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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 II. A HISTORICAL OVERVIEW OF POLISH SOLUTIONS  
FROM THE FALL OF THE FIRST REPUBLIC OF POLAND  
UNTIL MODERN TIMES

INTRODUCTION

The loss of sovereignty by the Polish Commonwealth as a result of partitions conducted by three neighboring superpowers led to the discontinuation of Polish lawyer tradition. The principles of the attorney-client relationship that were developed for centuries in specific conditions of nobles' democracy system were bene-

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ficial for the lawsuits participants, but they had no right to exist in absolute monarchies. They were not only unnecessary in foreign legal systems, but could even become a threat to the monopoly of royal power that was prevailing in all post-partition states. Therefore, all these achievements of the Polish legal culture were condemned to oblivion for many years. In the 20th century, despite regaining independence, only for part of the century the Poles were free to decide about their state system, including the issues of the title relations between lawsuit participants. However, these difficult experiences with foreign cultural patterns today allow us to better understand the specificity of systems that were built in non-democratic countries.

#### THE POLISH BAR UNDER THE PARTITIONS

Since the loss of sovereignty by Polish state for over one hundred years the Bar in Poland developed according to the rules imposed by the external factors. The national Bar lost its influence on the directions of development of the law that they used. Polish lawyers became the primary victims of the partitioners' policy, as they were discriminated against in a particularly severe manner in the foreign legal systems imposed on them. Their role and scope of authority before the courts were often limited or even marginalized. This was visible from early days after the loss of independence under Prussian rule, where the regulations issued by the Warsaw District to define the rights and responsibilities of "former Polish lawyers" allowed such lawyers to appear in court only as the so-called assistants. They were allowed to handle minor cases whose value did not exceed 200 thalers (provided that they spoke German and knew Prussian law), while reserving major cases for Prussian representatives [SOBOCIŃSKI 1983, 25].

However, what seems more important from this papers' point of view is the completely different approach to the mutual relations between the government, the lawyer and the client. Indeed, while in the Commonwealth, a nobles' democracy system, the primary relationship in court was the agreement between the lawyer and the client, and law required members of the Bar to pledge loyalty to the interests of the latter, in absolute monarchies, which differed from the Polish legal culture, a third factor came to the fore. As a result, lawyers who became attorneys, pledged allegiance to the ruler and that they will act for the latter's good and safeguard the position of the judiciary, and any obligations towards their clients were only secondary and ranked very low on the list of priorities [CEDERBAUM 1911, 12].

It would seem that in those conditions, the ethical principles of the Polish Bar would fade into oblivion. Forced to function in the new reality, lawyers would not see any other option but to toe the line and make a living by reaping benefits from new opportunities. However, this was not the case, because of the patriotism of the Polish Bar, which gradually turned into a rebellion, and, later, into resistance to enemy rule. This fight against the imposed legal system, which contradicted the Polish spirit, was considered a manifestation of patriotism. Indeed, far too often did Polish lawyers have to represent oppressed fellow countrymen against the enemy machine of oppression. This has reinforced the divide between “we”, as the oppressed, and “them”, as the oppressors<sup>1</sup>. In this situation, utmost support for clients' interests and adherence to legal professional privilege at any cost became as much of a fight with the partitioner as the fight on the front line. There was an atmosphere of general support for such behaviour. Uplifted by this wave of support, in many cases lawyers did their job without payment, and compliance with the ethical code, this time formulated without the use of any statutory regulations, spontaneously, so to say, became a matter of honour for every Pole<sup>2</sup>.

In this way it was proven that even in the absence of statehood and under extremely unfavorable conditions the tradition consistent with the Polish national spirit could continue to develop. In opposition to the prevailing system, the environment of Polish lawyers enriched the national legal culture and demonstrated the proper directions of developing a relation between the attorney and his client.

#### AFTER THE REGAINING OF INDEPENDENCE

The regaining of independence by Poland in 1918 opened up completely new opportunities, making it possible to go back to the previous relationship between the attorney and the client. It was particularly real, given that lawyers, as greatly desired part of the nation's intellectual elite, eagerly and in great numbers joined the reconstruction of the Polish statehood, assuming considerable power over public affairs and the shape of adopted regulations. Many members of the Bar took key positions within the judiciary, administration and political parties. The primary goal for everyone was, of course, to rebuild and strengthen statehood, but the judiciary was not left behind either. The importance of this issue to our ances-

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<sup>1</sup> For more information about significant differences in the Austrian system particularly visible since the 1860s, when the authorities allowed Poles to participate in shaping the legal order, see: KOTLIŃSKI, and KOTLIŃSKI 2016, 264 et seq.

