

IDEAS FOR REFORM OF THE LEGAL PROFESSION IN POLAND AS REGARDS ATTORNEYS, LEGAL ADVISORS AND NOTARIES

This is a summary of the extended Polish version of the draft. The cornerstones of the proposal are:

1. Unification of two professions: attorneys and legal advisors (and optionally notaries).
2. Admission to the profession depends on successful passage of the bar exam.
3. No formal requirement of apprenticeship or practical or theoretical training to sit for the bar.
4. More streamlined and centralized discipline system.
5. Law graduates who are not members of the bar may give legal advice or any other legal service not restricted by procedural or substantive law upon registering and buying insurance.
6. (Optional proposal, conditioned on unification of the attorney and notary profession) Attorneys are entitled to provide notarial services.

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A. INTRODUCTION

Authors. The authors of the draft are Lukasz Bojarski, Adam Bodnar and Filip Wejman. Adam Bodnar is a lawyer with the Helsinki Foundation for Human Rights (HFHR) where he is the head of the Precedent Litigation Program. In addition, he teaches public commercial law at Warsaw University. Lukasz Bojarski is also a lawyer with the HFHR where he specializes in access to legal aid. Filip Wejman is an attorney (currently not practicing), he works at the Jagiellonian University in Kraków where he manages the American Law Program, and at the University of Bielefeld (Germany) where he collaborates with The European Research Group on Existing EC Private Law (Acquis Group). **This is our private proposal, and it is NOT endorsed by the organizations that we are associated with, or that we work for.**

Political Background. The inspiration to launch our work came from one of the political parties: PO – Platforma Obywatelska (The Civic Platform). PO is the largest opposition party with poll support of ca. 30%. We are not associated in any way with PO, nor with any other political party. On an initial meeting, PO asked us to propose a remedy for the mess in the area of law that dealt with the admission process to the Bar. Since the summer of 2006, there have been a number of legislative attempts and decisions of the Constitutional Tribunal that have created confusion and a kind of stalemate on admission to the legal professions. We were free to propose whatever we thought best, and no politician influenced this draft. After we wrote the draft, the PO allowed us to say in

public that they endorse it. It remains, however, open what they will actually do with, and if they plan to amend it. We understand that PO has priority in using this document; however, if other parties or the government would like to draw upon it, that would be fine with us as well.

Presentation. On 23/2 the project was presented in public for the first time at ISP – Instytut Spraw Publicznych (The Institute of Public Affairs, <http://isp.org.pl>) in Warsaw. Our co-panelist was a representative of the Ministry of Justice, who submitted an alternative draft. The scope of the ministerial draft partly overlaps with our proposal as regards the situation of the lawyers who are not members of the bar. However the ministerial draft does not regulate the situation of attorneys, legal counsel, or notaries. Rather, the Justice Ministry's draft creates a system of licenses. The superior (third) tier of the license grants the right to provide basically the same services like attorneys. It requires a state exam to earn this license. There is no bar for such lawyers, and a very limited discipline system. This lower types of license entitles the holder to provide some legal services, but not the full range (for example excluding criminal law). As it will be clear from the following description, the ministerial draft is quite different from our proposal, since we do not propose a license system.

Drafting technique. We drafted the proposal as a set of aims and reasons rather than technical provisions of law. We thought it was premature to write detailed regulation, and it is more comprehensible in the public debate to use a document written in natural language.

Where to find the draft. Our draft is available at <http://nowaadwokatura.org> with additional materials.

Acknowledgement. We would like to thank professor Leah Wortham of The Catholic University of America for her comments as to the proposal and aid in drafting this summary.

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B. UNIFICATION: ATTORNEYS AND LEGAL ADVISORS

As described below, the Polish attorney (or advocate) profession was distinguished from the legal advisors (also sometimes called legal counsel) and notary professions. (In Poland, as in some other countries of the post-Soviet block, legal counsel was a category of the legal professions created to serve state enterprises and the public administration as in-house counsel. After the fall of Communism this profession gradually came closer to the attorney model. Right now the difference in what legal advisors versus attorneys are permitted to do pertains only to some areas of criminal and family law where only attorneys are competent to provide services and representation. The Bar of Legal Counsels had 22545 members, the Bar of Attorneys – ca. 6700, both as of as of 20 July 2006.) We use the word attorney to refer to the attorney/advocate profession, as it

currently exists in Poland. We then also refer to a new attorney profession that would be the result of our unification proposal.

1. Under our proposal, there would be only one integrated legal profession. This new single attorney profession would encompass people now within the current attorney, legal advisor, and notaries. The legal counsel Bar would be dissolved. (Judges and prosecutors would remain separate professions with their own admission procedures, conduct rules, and discipline mechanisms.)

2. Every member of the new attorney profession would be entitled to provide the same scope of services.

C. ADMISSION TO THE PROFESSION

1. Once a year, the Ministry of Justice would organize a test on theoretical and practical knowledge of law for the candidates to the Bar.

