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THE PROTECTION OF CLIENT’S INTERESTS,
AS ARISING FROM THE RIGHT (REQUIREMENT)
TO RELY ON LEGAL PROFESSIONAL PRIVILEGE IN CHINA,
COMPARED TO POLISH SOLUTIONS
– THE DEVELOPMENT OF THE SYSTEM.
PART I. A HISTORICAL OVERVIEW OF POLISH SOLUTIONS
(UNTIL 1795)

INTRODUCTION

Given the experience of the last decades, there can be no doubt that the independence of the Bar from State authorities is a prerequisite for the respect for human rights in any political system. This independence, in turn, comes down to the existence of the principle of the absolute observance of legal professional privilege within the legal system. If observance of this principle is not required by law,

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national authorities become too powerful, and the temptation to abuse this power and cut corners in the fight against crime at the expense of the individual is all-pervasive. Therefore, there is no freedom in a country without free legal practice, and, consequently, without the right to rely on legal professional privilege. If the State is given precedence over the individual, and if the responsibilities of citizens towards the State are put before their rights and freedoms, we can observe attempts to make professional secrecy a discretionary privilege, which can be taken away for the good of the society, in the name of fight against evil. This is a tempting prospect, indeed, especially today, when it seems that in the well established democracy we are dealing with in the West, and given the common acknowledgement of the array of fundamental human rights, the protection of legal professional privilege can be sacrificed as unimportant and applicable basically only to the dregs of society. However, history has shown that the world has never been civilised enough to resist falling into the abyss of barbarity by giving its tacit consent to exceptions from some fundamental principles.

But what really is legal professional privilege, the protection of which is so important for the respect for the rights of the individual, and even for retaining the attributes of the State of law?

Nowadays, there are few legal systems which define this notion directly and openly. Colloquially, a secret is “[...] a thing (a matter or a message) that should not be made public, which should not come to light, a mystery [...]” [SZKIŁADŹ 1994, 472], or, alternatively, “[...] a piece of information specified by law, the access to which, or the disclosure of which, is forbidden by law” [DUBISZ 2003, 9]. Professional secrecy, a subtype of which is legal professional privilege, is defined in the Polish doctrine as the requirement to use discretion in relation to one’s clients [KUNICKA–MICHALSKA 1972, 6]. The need for specific behaviour in attorney-client relations, which is based on confidentiality in relation to information obtained as a result of this relationship [Hansen 1962, 10 et seq.]. As you can see, the colloquial understanding of this concept is not that different from the approach taken by the legal doctrine, and its scope of application covers both information obtained as part of one’s professional practice, and during actions taken as a result of the assumed obligations [KUCHARCZYK 2007, 58].

THE ROLE OF TRADITION IN SHAPING THE CONCEPTION
OF MUTUAL RELATIONSHIPS
BETWEEN THE ATTORNEY AND THE CLIENT

Broadly defined professional ethics of lawyers, including professional secrecy addressed here, is now widely discussed in the world of science. Special attention is given to countries, such as China, whose practices in this area are distinctly different from those used in Europe. Successive reports on changes to Chinese law, new approaches to jurisprudence, and evolving views within the doctrine, all provoke strong emotions, encouraging one expert after another to speak out on the matter. While not denying the need for such a debate, we do see some of its shortcomings, which, in turn, prompts us to join it. Firstly, it seems that the historical aspect of the issue in question, and its long-standing tradition, are too often forgotten, even though these must not be disregarded or dissociated from, despite the fact that the previous political system has been officially done away with, or the systems have been changed repeatedly to completely different ones. Secondly, far too often do we feel that the debate is dominated by groups that are radically distant in mental and cultural terms, which hampers understanding. Indeed, on the one hand, there are scientific representatives of democratic States, who have never had any experience of totalitarianism in their professional career, while on the other, there are the interested parties, who feel obligated to defend the existing solutions uncritically, or just the opposite, thoughtlessly criticise them, if they have been directly and personally affected by the imperfections of the system. We, on the other hand, while not considering ourselves as arbiters or experts on the subject, feel that the matter should be addressed by the representatives of a group of countries that have unique experiences, since, having their roots in Judeo-Christian tradition, they have gone through the hell of communism, only to fight their way back to democracy. We believe that such countries could contribute to the ongoing debate, and perhaps also facilitate a better mutual understanding between the current participants in the discussion.

