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TASKS OF THE NATIONAL BAR OF ATTORNEYS-AT-LAW IN THE LIGHT OF ART. 17.1 OF THE CONSTITUTION OF THE REPUBLIC OF POLAND

ABSTRACT

The article deals with the issue of the constitutional basis for the functioning of the National Bar of Attorneys-at-Law as set forth in Article 17 of the Basic Law. The author stresses the particular importance of bar associations functioning independently from political power, linking their constitutional attributes to the axiology of the democratic system. He infers the need to preserve the independence of the National Bar of Attorneys-at-Law from their systemic function as protectors of the freedoms and rights of individuals and as collaborators in the administration of justice. The key determinant of the place and role of bar associations in the system of law protection authorities is their constitutional status of public trust professions and the related function of protecting the public interest in the activities of the National Bar of Attorneys-at-Law. Further in the paper, the author focuses on the issue of ensuring the proper practice of the profession by the National Bar of Attorneys-at-Law, e.g., through disciplinary liability mechanisms, which in essence are supposed to guarantee politically independent, reliable, and effective legal assistance is provided by attorneys-at-law to their clients. In the last part of the publication, the author points

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out the current threats to the constitutionally guaranteed independence of the National Bar of Attorneys-at-Law, seeing their sources in the consistent questioning of the rule of law standards by political authorities. According to the author, its manifestations include, inter alia, excessive interference by the Minister of Justice in the field of professional self-government of the attorneys-at-law and attempts by politicians of the ruling majority to question the constitutionality of the principle of mandatory membership in the National Bar of Attorneys-at-Law, which is fundamental for the independent and effective functioning of this professional association.

Keywords: professional self-government, independence, protection of public interest, rule of law

I. Introduction

The exercise of public trust professions in Poland is based on constitutional grounds. Pursuant to the provisions of Article 17.1 of the Constitution of the Republic of Poland of 2 April 1997[2] [hereinafter referred to as the Constitution], professional self-governments may be established by statute in order to represent persons engaged in public trust professions and to ensure the proper practice of such professions within the boundaries of the public interest and for its protection. It should be noted at the outset that the cited norm has been included in the chapter of the Constitution dedicated to the main principles of the political system, which unambiguously indicates the high rank given by the legislator to the functioning of professional self-governments representing persons engaged in the practice of public trust professions.

Article 17 of the Constitution is an element of the system of public power decentralization in the form of so-called material decentralization, which consists in entrusting independent bodies or organizations, usually self-governing, with the management of certain types of affairs.[3] The idea of decentralization *sensu largo* is directly related to the democratic system and the principle of national sovereignty enshrined therein (Article 4 of the Constitution). As the doctrine unanimously points out, decentralized structures are much more effective in meeting the needs of the sovereign, and it is much easier for citizens to exert influence on public authorities.[4] The goal of professional self-government is to fulfill public tasks not performed by the state and local government, although – similarly to the tasks of local governments – the goal of public trust professions is also to meet important human needs.[5] Unlike in the case of local self-government bodies, however, Article 17.1 of the Constitution regulates professions, the essence of which consists in the performance of professional activities towards specific individuals. At the same time, these activities involve allowing the persons performing them

2 Journal of Laws No. 78, item 483, as amended.

3 See: Z. Cieślak et al., *Prawo administracyjne*, Warsaw 2002, p. 102.

4 See, inter alia: P. Sarnecki, *Komentarz do art. 15*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, vol. IV*, ed. L. Garlicki, Warsaw 2005, p. 3.

5 See: P. Tuleja, *Komentarz do art. 17*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warsaw 2019, pp. 77–78.

access to the privacy of the recipients of these services.[6] An immanent correlate of practicing a public trust profession is trust on the part of the beneficiaries of the services. The detailed organizational and functional framework of professional self-government is shaped by the legislator. The law defines both the conditions for the practice of the profession and the guarantees of its independence in the performance of the entrusted tasks.[7] According to the case law of the Constitutional Tribunal, "public trust" is a conglomerate of a number of factors, among which the following come to the fore: the conviction that the practitioner of the profession has exercised goodwill, proper motivations, and due professional diligence.[8]

