



POLISH BAR COUNCIL
(NACZELNA RADA ADWOKACKA)



NATIONAL BAR
OF ATTORNEYS-AT-LAW
(KRAJOWA IZBA RADCÓW PRAWNYCH)

REPORT ON THE STATE OF RULE OF LAW IN POLAND
AS OF JUNE 2022

This report provides the most important information regarding the rule of law situation in Poland. We would like to highlight the following developments from the perspective of the advocates/attorneys-at-law profession.

- 1. Cases/examples undermining the independence of the Bar and the Bar of Attorneys-at-law and independence of lawyers (including access to the profession and the autonomous disciplinary proceedings and its organs).**
 - a. On 22 April 2022 a group of parliamentary members associated with the ruling party filed a motion to the Constitutional Tribunal (case K/22) asking it to assess the constitutionality of certain provisions of the Act on the Advocates Profession and the Act on the Attorneys-at-law Profession that require Advocates and Attorneys-at-law to be members of the regional bar associations competent for the place where the Advocate/Attorney-at-law practices. In general, the applicants claim in their motion that it is unconstitutional, in breach of the freedom of economic activity, to mandate Advocates and Attorneys-at-law to belong to regional bar associations in the place where they have the seat of their practice.**

The National Bar Council and the National Bar Council of Attorneys at Law in Poland are deeply worried by this motion to the Constitutional Tribunal and have undertaken strong measures aimed at countering this motion. The claims presented in the motion are completely unfounded and the real intention of the drafters of the motion seems to be aimed at partitioning the bar associations (divide and conquer tactic), depriving disciplinary and other powers from the bar associations and even ultimately finding that it is unconstitutional to require advocates and attorneys-at-law to be members of any bar association (despite the long history of this mandatory requirement). It has to be noted that an Advocate or Attorney-at-law is free to practice law on the whole territory of Poland (and abroad) despite his or her membership in the specific regional bar association competent for the place of the seat of his main office. Advocates and Attorneys-at-law may also freely change the membership in the regional bar associations once they report to the

bar that they have a primary office in another regional bar's jurisdiction. There are important reasons for this requirement, including care for the Clients' interests who may want to seek disciplinary measures towards an Advocate or Attorney-at-law.

During our meeting we will discuss these reasons and the different alarming implications of this motion to the Constitutional Tribunal.

- b. On March 10, 2022 the Constitutional Tribunal has issued a judgment in the case K 7/21 ruling in essence that article 6 section 1 sentence 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms is non-compliant with the Polish Constitution – inter alia in the scope in which it enables the European Court of Human Rights or country courts to assess and challenge the status of judges appointed at the request of the National Council of the Judiciary. The Constitutional Tribunal (CT) assessed in practice individual ECHR judgments issued in cases against Poland, which goes beyond the constitutional competence of the CT.
- c. The government has continued its attacks against advocate Roman Giertych.

An important judgment for the advocates profession was issued by the CJEU on January 13, 2022 in a case related to Mr. Roman Giertych (C-55/20). The court found against the governments arguments that the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw) meets the conditions required to be regarded as a court or tribunal within the meaning of Article 267 TFEU and that it may submit requests for preliminary rulings.

The outline of the case is provided below. By letter of 20 July 2017, the Prokurator Krajowy – Pierwszy Zastępca Prokuratora Generalnego (National Public Prosecutor – First Deputy of the Prosecutor General) ('the National Prosecutor') asked the Rzecznik Dyscyplinarny Izby Adwokackiej w Warszawie (Disciplinary Agent of the Warsaw Bar Association, Poland) ('the Disciplinary Agent') to initiate disciplinary proceedings against Mr. Roman Giertych on the ground that, by certain public statements, he had exceeded the limits of a lawyer's freedom of expression and committed disciplinary misconduct on account of the threats that those statements allegedly conveyed to the Minister of Justice.

By decision of 7 November 2017, the Disciplinary Agent refused to open that disciplinary investigation. Following the appeal brought by the National Prosecutor, that decision was annulled by an order of the Sąd Dyscyplinarny Izby Adwokackiej w Warszawie (Bar Association Disciplinary Court, Warsaw) of 23 May 2018, as a result of which the case was referred back to the Disciplinary Agent for a fresh examination. By decision of 18 June 2018, the latter opened a disciplinary investigation into Mr. Roman

Giertych, which was closed by a decision of 28 November 2018 in which that agent concluded that Mr. Roman Giertych was not guilty of disciplinary misconduct. Following appeals brought by the Minister of Justice and the National Prosecutor, the Bar Association Disciplinary Court in Warsaw, on 13 June 2019, annulled that decision of the Disciplinary Agent and the case was again referred back to the Disciplinary Agent.

