POLISH BAR COUNCIL
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NATIONAL BAR
OF ATTORNEYS-AT-LAW IN POLAND
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REPORT FOR THE 51ST EUROPEAN PRESIDENTS' CONFERENCE 2023

POLAND

Since our last report there have been a few major developments that we would like to highlight from the perspective of the advocates/attorneys profession.

1. Cases/examples undermining the independence of the Bar and independence of lawyers (including access to the profession and the disciplinary procedure process).

a. Constitutional action against obligatory affiliation of advocates and attorneys at law to bars (case K 6/22 before the Constitutional Court)

The Polish Bar Council and the National Bar of Attorneys at Law would like to bring again to the attention of the reader the case K 6/22 pending before the Constitutional Court. The case was initiated in 2022 by the motion of the group of deputies forming the current parliamentary majority. The deputies urge the Constitutional Court to declare as unconstitutional statutory obligation of affiliation of advocates and attorneys at law to bars on the basis of the criteria of their professional residence or legal address. The case is of vital importance for the effective functioning of the bars and advocates' and attorneys' at law ability to protect rights of the clients. Therefore potential Constitutional Court's judgment may adversely affect not only the bars but also effective protection of the rights of individuals. In practice the bars might be deprived of its independence, and therefore its ability to effectively execute its functions. Bars, as a result of the constitutional judgment, may cease to exist and there will be no structures to enforce ethical principles nor conduct disciplinary proceedings, due to a possible state of lack of legal certainty as regards implementation of such a constitutional decisions.

In 2022 the Commissioner for Human Rights joined the constitutional proceedings, underlining no legal grounds for deciding case K 6/22. However, on December 23rd 2022 the Prosecutor General – Minister of Justice presented its opinion before the Constitutional Court. The Prosecutor General supported the deputies' motion to declare the laws regulating advocates' and attorneys' at law professions unconstitutional.

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 Court (CC) assessed in practice individual ECHR judgments issued in cases against Poland, which goes beyond the constitutional competence of the CC.

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

Secret surveillance

In the previous report was underlined that the Polish Bar Council and the National Bar 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.

Since then the legislation nor the application of that law did not change. Therefore the Human Rights Commission of the National Bar of Attorneys at Law organized, in the cooperation the Human Rights Commission the Polish Bar Council and Panoptykon Foundation, a national conference on the human rights standards applicable to secret surveillance. Many attorneys at law and advocates took part in that hybrid conference, which was also attended by legal experts from academia and a deputy Commissioner for Human Rights. As a result of that conference the Commissioner for Human Rights addressed in January 2023 the Ministry of Administration and Home Affairs with recommendations regarding necessary changes to be introduced into the Polish legal system in order to guarantee its compatibility with European and constitutional standards, including legal provision which by far undermine and do not guarantee respect of the confidentiality of lawyer-client communications.

One shall also notice that apart from the illegal IT system Pegasus, (which purchase was formally challenged by the Polish Supreme Chamber of Control as illegal, due to the fact, that the software had been purchased with funds of the Justice Fund managed by the Minister of Justice. The fund was established to support crime victims, not to support secret service with purchase of surveillance software to spy on political opponents. Once the information was revealed, the Pegasus supplier in Israel refused to support Polish authorities with necessary actualizations). Which was mentioned earlier and analyzed lately (January 2023) by the PEGA Committee in the report commissioned by the European Parliament, used by the Central Anti-corruption Bureau (CBA) in Poland new electronic software was bought by Polish public institution. Thus, just in the beginning of January 2023 the media revealed that Police has bought new type of surveillance technology called Cellebrite, which application must be analyzed in terms of its legal founding. Although the need of police organs to apply effective tools to prevent and combat crime is necessary, at the same time all doubts regarding the illegal interference with the right to privacy and confidentiality of professional lawyer-client communications must be secured.

3. Test of independence and impartiality of a judge – defective procedure of appointment of judges

On 15 July 2022, the Act of 9 June 2022 amending the Act on the Supreme Court and certain other acts entered into force (the Act of 9 June 2022). In the Polish Government's opinion, the purpose of this law was to liquidate the Disciplinary Chamber of the Supreme Court and to implement the decision of the vice-president Court of Justice of the European Union of 14 July 2021 (case no. C-204/21).