2. There would be no formal requirement of an apprenticeship, practice or training in order to sit for the Bar or to be qualified as an attorney after passing the bar exam. The only formal condition to sit for the bar would be a degree from a Polish law faculty. For a Polish law school in order to be entitled to grant a law degree, it must be accredited by a government body. (Recognition of equivalent degrees from other European Union countries is an additional issue. Our draft does not address and is not meant necessarily to exclude admission of law graduates from other countries. Rather we are focusing only at the moment on the usual process of how a Polish law graduate enters a Polish legal profession.)

3. The exam would be written with no oral portion.

4. The exam would cover a broad range of issues across constitutional, private, criminal, administrative and human rights law.

5. The exam would have two parts: theoretical questions and practical drafting tasks. The latter might include a legal opinion, reply to an indictment, an appeal, a contract, a charter for a corporation, a will, etc. For the practical portion of the test, the applicant would be provided with a “library” of materials to be used in the drafting task so this would be testing on the ability to do the work of a lawyer, not memory of specific substantive or procedural law.

6. The questions and tasks for the test would be drafted by the Ministry of Justice. The grading commission would be composed of the representatives of the Ministry, the judiciary, law professors, and attorneys. We are open for input from the Bar on the exam, but we propose to have the Ministry alone prepare the test and be responsible for its security before it is given.

7. People, who grade the test, would see only the ID numbers of candidates, no names.
8. A person, who obtained the minimum positive score would become a member of the Bar upon filing a declaration that he or she intends to practice. The candidate would be obliged to enclose a document from the State Criminal Register stating whether the candidate has been convicted of any crimes. (This tracks a similar requirement in the current law). The law will list the crimes that prohibit admission to the Bar.
9. Other than the exam, there would be no additional avenues to enter the Bar. There would be no option to transfer from academia or any other legal profession, e.g., judges and prosecutors.
10. Application fees from candidates would provide the resources necessary for the construction and administration of the exam.
11. The Ministry would have the option of contracting the administration of the exam. If the outsourcing works well, contracting could be expanded in the future beyond administration to preparation of the exam as well.
12. The draft does not deal with it, but we note that the exam score might become a relevant factor in other admission of law degree holders to the foreign service, the civil service, the judiciary etc.

D. THE BAR

1. The Bar would comprise 11 local organizations, which would be organized to coincide with the boundaries of the 11 state Appellate Courts in Poland. Currently the Attorney Bar has 24 local organizations, and Legal Counsel Bar has 19). These local organizations currently are called chambers, and this name would be retained.
2. The Bar would be independent from the state administration and would have discretion to self-regulate with regard to ethical conduct rules and discipline.
3. Membership in the Bar would be compulsory. The functioning of the Bar would be financed by its members.
4. Malpractice insurance would be mandatory for all attorneys.

E. DISCIPLINE

1. Each Chamber would have a professional Disciplinary Officer (DO). He or she must not work as an attorney while holding the office. The DO would receive compensation from the budget of the Bar, which also would finance the DO's professional staff and

secretariat. The Officer would be appointed by the Board of the national Bar in Warsaw, not by the local Chamber.

2. In disciplinary proceedings, the Court of the First Instance is a Bar court, not a state court. Any appeal would go to the state Appellate Court.
3. The disciplinary court would hear cases in public. Their decisions would be public and would include an explanation of the basis for the decision. The disciplinary court waive the requirement for public hearing and publication of decisions only on the basis of professional confidentiality or serious public interest.
4. Serious disciplinary offences would have stated minimum penalties. For example, conversion of a client's funds would require at least some period of suspension.
5. We are still considering whether non-lawyers should be included on court panels that would hear the disciplinary cases.

F. PRACTICE OF LAW BY NON-ATTORNEYS

1. Law graduates who have not passed the bar exam may give legal advice or any other legal service not restricted by the substantive or procedural law upon registering and buying insurance.
2. Many existing legal requirements in procedure codes limit the right to represent clients only to attorneys. For example, in criminal procedure only an attorney can be a defense counsel. The civil procedure code generally precludes anyone but an attorney from representing another in court. Only an attorney may represent a citizen before the Constitutional Tribunal. Our draft would not change such provisions.
3. The right to hold oneself out with the term "attorney" is legally protected, in the sense that misrepresentation by non-attorney is a misdemeanor per se.

G. FURTHER UNIFICATION: NOTARIES

This is an optional, additional proposal.

1. Public notaries automatically would become attorneys. (Currently Poland follows the Latin model of this profession).
2. The notaries' bar would be dissolved.
3. Every attorney would be entitled to provide notarial services.

H. TRANSITION ISSUES

Even though we believe there is need for a change, our current system of training and organization is based upon it. Therefore, we propose several transitional rules with the aim of protecting the clients.