Using the term "public trust profession", the legislator did not specify the list of such professions in Article 17.1 of the Constitution. According to the case law of the Constitutional Tribunal, it comprises legal professions, including the profession of attorney-at-law, which implies the need to subject it to a special regulation procedure. In the democratic system, both advocates and attorneys-at-law are seen not only as persons of public trust but also as *sui generis* protectors of the rule of law and collaborators in the administration of justice.[9] The constitutional role defined in this way immanently entails the need to guarantee the independence of this profession. Legal assistance provided by lawyers acting independently of public authorities is one of the necessary guarantees for the proper protection of subjective rights, but the construction of this specific instrument for the protection of these rights must include an appropriate level of legal knowledge and an appropriate ethical attitude from the lawyers as well as systemic guarantees of their independence. One of these guarantees is the special protection resulting from membership in a bar association.

Admission to the profession and the preceding preparation for its practicing should guarantee a high quality of professional activities, as this is required by the protection of the public interest, which is the basic premise for distinguishing this group of professions in Article 17.1. of the Constitution. Moreover, as the Tribunal has repeatedly stressed in a number of judgments, public trust professions require special protection for the recipients of services provided by the representatives of these professions, as the said services involve particular risks. Consequently, from the systemic point of view, it is necessary to adequately verify the preparation for their practicing, including the practice of the attorney-at-law profession, both from the substantive and ethical point of view, in which the professional self-government should play a leading role.[10]

6 See: P. Sarnecki, *Komentarz do art. 17*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, vol. IV*, ed. L. Garlicki, Warsaw 2005, pp. 1–2.

7 Judgment of the Constitutional Tribunal of 18 October 2010, ref. no. K 1/09.

8 Judgment of the Constitutional Tribunal of 18 February 2004, ref. no. P 21/02.

9 See more: S. Patyra, *Radca prawny jako „osoba trzecia"? Refleksje na temat niezależności radcy prawnego w postępowaniu przed Trybunałem Sprawiedliwości UE na kanwie połączonych spraw C-515/17 P i C-561/17 P Uniwersytet Wrocławski przeciwko Agencji Wykonawczej ds. Badań Naukowych (REA)*, [in:] *Niezależność radcy prawnego*, ed. R. Stankiewicz, S. Patyra, T. Niedziński, Warsaw 2020, p. 77.

10 The Constitutional Tribunal expressed its opinion on these issues in the following judgments: ref. no. SK 22/02 of 26 November 2003; ref. no. K 6/06 of 19 April 2006; ref. no. K 30/06 of 8 November 2006, and in the judgment ref. no. K 41/05 of 2 July 2007.

II. Axiological foundations for the functioning of the National Bar of Attorneys-at-Law

Provision of legal assistance by attorneys-at-law in Poland, as a democratic state observing the rule of law and protecting human freedoms and rights, is a fundamental element determining the legal position and individual functions of not only the attorneys-at-law themselves but also the National Bar of Attorneys-at-Law. Thus, professional self-government, as the only permissible form of organization of attorneys-at-law in their activities – is a *sui generis* element of the system of the Republic of Poland, based on the idea of the primacy of the Constitution in the system of sources of law as well as on the principle of legalism, which sets limits on the public authorities ability to act.[11]

An equally important constitutional principle that creates the position and importance of professional self-government in the system of the Republic of Poland is the already-mentioned decentralization. Its purpose is to deetatize the public function by entrusting it to self-government associations, which thus become public authority bodies. This authority is expressed in the supervision over the proper practice of the profession within the limits of the public interest and for its protection. This formula directly refers to the constitutional assumption of perceiving the state as a "common good" within the meaning of Article 1 of the Constitution. It includes both the fulfillment of relevant statutory obligations as well as the embodiment of ethical standards derived from codes of ethics. Deontology is an indispensable factor in the functioning of public trust professions. Exercising supervision must also take into account principles of social co-existence as well as moral and customary considerations.

