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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 IV. CHINESE MODEL OF MUTUAL RELATIONS
BETWEEN THE ATTORNEY AND THE CLIENT
DURING THE PERIOD OF THE PEOPLE’S REPUBLIC OF CHINA

INTRODUCTION

After the civil war, Chiang Kai-Shek, a political leader of Kuomintang, was defeated by the communists. Thus, he had to retreat to Taiwan, where he announced the continuation of the political system of the Republic of China. In Mainland China, on October 1st, 1949, the communists led by Mao Zedong proclaimed the

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establishment of the People's Republic of China. The new state began to build a new political system from scratch and it destroyed with great efforts all the remains of the old structures. As a result, due to the repression against the existing elites, a considerable part of the intelligentsia and the legal professionals were murdered.

THE PERSECUTION OF CHINESE LAWYERS UNDER MAO ZEDONG'S REGIME

When communists rose to power in 1949 and the political system changed, this also affected the position of lawyers, who were treated with utmost distrust by Mao Zedong. The leader of the communist party believed that the practice as a lawyer could not be reconciled with maintaining ideological correctness, and efforts made by lawyers to help criminals clearly put them in opposition to the legal order that prevailed at the time [ŁAGIEWSKA 2016, 106]. Initially, the original number of law departments was maintained, while reducing the number of students. It was not until the reform of 1952 that a significant change was brought about. From then on, lawyers were trained using new, communist rules and programmes, in 4 institutions located in the largest Chinese cities¹ and in 6 majors at selected universities.

At the same time, the independence of lawyers was gradually being reduced. It was no longer possible to run a private practice as a lawyer, allowing only a small number of professionals to continue to practice, but on the basis of new rules and under strict supervision by the party. Legal aid centres were being established across the country to provide services to anyone in need, but, despite efforts made by some members of the community, they were far from maintaining appropriate relations with clients. Until 1957, 870 such centres employed slightly over 18 000 lawyers, but the campaign launched that year against rightists had placed legal professionals among the most hated enemies of the State².

This marked the beginning of over 20 years of lawyer persecution. The previous structure of the judiciary was destroyed and replaced with revolutionary courts, which employed people without the necessary qualifications, who only had the mandatory ideological background. Their predecessors ended up in labour camps in rural areas for re-education, an ordeal many of them did not survive.

¹ In Beijing, Shanghai, Chongqing and Wuhan [CONNER 2009, 6].

² For more information, see: ŁAGIEWSKA 2016, 106.

During this period (1959-1979), there was no Ministry of Justice, and access to legal education was closed for 10 years (1966-1976) [ŁAGIEWSKA 2016, 106]³.

THE THAW AFTER THE DEATH OF MAO ZEDONG

The death of Mao in 1976, and the end of the bloody period of the Cultural Revolution, also marked a gradual thaw in relations between the government and what had remained of the lawyer community. The structure of the judiciary was reconstructed, and law became perceived as essential for the economic growth of the State. Legal education was reintroduced, more or less consciously harking back to the standards from the early years of the republic, which was manifested, for instance, in more and more frequent sending of students to study abroad, as in the intellectually sterile China there was no one to share the necessary knowledge. The beginnings of lawyer education were very hard. Back in the 1980s, even though law as a major was reintroduced at 30 universities, there were not many people interested in such studies. Clearly, the long campaign against such practices must have left a permanent mark on the popular consciousness. This was aggravated by ideological controversies over the content of the curriculum and the lack of appropriate programmes, which were only being developed with great effort as a result of political clashes between individual camps [CONNER 2009, 9].

A breakthrough came as late as in early 1990s, when the Communist Party of China [CPC] announced the policy of “governing the country by law”, which provided the stimulus for the establishment of new departments of law. As many as 121 such departments were set up between 1990 and 1992, making up a total of 183 at the end of this period. In the following years, 376 more were founded, which made it possible to increase the number of law students from 25 000 in 1991 to 450 000 in 2005⁴. Over the last decade this number grew, but not as rapidly, having stabilised at around 600 thousand as a result of an intentional policy of the government, which, having noticed that not all graduates in humanities or sociology find employment in their profession, have attempted to restrict the number of admissions to such faculties in favour of technical or medical studies. This rapid increase in the number of students, observed also across other

³ See also: CONNER 2009, 7 et seq., who acknowledges the formal existence of two law schools in Beijing and Jilin in those years, although they did not actually operate.

⁴ However, this eighteenfold increase in the number of law students during this period was not followed by an equally quick increase in the academic staff, which increased only 1.2 times, which caused the quality of education to suffer significantly [CONNER 2009, 9 and 12].

majors, is even more surprising, given that university education is tuition-based [CONNER 2009, 9 et seq.].

