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Artykuły

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Ethics of Polish Bar Association in the Interwar Period According to Aleksander Mogilnicki

Etyka polskiej adwokatury w dwudziestoleciu międzywojennym w poglądach Aleksandra Mogilnickiego

SUMMARY

In Poland, during the partitions and the interwar period, lawyer ethics was not a popular subject, however, it was not neglected. During that time, some texts on the subject were published. The aim of the following paper is to present the standpoint of A. Mogilnicki, (lawyer, Supreme Court Justice) concerning the constitution of the code of lawyer ethics commonly used by lawyers at the time. He was one of the first to raise the issue in the press where he presented the guidelines that lawyers should pursue while creating their own code of professional ethics. Even though Mogilnicki's vision of creating the code did not materialize at the time, it was in the 1960s that *The Collection of Principles of Lawyer Ethics and Professional Dignity* was published.

Keywords: Aleksander Mogilnicki; legal ethics; codification; barristers' ethical code

The matter of legal ethics was not considered in details in the first decades of the 20th century in the Republic of Poland. Neither practicing lawyers nor law theoreticians saw an urgent need for codification. However, some lawyers recognized the necessity to create and codify the rules[1].

Aleksander Mogilnicki who had practiced law since 1901 expressed his opinion concerning legal ethics in his article *In the Matter of Legal Ethics*, which was published in the "The Warsaw Judicial Journal" in 1911. His article resulted from the lack of any written ethical rules that would have obliged barristers. He was

[1] P. [without the author], *Self-advertisers in the Bar Association*, "The Warsaw Judicial Journal" [SGW] 1908, No. 43, pp. 680–681.

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of the opinion that the code that would become a guidance for practicing lawyers should be established. He stressed the significant role that barristers play in the society and claimed that the establishment of ethical code would contribute to the development of legal profession. Moreover, barristers had already observed some existing, unwritten rules. Barristers as one of the professions of public trust should give a sign to other professions, e.g., doctors, that needed ethical codes. As he wanted to eliminate the opposition against the establishment of such a code, he gave examples of the development of law where several years before nobody had assumed that regulations concerning, e.g., "labour of workers and minors or compulsory insurance would be enacted, […] all these constitute the evidence that European societies strive to subject all their relations to the custody of legal written rules"[2].

The established code would not have the force of binding law, the written rules would develop and have a life of their own. He drew the attention to the fact that hypothetically "such a legal project might be considered and decided by the people who did not have any idea of the matters under discussion, the people who received the education based on different ethics and who were brought up according to different ideas, which could distort the sense of its content"[3]. "Such a code would not be given a legal sanction to observe it, only the opinion of general public – *vox populi* – would be taken into consideration. The aim of the code was to implement the rules people did not observe because they did not know them. They could learn them neither at school nor at home"[4]. He advocated to act and educate junior lawyers in order to raise the standards of legal ethics.

He realized that there did not exist the institution that would be entitled to establish such a code, thus, he appealed to all the legal organizations, all barristers to express their opinions in this matter. He pushed organizational and procedural matters into the background. He was exclusively concentrated on the opinions of other lawyers. He wrote "I do not doubt that my opinion cannot go unnoticed"[5]. However, he did not achieve the result he planned. The legal society did not see any necessity of the discussion over the codification of rules. Nobody reacted to his appeals.

Mogilnicki did not resign and six month later appealed again in "The Warsaw Judicial Journal"[6]. As he did not want to criticize the lack of reaction to his article, he wrote that his article might be not precise enough and that was the reason why nobody had joined the discussion. He stressed the fact that the establishment of the code would not be easy and straightforward. It was extremely difficult to make "effective, uniform law" although "it only embraced solely the external side

[2] A. Mogilnicki, *In the Matter of Barristers' Ethical Code*, SGW 1911, No. 28, p. 427.
[3] *Ibidem*.
[4] *Ibidem*, p. 428.
[5] *Ibidem*, p. 427.
[6] *Idem*, *In the Matter of Barristers' Ethical Code*, SGW 1912, No. 7, p. 96.

