Judgment of 18th February 2004, P 21/02

ADMISSION TO THE ADVOCATES' AND LEGAL ADVISORS' TRAINEESHIPS

Type of proceedings: Question of law referred by a court **Initiator:** Supreme Administrative Court	**Composition of Tribunal:** Plenary session	**Dissenting opinions:** 0

Legal provisions under review	**Basis of review**
Determination of the maximum number of advocate trainees by the relevant assembly of Advocate Chamber [Bar Act 1982: Article 40 point 4]	Rule of law Status of self-governing bodies Legal reservation (i.e. exclusivity of statutes) in relation to limiting rights and freedoms Principle of equality Freedom to choose one's profession Closed list of the sources of universally binding law [Constitution: Articles 2, 17, 31(3), 32, 65(1) and 87]
Determination of the rules for holding the competitive examinations for the advocate and legal advisor traineeships by the Chief Council of Advocates and National Council of Legal Advisors respectively [Bar Act 1982: Article 58 point 12(j); Legal Advisors Act 1982: Article 60 point 8b]	

In Poland, the provision of legal advice and representation of parties before the courts lies within the domain of two professions: advocates (or barristers; in Polish: *adwokaci*) and legal advisors (similar to solicitors in terms of the functions they perform; in Polish: *radcowie prawni*). The advocate's profession is traditionally a learned one. The legal advisor's profession, as distinct from the advocate's profession, emerged during the times of communist rule and was originally related predominantly to the provision of legal services to State institutions and undertakings. With time, the functions of both professions grew more similar: advocates now provide legal services to undertakings and legal advisors may conduct their business as a learned profession in legal advisors' offices dealing with various legal matters. Criminal and family law cases, however, remain solely within the advocates' domain.

Both advocates and legal advisors associate, by operation of law, within their own respective professional societies (similar to Law Societies or Bar Societies), which are of a self-regulatory nature. Among the organs of these self-regulatory societies are, in the case of advocates, the Chief Council of Advocates and, in respect of legal advisors, the National Council of Legal Advisors, together with the appropriate district branches of these respective bodies.

In order to obtain the right to pursue the profession of advocate or legal advisor, it is not sufficient merely to complete legal studies. It is also a legal requirement for those wishing to join these professions to have completed several years of professional training, known as the legal advisors' or advocates' "traineeship" (*aplikacja*) and to subsequently pass a professional qualifications examination. The organisation of traineeships and professional examinations is conducted by the organs of the relevant self-regulatory societies.

Admission to the professional traineeship is based on the results of competitive examinations conducted by district Advocate or Legal Advisor Councils. The provisions challenged in the present proceedings stipulate that the decision as to the number of traineeships available in any given year, and the rules for holding the competitive examinations on which such traineeships are allocated, rests with the appropriate organs of advocate and legal advisor self-regulatory societies. These provisions, in the form in which they hitherto existed, left the organs of the self-regulatory societies a great deal of discretion in the manner in which they chose to regulate these matters. This had attracted criticism that professionally active advocates and legal advisors were restricting young lawyers from entering these professions.

Candidates who were refused admission to the traineeship are allowed to appeal against such a refusal, issued by the aforementioned organs of the self-regulatory societies, to the Minister of Justice and, furthermore, to lodge a complaint before the administrative court. As a rule this was to no avail since the admission procedure, governed by resolutions of these organs, conformed to the relevant statutory provisions which allowed such resolutions to be adopted. Whether these statutory provisions were themselves in conformity with the Constitution, however, was a different question.

The answer to this question was delivered by a plenary session of the Constitutional Tribunal in the present case. The review of the constitutionality of the relevant statutes was initiated by two adjudicating benches of the Supreme Administrative Court, which each referred a question of law to the Tribunal. In both cases the complainants were refused admission to the traineeship (in one case the advocates' traineeship and, in the second case, the legal advisors' traineeship) as a result of the competitive examination and the limits placed on the amount of available traineeships by resolutions of the respective organs of the self-regulatory societies. The Supreme Administrative Court had doubts as to the constitutionality of the legal provisions which left these organs considerable freedom to shape the criteria for admission to, and the available number of legal profession traineeships, in the light of the constitutional principles of: rule of law (Article 2); equality before the law (Article 32); freedom to choose one's profession (Article 65(1)). The Supreme Administrative Court drew attention to the fact that the statutes in question allow for resolutions of organs of professional self-regulatory societies to restrict the freedom to choose one's profession, whereas the Constitution in Article 31(3) only permits such restrictions to be imposed by statute.

RULING

1. Article 40 point 4 of the Bar Act 1982 (which allows organs of the advocates' self-regulatory society to specify the maximum available number of advocate traineeships) does not conform to Article 2 and Article 65(1), read in conjunction with Article 31(3), of the Constitution.