1. The attorneys who have passed the new bar exam would be entitled to provide the full range of services.
2. For 10 years, former legal counsel must not act as defense counsel in serious criminal cases. During this period, legal counsel would have the option to take and pass the criminal law portion of the bar exam and become qualified in this regard. As to criminal law, they are entitled to represent the defendant only in proceedings which originate in the Sađ Rejonowy. Such courts have jurisdiction of less serious crimes and for a small town or a portion of a city After 10 years, the former legal counsels, who have now joined the integrated legal profession, could represent clients in more serious cases as well.
3. During the 10-year transitional period, former legal counsel would have to disclose their previous status on their letterhead, seal etc. Former legal counsel also would be required to make this disclosure to prospective clients in criminal cases as well.
4. A former legal counsel who takes and passes the criminal law portion of the bar exam would be entitled to provide full range of services.
5. As previously indicated, unification of the notary profession is an option within the proposal. If it were included, former notaries would be allowed to provide the full range of services, if they passed the bar exam. They would be exempted from the questions on notarial services.
6. If the notary profession is included in the reform, former attorneys and legal counsel who wish to provide notarial services would have to take and pass this part of the bar exam.

I. ISSUES THAT THE DRAFT DOES NOT COVER

1. The draft deals only with commercial provision of legal services to the public and not with public officers. It does not deal with the judiciary or the prosecutors.
2. We do not include specific proposals for the ethical rules that should govern the attorney prevision, e.g., rules on advertising, confidentiality, and conflicts of interest. Important questions regarding the role of the bar versus that of the government in promulgating such rules and in consideration of existing provisions need further study.

3. Legislation on legal aid to the poor also is under study. We cannot foresee what the future model for legal aid will be, and we do not address the relation of legal profession reform to legal aid for the poor in this proposal.

J. RESPONSE AND CRITICISM

1. In private communication we have received generally positive feedback from a group of distinguished professors and accomplished practicing lawyers, among them one Justice of the Supreme Court whom we asked to read the proposal and its justification.

2. We have set up a blog at nowaadwokatura.org where the comments are mixed.

3. At the public presentation of the proposal at ISP, we understood the general reaction of lawyers from big law firms as positive, but with some reservations. The response from the Bar of Attorneys was negative. However, on 3 March 2007 the Bar of Legal Advisors issued a statement in which they endorsed the idea for a unified profession. The media coverage thus far has concentrated on describing the proposal rather than taking a position.

4. Some from large law firms commented that the proposal does not go far enough and that it should deal with the judiciary and prosecutors. In our view, it is a well defined scope to deal with professions that provide legal services to the public for remuneration, at least at this point. At the same we are open to the extension of the proposal, and we are currently studying whether it would be feasible in our future work.

5. Some legal counsel have voiced concerns about the legal aid. They would not like the current model in which the court appoints attorneys for criminal defendants to be extended to legal advisors. Competence in criminal law for appointed counsel is a valid concern, but this question is part of the previously mentioned study of legal aid for the poor. We will be happy to look for solutions here. When it is more what the future system for legal aid in Poland may be, we can consider how this proposal should mesh with and support a good system for providing legal services for the poor. Certainly, legal aid for the poor in criminal, as well as civil, cases is an important issue, but we do not think consideration of legal profession reform should be delayed until the legal aid issue is resolved. Generally we believe that having more licensed lawyers, about whom we have more confidence in their competence level, can only be of benefit to any system for expanding access to the legal system. An additional important dimension of expanding access to justice is consideration of what parts of the legal system currently are possible to navigate adequately without a lawyer and if there are additional parts that should be simplified so they can be. That is beyond our proposal for legal profession reform, but we think it is important to keep in mind that maintaining and creating a legal system that requires an ordinary person to have a lawyer to do everything within it is not the most desirable system.

6. Some criticize the abolition of the current option to enter the profession through academia or other professions. We find this claim unfounded. We believe that attorneys providing services to the public should demonstrate through an exam that they have the specific theoretical and practical knowledge necessary to represent a client.

7. The part of the proposal regarding notaries seems to be the most controversial, even though in our opinion no hard arguments against it have been submitted. In our view, the extremely small number of public notaries in Poland – 1694 for a population of over 38M as of 31 December 2005 – suggests that this profession is in need of reform and expansion.

8. Our draft does not resolve the barriers to law practice for non-attorneys. Some countries are quite liberal in allowing non-attorneys to practice law. For example, in Sweden the bar is only a voluntary association, and every citizen entitled to represent other people in court in any types of proceeding. At the same, however, it is unclear to us how such a system would work in reality in Poland. How similar and how different is the Polish society from the Swedish one? While a country like Germany offers an intellectually satisfying clear-cut rule (non-attorneys must not provide almost any legal services), we do not favor such a restrictive solution. We propose a mixed option allowing others with law degrees to provide at least some legal services with safeguards such as mandatory insurance.

Kraków, 5 March 2007