

Judgment of 22nd November 2004, [SK 64/03](#)
**ABILITY TO RELEASE A LEGAL ADVISOR FROM
 AN OBLIGATION TO MAINTAIN PROFESSIONAL SECRECY
 IN CRIMINAL PROCEEDINGS**

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| Type of proceedings: Constitutional complaint Initiators: Natural persons | Composition of Tribunal: 5-judge panel | Dissenting opinions: 0 |
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| Legal provisions under review | Basis of review |
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| Ability to release a legal advisor from an obligation to maintain professional secrecy where this is indispensable for the sound administration of justice and facts protected by such secrecy may not be determined on the basis of any other evidence [Criminal Procedure Code 1997: Article 180 § 2] | Rule of law Status of professional self-governing bodies Principle of proportionality Requirement for acts prohibited under criminal law to be defined by statute Right to a fair trial Freedom and privacy of communication Informational autonomy of the individual [Constitution: Articles 2, 17, 31(3), 42(1), 45(1), 49 and 51(2)] |

Statutory provisions governing the status of persons practicing certain professions in which the public repose particular confidence (inter alia, advocates, legal advisors, notaries, physicians) envisage an obligation for such persons to maintain professional secrecy as regards confidential information concerning private persons having entrusted them with their affairs. An infringement of this obligation may justify holding such a person liable, within the meaning of civil or criminal liability, as well as disciplinary liability within the self-governing body in which the representatives of a given profession associate.

For the purpose of guaranteeing respect for professional secrecy within judicial and administrative proceedings, the appropriate procedural provisions, regulating witness testimony, envisage the right to refuse to testify or answer questions concerning circumstances encompassed within the obligation of secrecy.

Article 180 § 2 of the Criminal Procedure Code, challenged in the present case, envisages the possibility to release a legal advisor from an obligation to observe professional secrecy, thereby imposing a duty to provide testimony concerning confidential facts. A procedural decision releasing a legal advisor from an obligation of secrecy may be issued by a court where it is “indispensable to the sound administration of justice” for the court to hear such confidential facts and where such facts are, moreover, significant for the case and “may not be determined on the basis of other evidence”.

The authors of the constitutional complaints, examined jointly, are legal advisors. The complainants were called upon to provide testimony in criminal proceedings against the president of a certain joint-stock company, concerning information obtained during the provision of legal services to this company.

The district court decided to release them from their obligation of secrecy. The complainants' appeal against this procedural decision was dismissed by the court of second instance. Nevertheless, the complainants continued to refuse to testify, which in turn led to them being charged with having committed the offence of impeding criminal proceedings.

The constitutional complaints submitted that the challenged provision contradicts a norm derived by the complainants from a series of provisions of the Constitution (indicated in the ruling), according to which persons obliged to maintain secrecy within a profession in which the public repose confidence enjoy the constitutional guarantee of protecting a "special privacy of communication".

These constitutional complaints were supported by the Commissioner for Citizens' Rights, under the procedure contained in Article 51(2) of the Constitutional Tribunal Act 1997. In the Commissioner's view, numerous provisions of the Constitution justify extending protection to the provision of legal assistance by a legal advisor, which is connected with guaranteeing the confidentiality of information obtained from a client. Furthermore, in the Commissioner's opinion, the criteria permitting the release of a legal advisor from an obligation of secrecy, as contained in the challenged provision, fail to fulfil the requirement of sufficient specificity, thereby risking the possibility of arbitrary decisions.

RULING

Article 180 § 2 of the Criminal Procedure Code conforms to Articles 2, 17, 31(3), 42(1), 45(1), 49 and 51(2) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. It is not precluded to derive a certain right or freedom of a constitutional nature from the content of several provisions of the Constitution. Various elements of these provisions may coherently create a norm directed to a specified addressee. Moreover, in consequence of the existence of certain constitutional obligations, a right (freedom) may emerge for a different subject, even where this was not explicitly expressed in the Constitution.
2. Maintaining a legal advisor's professional secrecy constitutes an element of the sound functioning of the administration of justice. A legal advisor's professional secrecy relates not only to their clients' right to maintain the confidentiality of certain information, but also to the legal advisor's own right to particular behaviour vis-à-vis the organs administering justice. The scope of this right is determined by situations, envisaged by procedural statutes, in which it is permissible to refuse to testify or to answer a question in proceedings before a State organ. They are not, however, decisive as regards the existence of a constitutional right for legal advisors to maintain professional secrecy.
3. It is unfounded to allege the existence of an unclear relationship between Article 3(5) of the Legal Advisors Act (concerning legal advisors' professional secrecy) and Article 180 § 2 of the Criminal Procedure Code. The relationship between these norms

should be recognised as one having the nature of *lex generalis* – *lex specialis*. Moreover, since legal advisors “appeared” in Article 180 § 2 of the Criminal Procedure Code as a result of an amendment to the Code in the year 2000, a *lex posterior* – *lex anterior* relationship exists between these norms.