THE PERCEPTION OF LAWYERS IN THE OLD DAYS

By way of introduction to the problem, it is important to note that lawyers, as professionals dealing with studying and applying law for a living, enjoyed popularity and demand for their knowledge as far back as in antiquity. They rose to heights of their profession in the Roman Empire, where they created a legal sys-

tem that has served as the inspiration, reference and basis for the majority of contemporary systems. Appreciated to varying degrees also after the collapse of the Western Empire, they have had a considerable impact on the structures of individual countries and on the course of State affairs¹. Used by monarchs to strengthen their authority, desired by clients who have found themselves in urgent need of their skills, lawyers have at the same time been the most despised professional group in society as a whole. In early-modern France², along with millers and merchants, lawyers were perceived by society as the worst kind of people – cunning, greedy, ruthless and dishonest, ones who would play the worst possible trick for personal gain [KISZA 1975, 38 et seq.]. In Germany, Ulrich von Hutten expressed his opinion about lawyers, describing them as “[...] violators of law and justice, who do not know what justice is really about” [MALARCZYK 1995, 152]. In the times Poland was ruled by nobility, in addition to the official high regard for their knowledge and skills, there was persistent jealousy about their income and suspicions as to their honesty. Polish literature from that period describes them with dislike and contempt, especially when it comes to lawyers trained in Roman law, which was at the core of university education at the time [OPALIŃSKI 1953, 108 et seq.; ORZECZOWSKI 1564, code E]³.

Nevertheless, in our culture, lawyers have been the ones that spearheaded all important social and systemic transformations. Without them, any reform-oriented movements could hardly be successful. Therefore, even though they were hated, they were needed all the same. And often this hatred was the more bitter, the more indispensable they turned out to be. It were lawyers who were at the forefront of the French Revolution, and who laid the groundwork for the political system of the United States of America. They were the ones in the vanguard of transformations which resulted in the Western Hemisphere we know today. It was them, who contributed to the development and adoption of a number of concepts related to human rights, and basic freedoms and liberties of the individual. The most prominent figures of the Age of Reason were not those that supported the throne, but lawyers fighting with the apparatus of absolute monarchy to stand up for the oppressed subjects, often risking their own freedom, or even life, in the process. They were the ones to create a certain founding myth, a standard for the

¹ About the role of jurists in strengthening the position of the throne, see: GOFF 1966, 105 et seq.; BASZKIEWICZ 1963, 58 et seq.; PERROY 1969, 569.

² The first known regulations about lawyers in this country date back to the times of Philip III of France (1270-1285), who, by way of an ordinance of 1274, ordered legal representatives to take an oath before the court that required them to fulfil their duties in an honest manner [PAYEN 1938, 37].

³ For a more detailed exploration of the subject, see: BEDNARUK 2006, 153 et seq.

relationship between the attorney and the client, which is now used as a reference point by apprentice lawyers in the Western Hemisphere.

It goes without saying that this myth is still kept alive and influences the perception of the professional code of conduct among lawyers. The debate on this issue clearly testifies to this. The influence of this approach on a wide audience can also be observed in the attitude of society to lawyers. And specifically, in the fact that the citizens of western countries did not listen to the warnings issued by Old Polish journalists, who had recommended that they be ousted from legislation for society's sake⁴. This is why the role of legal professions has not diminished recently, quite to the contrary – it grew in importance, and now law graduates take prominent positions across the extensive government structures of Western civilisation.

THE BAR IN THE OLD POLAND PERIOD

The experience of ancient times aside, Polish lawyer tradition is one of the oldest in Europe, next to France and the UK. Indeed, it goes back to the 13th century and was started by Polish legal professionals⁵. First regulations concerning the Bar's professional code of conduct date back to the 16th century, as from 1543 professional attorneys have been required to take an oath before the land court. The oath, which was prerequisite for practising the profession, obliged legal representatives to take care of their clients' interests and to behave with integrity in their mutual relations⁶. This emphasis on loyalty in the relationship bet-

⁴ This was advocated by Adam Rzewuski, who postulated that all lawyers be forever banned from any parliamentary positions, as, in his opinion, lawyers “[...], in any legal bill, even if clear and obvious, see a reprimand for their actions and practices, well aware of the fact that when all laws are simple and straightforward, their profession, which is the embodiment of lawful injustice, shall thereby be done away with. Their minds are like the pieces of a broken mirror that produce thousands of tiny reflections and images of one and the same thing, and their advices are but sinister designs and ignominious extortions to the benefit of their own, dead and useless, causing unambiguous rights to be supplemented with obscured and doubtful options [...]” Then he goes on to explain that the complexity and ambiguity of law is the greatest treasure and source of income for lawyers, and they would do anything to keep it that way or even further aggravate the existing chaos, so he calls for keeping them as far away from the legislation process as possible, for the good of the State and the nation [RZEWUSKI 1790, 138 et seq.].

