Judgment of 19th April 2006, K 6/06

NEW RULES OF ACCESS TO THE ADVOCATE'S PROFESSION

Type of proceedings: Abstract review Initiator: Chief Council of Advocates	Composition of Tribunal: Plenary session	Dissenting opinions: 0

Legal provisions under review	Basis of review
Bar Act and Certain Other Acts Amendment Act 2005	Obligation of a subject exercising the right to introduce legislation to present the financial consequences of a proposed statute's implementation Principle of three readings of a statute in the Sejm Right to introduce amendments to a draft of a statute considered by the Sejm [Constitution: Articles 118(3), 119(1) and (2)]
Certain provisions of the aforementioned Amendment Act 2005 and the Bar Act 1982, amended thereby, regulating access o the advocate's profession and the provision of legal advice by persons who are not advocates	Rule of law Status of self-governing bodies Principle of equality [Constitution: Articles 2, 17(1) and 32(1)]

For some time now, the issue of the access of law-studies graduates to the learned legal professions in Poland (in particular those of advocate and legal advisor) has been the subject of both political controversy and legal disputes. These professions are only to be engaged in by persons associated within professional associations or societies, which are of a self-regulatory nature. Notwithstanding certain exceptions, it is usual for a person to be enrolled on the list of advocates or legal advisors following the completion of the period of professional training known as the legal advisors' or advocates' "traineeship" (*aplikacja*), as well as the subsequent passing of a professional qualification examination. The organisation of the said traineeships is the task of the relevant professional self-regulatory societies, and this was also true until recently of the aforementioned professional examination.

Adversaries of this system, including many young graduates of legal studies, have alleged that clear criteria for admission to the advocates' and legal advisors' traineeships are lacking, and that an overly broad scope of discretion has been vested in organs of the professional self-regulatory societies, such that the restrictions on lawyers' access to the professions are excessive.

The first significant step towards a broader "opening up" of the two professions to young lawyers came with the Constitutional Tribunal's judgment of 18th February 2004, P 21/02 (summarised separately). This judgment necessitated amendments to the statutes regulating admission to the discussed professions. The 2005 Act, challenged in the present case, amending provisions as regards the professions of advocate, legal advisor and notary, has sought to close the aforementioned lacuna. It also introduces several elements

serving to further liberalise regulation of the said professions.

In the present case, the Constitutional Tribunal has considered an application from the Chief Council of Advocates, submitted on behalf of the advocates' self-regulatory society and focusing on matters regarding the advocate's profession.

One of the Act's most important innovations, challenged by the Chief Council of Advocates, is its entrustment of examination committees established by the Minister of Justice with the organisation of the competitive examinations for the aforementioned traineeships, as well as with the professional qualification examinations allowing for admission to the advocate's profession. The said Minister is an organ of higher instance (appellate organ) vis-à-vis the examination committees. In consequence, the organs of the advocates' self-regulatory society lost their decisive influence on both the admission process as regards traineeships and the organisation of the professional examination. In exchange, they only gained the rights to make non-binding proposals regarding the examination questions, and to delegate two representatives to the five-member panel responsible for preparing the examination questions, as well as two representatives to each seven-member examination committee.

Another novelty challenged by the Chief Council of Advocates is the amended Article 66(1a) of the Bar Act 1982, providing for admission to the advocate's examinations (and, thereby, to the advocate's profession) – without the need to complete the advocates' traineeship – of persons who, following the completion of their legal studies, pursued a certain activity for at least five of the eight years prior to their application for admission to the said examination. The aforementioned activity could consist in employment on the basis of an employment contract "at positions connected with the application or making of law" (point 2 of the provision referred to above), or continuous rendering, in person, on the basis of a civil law contract, of "services consisting in the application or making of law" (point 3), or engagement in registered economic activity, whereof the subject encompasses the provision of legal advice deemed by statute to fall within the scope of practice of the advocate's profession (point 4). The Amendment Act 2005 further provides for an even more liberal approach towards persons who, following the completion of their legal studies, have passed the examinations for the professions of judge, prosecutor, legal advisor or notary; such persons being permitted to apply for enrolment on the list of advocates (under Article 66(1) point 2 of the amended Bar Act 1982), regardless of whether or not they possess any professional experience, and regardless of the period of time that has elapsed since one of the aforementioned examinations was passed.