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of life"[7]. Thus, the rules regulating "the sphere of human soul" would demand much more effort[8]. On the other hand, Mogilnicki gave examples of merging law and religion (e.g., the Ten Commandments). He still deeply believed that the necessity of writing down the rules would be broadly recognized. Ethics was to answer the following question: "What rules should a barrister follow except applying binding statutes and observing general rules of human ethics?"[9]. He thought that such a guidance would be helpful in any profession.

He claimed that although, general human ethics was consistent with professional ethics, in some cases they might be contradictory. He gave the direct advertisement of goods, i.e., by door-to-door salesmen, as an example. Such a way of selling goods was ethical, but it would not be ethical if a barrister took on clients in this way. This was the reason why the rules of ethical conduct for barristers should be established. On the one hand, a barrister was only a human being, but on the other hand, he remained in a fiduciary relationship with the people he represented; the people who usually had violated law. According to Mogilnicki, the specific character of legal profession "compelled a barrister to divide his individuality into two separate beings"[10]. The interest of a client should be the most important for a barrister; it should be even more important than his own one. However, a barrister could not identify himself with his client. He wrote: "A barrister remains in the same relation with his client as an MP with his electorate"[11]. Thus, it was particularly essential to set the limits determined by the power of attorney given to a barrister and by client's directions that, however, cannot be accepted without criticism. The personal interest of a barrister, i.e., his fee for handling cases, constituted another aspect of this relation based on trust and confidence. Despite any failure, a barrister was not allowed to make clients take a dislike to him, or to win a case due to "excuses, insults, or deceits", even if it could aim to dispense justice[12]. Cases should be handled diligently, in accordance with binding law and ethics.

Mogilnicki criticized the organization of legal profession. He claimed that most barristers had neither enough knowledge nor experience to practice law. Those who wanted to become members of the Bar were required to have a university degree and five years' experience of holding a post in judiciary where they could acquire experience in applying law. This could be the post of a court applicant, or a plenipotentiary of a member of the Bar[13]. The time of preparation to

[7] *Ibidem*.
[8] *Ibidem*.
[9] *Ibidem*.
[10] *Ibidem*.
[11] *Ibidem*, p. 97.
[12] *Ibidem*.
[13] *Idem*, *In the Matter of Barristers' Ethical Code*, SGW 1912, No. 8, p. 110. Extended: M. Materniak-Pawłowska, *The Bar Association in the Kingdom of Poland 1876–1917*, "Law-history Journal" [CPH] 2010, Vol. 62, No. 2.

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practice law was, according to him, long enough. The system of preparation constituted the real problem. The first two systems of acquiring the title of a barrister had the disadvantage that they did not teach "the right and responsible attitude to clients, general public, colleagues and court", they only taught drafting legal documents, the so called "office side of legal practice"[14].

In the author's opinion the work of a barrister' s assistant was the only proper system that could lead to entering the legal profession. However, even this system had certain legal weak points. First of all, a barrister's assistant could set up his own law firm after two years and represent clients in courts. "The letter 'a' on his signboard, a badge on his jacket lapel and… a knowledge of legal matters were 'the only' difference between him and a barrister"[15].

Although, a barrister's assistant could gain some experience in legal matters, according to Mogilnicki, it was not wide enough. He criticized the cases of setting up law firms soon after getting a university degree as well as cases of fictitious work as a barrister's assistant. In the second case, Mogilnicki criticized not only barrister's assistants, who in fact did not do that job, but also barristers who consented to such fictitious practice. Barrister's assistants were not paid well which was the reason why the people who theoretically were barrister's assistants, did other, better paid jobs, actually. First of all, Mogilnicki criticized barristers who consented to make agreements with their assistants but did not prepare them for their future profession. He stressed the fact that such a conduct was highly unethical. He expressed the opinion that more thorough, not necessarily longer practice resulted in the formation of ethical rules of conduct of young lawyers. Writing down these rules would facilitate practicing legal profession, make them more widespread, which, would certainly decrease the number of cases of unacceptable barristers' conduct.