⁵ However, it was no sooner than in the 14th century that attorney services, previously often an amateur favour, became a fixed service provided for a fee [CAR 1925, 3; 6].

⁶ *Constitutiones in comitijs generalibus cracoviensibus*, [in:] *Volumina Legum. Przedruk zbioru praw staraniem XX. Pijarów w Warszawie od 1732 do 1782 roku* [further cited as: VL], Vol. I, Petersburg: Nakładem i Drukiem Jozafata Ohryzki 1859, p. 282.

ween attorneys and their clients, the ban on leaving one party for the other, or on revealing secrets, have all become the cornerstones of subsequent oaths required to be taken by anyone who wanted to join the Bar.

Unlike other European States of the early-modern era, the Republic of Poland has not produced a vast bureaucratic machinery that could interfere in the lives of its citizens. Until the country's collapse due to partitions at the end of the 18th century, many public spheres, which were managed by royal officers in the neighbouring countries, in Poland were left to the people, or local communities⁷. In old historiography, this policy was presented as an example of backwardness and poor development of public structures. Today, when the role of local governments is acknowledged and appreciated, given the numerous benefits of empowering citizens as close to the grassroots level as possible, the popularity of such restraint on the part of the State is growing, as is the understanding of the advancements made in that period, which is no longer unanimously perceived as the example of the helplessness of government authorities and organisational underdevelopment. On the contrary, we are beginning to recognise the profoundness of ideas developed by our ancestors, who intentionally designed the State in such a way.

In this system, where the power of central government was deliberately restricted in favour of increased freedom of citizens and grassroots initiatives, there was no place for the inquisitorial process in penal cases, popular in the neighbouring countries, which was also the sign of the growing aspirations of monarchs in the judiciary. The nobility, who relied on land law, retained the principle of the adversarial court process, in both civil and penal cases, which considerably limited the involvement of the State in lawsuits. Only judges, as impartial arbitrators, ensured the appropriate course of legal proceedings, and the dispute was resolved by the parties to the lawsuit, who, in penal cases, included the perpetrator, on the one hand, and the victim, or their family, on the other [RAFACZ 1925, 5 et seq.].

This model has caused ethical considerations in the representative-client relationship to be addressed completely differently than in the systems where a representative of the government was involved. Here, there was no dilemma concerning, on the one hand, obedience to public officers, who represented the royal authority, and loyalty to clients and their interests, on the other. Indeed, both camps were represented by private persons. Without doubt, this facilitated the development of a certain ethos of serving the public, and attitudes of independence from

⁷ For information about the role of local government in the life of nobility, see: BEDNARUK 2011, 12 et seq.

the judiciary and monarchy, which did not support any of the parties with its authority. Unfortunately, however, this was also associated with an increase in pathology, including corruption within the judiciary of nobles⁸.

Based on the nature of the reality it was to function in, there were attempts to establish a certain ethical framework for the Bar, which only developed at the time. Consequently, each consecutive oath required to be taken by advocates-to-be put more and more emphasis on the safeguarding of their clients' interests, as an overriding concern. It was considered even more important than the good of the judiciary itself, which was emphasised by forbidding any subterfuge that led to dragging out of the proceedings. This approach was best evidenced in the regulation of 1638, which introduced death penalty for lawyers who betrayed their clients⁹, while the law was not as strict in relation to other possible crimes.

The 18th century was to become the most important period in the development of ethical standards for lawyers, including those concerning legal professional privilege. Subsequent regulations gradually complemented the previous ones, so that the regulations were, on the one hand, more and more accurate, and, on the other hand, these changes seem to constitute a record of violations committed by the Old Polish Bar, which were repeatedly addressed by legislative bodies, closing any legal loopholes. The oath of tribunal lawyers adopted in 1726 accentuated obligations towards clients by putting them at the beginning of the text to emphasise the absolute requirement concerning loyalty to their interests¹⁰. It was not explicitly explained what was understood by this at the time, but it goes without saying that the confidentiality of information obtained during preparations for the trial was to be included in these obligations.

More than 40 years later, in 1768, the need to particularise the range of lawyers' obligations towards their clients was acknowledged. While keeping its old beginning almost unchanged, the oath now explicitly forbade such actions as gi-

⁸ For more information, see: BEDNARUK 2008, 25 et seq.

