



Human Rights
Institute

Joint Submission to the United Nations Universal Periodic Review
LAWYERS FOR LAWYERS & THE INTERNATIONAL BAR ASSOCIATION

Republic of Poland

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Presented by:

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A. Introduction

1. Lawyers for Lawyers (“L4L”) and the International Bar Association (“IBA”) submit this report on the state of human rights in the Republic of Poland (“Poland”), particularly in respect of the legal profession, with recommendations for the 41st session of the Universal Periodic Review (“UPR”) Working Group in the UN Human Rights Council in November 2022.
2. L4L is an independent and non-political foundation based in the Netherlands, established in 1986 and merely funded by lawyers’ donations. L4L promote the proper functioning of the rule of law through the free and independent exercise of the legal profession around the world. L4L has special consultative status with ECOSOC since 2013.
3. The IBA was established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of 80,000 individual lawyers and more than 190 Bar Associations and Law Societies, spanning all continents. The IBA’s Human Rights Institute (“IBAHRI”), an autonomous and financially independent entity, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

B. Executive summary

4. This submission highlights key concerns regarding Poland’s compliance with its international human rights obligations to guarantee the proper functioning of lawyers, without harassment and hindrance, as set out in the UN Basic Principles on the Role of Lawyersⁱ (“Basic Principles”) and other international rights instruments, focusing on the lawyer-client confidentiality and its infringements by the Polish authorities and the harassment of lawyers.

C. Normative and institutional framework of the State

5. The adequate protection of human rights and fundamental freedoms requires that every citizen has effective access to justice and legal assistance. Legal assistance can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are free to carry out their professional duties independently of the government and political pressure. This follows, inter alia, the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (ICCPR). In particular, the protection and the independence of justice actors is a key component to ensure the well-functioning of justice systems and to combat impunity. This is a precondition to the right to a fair trial, protected by Article 14 of the ICCPR.
6. In addition, intimidation and reprisals against legal counsel constitute a further violation of article 14(3)(b) of the ICCPR, as also recognised by the UN Working Group on Arbitrary detention.ⁱⁱ

7. The Declaration on Human Rights Defenders guarantees the right to provide professionally qualified legal assistance in defence of human rights, and the right to the lawful exercise of occupation or profession.ⁱⁱⁱ
8. Furthermore, on the 16th of July 2020, the Human Rights Council (HRC) passed a resolution condemning in general *“the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions.”* The HRC expressed its deep concern over *“the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession”* and called upon States *“to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable.”*^{iv}
9. In its task of promoting and ensuring the proper role of lawyers, the Government of Poland should respect the Basic Principles within the framework of its national legislation and practice. The Basic Principles provide for a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental pre-condition to fulfilling the requirement that all persons have effective access to independent legal assistance.
10. During the third UPR cycle in 2017, Poland received and supported several recommendations concerning the need to respect^v, protect^{vi}, uphold^{vii} and ensure^{viii} the independent functioning of the judiciary and the Constitutional Court as well as the necessity to improve the delivery of justice^{ix} by taking measures to restore this independence^x. Even though the last UPR session has focused to a great extent on the judiciary and its functioning, unfortunately little attention was paid to the ongoing, systematic threats to the legal profession in Poland.
11. However, reports gathered by L4L and IBAHRI including information received from various lawyers in Poland, demonstrate that Poland does not uphold the necessary guarantees for the proper functioning of the legal profession as set out in the Basic Principles. Lawyers are dealing with various forms of breaches of the lawyer-client confidentiality and harassment. Consequently, lawyers encounter serious difficulties in carrying out their professional duties independently and without fear.

D. Lack of attorney-client confidentiality

a. Attempts to interview and question lawyers

12. Article 6, paragraph 3, of the Polish Law on the Advocates Bar states *“an advocate may not be relieved from the duty to keep professional secrets with regard to facts which came to his/her knowledge whilst providing legal assistance or conducting a case”*. However, Article 180, paragraph 2 of the Polish Criminal Procedure Code claims the contrary, and states that *“persons obligated to preserve confidential information such as lawyers, physicians or journalists, may be examined as to the facts covered by these secrets, only when it is necessary for the benefit of the administration of justice, and the facts cannot be established on the basis*

of other evidence, as decided by court. The court shall decide on examination or permission for examination”.