The First Convention of Polish Barristers was held in Lwów on 28 and 29 June 1914. On the second day of the Convention, Mogilnicki presented a report about "Codification of barristers ethical rules". He talked again about the necessity of writing down the standards that customarily obeyed barristers. He regretted that the initiative undertaken by Adolf Suligowski in 1886 had not produced the desired result[16]. He suggested that the Convention should appoint a commission to work out a questionnaire and then the answers to the questions included in it. The commission was to prepare a draft version of a code on the basis of the gathered material and to present it during the following Convention. However, the following Convention was not held soon as the Second World War broke out. During the First Convention to facilitate the work, Mogilnicki worked out the following ten basic rules that the commission should obey drafting a project:

[14] A. Mogilnicki, *In the Matter of Barristers' Ethical Code*, SGW 1912, No. 8, p. 110.

[15] *Ibidem*, p. 111.

[16] Adolf Suligowski (1849–1932) a member of the Bar Association, the author of *The Questionnaire to the Defence Ethics* published in "The Warsaw Judicial Journal" (1886, No. 14).

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Being a representative of a client, defending his interests and rights, representing him in court and before an opponent, directing his steps in the field of law, a barrister cannot identify with a client, before he establishes his way of conduct he should change himself into a judge and impartially estimate not only legal but also ethical data[17].

Before a barrister decides to handle a particular case, either civil or criminal, he should estimate it from the legal and ethical point of view and undoubtedly refuse to handle it if he considers it a) to be lost from the legal point of view, b) to be contradictory with the rules of either general or professional ethics. A defendant accused of committing a criminal offence should not, generally, be refused legal assistance by a barrister[18].

He had expressed such an opinion in his article *Criminal Defence Counsel and Public Opinion* in 1901. He could not see the possibility not to handle a criminal case despite negative, condemning voices of public opinion. He claimed that every defendant had the right to be defended in court. A barrister cannot refuse to handle a case "in the fear of the fact that the person deemed guilty would escape the punishment"[19]. The matters of religious, political or national nature could only justify the refusal of handling a case. He wrote "when personal feelings of a defence counsel, not as a barrister or a human being, but as a member of a particular religion, political party or nation are at stake […], a barrister can break the rule and refuse […]"[20]. Moreover, he considered that it was "unethical to prove the innocence of the person deemed guilty by manipulation and excuses"[21]. As far as civil cases are considered, a barrister had, generally, freedom to handle a case or to refuse. Nevertheless, he should always take justice and fairness into consideration and represent the party that had the sense of fairness. A client who does not have the sense of fairness should be convinced to throw it out[22]:

1. "Cases by virtue of Legal Board Aid should be handled with the same due diligence as paid cases. Replacement in cases by virtue of Legal Board Aid is admissible only in specific circumstances and a supply barrister should be a suitable person"[23]. "He stressed the importance of proper preparation of a barrister to practice law because of the shortfall of proper practical training. That was the reason why a supply barrister should be experienced enough and not only did the job of a barrister's assistant"[24].

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[17] A. Mogilnicki, *The Codification of the Rules of Barristers' Ethics. (Summary)*, [lack of publishing place] 1914, p. 8.

[18] *Ibidem*.

[19] *Idem*, *A Criminal Defence Counsel and the Public Opinion*, "Ateneum" 1901, Vol. 1, No. 3, p. 463.

[20] *Ibidem*.

[21] *Ibidem*, p. 458.

[22] *Ibidem*, p. 463.

[23] *Idem*, *The Codification of the Rules*..., p. 9.

[24] See *ibidem*, p. 3.

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2. "The pieces of information that were disclosed to a barrister by a client with the express or implied reservation that they were confidential should constitute a barrister-client privilege a barrister was not allowed to reveal to anybody in any circumstances"[25]. He opted for the absolute rule of barrister-client privilege and did not anticipate any circumstances under which it could be divulged. This was to provide a client with the most effective protection of his interests.