This change in the approach of the communist government to law and lawyers following the death of Mao Zedong, was also visible in the area of legislation, where previous years brought no less damage than in the case of professional training. Repealed early on after the proclamation of the People's Republic of China [PRC], the collection of "Six Codes" was to be replaced with a new, communist system, which was developed in the 1950s. However, the repealed regulations were replaced with merely provisional solutions modelled on the Soviet system, and the process of codification was discontinued during the persecution of the lawyer community. It was not until the 1980s, that this work was resumed to pass the penal code, the civil procedure and the penal procedure, while substantive civil law was developed in the form of separate regulations for its individual areas [DARGAS 2012, 62].

The year 1980 was also the time when transitional provisions on lawyer practices in the PRC⁵, which became effective as of 1 January 1982, were passed. In addition to other regulations, this short legal Act, comprising only 21 Articles⁶, included one referring to the obligation to adhere to legal professional privilege. Unfortunately, as a rather laconic document, it only scratched the surface of this issue. Namely, it restricted the obligation to private information and State secrets, the keeping of which was also required of this profession. When it came to the lawyer-client relation itself, and the associated rights or responsibilities of the attorney, the Act remained silent [XU 2009, 49 et seq.].

THE RECONSTRUCTION OF THE LAWYER SERVICE MARKET

The explosive growth of the lawyer service market that could be observed in the following years, especially in the private practice sector, required that the government take legislative measures to sanction those changes, while also ensuring favourable conditions for further expansion. These efforts produced the PRC Lawyers Law, passed in 1996 by the National People's Congress [NPC], which replaced the transitional provisions⁷. It comprehensively governed the activities of

⁵ See The Interim Regulations of the People's Republic of China on Lawyers [中华人民共和国律师暂行条例], Act of August 26, 1980, [in:] www.npc.gov.cn [accessed: 24.07.2018].

⁶ In effect, it brought legal professions back to China, the practising of which had been violently stopped in the 1950s, for more information, see: LYNCH 2011, 537 et seq.

⁷ The Lawyers Law of the People's Republic of China [中华人民共和国律师法], Act of May 15, 1996, for the full text of the Act see <http://www.gov.cn> [accessed: 24.07.2018].

legal firms, lawyers' chambers, and rules for lawyer practices themselves. It provided broader and clearer protection of professional secrecy, which was now to include, in addition to State secrets and private information from clients, also commercial secrets discovered during one's professional practice. However, the lawyer-client relationship was yet to be defined, which constituted a serious barrier to building mutual trust [XU 2009, 50].

The Law was amended in 2001, 2007 and 2012, but for the issue at hand it was the second amendment, in force from 1 June 2008, that was the most important. It expanded the range of responsibilities related to legal professional privilege, ensuring a better protection of confidential information and specifying that any private matter or information, when disclosed to the attorney, should remain secret if required so by the client. Exceptions to this rule included facts and information concerning offences that could put the security of the State or public security at risk, or constituted a serious threat to the safety of other people or their property. In addition, the privilege could not be invoked in relation to any crimes that the client, or another person, planned to commit in the future or were committing at the time⁸.

Therefore, it seems unquestionable that the protection resulting from legal professional privilege covered acts performed by clients in the past, while excluding any present and future offences⁹. Although not answered by the Law itself, the question is: does the impossibility of invoking legal professional privilege in such cases mean that lawyers are required to notify the relevant authorities about any such ongoing or planned illegal activities, or does this requirement need to be met only at the request of the relevant authorities?

Statutory regulations were supplemented with a whole range of lower-level regulations, such as the Lawyers Disciplinary Rules issued by the Ministry of Justice in 1992, which defined the responsibility of lawyers who conducted themselves in an unethical way. A year later, the Ministry issued Provisions Concerning Lawyers' Professional Ethics and Practice. In 2008, these provisions were

⁸ See Article 38 of The Lawyers Law of the People's Republic of China.