An important determinant of the proper functioning of professional self-government is the protection of the public interest. This formula brings the status of its members closer to that of public officials. As P. Sarnecki points out, entrusting professional self-governing associations with the protection of the public interest is an expression of the state's trust in a given professional group and its organization. The consequence of entrusting the professional self-government with such an important function is the obligatory membership of persons practicing a given profession in its structures, which – through procedures of selecting candidates to practice the profession – should ensure its proper practice.[12] Both the concept of compulsory membership in the self-government organizations of the public trust professions, as well as the legitimacy of statutory limitations on the freedom to practice these professions, were clearly emphasized in the discussions on the final shape of Article 17 of the Constitution, held in the course of the works of the Constitutional Committee of the National Assembly.[13]

11 See: Z. Maciąg, *Samorząd zawodowy radców prawnych a wolność wykonywania zawodu*, [in:] *Ustroje. Tradycje i porównania. Księga jubileuszowa dedykowana prof. dr. hab. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, ed. P. Mikuli, J. Karp, G. Kuca, Warsaw 2015, p. 155.

12 See: J. Ciapała, *Samorządy osób wykonujących zawody prawnicze w kontekście postanowień art. 17 Konstytucji RP z 2 kwietnia 1997 roku*, [in:] *Samorządy w Konstytucji RP z 2 kwietnia 1997 roku*, ed. Z. Witkowski, A. Bień-Kacała, Toruń 2013, p. 317.

13 See more: R. Chruściak, *Konstytucjonalizacja samorządów zawodów zaufania publicznego*, [in:] *Samorządy w Konstytucji RP z 2 kwietnia 1997 roku*, ed. Z. Witkowski, A. Bień-Kacała, Toruń 2013, p. 374 et seq.

As J. Ciapała points out, the National Bar of Attorneys-at-Law protects the public interest in many ways; by protecting individual and group interests, by influencing the process of making and applying the law, as well as by shaping a broadly understood culture of respect for the law and related democratic values.[14] However, it should be remembered that tasks of the professional self-government are also tasks of its members. Membership in the professional self-government, which is guided in its activities by the ethos of respect for constitutional values, in particular the principle of a democratic state observing the rule of law, obliges attorneys-at-law to make these values a determinant of their professional activities. It is undeniable that providing high-quality services to clients is a function of protecting the public interest, as it undoubtedly enhances trust, both in the law and in persons practicing public trust professions.[15]

The public interest, perceived through the axiology of a democratic state observing the rule of law, cannot be associated with any political party or ideology, but only with an elementary principle underlying the rule of law: "In a state governed by the rule of law, it is law and legal norms, not political will, that take precedence in application over all other norms." The public interest understood in this way is guarded in a democratic state by the National Bar of Attorneys-at-Law. Its functioning should meet standards stemming from constitutional axiology and be based on statutory regulations corresponding to international and European standards. Compliance with these standards should manifest itself not only in the sphere of lawmaking but also in the practice of law application by public authorities. This is natural in that the constitutional assumptions of the system, related to the functions of the National Bar of Attorneys-at-Law, generally coincide with the assumptions arising from international and European norms and standards concerning the independence of lawyers providing legal assistance and their bar associations. Normative regulations, as well as acts of applying the law by the competent bodies of the United Nations, the Council of Europe, and the European Union, confirm the general need to ensure the possibility for bar associations to independently, and thus effectively, carry out functions of representing affiliated lawyers and entrust them with the supervision over the proper practice of the profession.[16]

III. Systemic functions of the professional self-government

In Article 17.1. of the Constitution, the legislator defined the basic functions of professional self-governments, including the National Bar of Attorneys-at-Law. These include

14 See: J. Ciapała, *Samorządy…*, p. 321 et seq.

15 See: A. Surówka, D. Padjas, *Samorządy zawodów prawniczych – zakres pieczy oraz obowiązek przynależności do samorządu w świetle art. 17 ust. 1 Konstytucji*, [in:] *Samorządy w Konstytucji RP z 2 kwietnia 1997 roku*, ed. Z. Witkowski, A. Bień-Kacała, Toruń 2013, p. 398.

16 Of particular relevance in this regard are documents such as "Basic Principles on the Role of Lawyers" adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 27 August – 7 September 1990); Recommendations of the Committee of Ministers of the Council of Europe on the Freedom of the Legal Profession of 2000; "Rule of Law Checklist" adopted on 12 March 2016 by the European Commission for Democracy through Law (Venice Commission); European Parliament Resolution of 23 March 2006 on the Legal Profession and the General Interest in the Functioning of the Legal System.

representing attorneys-at-law and exercising supervision over the proper practicing of their profession.