<sup>2</sup> For examples of such attitudes, see: KISZA, KRZEMIŃSKI, and ŁYCYWEK 1995, 71 et seq.

tors is shown in a decree passed by the Regency Council on 20 February 1918, so at the time when the First World War was still raging on, and the future independence of Poland hanged in the balance. The decree included the oath for ministers, public officers, judges and lawyers<sup>3</sup>. Its rather laconic reference to the requirement of protecting clients' interests according to the Act and one's conscience, was particularised 10 months later, in independent Poland, by way of a decree of the Chief of State [pl. *Naczelnik Państwa* – W.B., O.K.] of 24 December 1918 (*On the temporary statutes of the Bar in the Polish State*)<sup>4</sup>.

Developed by the representatives of the Bar themselves, the statutes, which in many respects remain valid even today, set very ambitious tasks for the lawyer community, stipulating already early on in Art. 4: "Lawyers should advocate law and rightness". When it comes to the professional code of conduct, in addition to other clearly defined responsibilities, there was also Article 8, which did not raise any doubts and did not allow any exceptions: "Lawyers should keep secret any information they are provided in the course of their practice, and must not be forced to reveal any such information to the court or any other authority"<sup>5</sup>.

The uncompromising nature of this regulation must command respect, if only because of the period in which it was adopted. During the fight for freedom, the confusion associated with the re-emerging statehood, there is always temptation to make exceptions and cut corners. Here, however, no such exceptions were allowed and in this form this fundamental principle of mutual relations between lawsuit participants came into force and was in force during the first years of the Second Republic of Poland. However, for some people the adopted solutions were an advantage, while for others, especially those who saw the need to strengthen the role of the state in the life of societies and its greater interference in the sphere of rights, these were not so clearly positive. Therefore, the adopted solutions caused the statutes to attract criticism during the rule of the Sanation<sup>6</sup>.

The time after the May Coup d'État launched by the supporters of Józef Piłsudski in 1926 was a sore trial to lawyers, since the ruling camp, which put the

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<sup>3</sup> "Dziennik Praw Królestwa Polskiego" No. 4, item 6.

<sup>4</sup> "Dziennik Praw Państwa Polskiego" No. 22, item 75.

<sup>5</sup> Ibidem, Articles 4 and 8, for a more comprehensive analysis of the statute, see: KOTLIŃSKI 2008b, 22 et seq.

<sup>6</sup> Especially turbulent disputes were raised by the issue of exercising the rights of citizens of a newly created state by people who had a hostile attitude to its existence. From all over there were voices denying the right to privileges and freedoms for the enemies of freedom in the context of trial of communist. These people who openly opposed to the independent existence of the Polish state and strived to include it in the structures of the Soviet Union did not enjoy the sympathies of the majority of the society, while a large part of this aversion focused on lawyers who represented them, see: KOTLIŃSKI 2009, 119 et seq.

good of the State before the privileges of its people, had a tendency to authoritative behaviour, which often met with resistance from the lawyer community. Generally, however, the Bar passed the test, not giving in to pressure from the government, especially when the good of their clients, the protection of which was treated very seriously, regardless of political orientation, was at stake<sup>7</sup>.

Subsequent regulations from the inter-War period reflected the political atmosphere of the time, which was not conducive to any displays of independence of the Bar before the court or administration, and the gradual subordination of citizens' interests to the good of the State, caused the guarantee of maintaining professional secrecy to be diluted. This policy is reflected in the Regulation of the President of 7 October 1932, known as the Law on the organisation of the Bar, which was less categorical in its approach to the issue at hand: "Lawyers shall be required to keep secret any information they are provided in the course of their practice"<sup>8</sup>. There is no reference to their not being forced to reveal any such secrets, which, of course, was quickly exploited by courts and relevant offices in their practices. The Law on the organisation of the Bar, passed in May 1938, quotes the relevant Article from the Regulation almost word for word, with the rule concerning professional secrecy being mentioned later in the Act, which also shows the attitude of the legislator to the issue in question<sup>9</sup>.

#### THE ATTEMPTS BY COMMUNISTS TO SUBDUCE THE POLISH BAR<sup>10</sup>

However, these minor acts of oppression were insignificant in comparison with the persecution of the independence of the lawyer community in the communist period following World War II. No later than in May 1945, a decree by Bole-

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<sup>7</sup> For more information, see: KOTLIŃSKI 2008a, 30 et seq.

<sup>8</sup> Article 12 of the Regulation, Dz. U. No. 86, item 733.

<sup>9</sup> Article 71, Dz. U. RP, No. 33, item 289.