⁹ Such an extent of the protection of clients' interests seems closer to European solutions, as American courts, in a number of their judicial decisions, expanded it to some extent to include also current crimes, if their disclosure would contribute to the aggravation of the clients' situation. Take for instance, the well-known case of a murderer from the 1960s, who killed a child and hid the body, telling about it to his lawyers, who refused to reveal where the body was hidden, despite parents' begging. Only when their client pleaded guilty did they show the place, and one court after another did acknowledge that the lawyers acted justly. In turn, if American lawyers receive information about the intention to commit a crime, they are required to report it to relevant authorities [MARSHALL 2013, 16 et seq.].

supplemented with Administrative Regulations Concerning the Lawyers' Professional Practice. All of the above-mentioned documents contain references to the issue of confidentiality in the client-lawyer relationship. They acknowledge the obligation of lawyers to keep the secrets of their clients, but their wording does not facilitate a fuller understanding of the legislator's intention¹⁰. There was no guidance on how to interpret the confidentiality obligation in lawyer practice, as this was not the purpose of regulations issued by the Ministry. The majority of these rules are norms that discipline lawyers. It is clear that the government wished to subdue the profession which was growing stronger and stronger, and whose independence could be inconvenient, if not outright dangerous for those in power. At that time, the ethical and moral dilemmas of lawyers seemed to have not been of interest to the officials at the Ministry.

THE PROTECTION OF CLIENT'S RIGHTS IN CHINESE JUDICIAL PRACTICE IN THE RECENT YEARS

In principle, their laconicism aside, Chinese regulations can be considered to show no major differences from similar solutions used in countries with longer traditions concerning legal professional privilege. However, there are some differences in the legislation that governs the individual types of proceedings before Chinese courts. Specifically, the Code of Criminal Procedure¹¹, the Code of Civil Procedure¹² and the Code of Administrative Procedure¹³ clearly define obligations of lawyers who are citizens of the PRC. These include the requirement to cooperate with courts, public prosecution services and public security authorities, which involves true testimony to the best of their knowledge about their clients, regardless of whether the obtained information has been designated as confidential at the request of the client or not [XU 2009, 56].

In Polish law from the times of the Polish People's Republic [PPR], the government also had designs on restricting the legal professional privilege by using similar solutions¹⁴, but the brave attitude of the Polish Bar made it possible to

¹⁰ For a more detailed description, see: XU 2009, 50 et seq.

¹¹ See Article 45 and 48 of The Criminal Procedure Law of the People's Republic of China [中华人民共和国刑事诉讼法], Act of July 1, 1979, [in:] www.npc.gov.cn [accessed: 24.07.2018].

¹² See Article 65 and 70 of The Civil Procedure Law of the People's Republic of China [中华人民共和国民事诉讼法], Act of April 9, 1991, [in:] www.npc.gov.cn [accessed: 24.07.2018].

¹³ See Article 34 of The Administrative Procedure of the People's Republic of China [中华人民共和国行政诉讼法], Act of April 4, 1989, [in:] www.npc.gov.cn [accessed: 24.07.2018].

¹⁴ This issue is discussed in detail by A. Kaftal in his article [KAFTAL 1970, 31 et seq.].

retain, to a large extent to, the independence of lawyers, especially in terms of their relations with clients. Even today, not only Polish, but also European and American courts have made attempts to pressure attorneys and force them to violate legal professional privilege [JURZYK 1998, 162 et seq.; AGACKA-INDECKA 2005, 121 et seq.]. However, practice is all that matters, and the judiciary have been seen to show very good judgement in this respect, understanding the importance of maintaining a specific balance within court proceedings to ensure the appropriate functioning of not only the judiciary itself.

It was this practical application of Chinese solutions that was the cause of greatest concern during the first months following the amendment of the Lawyers Law in 2007. Bearing in mind the tendency of Chinese courts to punish disobedient lawyers, there was a sense of unease about the possibilities that opened up for overeager investigating officers [XU 2009, 57 et seq.]. As it soon turned out, these concerns have been fully justified, especially in relation to the lawyers who had the courage to stand up for human rights. This still fairly small, but better and better organised group that represented the lawyer community, operates in a way that made the communist government concerned. By referring to rights of the individual, formally guaranteed under the Chinese system, they defend opposition activists against the strictness of law. This discrepancy between the declared wide range of liberties, and their actual, very limited charter, so characteristic of communist countries, has always been the weak spot of such political systems. Exposing self-contradictions and the absurd within the system, showing differences between theory and practice – all this was the traditional weapon against the “people’s” government in our country, and it turns out to be more and more useful in China as well. This is a reason for concern for the authorities, which is why they sometimes heavily persecute disobedient lawyers¹⁵.