Furthermore, the amended Bar Act 1982 allows, in its Article 4(1a), for the provision of legal advice by lawyers who are not advocates. The discussed provision states that Article 4(1), defining the scope of the advocate's profession as the provision of legal advice and, in particular, the rendering of legal counsel, the drawing up of legal opinions, the drafting of legal acts, and appearances before courts and offices, does not constitute an obstacle to legal advice within such a meaning also being provided by other persons who have completed their legal studies. The only exceptional situation, wherein advocates enjoy exclusivity, applies to "representation in proceedings at law", save where such a representative appointed in a civil case is not an advocate but remains in a permanent commission relationship with the party in regard to a

case that falls within the scope of such a commission or where such a person manages the property or interests of the party.

In challenging these and other substantial legal solutions, the Chief Council of Advocates referred primarily to the status of self-governing bodies with regard to the advocates' self-regulatory society, based on Article 17(1) of the Constitution, which tasks professional self-regulatory societies with overseeing the proper pursuit of professions wherein the public repose confidence. In certain instances, the applicant also indicated as bases of review the principle of equality (Article 32(1) of the Constitution), and the principles of correct legislation, as derived from the rule of law clause (Article 2 of the Constitution).

As regards the merits of the challenged provisions, see also the summary of points I.2–11 of the ruling provided below.

The Chief Council of Advocates also attempted to challenge the Amendment Act 2005 in its entirety, alleging infringements as regards legislative procedure (cf. the table above and point I.1 of the ruling).

RULING

I

1. The Bar Act and Certain Other Acts Amendment Act 2005 conforms to Article 118(3) and Article 119(1) and (2) of the Constitution.

2. Article 1 point 5 letter b of the aforementioned Amendment Act 2005, amending the wording of Article 58 point 12 letter b of the Bar Act 1982 (prior to the amendment: the Chief Council of Advocates' competence to establish the principles governing enrolment on the advocates' traineeship and the taking of the advocate's examination; following the amendment: the above referring only to the establishment of principles governing enrolment on the advocates' traineeship), insofar as it deprived the advocates' self-regulatory society of influence – appropriate from the point of view of overseeing the proper practice of the advocate's profession – on the determination of principles governing the taking of the advocate's examination, does not conform to Article 17(1) of the Constitution.

3. Article 5 of the aforementioned Amendment Act 2005, in the part concerning advocate trainees (the organisation of the professional examination in 2005 on the basis of hitherto operative principles), conforms to Article 32(1) of the Constitution.

4. Article 4(1a) of the amended Bar Act 1982 (allowing other persons who have completed legal studies to provide legal advice within the scope of practice of the advocate's profession, albeit with the exception of representation in proceedings at law) does not conform to Article 2 of the Constitution.

5. Article 66(1) point 2 of the amended Bar Act 1982, insofar as it allows for the possibility of admission to the advocate's profession of those who have passed examinations indicated therein (for the professions of judge, prosecutor, legal advisor or notary), who do not possess appropriate legal experience, does not conform to Article 17(1) of the Constitution.

6. Article 66(1a) points 2–4 of the amended Bar Act 1982 (admission to the advocate's examination, non-attendant upon participation in an advocates' traineeship, in the cases of certain persons whose completion of legal studies was followed by engage-

ment in professional activity specified in the said points) does not conform to Articles 2 and 17(1) of the Constitution.

7. Article 75a of the amended Bar Act 1982 (organisation of the competitive examination for advocates' traineeships by examination committees established by the Minister of Justice; the scope and date of that examination) conforms to Articles 2 and 17(1) of the Constitution.

8. Articles 75b–75j of the amended Bar Act 1982 (detailed principles governing the organisation of the aforementioned competitive examination) conform to Articles 2 and 17(1) of the Constitution.

9. Article 76b of the amended Bar Act 1982 (the payable nature of the advocates' traineeship, the principles and procedure for specifying the level of the annual payment and the granting of exemptions in this respect), understood as also referring to advocate trainees who commenced their traineeship prior to the entry into force of the aforementioned Amendment Act 2005, does not conform to the principle of protecting pending interests, stemming from Article 2 of the Constitution.

10. Article 78(1) and (6) of the amended Bar Act 1982 (organisation of the advocate's examination by committees established by the Minister of Justice, these also being authorised to organise the competitive examination for advocates' traineeships; determining the set of questions and topics for the advocate's examination by the Minister of Justice) does not conform to Article 17(1) of the Constitution.