<sup>10</sup> We omit here the period of World War II, during which the Polish nation suffered unimaginable losses and was subjected to mass extermination by both aggressors. It was particularly severe since the persecution was directed against the intelligentsia perceived as a potential leader in resistance to the occupiers and also against the legal profession itself, who suffered losses exceeding half of their numbers from the period before the war. This omission is due to the fact that during this period no civilized relations between the attorney and the client were possible. The vast majority of lawyers who were not murdered could not practice their profession. These two totalitarian systems did not observe, especially with regard to Poles, even the basic right to life, so one could not even dream of respecting far-reaching rights and freedoms. For more information, see: MARKIEWICZ 2009, 152 et seq.

sław Bierut<sup>11</sup> set off the process of clearing the Bar of anyone who could be inconvenient to the ruling camp because of their views. After the brutal persecutions of the War time, experienced by Polish intelligentsia from both German and Soviet occupants, the post-War period did not bring any perceptible relief. Communists decided to destroy what had remained of the pre-War judiciary, and to build a new system in its place that would be subordinated to their authority. In addition to discriminatory legal solutions, physical extermination was continued as well [DUDEK 2009, 529].

In June 1950, during the peak of Stalinist repressions, the government passed the Act on the organisation of the Bar, modelled after Soviet solutions, which introduced completely new systemic solutions, foreign to the Polish system. It deprived the Bar of all its independence, passing over the issue of its autonomy, and putting it under the supervision of the Ministry of Justice. From then on, the primary goal of the Bar was not to protect their clients' interests, but rather to safeguard the public order in the people's State, in cooperation with courts and other competent authorities. Full of clichés, typical of Soviet regulations, the Act accentuated the obligation to remain loyal to the State, and in reality to the communist party<sup>12</sup>.

Luckily for the future of the Polish Bar, this period of its severe repressions did not last long enough for the communists to achieve their goals. After 1956, there was a thaw in the relations between the government and the people, which caused the persecution of lawyers to stop as well. Many Polish patriots, who managed to survive this difficult period, were released from Russian labour camps and returned back to their motherland. Others lived to be granted amnesty and were released from local prisons. Some of them even managed to return to the Bar, where they re-established their professional positions, proving the sense of remaining faithful to their principles in their attitude. In an overwhelming majority of cases, these were lawyers educated in pre-War schools that acted as role models for younger generations in respect of their relations with clients, as they were convinced of the need for an uncompromising protection of clients' interests [REDZIK, and KOTLIŃSKI 2012, 317 et seq.].

Even though the thaw after the death of Stalin, and the associated reshuffling in the government, did not last long, since no later than in 1958 there was a gradual withdrawal from the repression alleviation policy, this respite was sufficient to preserve what was left of pre-War intelligentsia, including the remnants of the

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<sup>11</sup> Decree of 24 May 1945 o tymczasowych przepisach uzupełniających prawo o ustroju adwokatury, Dz. U. No. 25, item 146.

<sup>12</sup> For more information, see: REDZIK, and KOTLIŃSKI 2012, 306 et seq.

Polish Bar. However, the change, involving the withdrawal from mass physical extermination of anyone considered inconvenient by the communists, turned out to be permanent [NOWAK–JEZIORAŃSKI 1986, 10 et seq.]. From then on, the oppression faced by the lawyer community was different in nature. The disobedient were kept under surveillance, blackmailed and vilified to make their life miserable. There were also attempts to undermine their authority or take away their licence to practise, but murders were infrequent and were usually committed by secret service, who made them look like “accidents”.

At that time, an important aspect of the clash between the government and the Bar was attitude to the case, and the issues of ethics and loyalty to clients' interests. From the time they rose to power, communists tried to make lawyers another group of public officers, who would obediently follow their orders, just like the rest. They were allergic to any attempts by lawyers to retain their independence, and whenever they invoked their obligation to keep the information concerning their clients secret, this was considered a provocation. The authorities were particularly interested in political trials. Communists would not tolerate any competition, so any manifestations of independence in action, or even in thinking, were nipped in the bud. As a result, they showed virtually no interest in the secrets of the defendants in criminal cases, but attorneys of political prisoners had to be prepared for all possible pressure<sup>13</sup>.

Despite this blatantly obvious disproportion between the treatment of different members of the Bar, where the obedient were taken very good care of, while the disobedient had their lives made miserable, the latter did not decrease in number. Quite the contrary. Polish society, which was not strong enough yet to openly challenge the culturally foreign attitudes represented by the authorities, gradually took the approaches characteristic of the times of partitions and occupation. The divide between friend (the nation) and foe (the communists) was becoming sharper and sharper. In this atmosphere, lawyers, who followed their conscience and moral code, and not the orders of the commonly rejected authorities, rose to the rank of national heroes<sup>14</sup>. This, in addition to clear conscience and a sense of decency, was more tempting than any medals, appanages and other privileges granted by the government. In other words, being honest was becoming fashionable.