Representing lawyers practicing an independent profession is one of the primary functions of the National Bar of Attorneys-at-Law. It should be understood as broadly as possible and refer to any activities of the National Bar of Attorneys-at-Law and its bodies, which are primarily aimed at ensuring a proper level of provision of legal assistance by independent lawyers. Representation can and should include relations with public authorities, citizens, civil society organizations as well as international organizations and institutions.[17]

As regards the second function of the professional self-government, mentioned *expressis verbis* in Article 17.1 of the Constitution, one should begin by stating that the fundamental purpose of self-government is not only to ensure the independence of individual lawyers providing legal assistance but also to guarantee a substantively and ethically appropriate level of the assistance they provide. In the light of Article 17.1 of the Constitution, there is no doubt that the need to ensure proper supervision over practicing the profession of attorney-at-law within the limits of the public interest, and for its protection, was the basic premise for the establishment of the National Bar of Attorneys-at-Law. Similar to other bar associations, the activity of the National Bar of Attorneys-at-Law is an important guarantee of the reliable and proper practice of the profession by its members, ensuring the required quality of legal assistance is provided.[18] At the same time, it should be stressed that the supervision over the exercise of a profession is a constitutional value, hence it cannot be subject to restrictions by political authorities. Just as the essence of the activity of an attorney-at-law as a collaborator in the administration of justice is independence, so the National Bar of Attorneys-at-Law must also be independent and autonomous in carrying out its constitutional and statutory tasks. Its independence is a key determinant of the exercised "supervision" also because it does not boil down to merely overseeing the legality of the actions taken by members of the association. It also includes "soft" elements such as adherence to rules of social co-existence, ethical and moral standards as well as good manners by attorneys-at-law.[19] Therefore, assessment of the respect for the indicated values is based on the principles of professional deontology, and these are shaped directly by the National Bar of Attorneys-at-Law.

"Supervision" over the proper practice of public trust professions is treated in this way also by the Constitutional Tribunal, which in its case law draws attention to a close connection between the shaping of high professional standards by self-governing bodies that act independently from political authorities and the protection of the public interest.[20] Referring to the concept of "supervision" exercised "within the limits of the public interest and for its protection", the Constitutional Tribunal explained that its aim

17 See: M. Szydło, *Komentarz do art. 17 Konstytucji RP*, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1–86*, ed. M. Safjan, L. Bosek, Warsaw 2016.

18 See: W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy*, Warsaw 2012, p. 22 et seq.

19 See: J. Ciapała, *Samorządy…*, p. 325.

20 See, for instance: judgment ref. no. K 37/00 of 22 May 2001 and judgment ref. no. K 20/08 of 14 December 2010.

is to maintain the proper quality, in both a substantive and legal sense, of the activities comprising the "practicing of the professions", which should lead to their proper performance. It also pointed out that "the supervision exercised by the self-governments of the public trust professions over their proper practicing has the character of public authority activity, and the mere fact of entrusting it to the professional self-government 'does not change the essentially public nature of this function'."[21] Article 17.1 of the Constitution defines both the framework of the supervision exercised by professional self-governments and its direction. This framework is determined by the public interest, and the supervision is to protect this interest. Any action by professional self-government in the "exercise of the supervision" is, therefore, subject to a constitutionally directed evaluation, made from the point of view of the public interest and aiming at its protection. A constitutional approach to the requirement of acting "within the limits of the public interest and for its protection" leaves no doubt as to the priority of the public interest within the framework of the supervision exercised by the professional self-government.[22] As the Constitutional Tribunal rightly emphasizes, it takes precedence over the particular interests of a given professional self-government.[23]