11. Article 78i(2) and (3) of the amended Bar Act 1982 (the right of a person undergoing the advocate's examination to appeal against the result of such an examination to the Minister of Justice; the notification of regional councils of advocates in respect of the results of examinations and the publishing of the list of persons obtaining positive results – by the said Minister) does not conform to Article 17(1) of the Constitution.

II

The Tribunal ruled that the loss of binding force of the provisions cited above in points I.2, I.4, I.10 and I.11 shall be delayed until 31st December 2006.

Furthermore, on the basis of Article 39(1) point 1 and Article 39(2) of the Constitutional Tribunal Act 1997, the Tribunal discontinued proceedings within the remaining scope, given the superfluity of adjudication.

PRINCIPAL REASONS FOR THE RULING

1. The statutory conferment upon certain professions of the feature that the public repose confidence therein is connected with the imposition of certain limitations as regards the constitutional freedom of access to, and pursuit of, such professions (Article 65(1) of the Constitution), as well as with a requirement that representatives of the aforementioned professions hold membership of the relevant self-regulatory professional society.

2. The basis for a given profession's inclusion among those professions wherein the public repose confidence should always be a recognition that the aforementioned limitations and obligations are imposed with a view not to privileges for a certain professional group being established, but rather to serving the public interest, consisting primarily in protection of recipients of the given profession's services.

3. Pursuant to Article 17(1) of the Constitution, it is the legislator that decides to confer upon a given legal profession the status of profession wherein the public repose confidence, as well as to establish that profession's self-regulatory society. It also remains the legislator's task to choose the model of access to the legal professions. While the Constitution offers no unambiguous determination of the procedure for theoretical training and practical preparation for the practice of the regulated legal professions, it is nevertheless in the interests of both the administration of justice (itself an element of the public interest) and those seeking legal advice, that the said preparation meet criteria as regards both high quality and credibility, in line with the notion of public trust. The regulation introduced by the legislator should also be coherent internally, extending equal treatment to those practising in the different legal professions, or aspiring to practice therein, as well as avoid solutions that further evasion of the law and shift the risks inherent in the inappropriate provision of legal services on to the recipients thereof, most particularly those in a less favourable material situation.

4. In reviewing the content of provisions challenged in the present case, the Constitutional Tribunal may not abstract from the model adopted by the legislator itself. The latter specified the particular, distinct legal professions wherein the public repose confidence (i.e. advocates, legal advisors and notaries), as well as defined precisely the principles upon which these might be practised. It was the will of the legislator that a uniform State system of preparation for practice in the legal professions of the kind popular in many other countries' legal systems should not be introduced, with training for each of the professions in question thereby taking place in line with a procedure involving different traineeships, and as entrusted to particular self-regulatory legal societies.

5. While the opening-up of the legal professions and improved access to legal services are desirable, they must take place by means of comprehensive solutions clearly shaping the new model for professional legal training and the principles underpinning movement between highly-qualified legal professions. Consent for legal advice within a strictly and precisely-defined scope that does not require particular qualifications to be provided by persons who are not members of the legal professions wherein the public repose confidence, would also conform to the Constitution. This would require radical amendment of provisions hitherto maintained in force by the legislator itself.

6. It follows from the locating of the discussed Article 4(1a) of the amended Bar Act 1982 in the vicinity of Article 4(1) (categories of action the practice of the advocate's profession is taken to comprise), as well as from the reference in Article 4(1a) to Article 4(1), that these provisions are interconnected substantively. It is not clear why the legislator referred to the designation of actions typical for the advocate's profession in order to indicate actions remaining beyond the scope of practice of this profession. Such a solution leads to the shaping of an erroneous belief among potential recipients of legal advice that the activity of persons mentioned in the challenged Article 4(1a) – i.e. those who have completed their legal studies but are neither advocates nor legal advisors – is of the same kind as the legal advisory activity engaged in by advocates and legal advisors. Additional difficulties with interpretation arise from the locating of the challenged norm within the text of a statute regulating the status of the Bar, while concomitantly refraining from appropriate modification of statutory provisions concerning other legal professions. The result may be an errone-

ous conviction that the legislator aimed to "shift" the provision of legal advice under Article 4(1a) of the Bar Act 1982 from the category of legal services provided within the framework of registered economic activity (on the basis of the Freedom of Economic Activity Act 2004) in the direction of practice within the advocate's profession. Since the challenged Article 4(1a) of the Bar Act 1982 allows for performance of the same actions (other than representation in proceedings at law) by persons before whom no requirements connected with the right to practice in the profession of advocate, legal advisor or notary (save the requirement to complete legal studies) are set, this undermines the sense in seeking to distinguish the three aforementioned professions as ones wherein the public repose confidence.