13. Various lawyers from Poland have shared with us how these conflicting provisions are problematic when considering some cases in which courts decided Polish Criminal Procedure Code may take precedence over the Law on the Advocates Bar. In doing so, these courts allow for a breach of attorney-client privilege by the prosecutor/court. This is in violation of Article 8 of the European Convention on Human Rights (ECHR), which “affords strengthened protection to exchanges between lawyers and their clients”.^{xi} Attorney-client privilege is of great fundamental importance for the functioning of lawyers as it is a rule that preserves the confidentiality of communication between lawyers and clients.
14. Similarly, Principle 22 of the Basic Principles states “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential”. The manner detailed above in which a court decides on examination or permission for examination is incompatible with this requirement to respect attorney-client privilege; and as such negatively impacts lawyers’ ability to ensure confidential communications with their clients.
15. L4L and IBAHRI have been informed that most of the incidents concerning attorney-client privilege are related to prosecutors summoning lawyers for an interview during the investigation phase in cases which they represent clients. In these cases, the prosecutors demand that lawyers discuss matters that specifically fall under the attorney-client confidentiality, such as details of the client’s actions, contents of the client’s communications with third parties or the attorney, etc.

b. Phone tapping and hacking of lawyers

16. Another issue of serious concern is that various lawyers have shared with L4L and IBAHRI that they have strong reason to believe that their phones were being tapped. This appears to be in line with the fact that that since 2016, Poland severely limited the judicial oversight over phone tapping. Consequently, phone tapping is easily used and subject to abuse, as there are possibilities for police to circumvent the requirement of prior judicial permission.
17. In 2018, research from the University of Toronto Citizen Lab, a cybersecurity watchdog, revealed that Poland had access to Pegasus spyware.^{xii} The Pegasus spyware, once present in a phone, surveilles everything ranging from messages to contacts and conversations. In December 2021, it became known that the Polish government has used Pegasus software to hack not only opposition leaders, but also the attorneys representing them.^{xiii} Roman Giertych is among the most prominent figures publicly known to have been hacked.^{xiv}
18. In addition to the above, five Polish human rights defenders, including one attorney, have applied to the European Court of Human Rights (ECtHR) claiming a violation of their right to privacy (article 8 ECHR) and to an effective remedy (article 13 ECHR).^{xv} They have argued that the system of secret surveillance and collection of metadata, created by the Law amending

the Law of the Police and the Anti-Terrorism Law, both of 2016, does not provide sufficient guarantees for the protection of these rights.

19. This secret surveillance not only interferes with the individual right to privacy, but additionally with the attorney-client privilege. Private conversations and all correspondence between lawyers and their clients appear to be tapped and/or accessed by the authorities and even shared with third parties. For example, sometimes confidential information from criminal proceedings has been used during press conferences by the current Minister of Justice.
20. The unlawful surveillance of lawyers by the government is not only violating basic human rights, such as the right to privacy as enshrined in Article 8 of the ECHR and Article 12 of the Universal Declaration of Human Rights (UDHR), but is also a breach of attorney-client privilege, and herewith in violation of the above mentioned Principle 22 of the Basic Principles on the Role of Lawyers.

E. Harassment of lawyers

21. Basic Principle 16 states that “governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference [...] and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.
22. In recent Resolution 2348, the Parliamentary Assembly of the Council of Europe has reiterated its concern over the numerous cases of violations of lawyers’ rights, including attacks on their safety and independence in the recent years. The Assembly recalls “that Council of Europe member States have subscribed to the minimum standards currently laid out in the Recommendation No. R(2000)21 of the Committee of Ministers on the freedom of exercise of the profession of lawyer”.^{xvi} The Assembly therefore urges all Council of Europe member States to ensure effective protection of the profession of lawyer, including by “prohibiting State interference in the legal profession and clearly identifying the specific activities that amount to prohibited interference, and establishing a domestic legislative framework guaranteeing efficiency, independence and safety of lawyers’ work”.^{xvii}
23. Several Polish lawyers have informed L4L and IBAHRI about the harassment of lawyers in the country. Some of the lawyers we spoke to fear that lawyers might be become the direct target of harassment more often in the coming years in light of the recent judicial reforms concerning the independence of the judiciary.^{xviii}
24. The harassment of lawyers in Poland can be illustrated by the two following cases:

Michał Romanowski

Michał Romanowski is a Polish attorney and professor of company law at the University of Warsaw representing Polish and European judges Paweł Juszczyzyn and Igor Tuleya. As a result of his involvement in the cases of judges Juszczyzyn and Tuleya, Mr. Romanowski has been facing legal actions.^{xix}

On 14 April 2021, the District Court of Bydgoszcz ruled that judge Juszczyzyn should be permitted to resume adjudicating cases immediately at the court where he is employed. Mr. Romanowski notified the public prosecutor's office that the President of the District Court in Olsztyn, Mr. Nawacki, unlawfully refuses to enforce the decision of the court in Bydgoszcz. Consequently, Mr. Romanowski has been accused of committing the crime of false accusation against Mr. Nawacki.^{xx} The case is currently being investigated by the Internal Affairs Department of the National Prosecutor's Office.