By decision of 8 August 2019, the Disciplinary Agent once again closed the disciplinary investigation after finding that there were no elements constituting disciplinary misconduct on the part of Mr. Roman Giertych. The Bar Association Disciplinary Court, Warsaw, was seized of an appeal brought by the Minister of Justice against that decision.

In that context, the Bar Association Disciplinary Court, Warsaw, stated, as a preliminary point to the CJEU, that it considers that it satisfies all the conditions necessary for it to be regarded as a court or tribunal within the meaning of Article 267 TFEU, so that it is entitled to make a reference to the Court for a preliminary ruling.

2. Cases/examples undermining and not respecting the confidentiality of lawyer-client communications.

- a. The Polish Bar Council and National Bar Council of Attorneys at Law are worried and are specifically monitoring any information and cases related to the abuse of state surveillance systems and software against advocates or attorneys-at-law.

Since mid-January 2022 a Senate Commission was constituted to examine the cases related to the use of Pegasus surveillance. The ruling party did not submit any of its representatives in the Commission. Experts from Citizens Lab have found that Pegasus software was used in Poland against prosecutor Ewa Wrzosek, attorney Roman Giertych, senator Krzysztof Brejza, president of Agrounia Michał Kołodziejczak, journalist Tomasz Szwejgiert and president of Polish Employers Andrzej Malinowski. The Commission is continuing its work and we can expect major developments later during this year.

Meanwhile the Commissioner for Human Rights and NGOs active in the field of respect of privacy, including Panoptykon Foundation, reminded that Polish legislation concerning secret surveillance is not compatible with the Constitution, nor international and European standards of human rights. The Commissioner lodged a motion to declare unconstitutionality of surveillance law in the Constitutional Tribunal in 2016, however he decided to withdraw the motion because of the illegal composition of the adjudicating panel. In January 2022 the Commissioner for Human Rights alarmed the Prime Minister of the urgent need to change laws in that regard, however by May the government did not answer.

The lawyers are trying to convince the court that in a case of a journalist, Mrs. Ewa Siedlecka, the court should use the preliminary procedure to receive CJEU answer whether the e-privacy directive guarantee citizens' right to be informed about the ended surveillance. The Commissioner for Human Rights support the litigant as well.

b. The National Council of the Judiciary was nominating judges and functioning throughout 2021 despite the judgments of the CJEU (e.g. C-824/18, A.B.) and the judgments of the National Administrative Court. In December 2021 new elections to the National Council of the Judiciary began and are now being finalized. The Council will most probably be composed of the same persons (with some exceptions). Very few candidates decided to participate in this process due to a boycott of these elections by the majority of the judges. The composition of the Council suggests that this institution, that is crucial for the democratic state, has strong personal links to the Ministry of Justice, what undermines the constitutional balanced and mixed composition of the Council and its effective protection of independence of courts and judges.

3. Strategic litigation against public participation (SLAPPs)

SLAPPs have been used by public entities in last years against the human rights defender (e.g. Mr. Bart Staszewski, LGBT activist), but also against public officials (Mr Adam Bodnar, the Commissioner for Human Rights was challenged by public television for speaking about the murder of the President of Gdańsk city). SLAPPs however have used also to appease prosecutors who are opposed to changes in the judiciary has also increased. Overnight prosecutors were delegated to cities away from their place of residence, in 2022 this happened with 4 prosecutors in Świnoujście. Prosecutor Katarzyna Kwiatkowska for criticizing the actions of the General Prosecutor's Office and the National Public Prosecutor, including a delegation of prosecutors, was sued for payment of PLN 250,000 as compensation.

Legal proceedings which may be qualified as SLAPPs are also been reportedly brought against investigative journalists. A study published in June 2021 by the Polish Society of Journalists noted at least 66 instances of SLAPPs brought to silence journalists between 2015 and 2021, with public institutions, state-owned bodies, and politicians and their relatives among those who most frequently launched these legal actions. Prominent cases have also been denounced by international press freedom groups, such as proceedings brought against Gazeta Wyborcza reporter Katarzyna Włodkowska and the criminal defamation claims brought against Polityka journalist Ewa Siedlecka, who was convicted of criminal defamation.