7. The circumstance that the regulation discussed above envisages the possibility of legal advice being provided by persons not practicing a profession wherein the public repose confidence, and not associated within a professional self-regulatory society, does not of itself give rise to unconstitutionality. However, due to numerous defects including those referred to in point 6 above, the said regulation fails to fulfil requirements of the sufficient specificity of law and correct legislation, as stemming from Article 2 of the Constitution.

8. Article 17(1) of the Constitution does not constitute a basis upon which to extend the self-regulatory advocate society's overseeing the proper practice of the profession to legal advice as envisaged in Article 4(1a) of the Bar Act 1982. The provision of such legal advice represents a form by which the freedom of economic activity may be exercised (cf. point 6 above). It may be deemed desirable that the State or specialised public institutions establish control over the proper provision of legal advice by persons who have completed their legal studies, but do not practice one or other of the legal professions wherein the public repose confidence.

9. Article 66(1) point 2 of the Bar Act 1982 (cf. point I.5 of the ruling) is legally defective due to both the absence of a statutory requirement that there be any professional experience and the failure to specify a maximum time period which may elapse following the passing of a legal examination (other than that for the advocate's profession), by a person applying for enrolment upon the list of advocates. As the threat of the advocate's profession being practised improperly is inherent in the regulation, requirements under Article 17(1) of the Constitution are not fulfilled.

10. The allegations regarding the lack of precision to the distinguishing, under Article 66(1a) point 2 of the Bar Act 1982, of persons "employed on the basis of an employment contract at positions connected with the application or making of law" for a required time period (cf. point I.6 of the ruling) are justified. The expressions used in this part of the provision fail to define the type of action performed in a sufficiently precise manner and do not exclude persons of excessively-limited professional experience where the skills necessary to practise in the advocate's profession are concerned.

11. Similar doubts arise on the basis of Article 66(1a) point 4 of the Bar Act 1982 (*ibidem*), which refers to engagement in "economic activity", whereof the subject "encompasses the provision of legal advice". This provision even fails to require a person engaging in such economic activity to offer the legal advice in person and in a con-

tinuous manner. Furthermore, the provision of legal advice could only constitute the subject of activity declared and registered, though not necessarily pursued.

12. In turn, Article 66(1a) point 3 of the Bar Act 1982 (*ibidem*), allowing access to the advocate's examination without prior completion of an advocates' traineeship, for persons who provided "services consisting in the application or making of law", employs a notion having no real equivalent within the operative legal system of the Republic of Poland. Both legislative activity and application of the law are tasks for appropriate public authority organs.

13. For the reasons summarised in points 10–12 above, the provisions of the Bar Act 1982 indicated in point I.6 of the ruling fail to fulfil the requirements of correct legislation stemming from the rule of law principle (Article 2 of the Constitution). Furthermore, they prevent the precise determination of the group of persons who, by undergoing the advocate's examination, aspire to practice the advocate's profession. Concomitantly, they allow for access to this examination on the part of persons with objectively unverified professional skills, the relevant traineeship having been omitted. Due to these defects, the indicated provisions restrict the possibility for the advocates' self-regulatory society to oversee the proper practice of the profession by the persons referred to, pursuant to Article 17(1) of the Constitution.

14. The procedure underpinning access to advocates' traineeships (as well as to legal advisors' traineeships) remains beyond the limits of overseeing the "proper practice" of the profession exercised by the advocates' self-regulatory society on the basis of Article 17(1) of the Constitution, since it does not concern persons carrying out the professional actions of an advocate (cf. points I.7 and I.8 of the ruling).

15. In the light of the current provisions contained within Articles 78–78i of the Bar Act 1982, and notwithstanding the amendments introduced by the legislator, the advocate's examination did not lose the features of a professional examination, while the examination committee's resolution on the positive result of an advocate's examination constitutes the basis upon which an organ of the advocates' self-regulatory society passes a resolution concerning enrolment on the list of advocates, where the latter allows for the commencement of practice in the advocate's profession. The discussed circumstances, as well as the fact that a considerable number of persons undergoing the advocate's examination are advocate trainees, justify the need for harmonisation of the procedure for organising the advocate's examination with the constitutional tasks of the self-regulatory society of a profession wherein the public repose confidence (Article 17(1) of the Constitution). As long as the current character of the advocate's examination and the professional training system of advocates are preserved, it is necessary to guarantee organs of the advocates' self-regulatory society appropriate participation in specifying the scope of the advocate's examination, adequate representation of this society within the composition of the committee organising the examination, and participation of its representatives in appellate proceedings following the advocate's examination. Statutory provisions indicated in points I.2, I.10 and I.11 of the ruling fail to conform to these requirements.