Apart from the regulations concerning liquidation of the Disciplinary Chamber of the Supreme Court, the Act of 9 June 2022 introduced so-called test of independence and impartiality of a judge (the Test). According to the explanatory memorandum to the presidential bill, which was the basis for the adopted solution, it was indicated that this is a "*new procedural institution enabling the examination of a judge's fulfilment of the requirements of independence and impartiality, taking into account circumstances surrounding his appointment and the judge's conduct after his appointment, if doubts are raised in the circumstances of a particular case*

as to the breach of the standard of independence or impartiality affecting the outcome of the case", and its purpose was to "*provide participants in court or administrative court proceedings with procedural guarantees that there are no doubts as to the impartiality and independence of the judge adjudicating in the case*".

The real goal behind this new solution was to solve problems resulting from the defective procedure of appointment of judges on the basis of resolutions of the new National Council of Judiciary (NCJ), which – in its current composition – is not an independent body of the legislative and the executive authorities (judgement of 22 July 2021 of the European Court of Human Rights, application no. 43447/19). For the above reason the judges selected by new NCJ (and presented for appointment to the President of the Republic of Poland) cannot be considered as meeting the standards of independence and impartiality, as required by Article 6 of the European Convention on Human Rights.

In fact, the Test does not meet any of the above-mentioned objectives. Along with its introduction, it was stipulated that the circumstances surrounding the appointment of a judge may not constitute the sole basis for challenging a judgment issued with the participation of a given judge. As a result, the party of a proceedings requesting for the Test must provide evidence of the circumstances surrounding the appointment of a judge and his conduct after the appointment, and furthermore, prove not only that these circumstances may lead to a breach of the standard of independence and impartiality, but also that breach of this standard would affect the outcome of the case, which in turn should be determined "taking into account the circumstances concerning the entitled person and the nature of the case".

Moreover, the new solution is subject to a number of additional procedural requirements, which significantly limit the party's right to verify whether his/her case is to be examined in accordance with the standard of the right to a fair trial. Firstly, the time-limit for applying for the Test is 7 days from the date of notification of the composition of a court examining the case. Secondly, the party must indicate the circumstances justifying the application for the Test together with evidence to support them. Taking into account the fact that required circumstances refer to the nomination procedure to which the party does not have the access, this requirement is almost impossible to fulfill. Thirdly, the party may apply for the Test only in cases indicated in relevant regulations concerning judges of the Supreme Court and judges of common and administrative courts. There are also many exceptions from this possibility. As a result, it is doubtful whether the party may apply for the Test of the judge of Supreme Court examining the application for the Test. Fourthly, if the above requirements are not fulfilled, and the request for the Test was submitted by a professional lawyer representing a party (e.g. the term, the indication of required circumstances and provision of evidences of it), the court recognizing the request must inform about such situation the relevant lawyer's self-government body (the Advocacy, the Attorneys-at-law) to which the professional lawyer belongs. This provision can create a chilling effect, because – as mentioned above – the procedural and material requirements of the test are almost impossible to fulfill.

Finally, it should be noted, that while introducing the Test, the legislator did not repeal the provisions of article 42a(1) and (2) and of Article 55(4) of the Law relating to the organization of the common courts, and of Article 26(3) and Article 29(2) and (3) of the Law on the Supreme Court, as they prohibit national courts from verifying compliance with the requirements of the European Union relating to an independent and impartial tribunal previously established by law, as well as points 2 and 3 of Article 107(1) of the Law relating to the organization of the common courts, and of points 1 to 3 of Article 72(1) of the Law on the Supreme Court, which allow the disciplinary liability of judges to be incurred for having examined compliance with the requirements of independence and impartiality of a tribunal previously established by law. Maintaining these provisions in force means that judges, when

examining application for the Test, expose themselves to charges of their violation and their disciplinary liability.

It is also worth mentioning that the current practice also shows that applications for the Test are not examined on their merits and are rejected due to non-compliance with the procedural and material requirements, or in the case of the Supreme Court – cannot be examined due to the exclusion of subsequent judges from examining them.

