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Lawyers' Professional Secrecy in Polish Constitutional Law

Abstract of the thesis

The main issue analyzed in the dissertation concerned the constitutional roots and legal basis of protecting lawyers' professional secrecy. Whereas the social, economic and legal circumstances in Poland have changed drastically since 1989, studies on legal ethics are based almost exclusively on rulings and publications from the communist era. Before the 1989 Velvet Revolution, relevant issues concerning lawyers' obligations and privileges (which are defined jointly as "secrecy") almost exclusively concerned a lawyer's right to refuse disclosure of information in the course of criminal proceedings against individuals who were often prosecuted for their political, anti-regime activities. Therefore, courts have basically had no opportunity to discuss certain questions that arise when it comes to commercial proceedings or criminal investigations involving the interests of companies. There has also been very little consideration about the nature of the lawyer-client relationship and the existence of the obligation to maintain secrecy outside the courtroom context. Even less interest has been given to an analysis of the constitutional background of protecting this secrecy. This is somehow surprising since Polish law requires that interpretation of a statute should be made in accordance with the Constitution.

The most fundamental and as yet unresolved problem in Polish jurisprudence on lawyers' secrecy concerns the various motives that have been attributed to the idea of lawyers' confidentiality. In Poland, as in many other jurisdictions, the idea of confidentiality has a very long tradition. It is probably due to these ancient origins and its long-lasting existence that has made all attempts at reconstructing the reasoning (rationale) justifying special treatment of the obligation and privilege of lawyers' professional confidentiality quite difficult. There are at least three different groups of interests which may primarily be protected by lawyers' secrecy: (1) interests of the client (providing access to legal assistance, the right to privacy, freedom of communication); (2) interests of lawyers as professionals (prestige, credibility, clients' trust, efficiency in providing legal service); and/or (3) interests of the legal system (justice, fair trial, *etc.*). These values also describe the potentially

conflicting obligations of lawyers towards the client, the legal system and the legal profession. In the vast majority of cases these diverse values do not exclude one another, but in some circumstances they might not be reached at the same time and should be weighed up. Identifying the rationale behind the protection contributes to a precise description of the scope of lawyers' secrecy and helps to understand the hierarchy of values in cases where the interests of individuals, the legal profession and the court clash with one another.

It is commonly accepted that protecting lawyers' professional secrecy is not an "independent" constitutional right but is rather a mechanism necessary to provide effective protection of other constitutional rights. The Polish Constitution does not specifically mention the attorney-client privilege or lawyers' professional secrecy. However, there are a few constitutional provisions which express the clear intention of legislature to protect this area as an individual right of the attorney's client. The right to request secrecy of facts disclosed by an individual to his/her attorney is based on the constitutional right to a due process (in all kinds of cases, Article 45 Sec. 1 of the Constitution) and the right to defense (in criminal cases, Article 42 Sec. 2 of the Constitution). To some extent those fundamental rights need to be protected by free access to professional legal aid. Free, unrestricted communication between lawyers and clients is essential in order to deliver accurate legal service. Without access to professional legal aid, in many cases the practical exercise of the rights would not be possible. Taking into account the complexity of legal matters, procedural restrictions and the necessity of having some level of expertise, an individual would need access to a lawyer to protect his/her rights in an effective fashion. Only professional legal aid may somehow eliminate the inequality of arms before the courts and tribunals as well as in a non-litigious context. The lack of protecting confidentiality would reduce the value of any legal assistance. Thus, a person communicating to a lawyer needs to trust that the facts being disclosed will not be used against him or her. This is a form of protection against self-incrimination.

An important constitutional right which clearly pertains to lawyer-client relationships is the right to privacy (Article 47 of the Constitution) and the freedom of communication (Article 49 of the Constitution). Some authors try to deconstruct lawyers' secrecy as an attempt to

protect the individual right to control information, just like property. The limits of the secrecy would depend on restrictions analogous to the limits of property right. Thus, the reason for protection, according to this theory, would not be raised by the nature of the lawyer-client relationship but by the will of the client to maintain limited access to information. As far as legal service is concerned, this would be implied in any and all communication with the lawyer. This theory also explains the protection of documents, letters, computer files and other forms of materials containing information.

An important constitutional question concerns the scope of admissible exceptions from the obligation to keep the information confidential. Once accepted that confidentiality in the relation between a lawyer and client is essential for the protection of constitutional rights, any possible exceptions from the protection must be in line with the rules set forth by the Constitution for restriction of fundamental rights. In this context the dissertation examines the proportionality test and the question as to what is the "core" element of the client's right to keep information that is disclosed to a lawyer confidential. This element of the right should not be restricted.

The paper also deals with the most often discussed exemptions and analyzes arguments used in the debate about the so-called "absolute" or "relative" character of the obligation to maintain confidentiality. It seems that lawyers' secrecy is neither purely public nor private in its nature. It is rather a more complicated structure with varying rights and obligations depending on the legal and factual background of the case. It is probably a patchwork of different regulations depending on the areas of compelling interests that are at stake. Providing the abstract answer as to how far-reaching the privilege/obligation to maintain secrecy is not possible without knowing the facts concerning the case. Under Polish law there is a general rule and a set of exceptions, some of which are explicitly regulated by the law, some are implied, some are the result of judicial activism and some are only the result of convention. The true question is not whether secrecy has an absolute (public) or contractual character but what justifies exception from the secrecy principle. It seems that the statutory exceptions from the confidential duty protecting "everything" that lawyers have learned during their legal service should at least concern the following information: (1) information which the client has consented to disclose; (2) knowledge which is in the

public domain, *i.e.* publicly available to potentially everyone; (3) information containing knowledge about legal issues acquired in the course of legal service; (4) facts necessary for the tax authorities; and (5) facts necessary in a dispute between the lawyer and his/her former client. These limitations of the protected area of confidentiality have in fact already been accepted as conventions.

A related issue concerns the legal status of the quasi-legislative activity of the lawyers' professional association. The bar associations of advocates and legal advisers issue so-called codes of ethics and regulations on the rules of professional conduct. The rules set out in those acts are enforced in disciplinary proceedings before the bar authorities. However, the legal status of those documents is ambiguous. First, the documents interfere with the constitutional rights of individuals who are not members of the associations, in some cases indirectly restricting their access to legal aid. Such restrictions are allowed only in the statutes. Second, the Constitution provides for a so-called closed catalogue of the sources of law, *i.e.* it indicates the types of statutes, directives and regulations which may be promulgated by the state authorities. The bar legislation is not included among the types of legal sources. Thus, it is difficult to claim that the legislative activity of the bar associations may have an "external" dimension and impose any obligation or constrain any right of individuals who are not members of those associations.

Assuming that lawyers' secrecy protects not so much the position of the lawyer but much more the comfort of the relation in which legal aid is provided, the dissertation also analyzes the kind of information that is protected. Additionally, for effective protection it is essential to provide protection of lawyers' colleagues, law students, administrative staff, translators, *etc.*, who are involved and necessary in the process of providing legal assistance to a client.