⁹ *O nieznośeniu dekretów Trybunalskich w W. X. Litewskim przez plenipotentow*, [in:] VL, Vol. III, Petersburg: Nakładem i Drukiem Jozafata Ohryzki 1859, p. 444: "[...] plenipotens [...] tedy na gardle karany będzie, [...], a ten, który plenipotenta przenaiał, ma sto kop Litewskich płacić [...]" ("the plenipotentiary shall face death penalty, and the one who suborned the plenipotentiary, shall pay one hundred Lithuanian threescores").

¹⁰ See: *Trybunał Główny Koronny*, [in:] VL, Vol. VI, Petersburg: Nakładem i Drukiem Jozafata Ohryzki 1860, p. 223: "Ja N. przysięgam Panu Bogu w Trojcy S. Jedynemu, iż stronie, która mię do sprawy swoiey wokować będzie, wiernie służyć będę, zbytecznego salarium po niey wyciągać nie będę, wziąwszy salarium, od sprawy nie odstąpię [...]" ("I, N., hereby swear to Lord God Almighty in the Trinity, that I shall offer my faithful support to any party who shall procure my services, and I shall not demand any unreasonable payment from them, and shall not abandon the case after receiving the payment").

ving any advice or selling any information to the other party, or providing it with any documents, whether personally or via other individuals¹¹.

However, the requirement of adhering to legal professional privilege was expressed in the most comprehensive and straightforward manner in the regulation of 1793. The new, very extensive text of the oath, as adopted by the Grodno Sejm, radically changed the perception of the role of a lawyer in a trial. Precisely, from that moment, their primary obligation was to act for the good of the judiciary. Clients' interests, now described more accurately, but still on the basis of previous regulations, seemed to be of secondary importance. This long list of requirements imposed on legal representatives included the following: "I shall faithfully keep any secret divulged to me in confidence [...]"¹².

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¹¹ *Złączenie Trybunału Koronnego*, [in:] VL, Vol. VII, Petersburg: Nakładem i Drukiem Jozafata Ohryzki 1860, p. 327; see also: JANISZEWSKA 2008, 169 et seq.

¹² *Rota przysięgi dla palestry*, [in:] VL, Vol. X, Poznań: Poznańskie Towarzystwo Przyjaciół Nauk z zasiłkiem Ministerstwa Szkolnictwa Wyższego i Polskiej Akademii Nauk 1952, p. 265.

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PART I. A HISTORICAL OVERVIEW OF POLISH SOLUTIONS (UNTIL 1795)

S u m m a r y

The protection of a client's interests in his relationship with a lawyer is an obligation of special importance, especially when we talk about maintaining the professional secrecy, without with a person granting the power of attorney could not have confidence that is necessary for the full use of his procedural rights. In the Polish systemic solutions the model of mutual relationships between the attorney and the client has been shaped for centuries and led to the conception of their bond that was believed to guarantee a wide protection of the rights that a party of proceedings is granted with before all courts. Chinese experiences are completely different, therefore the obligation that is included in the title is understood in a completely different way.

Key words: lawyer; legal professional privilege; history of the Bar; history of law; Poland – history; China – history

OCHRONA INTERESÓW KLIENTA
WYNIKAJĄCA Z PRAWA (OBOWIĄZKU) ZACHOWANIA TAJEMNICY ADWOKACKIEJ
W CHINACH NA TLE ROZWIĄZAŃ POLSKICH – NARODZINY SYSTEMU.
CZĘŚĆ I. RYS HISTORYCZNY ROZWIĄZAŃ POLSKICH (DO 1795 ROKU)

S t r e s z c z e n i e

Ochrona interesów klienta w jego relacjach z adwokatem jest obowiązkiem o szczególnym znaczeniu, zwłaszcza gdy mówimy o zachowaniu tajemnicy zawodowej, bez której udzielający pełnomocnictwa nie mógłby zdobyć się na zaufanie konieczne dla pełnego wykorzystania przysługujących mu praw procesowych. W polskich rozwiązaniach ustrojowych model wzajemnych stosunków na linii adwokat-klient kształtował się przez stulecia, prowadząc do takiego rozumienia łączącej ich więzi, która daje rękojmię szerokiej ochrony praw przysługujących stronie w postępowaniu przed wszystkimi sądami. Chińskie doświadczenia są zupełnie odmienne, dlatego też tytułowy obowiązek jest tam pojmowany w zasadniczo różny sposób.

Słowa kluczowe: adwokat; tajemnica adwokacka; historia adwokatury; historia prawa; Polska – historia; Chiny – historia