Therefore, the attitude to subsequent amendments to the applicable law is far from surprising. Not only did society learn to evade it, as something foreign and

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<sup>13</sup> For more information about the role of Polish lawyers in political trials, see: REDZIK, and KOTLIŃSKI 2012, 326 et seq.

<sup>14</sup> For information about the atmosphere of the time and the role of Catholic Church within Polish society during communist times, see: ŻARYN 2003, 290 et seq.

hostile, but lawyers themselves treated it with deep reserve. They learned this from the authorities, who had been unscrupulous in bending the rules they themselves had passed to meet their needs, interpreted them according to the rules they deemed fit in a given situation, or even broke them, whenever they found it convenient<sup>15</sup>.

### THE BEGINNINGS OF THE THIRD REPUBLIC OF POLAND

The turn of 1989/1990 was a period of intense political changes that led to Poland's regaining its sovereignty, restored the mechanism of democratic governance and enabled an independent development of the Polish legal system. These changes also have an enormous importance for the possibility of developing new relations between attorney and their clients. From now on it was possible to return to the old principles of fully respecting lawyer's professional privilege, while the comparison of the experiences of democratic states in this area the Polish experience has contributed to a better understanding of the importance of this type of mechanisms in the rule of law.

Interestingly, despite the fact that radical reforms fundamentally changed the state system, we did not settle the accounts with the past. The people who became discredited because of cooperating with the communist system were never removed from their profession including the positions in the justice system. The actions were not explicitly condemned and those who were guilty of persecution of the anti-Communist opposition or judicial crimes have never been brought before a judge to stand trial. This policy, which is extremely difficult to understand, especially to outside observers, has led to an unprecedented situation in the world, where those persecuted in the past live and work alongside their persecutors. At the same time, in their daily reality they both use the law, for which only part of them fought and sacrificed much to realize the ideals.

### SUMMARY

The past two centuries of the legal order in Poland were the times of many radical changes that have an impact on the current native legal culture. It is worth remembering that the vast majority of this period is the years of belonging to fo-

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<sup>15</sup> A prime example is the very Act that introduced martial law in Poland on 13 December 1981, which was issued by the authorities in violation of the law that was in force at that time.

reign legal systems treated mostly as hostile and contrary to the national spirit and its ethos of the fight for freedom. In our opinion, it has a great importance in the process of building further systems of interpersonal relations, in times when we could decide for ourselves, also on the issue of legal professional privilege. On the other hand, these unique experiences allow us to better understand the current situation of citizens in the People's Republic of China and can simultaneously provide them with a kind of test ground that can be used in their reform projects as well.

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S u m m a r y

After a long period of the native legal culture development, a systematic increase in the importance of the Bar in the social and political life of the country and the strengthening of its influence, there was a period much worse for lawyers. The loss of independence for more than one hundred years and the necessity of functioning in the structures of absolute monarchies caused many negative effects in the mutual relations between attorneys and their clients, primarily in the area of the legal professional privilege. Despite the fact that Poland regained its independence, the next century brought new, difficult challenges in the process of shaping the relations between lawsuit participants.

**Key words:** history of the Bar; the Second Republic of Poland; the Polish People's Republic (PPR)

OCHRONA INTERESÓW KLIENTA  
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W CHINACH NA TLE ROZWIĄZAŃ POLSKICH – NARODZINY SYSTEMU.  
CZĘŚĆ II. RYS HISTORYCZNY ROZWIĄZAŃ POLSKICH  
OD UPADKU I RZECZYPOSPOLITEJ DO CZASÓW WSPÓŁCZESNYCH

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

Po długotrwałym okresie rozwoju rodzimej kultury prawnej, systematycznego wzrostu znaczenia palestry w życiu społeczno-politycznym kraju oraz umacniania jej wpływów, nastąpił czas zdecydowanie gorszy dla prawników. Utrata niepodległości na ponad sto lat i konieczność funkcjono-

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wania w strukturach monarchii absolutnych wywołały szereg negatywnych skutków we wzajemnych relacjach adwokatów z ich klientami, przede wszystkim w zakresie prawa do zachowania tajemnicy adwokackiej. Kolejne stulecie zaś, mimo odzyskania niepodległości przez Polskę, przyniosło nowe, trudne wyzwania w procesie kształtowania stosunków uczestników postępowania sądowego.

**Słowa kluczowe:** historia adwokatury; II Rzeczpospolita; PRL