4. Whilst the notion of the “sound administration of justice” is very general, the second criterion indicated in Article 180 § 2 of the Criminal Procedure Code – “the absence of other evidence” – is specific, measurable and verifiable. A decision concerning releasing a legal advisor from an obligation of secrecy is taken by a court having at its disposal the material collected within preparatory proceedings and which is, accordingly, capable of assessing whether such evidence is indispensable, i.e. ascertaining that a given circumstance may not be proven by way of other, effectively accessible, evidence. Accordingly, the argument concerning the lack of precision of Article 180 § 2 of the Criminal Procedure Code is insufficient to lead to the conclusion that this provision fails to conform to the Constitution.
5. Article 2 of the Constitution does not represent a source of rights or freedoms and, accordingly, may not constitute an independent basis for a constitutional complaint. In particular, a constitutional right may not be derived from the principle of correct legislation, as stemming from this provision.
6. The aforementioned reasoning also applies to Article 31(3) of the Constitution. Reference to the principle of proportionality, expressed in this provision, may only complement an additional basis of review and may be referred to only in order to indicate that the limitation of a constitutional right or freedom has been excessive. Only those rights which are derived from a norm of constitutional rank, as opposed to rights contained solely in a statute, have a constitutional character.
7. Permitting the functioning of professional self-regulatory bodies (cf. Article 17 of the Constitution) does not signify that the mere fact of belonging to a self-regulatory body *per se* creates constitutional rights, in particular the right to maintain professional secrecy. The constitutional recognition of the position of a professional self-regulatory body has its basis in the public-legal aspect of the work of a legal advisor or advocate, which constitutes a source of particular public-legal obligations. Whilst self-regulatory bodies are authorised to enforce legal advisors’ maintenance of professional secrecy, within the framework for supervising proper practice of the profession (Article 17(1)), the quality of legal service may not be assessed solely from the perspective of the lawyer-client relationship. In situations where two values conflict – namely, the sound administration of justice and the interests of a client having entrusted information to a lawyer appearing in a role other than as the defendant’s lawyer (cf. Article 42(2) and point 12 below) – the Constitution does not demand that priority be accorded to the latter value.
8. No conjunction exists between the principle of *nullum crimen sine lege* (Article 42(1) of the Constitution) and the need for legal advisors to maintain absolute professional secrecy. The possibility for criminal liability of a legal advisor who, by refusing to testify, fails to comply with a court’s procedural decision releasing him from an obligation of secrecy, is subject to general principles.
9. Professional assistance during legal proceedings is significant for exercising the right to a fair trial (Article 45(1) of the Constitution). Conversely, however, the Constitution

does not guarantee the possibility to take advantage of legal assistance provided by an advocate or legal advisor outside the scope of criminal proceedings. *A fortiori*, in strictly specified cases, the release of a legal advisor from an obligation of professional confidence does not signify a limitation of the right to a fair trial.

10. The only provision of the Constitution upon which a lawyer's absolute obligation to maintain professional secrecy may be based is Article 42(2) (the right to defence). However, not even this provision implies a constitutional right for lawyers to respect the obligation of secrecy; this provision establishes the right of a person against whom criminal proceedings have been instituted to unrestricted contact with their lawyer.
11. Articles 49 (the freedom and privacy of communication) and Article 51(2) (limiting the ability of public authorities to acquire, collect and disseminate information regarding citizens) of the Constitution allow for restrictions on a legal advisor's professional secrecy. The former envisages the possibility for statutory limitation of the freedom contained therein; the latter permits actions necessary in a democratic State governed by the rule of law. One of the basic tasks of the democratic State governed by the rule of law is to detect offences, prosecute the perpetrators thereof and to impose penalties thereupon. Where, for this purpose, the collection of specific information appears indispensable, the activities of prosecutorial organs in this scope do not fail to conform to the Constitution.
12. A provision challenged under the [constitutional complaint](#) procedure should constitute the basis of a final decision concerning the complainant's constitutional rights or freedoms. However, the wrongful application of such a provision in any particular case is not *per se* evidence of its unconstitutionality.

Provisions of the Constitution and the Constitutional Tribunal Act

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 be 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. 42. 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally liable. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

2. Anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. He may, in particular, choose counsel or avail himself - in accordance with principles specified by statute - of counsel appointed by the court.

3. Everyone shall be presumed innocent of a charge until his guilt is determined by the final judgment of a court.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 49. The freedom and privacy of communication shall be ensured. Any limitations thereon may be imposed only in cases and in a manner specified by statute.

Art. 51. [...] 2. Public authorities shall not acquire, collect nor make accessible information on citizens other than that which is necessary in a democratic state governed by the rule of law.

CT Act

Art. 51. 1. The Tribunal shall inform the Commissioner for Citizens' Rights about the institution of proceedings. Provisions of Article 33 shall apply accordingly.

2. The Commissioner for Citizens' Rights may, within the period of 60 days from the receipt of information, give notice of his/her participation in the proceedings.