Summarizing, it must be clearly stated that the test of independence and impartiality as introduced by the Act of 9 June 2022, does not solve any problems occurring in the Polish justice system resulting from the defective procedure of appointment of judges on the basis of resolutions of the new NCJ.

4. Dispute concerning the length of the term of office of the President of the Constitutional Tribunal

In December 2022 a new dispute arose regarding the length of the term of office of Julia Przyłębska - the current President of the Constitutional Tribunal. The Act on the Organization and Proceedings before the Constitutional Tribunal, adopted at the end of November 2016, provides - unlike previous regulations in force – that the term of office of the President of the Constitutional Tribunal lasts six years. Previously applicable laws did not specify the length of the term of office of the President of the Constitutional Court. In practice, the person appointed as the President of the Constitutional Tribunal exercised this function until the end of that person's term of office as the judge of the Constitutional Tribunal.

The Act on the Organization and Proceedings before the Constitutional Tribunal entered into force on 20 December 2016. Julia Przyłębska was appointed as the President of the Constitutional Tribunal on 21 December 2016. However, new regulations concerning the length of the term of office of the President of the Constitutional Tribunal entered into force on 3 January 2017, i.e. after Julia Przyłębska was elected as President of the Constitutional Tribunal.

Fundacja Batorego[1] ("Batory Foundation") – a Polish NGO – issued an analysis finding that the applicability of the previous regulations, which already had been repealed, cannot be presumed after the entry into force of new regulations. Thus, according to the Batory Foundation's lawyers, since the entry into force of the provisions specifying the length of the term of office of the President of the Constitutional Tribunal, these provisions also applied to Judge Przyłębska, who was appointed as the President of the Tribunal two weeks earlier. This findings were shared also by other lawyers, including the former Vice-President of the Constitutional Tribunal, prof. Stanisław Biernat.

The Office of the Constitutional Tribunal issued a statement indicating that regulations in force at the time when the current President of the Constitutional Tribunal was elected, did not specify the term of office of this office, and therefore - as in the case of all previous presidents - the term of office of the current President of the Constitutional Tribunal would end when the mandate of the judge of the Constitutional Tribunal expired.

At the end of December 2022 media reported that six judges of the Constitutional Court, including its Vice-President Mariusz Muszyński (noteworthy elected and nominated as judge of the Constitutional Tribunal at the judicial post that had already been filled by another judge– cf. judgement of the European Court of Human Rights *in Xero Flor sp. z o.o. against Poland*, application no. 4907/18), issued a statement pointing that, in their opinion, the term of office

[1] https://www.batory.org.pl/en/

of Julia Przyłębska as the President of the Constitutional Tribunal had ended on 20 December 2022. They demanded that Julia Przyłębska convened the General Assembly of the Judges of the Constitutional Tribunal in order to select candidates from among whom President Andrzej Duda would nominate the new President of the Constitutional Tribunal.

This dispute is important from the perspective of rule of law as the President of the Constitutional Court directs the work of the Constitutional Tribunal, including appointment of judges into the adjudicating panels and undertakes organizational actions at the initial stage of disciplinary proceedings against actual and former judges of the Constitutional Court.

5. Erosion of the principles of the democratic state of law through legislative amendments to the Polish Criminal Code (current issues)

On 7 July 2022 Polish parliament passed a significant set of amendments to the Criminal Code, which, after being signed by the President of the Republic of Poland (which took place in December 2022), will enter into force, in their majority, in 2023. It should be noted that although amendments to important laws concerning human rights and freedoms (and criminal codes are examples of such laws) are something natural in democratic states (governed by the rule of law), the nature of the latest amendments in Polish Criminal Code in fact 'moves back' Polish criminal law in its certain spheres to the times before the democratic changes in the state started, making it an instrument - due to its highly repressive nature and restriction of judicial discretion - rather reminiscent of laws characteristic for authoritarian states. From the perspective of the principle of the rule of law, those amendments that deeply interfere with the judicial discretion and constitutional civil rights and freedoms (personal freedom and property) - are worrying.