Mr. Nawacki has urged the Regional Council of Attorneys in Warsaw to initiate disciplinary proceedings against Mr. Romanowski for his request that the case of judge Juszczyzyn should not be adjudicated by the court in Olsztyn, due to the alleged lack of impartiality and a conflict of interests of Mr. Nawacki as the president of this court.^{xxi} The accusations against Mr. Romanowski are currently under investigation.

Furthermore, Mr. Romanowski sent a letter to the European Commission Vice-President for Values and Transparency concerning the decision by the District Court of Bydgoszcz and the failure of the relevant authorities to reinstall judge Juszczyzyn. Following the letter to the EU Commissioner, the Deputy Disciplinary Ombudsman of the Common Law Court Judges filed a private accusation against Mr. Romanowski, accusing him of defamation. Moreover, Mr. Romanowski has been accused of publicly insulting the constitutional organ of the state after writing a critical open letter that challenged the independence of the First President of the Supreme Court.^{xxii} At the time of writing, an indictment for allegedly defaming the Deputy Disciplinary Ombudsman of the Common Law Court Judges against Mr. Romanowski is pending.

Roman Giertych

Roman Giertych has worked on a series of high-profile cases against the governing Law and Justice party. He has also represented various prominent opposition figures.

On 15 October 2020, Mr. Giertych was arrested by officers from the Central Anticorruption Bureau (CBA) outside a Warsaw court. Mr. Giertych's arrest happened one day before the scheduled detention hearing in another politically significant high-profile case, concerning Leszek Czarnecki, in which Roman Giertych was appointed as defence counsel.^{xxiii}

Officers from the CBA conducted a search of Mr. Giertych's house, after a search warrant was issued by the prosecutor. During the search in his home, Mr. Giertych fell unconscious on his bathroom floor and was rushed to the hospital. After being hospitalized and while still unconscious, the public prosecutor presented Mr. Giertych with charges.^{xxiv}

The Poznań prosecutor's office did not apply to the court for Mr. Giertych's arrest but instead, acting by itself and without the need for court approval, applied preventive measures against him. The prosecutor served Mr. Giertych with the charges while he was unconscious in the hospital. The preventive measure include a bail of 5 million Polish Zloty and the suspension of

his right to conduct professional activities as an advocate. The power of the prosecutor to take preventive measures is laid down in Article 276 of the Code of Criminal Procedure. In November 2020, after a complaint by Mr. Giertych's lawyers, the Poznań district court suspended the implementation of preventive measures against Mr. Giertych.^{xxv} On 3 December 2020, the District Court in Poznań cancelled the implementation of all measures, citing the lack of probability of Mr. Giertych committing any crimes. Later courts went on to rule his detention, personal search and the search of his office were all illegal. On the 29th of March 2022, a court in Lublin rejected a motion by the prosecution to arrest Mr. Giertych, arguing Similar to the District Court in Poznań, there was a lack of probability of him committing any crimes.

F. Recommendations to the Government of Poland

- **Immediately take effective measures to ensure that all communications and consultations between lawyers and their clients within their professional relationship are confidential, including in situations where lawyers are called in for interviews and questioning, as set out in article 22 of the Basic Principles on the Role of Lawyers.**
- **Take immediate measures to ensure that sufficient safeguards are in place, both in law and in practice, to guarantee the full independence and safety of lawyers and their effective protection against any form of retaliation in connection with their professional activity.**
- **Refrain from any actions that may constitute harassment, persecution or undue interference in the work of lawyers, including their criminal prosecution on improper grounds such as the expression of critical views or the nature of cases they are involved in.**