A NEW SYSTEM OF RELATIONS

However, from our Polish perspective, it is beyond all doubt that the old order is slowly but surely becoming a thing of the past, and these nervous reactions of the authorities to the liberation-oriented demands of citizens seem only to confirm this assumption. Realising that the system is getting weaker, old activists try to

¹⁵ Infamous cases of such persecution by Chinese authorities came to light in 2009 and 2010, when three renowned lawyers were stripped of their licences to practise, using made up allegations as a pretext, see LYNCH 2011, 539 et seq.

exact obedience through threats, but they are faced with less and less understanding even among their own associates. We experienced this in our country in the 1980s. Brought under internal and external pressure, the Chinese ruling party has agreed to liberal changes, but it is trying to delay them, so that their implementation does not recoil in any violent way that could spark off an uncontrolled crisis. What has significantly facilitated this transformation is the generational replacement that took place recently in the top management within the party. Old comrades, who remember the times of Mao were replaced with new, pragmatic ones, educated at western universities, who are not afraid of changes and believe they can remain in power despite, or perhaps thanks to, the reforms they introduce and fully control. This is irrefutably confirmed by their recent concessions regarding the less severe punishments in the Penal Code, starting from the death penalty, and in the family policy, resulting in less control over the number of births. These and other similar concessions will eventually lead to the gradual adoption of systemic solutions used in Europe, and their adjustment to Chinese conditions. There is no question about it. However, the Chinese have to do it at their own pace and on their own terms, since they do not want to repeat the mistakes that happened within the reference systems. The well-known examples of discredit brought in the recent years on the judiciary in a number of European States, which have been perceived by the general public as the consequence of excessively far-reaching protection of perpetrators, coupled with the complete disregard for victims' suffering, do not encourage their rash emulation.

CONCLUSION

To sum up, it needs to be concluded that the peculiar Chinese legal and political system, based on the experimental, at least under those conditions, combination of the economy with clearly free-market character, on the one hand, and the authoritarian government in the political domain, on the other, has been evolving in the right direction, despite the concerns of commentators. Even though these changes are too slow compared to expectations, and the government seems to have allergic reactions to any attempts to compel it to make concessions it considers too far-reaching, the liberation-oriented policy is not at risk under current circumstances. The new political system that is emerging from these transformations will probably never be a faithful copy of any of the existing models, but the world's oldest cultural tradition of this nation is sure to provide it with conditions conducive to continued and undisturbed growth. This will most

certainly be followed by changes in the area of human rights, and appropriate relations between lawyers and clients will be provided with a sound foundation, not only in declarative terms. However, the Confucian tradition of putting the interests of the community above those of the individual will not allow individualism to be taken to such extremes as in Judeo-Christian culture, where it has led to so many pathologies in the application of the law.

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S u m m a r y

During the first decades that followed the establishment of the People's Republic of China (1949) it was very difficult to pursue a legal profession. The communist authorities were reluctant and hatred against its representatives, especially towards the attorneys. The legal practitioners were constantly suspected of disloyalty and the propensity to conspire against the authorities. Therefore, the lawyers were subjected to mass persecution, leading to the extermination of the vast majority of this professional group, until the death of the creator of new political system - Mao Zedong. Only in the 1980's, we can observe a gradual rebuilding of the justice structures, as well as the restoration of civilized relations between the attorneys and their clients. In recent years, it has increased the likelihood of a better protection for the client's interests before Chinese courts.

Key words: Mao Zedong; persecution of Chinese lawyers; Cultural Revolution

OCHRONA INTERESÓW KLIENTA WYNIKAJĄCA Z PRAWA (OBOWIĄZKU)
ZACHOWANIA TAJEMNICY ADWOKACKIEJ W CHINACH
NA TLE ROZWIĄZAŃ POLSKICH – NARODZINY SYSTEMU.
CZĘŚĆ IV. CHIŃSKI MODEL WZAJEMNYCH RELACJI ADWOKAT-KLIENT
UKSZTAŁTOWANY W CZASACH CHIŃSKIEJ REPUBLIKI LUDOWEJ

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

Pierwsze dekady istnienia ChRL to czas niezwykle trudny dla świata prawniczego. Komunistyczne władze żywiły w stosunku do jego przedstawicieli, a szczególnie wobec adwokatów, niechęć graniczącą z nienawiścią. Stale podejrzewano parających się tą profesją o nielojalność oraz skłonności do spiskowania przeciwko rządzącym. Dlatego też do śmierci twórcy nowego systemu ustrojowego Mao Zedonga prawnicy poddawani byli masowym prześladowaniom, prowadzącym do eksterminacji znakomitej większości przedstawicieli tej grupy zawodowej. Dopiero od lat osiemdziesiątych XX wieku obserwujemy stopniową odbudowę struktur wymiaru sprawiedliwości, jak również przywracanie cywilizowanych relacji pełnomocników z ich klientami, co pozwala żywić nadzieję na pełniejszą ochronę interesów tych ostatnich przed chińskimi sądami.

Słowa kluczowe: Mao Zedong; prześladowania prawników chińskich; rewolucja kulturalna