Delegating supervision over the proper practice of the profession to the National Bar of Attorneys-at-Law leads, in consequence, to the conclusion that the bodies of the National Bar of Attorneys-at-Law must exert influence on the shaping of the principles of practicing the profession within the boundaries of other constitutional values, which, in turn, implies the necessity to create legal mechanisms that will actually guarantee that influence. In the light of the doctrine, specific tasks and competences of the professional self-government in this respect should include, in particular, deciding, or at least co-deciding, whether an attorney-at-law should be permitted to practice, exerting influence on the professional training of attorneys-at-law and trainee attorneys-at-law, establishing ethical principles of the profession as well as enforcing disciplinary liability.[24] This position also coincides with the established case law of the Constitutional Tribunal. It shows that regulations governing recruitment to public trust professions should meet the requirement of consistency and the preserved influence of the professional self-government on this aspect of the proper practice of the profession. In the model of preparing for and practicing of the regulated legal professions adopted by the Polish legislator, it is desirable that the entire course of the traineeship be under the supervision of the self-governing bodies, the aim and effect of which is to ensure the proper practice of the profession. An element of this supervision is a significant impact on both the training process of future lawyers and the final examinations which end that process.[25] In a judgment

21 See: judgment ref. no. P 21/02 of 18 February 2004. See also: P. Sarnecki, *Radca prawny jako zawód zaufania publicznego*, „Radca Prawny. Zeszyty naukowe" 2002, no. 4–5, p. 27 and T. Niedziński, *Nadzór sądów i Ministra Sprawiedliwości nad postępowaniem dyscyplinarnym wobec radców prawnych*, „Przegląd Prawa i Administracji" 2020, no. CXXIII, p. 293.

22 M. Szydło, *Komentarz do art. 17…*, Legalis.

23 See: judgment cited in reference 21.

24 See: W. Mojski, *Odpowiedzialność dyscyplinarna radców prawnych. Wybrane aspekty konstytucyjne i międzynarodowe*, „Radca Prawny. Zeszyty naukowe" 2018, no. 4, p. 25–36.

25 Judgment of 19 April 2006, ref. no. K 6/06.

directly referring to the competences of the National Bar of Attorneys-at-Law, the Tribunal explicitly stated that the attorney-at-law's traineeship is the basic form of professional preparation to take up and practice the profession of an attorney-at-law. Within its framework, trainee attorneys-at-law undergo not only theoretical training but also improve their practical skills. In particular, they also undertake activities falling within the scope of legal representation before courts and other bodies.[26] At the same time, the Constitutional Tribunal reaffirmed its earlier view that the exclusion of any influence exerted by the National Bar of Attorneys-at-Law on the determination of rules governing professional examinations prevents that bar association from fulfilling, to a significant extent, its constitutional obligation laid down in Article 17.1 of the Constitution.

Thus, in light of the cited views, there can be no doubt about the need to guarantee the National Bar of Attorneys-at-Law the possibility of exerting influence not only on the course of the attorney-at-law's traineeship but also on the scope and content of professional exams, which is intended to ensure the proper level of legal assistance provided by individual persons admitted to the profession. Specific competences of the National Bar of Attorneys-at-Law with regard to organizing and conducting the traineeship are, therefore, necessary for the implementation of the directive expressed in Article 17 of the Constitution, due to the fact that this process directly prepares trainee attorneys-at-law to practice a public trust profession. If therefore, the professional self-government is supposed to supervise the proper practicing of the attorney-at-law's profession, then it is a logical consequence that it should also supervise the proper preparation of persons applying for its future practicing.

In the aspect related to the organization and conduct of attorneys-at-law's traineeship, the Act on Attorneys-at-Law[27] [hereinafter referred to as the AAL] implements provisions of Article 17.1 of the Constitution regarding supervision over the proper practice of the profession of attorney-at-law. Of fundamental importance for the implementation of the constitutional directive contained in Article 17 is the provision of Article 38.1 of the above-mentioned Act, according to which the attorney-at-law's traineeship is organized and conducted by regional bar associations of attorneys-at-law. In this respect, the National Bar of Attorneys-at-Law enjoys far-reaching independence. It is solely responsible for shaping the traineeship program as well as organizing its course.[28]

IV. Disciplinary liability of attorneys-at-law as a constitutional value

The tasks of professional self-government set forth in Article 17.1. of the Constitution, in particular, the duty to exercise supervision over the proper practice of the profession, are immanently linked with the possibility of the professional self-government to

26 Judgment of 8 November 2006, ref. no. K 30/06.

27 Act of 6 July 1982 on attorneys-at-law, consolidated text published in Journal of Laws of 2020, item 75, as amended.

28 *Ustawa o radcach prawnych. Komentarz*, ed. T. Scheffler, 2018, Legalis.