Examples of worrying amendments of provisions include those under which:
- certain civil freedoms may be restrained in various situations (e.g. protest, demonstration with related forms of civic expression) - the new provision - Art. 256a § 1 PCC defines the offence of public promotion of, inter alia, an ideology exhorting somebody to the use of violence in order to influence upon political or social life. Such violence is not defined in any way, so it seems that it may be understood in a purely instrumental manner (e.g. as inciting to paint a certain slogan on a monument or, for example, to bring down a billboard with a poster warning against gender style of life).
- judges decide obligatory (so, they have no power to make a proper decision themselves, using judicial discretion), certain consequences having the nature of a nuisance for the offender - this in fact makes some provisions an 'offender's manual', because judges must apply them (for instance, this is the case of the offender's recidivism in the specific situation which demands from judges the application of certain criminal measures – see: new Art. 64a PCC);
- life imprisonment may become absolute when the court will decide it (i.e. life imprisonment would be a sentence without the possibility of early conditional release for the perpetrator). In addition, the catalogue of crimes punishable by such a penalty has been expanded (see: new Art. 77 § 3 and § 4 PCC);
- there is forfeiture of a motor vehicle (or its equivalent) when the perpetrator of the offence drove the vehicle while intoxicated, having 1.5 per mille or more of alcohol in the blood or 0.75 milligrams of alcohol per cubic decimeter in the exhaled air. The exception to such forfeiture is very narrowly defined. Such an offender will be deprived by forfeiture of his/her motor vehicle (or its equivalent) even if he/she didn't cause any accident with victims (see: new Art. 178a § 5 in conjunction with new Art. 44b PCC).

6. The case of amendments to the Code of Criminal Procedure, relevant to the pending private criminal case of the family of the Minister of Justice and Prosecutor General - Zbigniew Ziobro

Jerzy Ziobro - Zbigniew's father died in 2006 at the Jagiellonian University Hospital in Krakow, where he was treated for cardiological reasons. A month after his death, the minister's brother, Witold Ziobro, filed a report with the prosecutor's office, pointing to possible irregularities in the method of treatment. In 2008 and 2011, the prosecutor's office discontinued the proceedings. Zbigniew Ziobro's mother, Krystyna Kornicka-Ziobro, filed a private indictment against the doctors with the prosecutor's office.

During the trial in 2015, the political power in Poland shifted and Zbigniew Ziobro became the Minister of Justice, and a year later the Prosecutor General.

Soon after the merger of these functions, changes prepared by the Ministry of Justice appeared in the codes. The provision of Article 55 of the Code of Criminal Procedure has been changed in such a way that a prosecutor may join a case initiated by a private indictment at any time and act as a public prosecutor. In result, the prosecutor joined the case on the side of the Ziobro family.

A few days before the verdict was passed in 2017, Zbigniew Ziobro's mother filed a notification of suspicion of a crime committed by Judge Pilarczyk, and three days later the Regional Prosecutor's Office in Katowice launched an investigation into the commission of expert opinions. The justification for the notification of the suspicion of committing a crime were the circumstances related to the ordering of a supplementary forensic medical opinion in this process. The document prepared by several professors cost PLN 372,000.00. Prosecutor Paweł Baca filed a motion to exclude Judge Pilarczyk from the ongoing proceedings. However, the court did not exclude Judge Pilarczyk, and a few days later, on February 10, 2017, she issued a verdict and acquitted the doctors.

The Ziobro family appealed. The trial in the second instance has been pending since April 2018.

In January 2023, Judge Agnieszka Pilarczyk spoke publicly on this subject and indicated that in her opinion the Code of Criminal Procedure was amended, to help the private case of the Ziobro family.

On October 20, 2022, the European Court of Human Rights in Strasbourg announced its judgment in the case of Kornicka-Ziobro against Poland. The Strasbourg Court ruled that there had been no violation of Art. 2 of the Convention (right to life), because the prosecutor's office, experts and courts explained the case very thoroughly at every stage of the proceedings. “The mere fact that medical negligence proceedings ended unfavourably to the person concerned does not mean that the respondent State failed to fulfil its positive obligation under Article 2 of the Convention,” the Court stated.