16. There is no justification for the claim that Article 5 of the Amendment Act 2005, which envisages some advocate trainees undergoing the advocate's examination on the basis of principles operating prior to the entry into force of this Act, others on the

basis of principles stemming therefrom (cf. point I.3 of the ruling), infringes the principle of equality (Article 32(1) of the Constitution). The legislator is authorised to stipulate the date of entry into force of an amendment act, as well as the moment at which its application commences. The group of advocate trainees whose examination was due in 2005 may, therefore, be treated as different from the group of trainees whose examination was (or is) due after 31st December 2005.

17. A legal defect of the regulation contained within Article 76b of the Bar Act 1982 (cf. point I.9 of the ruling) is the lack of transitional provisions regulating the issue of payment for the advocates' traineeship by persons who commenced this training prior to the entry into force of the Amendment Act 2005. This defect justifies the allegation that Article 2 of the Constitution has been infringed through a failure to meet the requirements of correct legislation and the insufficient protection of pending interests.

18. The loss of binding force of the provisions indicated in part II of the ruling necessitates the establishment of new statutory regulations. The absence thereof could make it temporarily impossible for examinations for the advocate's profession to be taken, or for advocates' traineeships to be commenced with and undergone. Such a situation would infringe the pending interests of persons concerned. For these reasons, on the basis of Article 190(3) of the Constitution, the Tribunal delayed the loss of binding force of the indicated provisions, taking into account the pace of legislative activity in the Parliament, the potential need to determine the principles governing the organisation of the advocate's examination and the assembling of examination committees including broader participation of the advocates' self-regulatory society, as well as the commencement date of the budget year.

19. Prior to the entry into force of the new regulation, the procedure by which advocate's examinations are organised should follow the provisions hitherto in force.

20. In light of Article 118(3) of the Constitution, read in conjunction with Article 34(2) point 5 of the Sejm's Rules of Procedure (Sejm is the first chamber of the Polish Parliament), it is permissible for the financial consequences of a statute laid before the Sejm being implemented to be omitted from the reasoning thereto, whenever the said consequences are negligible, in particular as regards the burdening of the State budget or budgets of local authorities (cf. point I.1 of the ruling).

21. Where the case under consideration is concerned, analysis of the course of work in the Sejm committees fails to confirm the alleged infringement thereby of Article 119(1) (the principle of three readings of a statute in the Sejm) or Article 119(2) of the Constitution (the right of a draft's sponsors, Deputies and the Council of Ministers to introduce amendments to a draft of a statute considered by the Sejm). In particular, the circumstance in which a government draft subjected to a second reading at a plenary sitting and directed, together with a Deputies' draft, to the committees was not subject to a third reading due to the Sejm's approval of a minority motion based on the Deputies' draft, does not constitute an infringement of the requirement that there be three readings.

Provisions of the Constitution, the Constitutional Tribunal Act and the Sejm's Rules of Procedure

Constitution

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 17. 1. By means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

Art. 65. 1. Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work. Exceptions shall be specified by statute.

Art. 118. […] 3. Sponsors, when introducing a bill to the Sejm, shall indicate the financial consequences of its implementation.

Art. 119. 1. The Sejm shall consider bills in the course of three readings.
2. The right to introduce amendments to a bill in the course of its consideration by the Sejm shall belong to its sponsor, Deputies and the Council of Ministers.

Art. 190. […] 3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed 18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

CT Act

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:
1) if the pronouncement of a judicial decision is superfluous or inadmissible;
2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

2. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.

Sejm's Rules of Procedure

Art. 34. […] 2. The draft of a statute shall be accompanied by a reasoning which should:
1) explain the need for, and purpose of, issuing thereof;
2) present the current state of the domain whose regulation is intended;
3) demonstrate the difference between the legal situation hitherto and that proposed in the draft;
4) present the expected social, economic, financial and legal consequences;
5) indicate sources of funding, insofar as what is proposed by the draft further burdens the State budget or budgets of local authorities;
6) present guidelines as regards the drafting of fundamental executive acts;
7) contain a declaration as regards the draft's conformity with European Union law, or else a declaration to the effect that the subject of the drafted regulation is not encompassed thereby.