enforce disciplinary liability against its members. Supervision over the proper practice of a public trust profession, including the profession of attorney-at-law, is aimed not only at protecting persons practicing a given profession but also at eliminating and condemning attitudes of the members of a professional association which undermine this trust. Taking care of the public interest, even at the expense of the interests of the association, is an important element of building public confidence in persons practicing legal professions. Indeed, building a culture of trust and strengthening social approval is an essential factor in the effective implementation of the tasks of all public trust professions.[29] On an individual level, building this trust is primarily about the relations between attorneys-at-law and their clients.[30] In general, though, it includes actions taken by the professional self-government – both in the broadly understood public space as well as in the sphere of internal functioning, e.g., by drawing disciplinary consequences against those members of the professional association who in their activities are not guided by the legal and ethical values underlying the establishment of the professional self-government. The importance of trust in the attorney-at-law – client relationship has not only a theoretical and legal dimension but is also reflected in the practice of the law application, particularly as regards the jurisprudence of the National Bar of Attorneys-at-Law disciplinary courts, which stresses the duty to build and maintain public confidence in the profession of attorney-at-law.[31]

At the same time, it should be emphasized that the public image of an attorney-at-law is also significantly affected by his/her function as a collaborator in the administration of justice. This means that efficiency in handling clients' cases is not the only determinant of their professional quality. An equally important factor creating the perception of a member of the National Bar of Attorneys-at-Law is his/her activity taken for the common good within the meaning of Article 1 of the Constitution. This, in turn, means that in order to shape positive patterns of legal culture, the attorney-at-law as a person of public trust and a "servant in the administration of justice" should unequivocally advocate constitutional values which create a system of justice for the benefit of all citizens, rather than making it merely an instrument of ad hoc political goals and benefits. Justice, as an intrinsically universal phenomenon, cannot serve particular ends and, therefore, cannot be an instrument of discrimination, either positive or negative, against any person or social group.

For these reasons, bodies of professional self-government must enjoy a guaranteed influence on shaping the principles of the disciplinary liability of attorneys-at-law and trainee attorneys-at-law as well as on its enforcement in specific cases, which in turn implies a systemic need to create an effective system of self-government disciplinary proceedings. The very essence of the self-government principle means that it should be internal in nature, as it is based on the assumption of organizational autonomy of

29 Judgment of the Constitutional Tribunal of 2 July 2007, ref. no. K 41/05.

30 See: D. Seroka, *Tajemnica zawodowa a wykorzystywanie informacji nią objętych przez radcę prawnego we własnej sprawie dyscyplinarnej*, [in:] *Tajemnica zawodowa radcy prawnego*, ed. R. Stankiewicz, Warsaw 2018, p. 159.

31 For instance, judgment of the Higher Disciplinary Court of 14 March 2016, ref. no. WO-95/15.

the National Bar of Attorneys-at-Law, derived directly from the provisions of the AAL and indirectly from Article 17.1 of the Constitution. Disciplinary jurisdiction is also immanently lined with the ethos of the attorney-at-law's profession, in particular its independence.

The obligation to create a specific regime of disciplinary liability, which takes into account the necessary scope of the self-government autonomy, lies with the legislator.[32] This means that, from the point of view of constitutional values, it is not allowable to abolish the autonomous system of self-government disciplinary responsibility, which does not mean, however, that it cannot be subject to control by state authorities. A democratic state has the right to interfere in the legally shaped sphere of independence of the bar associations of lawyers providing legal assistance, but this interference must be proportional and must not violate the very essence of self-governmental independence as well as the independence of individual lawyers. As a result, it is possible only if it serves the protection of other constitutional values of a democratic state of law, and first of all, to guarantee an appropriate level of legal assistance is provided to individuals. The protection understood in this way does not, therefore, exclude the exercise of supervision over the National Bar of Attorneys-at-Law by state authorities, including the Minister of Justice, however, such supervision is permitted only within the limits set forth by law. As J. Ciapała rightly points out, the supervisory authority may not undertake activities aimed at legal or actual takeover by a state authority of certain tasks or powers of the professional self-government bodies.[33]