2. The aforementioned provision is not inconsistent with Article 17, Article 32 and Article 87 of the Constitution insofar as it forms the basis for determining the maximum number of advocate apprentices.

3. Article 58 point 12(j) of the Bar Act 1982 (which allows organs of the advocates' self-regulatory society to determine the rules applicable to the traineeship competitive examination) does not conform to Article 87(1) of the Constitution.

4. The aforementioned provision is not inconsistent with Article 17 of the Constitution.

5. Article 60 point 8b of the Legal Advisors Act 1982 (which allows organs of the legal advisors' self-regulatory society to determine the rules applicable to the traineeship competitive examination) does not conform to Article 87 (1) of the Constitution.

6. The aforementioned provision is not inconsistent with Article 17 of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The rules and criteria relating to the qualification and selection of candidates for advocate and legal advisor traineeships should be consistent with the conditions stemming from Article 65(1) of the Constitution, which guarantees the freedom to choose and pursue one's profession and to choose a place of work. Such rules and criteria should also be consistent with constitutional provisions limiting the extent to which an individual's ability to exercise their rights and freedoms may be restricted (Article 31(3)). In particular, the Constitution demands that any limitations upon the exercise of constitutional freedoms may only be imposed by statute.

2. The ability of self-regulatory professional societies to "concern themselves with the proper practise of a profession in which the public repose confidence", within the meaning of Article 17(1) of the Constitution, does not entail the right to impose any restrictions whatsoever on the freedom to choose a given profession, especially as regards persons not belonging to the professional body in question and wishing to obtain the necessary qualifications to enable them to choose this profession.

3. In accordance with the principles of the sources of constitutional law (Article 87 *et seq*.) the resolutions of self-regulatory professional societies do not constitute sources of universally binding law. For this reason, the determination of conditions for interference with the rights and freedoms of persons not belonging to a given professional body may not be regulated by internal resolutions of a regulatory nature.

4. All normative acts having an internal character, including those issued by organs of professional self-regulatory societies, must fulfil the requirements imposed by Article 93 of the Constitution.

5. The statutory provisions mentioned in the Tribunal's ruling grant exclusive control to the self-regulatory societies of advocates and legal advisors as regards organising traineeships for their respective professions. A candidate may only be enrolled on the list of trainees on the basis of their results in the relevant competitive examination (Article 75a of the Bar Act 1982 and Article 33(2) of the Legal Advisors Act 1982), the substantive elements of which are determined, independently and exclusively, by the Chief Council of Advocates (Article 58 point 12(j) of the Bar Act 1982) and the National Council of Legal Advisors (Article 60 point 8b of the Legal Advisors Act 1982) respectively. Efforts to be admitted to the traineeship and, in due course, to the relevant legal profession thus involve a legal obligation for the candidate to be willing to submit to the internal regulatory rules governing the competitive examination of the relevant professional organisation. Such rules have a restrictive effect on the ability of

a candidate, who is not a member of the relevant professional organisation, to enjoy their right to choose their profession in accordance with Article 65(1) of the Constitution. The statutory authorisation for the Chief Council of Advocates to determine, by way of internal regulations, "the rules on holding advocate apprenticeship competitive examinations" (Article 58 point 12(j) of the Bar Act 1982), and the analogous authorisation for the National Council of Legal Advisors (Article 60 point 8b of the Legal Advisors Act 1982), do not define the substantive content of the rules governing such competitive examinations. They do not specify the conditions for the imposition of possible restrictions on the constitutional right to choose and pursue one's profession, which inevitably result from applying the rules governing the holding of traineeship competitive examinations. In contravention with the constitutional requirement resulting from Article 31(3), these provisions fail to indicate the constitutional value justifying the limitation of a constitutional right in such as way as to make these restrictions transparent and to allow an assessment of their proportionality. These provisions cede regulatory powers, unfettered by any statutory limitations, to organs of a self-regulatory professional society. The regulations adopted by such bodies by virtue of these statutory provisions have a *de facto* legal effect which is indistinguishable from norms contained in universally binding legal acts (e.g. statutes), despite the fact that these kind of regulations are not included in the exhaustive list of legal measures which may have such effect (Article 87 of the Constitution).

6. The foregoing critical appraisal of the constitutionality of the statutory provisions authorising the enactment of the relevant "rules" (as mentioned above in the Tribunal's ruling) remains valid from the perspective of the new Polish Constitution, insofar as the substance and legal meaning of these "rules" is not clarified in the authorising statutory provisions and cannot be derived on the basis of other provisions of the Act.