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- ⁱ The UN Basic Principles on the Role of Lawyers provide a concise description of international norms relating to the key aspects of the right to independent counsel. The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on 7 September 1990. Subsequently, the UN General Assembly “welcomed” the Basic Principles in their ‘Human rights in the administration of justice’ resolution, which was adopted without a vote on 18 December 1990 in both the session of the Third Committee and the plenary session of the General Assembly.
- ⁱⁱ Working Group on Arbitrary Detention, Opinion No. 17/2019, A/HRC/WGAD/2019/17, para 88.
- ⁱⁱⁱ UNGA, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (8 March 1999), A/RES/53/144, Articles 3(c) and 11.
- ^{iv} UN Human Rights Council, Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, A/HRC/RES/44/9, 16 July 2020, <https://digitallibrary.un.org/record/3876533>.
- ^v Recommendation 120.91 (Chile): 120.91 Respect the integrity and independence of the Constitutional Court.
- ^{vi} Recommendation 120.98 (Germany): Protect the independence of the judiciary.
- ^{vii} Recommendation 120.90 (Austria): Uphold the independence of the judiciary, including by maintaining the procedures of nominations and promotions of judges by decisions of the judiciary in accordance with the Polish Constitution and international standards.
- ^{viii} Recommendations 120.95 (Czechia): Ensure the independent functioning and decision-making of the Constitutional Court free from any political interference as a fundamental pillar of democracy, rule of law and human rights protection; and 120.95 (Denmark): Ensure the independence of the judiciary in order to safeguard the rule of law by taking immediate steps to ensure that the Constitutional Tribunal is able to deliver effective constitutional reviews.
- ^{ix} Recommendation 120.87 (United States of America): Ensure reform efforts respect and strengthen judicial independence and improve delivery of justice.
- ^x Recommendations 120.93 (Canada): Take immediate measures to restore the independence, integrity and effective functioning of the Constitutional Tribunal and its judges, including by amending pertinent legislation; Recommendation 120.89 (Switzerland): Take the measures necessary in the context of the judicial reform and the reform of the national judicial council to guarantee the separation of powers and the independence of the judicial system.
- ^{xi} European Court of Human Rights, 6 December 2012, (*Michaud v. France*) §118-119.
- ^{xii} Citizen Lab, ‘HIDE AND SEEK: Tracking NSO Groups Pegasus Spyware to Operations in 45 Countries’, 18 September 2018, available at: <https://citizenlab.ca/2018/09/hide-and-peek-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/>
- ^{xiii} Associated Press, ‘AP Exclusive: Polish opposition duo hacked with NSO spyware’, 21 December 2021, available at: <https://apnews.com/article/technology-business-poland-hacking-warsaw-8b52e16d1af60f9c324cf9f5099b687e>
- ^{xiv} See: Rule of Law, ‘Giertych will report the matter of monitoring him to the Italian prosecution service’, 21 December 2021, available at: <https://ruleoflaw.pl/giertych-will-report-the-matter-of-monitoring-him-to-the-italian-prosecution-service/> and Haaretz, ‘New Pegasus Cases in Poland: Two Opposition Figures Targeted With Spyware’, 17 February 2022, available at: <https://www.haaretz.com/israel-news/tech-news/.premium-two-polish-opposition-officials-targeted-with-pegasus-spyware-1.10617431>
- ^{xv} ECtHR, *Pietrzak c. Pologne*, et 1 autre affaire, Requête nos 72038/17 et 25237/18
- ^{xvi} Parliamentary Assembly of the Council of Europe, Resolution 2348 (2020): the principles and guarantees applicable to advocates, 23 October 2020, par. 4, available at: <https://pace.coe.int/en/files/28819/html>.
- ^{xvii} *Ibid.*, par. 6.
- ^{xviii} Lawyers for Lawyers, ‘Concerns about draft law restricting judicial independence’, 10 January 2020, available at: <https://lawyersforlawyers.org/en/concerns-about-draft-law-restricting-judicial-independence/>
- ^{xix} Lawyers for Lawyers, ‘End harassment of Michał Romanowski’, 15 July 2021, available at: <https://lawyersforlawyers.org/en/end-harassment-of-michal-romanowski/>
- ^{xx} *Ibid.*
- ^{xxi} *Ibid.*
- ^{xxii} *Ibid.*
- ^{xxiii} Lawyers for Lawyers, ‘Treatment of Roman Giertych undermines independence of legal profession’, 16 November 2020, available at: <https://lawyersforlawyers.org/en/treatment-of-lawyer-roman-giertych-undermines-independence-of-legal-profession/>
- ^{xxiv} *Ibid.*
- ^{xxv} *Ibid.*