V. Interference of political authorities as a threat to the independence of the professional self-government – some conclusions to finish with

Pursuant to Article 5.3 of the AAL, the Minister of Justice exercises supervision over activities of the professional self-government to the extent and in the forms laid down in the Act. As a matter of fact, supervisory competences are limited solely to the verification of the actions taken by professional self-government bodies, and they cannot modify their tasks and competences as defined by law.[34] When referring to the current statutory regulation, one should draw attention to the particularly extensive competencies of the Minister of Justice regarding an exceptionally sensitive sphere of the National Bar of Attorneys-at-Law operation, that is disciplinary proceedings. The Minister has the power, inter alia, to order institution of disciplinary proceedings, which raises doubts in the context of the principle of independence and autonomy of the professional self-government.[35] Furthermore, both the Minister and persons authorized by the Minister have

32 See: W. Bujko, *Odpowiedzialność dyscyplinarna*, [in:] *Zawód radcy prawnego. Historia zawodu i zasady jego wykonywania*, ed. A. Bereza, Warsaw 2015, pp. 491–492.

33 See: J. Ciapała, *Samorządy…*, p. 347.

34 See: judgment of the Constitutional Tribunal of 1 December 2009, ref. no. K 4/08.

35 See: T. Niedziński, *Nadzór…*, p. 94.

the right to inspect the proceedings at any stage, and disciplinary courts are required to immediately submit to the Minister copies of every final disciplinary decision. Undoubtedly, in the light of the disposition contained in Article 5.3 of the AAL, the power of the Minister of Justice to initiate disciplinary proceedings against an attorney-at-law seems to exceed the boundaries of the supervision set out in this provision. The order to initiate proceedings as an action taken with a view to determine whether there are grounds for submitting a motion to the disciplinary court to institute disciplinary proceedings, or referring a motion for punishing an attorney-at-law to the dean of the competent regional bar association, or to discontinue the proceedings, definitely goes beyond the sphere of verification of the professional self-government decision-making process, which is the *clue* of the supervisory competencies of the Minister of Justice. An activity that initiates the decision-making process cannot be used to verify the decision-making process itself.

When assessing the supervisory competences of the Minister of Justice over the National Bar of Attorneys-at-Law, one cannot ignore the issue of the combined functions of the Minister and the Prosecutor General, as decreed in the Act of 28 January 2016 – Law on the public prosecutor's office[36] as well as the resulting modus operandi of the system of justice. The above-mentioned Act has turned the Minister of Justice and Prosecutor General into a virtually omnipotent body that not only directs, controls, and coordinates activities of the prosecutors' offices but also decides about individual procedural actions to be taken in specific cases, and even has the power to take these actions himself. The law granted the Minister of Justice status of *sui generis* "super prosecutor". As the supreme body of the public prosecutor's service, he also gained the procedural rights of a public prosecutor conducting proceedings at the level of district or regional prosecutor's offices.[37] This formula weakened the relatively fragile construction of prosecutorial independence, as proved by numerous cases of "manual" political control of the prosecutor's offices, both in terms of the personal composition and in the area of conducting prosecution proceedings, which affects performance by this body of its primary function, namely, to uphold the rule of law. From the perspective of the operation of the independent National Bar of Attorneys-at-Law, the merger of the Minister of Justice and the Prosecutor General functions, and in particular the way it has been implemented in practice, implies serious risks. The Minister of Justice, as the supervisory authority over the National Bar of Advocates and the National Bar of Attorneys-at-Law as well as the initiator of disciplinary proceedings against representatives of these legal professionals, is also their natural litigation opponent in criminal proceedings. This clearly violates the principle of a *fair trial*, which is one of the indispensable components of the right to a trial within the meaning of Article 45.1 of the Constitution. In a situation of progressive politicization of the prosecutor's office, the systemic supervision of the Minister of

36 Consolidated text published in Journal of Laws of 2021, item 66, as amended.

37 For more on this see: S. Patyra, *Nowe czasy – stare błędy. Refleksje na temat skutków łączenia funkcji Prokuratora Generalnego i Ministra Sprawiedliwości na gruncie ustawy z 28 stycznia 2016 r. – Prawo o prokuraturze*, [in:] *Idea wolności niezależności w państwie demokratycznym – perspektywa praw jednostki. Księga jubileuszowa dedykowana Profesor Halinie Ziębie-Załuckiej w czterdziestą rocznicę pracy naukowej*, ed. M. Grzesik-Kulesza, G. Pastuszko, Rzeszów 2017, p. 371.