7. The mere fact of determining a maximum number of advocate traineeships within the district of a given Advocate Chamber (as mentioned above in points 1 and 2 of the Tribunal's ruling) does not, in itself, eliminate the freedom to choose and pursue the profession of advocate, although it does reduce the chances for practical enjoyment of this freedom and, furthermore, it has this effect for reasons which are at least partially unrelated to the personal qualities of individual candidates. The decision to grant this competence to organs of self-regulatory societies of professions in which the public repose confidence does not, in principle, exceed the limits of the powers of such societies to supervise the relevant profession, as granted by virtue of Article 17(1) of the Constitution. The number of members of an Advocate Chamber, including the number of trainee advocates, is of significance to the proper practice of the profession, including the adequate training of advocate apprentices. The competence to determine the aforementioned limit of trainees need not contradict the principles of equality and justice (Article 32 and Article 2 of the Constitution) provided that such limits are set, and subsequently applied, in accordance with rules which are defined in advance, adequately published and transparent, based on objective criteria and applied in a uniform manner. The principal elements of the conditions for determining this limit should be laid down by statute, given their effect on the scope of enjoyment of the freedom to pursue a profession and to choose the place in which the profession is pursued. Meanwhile, the unfettered discretion which is granted to self-regulatory organs of the advocates' profession, by Article 40 point 1 of the Bar Act 1982, infringes the requirement of statutory regulation stemming from Article 65(1), read in conjunction with Article

31(3), of the Constitution and, moreover, renders impossible the judicial assessment of adherence to the conditions for restricting individual freedoms, as defined in Article 31(3). At the same time, it contravenes the constitutional requirement that legal provisions should be sufficient precise, which forms an element of the rule of law principle (Article 2 of the Constitution).

8. The statutory provisions requiring consideration in this case, by virtue of the questions of law referred to the Tribunal, require urgent amendment in order to bring them into line with the requirements of the Constitution of 1997. The conditions justifying a finding that the contested provisions are inconsistent with the Constitution arose with the entry into force of the current Constitution, i.e. on the 17th of October 1997. To allow these unconstitutional provisions to continue in force would result in an unjustified prolongation of the period during which statutory provisions adopted in 1982 were not amended so as to bring them into line with the constitutional guarantee of the freedom to choose and pursue a profession (Article 65(1) of the Constitution). Therefore, the Constitutional Tribunal can not find any grounds to delay the date on which the challenged provisions will lose the binding force (cf. Article 190(3) of the Constitution).

9. The fact that the challenged provisions will cease to have binding force, from the date on which this judgment is published in the Journal of Laws, does not mean that all acts and activities taken before the date of publication of this judgement are automatically invalid. In particular, the traineeship competitive examinations begun before the publication of this judgment (with the date on which the list of candidates was finalised being the decisive cut-off point) may be held according to the previous rules. The nature of the competitive examinations conducted in accordance with these rules precludes the possibility of challenging the results thereof by reason of delivering this judgment.

10. "Proper practise of a profession in which the public repose confidence" within the meaning of Article 17(1) of the Constitution includes not only individual actions of persons practising these professions, but also the collective activities of professional societies of such persons.

11. Self-regulatory professional societies of persons practising professions in which the public repose confidence (Article 17(1) of the Constitution), unlike "other forms" of self-government (as referred to in Article 17(2)), may, and sometimes even should, restrict to a certain degree the freedom to pursue a profession or economic activity with regard to the purposes for the fulfilment of which they were created. They may, however, only do this within the confines of the public interest and for the protection of this interest, on the basis of a statute and with regard to the conditions laid down in Article 31(3) of the Constitution.

12. The function of the legislator in regulating an individual's freedoms ("freedom rights") is not to enact a norm permitting certain behaviour, but above all to enact prohibitions which prevent taking action that would hinder the beneficiary of a particular right from shaping his behaviour, in a given sphere, according to his choice. In regulating a personal right which has the character of a "freedom", the legislator must, in particular: define the beneficiaries of the right; indicate subjects having any obligations in respect of this right; define the scope of the given freedom, thereby indicating the sphere of behaviour which is subject to legal protection and with which other subjects

may not interfere; define the conditions, procedure and character of interference which may be undertaken, in exceptional circumstances, for the protection of values of special importance and the State organs authorized to undertake such interference; create legal measures safeguarding against unlawful interference by a State organ or other entities; ensure, at least to a minimal extent, the conditions for the practical enjoyment of the particular freedom.

Provisions of the 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.
2. Other forms of self-government shall also be created by means of statute. Such self-governments shall not infringe the freedom to practice a profession nor limit the freedom to undertake economic activity.

Art. 31. […] 3. Any limitation upon the exercise of constitutional freedoms and rights may by imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.
2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

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

Art. 87. 1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.
2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

Art. 93. 1. Resolutions of the Council of Ministers and orders of the Prime Minister shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act.
2. Orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects.
3. Resolutions and orders shall be subject to scrutiny regarding their compliance with universally binding law.

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.