Justice – Prosecutor General, over the National Bar of Attorneys-at-Law restricts its independent functioning and its supervision over the proper practicing of the profession in the name of protecting the public interest.

The scale of threats to the functioning of the National Bar of Attorneys-at-Law according to the standard set by Article 17.1 of the Constitution is clearly demonstrated by the latest initiative of a group of deputies to the Sejm of the 9th term, aimed at challenging the compliance of Article 49.1 and 49.3 of the Act of 6 July 1982 on attorneys-at-law with Article 17.1 of the Constitution. It has been expressed in the motion submitted to the Constitutional Tribunal on 22 April 2022 (ref. no. K 6/22). The allegation of the unconstitutionality of the quoted provisions of the Act formulated therein is based entirely on their alleged content (material) incompatibility with the independently specified model of constitutional control, i.e., Article 17.1 of the Constitution of the Republic of Poland. Article 49.1 and 49.3 of the Act on Attorneys-at-Law provide that: "Attorneys-at-law and trainee attorneys-at-law residing within a given region shall form a regional bar association of attorneys-at-law" and that: "The resolution on the establishment and the area of operation of the regional bar association of attorneys-at-law is adopted by the National Bar Council of Attorneys-at-Law, taking into account the basic territorial division of the state." The applicants argue that:

> The essence of both objections contained in the present motion is the assertion that the legislator, when determining the shape of the professional bar associations of advocates and attorneys-at-law, unreasonably adopted only the territorial criterion for the establishment of individual units of these associations. Furthermore, the legislator gave the bar associations of advocates and attorneys-at-law the competence to determine the shape of their territorial structures and, at the same time, based a given advocate's or attorneys-at-law's membership in a given self-government unit on the sole criterion of the advocate's or attorneys-at-law's professional seat or place of residence, respectively. Thus, the solutions adopted by the legislator exceed the scope of legislative freedom set by the system legislator as to the possibility of shaping the system of professional self-government and the requirement of its statutory regulation.

This allegation is entirely unfounded. Neither the literal wording of Article 17.1 of the Constitution nor the normative content of this provision as determined by the case law of the Constitutional Tribunal to date implies any restriction imposed on the legislator with regard to the criteria for establishing organizational units of the National Bar of Attorneys-at-Law. The cited provision grants the legislator wide regulatory discretion, both as regards the decision to establish, by way of a statute, a professional self-government representing persons exercising public trust professions, as well as determination of the systemic shape of the professional self-government established by way of a statute. It cannot be argued that the legislator, when establishing a professional self-government, cannot adopt a solely territorial criterion for the formation of its units. Such an assertion directly contradicts one of the basic legal reasonings: *a maiori ad minus* ("if more is allowed, so much the less is allowed"). If the Constitution grants the legislator the freedom to decide on the establishment of a professional self-government as such, so it grants it even more freedom to determine its shape, including the adoption of the territorial

criterion as the sole criterion for the creation of its units. The above finding is also supported by the case law of the Constitutional Tribunal. The Court emphasized, quote, "the far-reaching freedom of the legislator to decide on the establishment of a professional self-government, which is apparent from the use in this provision of the phrase *professional self-government may be established by way of a statute*."[38] It is, therefore, a sovereign decision of the legislator, and the Constitution does not formulate a right to the professional self-government."

The limited space of this paper does not allow for a detailed analysis of the argumentation contained in the cited motion. However, it is hard to resist the impression that the initiative of deputies of the so-called "United Right", including members of the party headed by the current Minister of Justice, only seemingly serves to protect constitutional values and the freedoms and rights indicated in the motion. In fact, however, it seeks to produce an unconstitutional result in the form of undermining the principle of independent functioning of the National Bar of Attorneys-at-Law resulting from Article 17.1 of the Constitution of the Republic of Poland of 2 April 1997.

38 Judgment of the Constitutional Tribunal of 30 November 2011, ref. no. K 1/10.

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