3. "A barrister should not publish his opinions in newspapers or magazines or make any other attempts to shape public opinion for or against any party to legal proceedings until the verdict is rendered"[26]. This rule did not forbid contacts with the media, which even then was inevitable when a barrister was handling a well-known case. It only limited the barrister's statements to those that were necessary to protect client's interests.

4. "A barrister as a criminal defence counsel should not place the blame on a fellow defendant"[27].

5. "A barrister should avoid any actions that were to advertise him in the society"[28]. Mogilnicki opted for a total ban on advertisement.

6. "A barrister should look for cases by himself not by any third parties"[29]. He criticized the recruitment of clients by agents, but did not exclude this solution in other fields of life, e.g., in commerce.

7. "The commonality of a profession and an occupation results in certain reciprocal obligations for members of the Bar. Barristers should help one another to fulfill their professional obligations duly"[30]. According to Mogilnicki, barristers should be helpful, friendly and loyal to one another as they were the members of the same professional group.

8. "Senior barristers who are more experienced, are obliged to employ young barristers in their law firms in order to educate them to acquire experience in the legal profession"[31]. The author thought that was the only proper way of training young lawyers to practice the profession of a barrister, i.e., serving an internship as a barrister's assistant for the time stipulated by the regulations.

The foundations or the framework of the codification of the barristers' ethical code created by Mogilnicki were often quoted in various later studies concerning history and development of barristers' ethics[32]. Some statements included in the

[25] *Ibidem*, p. 9.
[26] *Ibidem*.
[27] *Ibidem*.
[28] *Ibidem*.
[29] *Ibidem*.
[30] *Ibidem*.
[31] *Ibidem*.
[32] See: M. Materniak-Pawłowska, *The Bar Association of the Second Republic of Poland: Legal and Political Issues*, Poznań 2009; Z. Krzemiński, *Barristers' Ethics: Texts, Judgments, Commentary*, Cracow 2006.

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report have lost none of its relevance even today: "Constant conflict of interests between a client and a barrister and the requirements of law and ethics, the necessity to resist temptations, the apparent ease and profitability of unethical conduct make the profession of a barrister more difficult than it might seem"[33].

The lack of barristers association on the territory of previous Congress of Poland constituted another problem. Mogilnicki wrote: "Barristers chambers were not introduced in Poland for political reasons. Their functions of controlling the personal composition and activities of the legal community were vested in Russian judicial institutions that performed their duties without success"[34]. The disputes concerning barristers' disciplinary responsibility were resolved by the district court and the Judicial Chamber of Warsaw[35] was an appellate instance. Till regaining independence, the legal community acted in pursuance of Russian regulations that had started to oblige on the territory of the Congress of Poland in 1876[36].

Mogilnicki was one of the members of the special commission that was founded in August 1916. Its aim was to draw up a statute of the Bar that was announced in January 1917 in "The Warsaw Judicial Journal"[37]. It became the basis for the work of the Committee of the Bar Association that was founded in the Department of Justice of the Provisional Council of State of the Kingdom of Poland in 1917[38]. The regulations of the interim statute of the Bar of the Congress of Poland that regulated, among others, the system of the legal community, the access to the legal profession and disciplinary proceedings of barristers came into force on 1 January 1919[39]. Disciplinary affairs came within the competence of local governments instead of courts. According to this document, the disciplinary court appointed by the council of barristers the accused barrister belonged to, was

[33] Z. Czeszejko-Sochacki, *Barristers' Ethics as a Means to Set Standards of Barristers' Conduct*, [in:] *The Bar, the Body of the Supreme Bar Council*, Warsaw 1957, p. 7.

[34] A. Mogilnicki, *The General Rules of Law. A Handbook for Secondary Schools*, Warsaw 1916, p. 246.

[35] Extended: M. Materniak-Pawłowska, *The Bar Association in the Kingdom of Poland in 1876–1917*, p. 185.

[36] Art. 353 of Judicial Statute binding in the Provinces of the Kingdom of Poland approved in the highest Power on 19 February 1875 of the provision concerning the application of judicial statute of 20 November 1876 to the Warsaw Judicial District, Vol. 1, *Judicial Organization and Notary Statute*, Saint Petersburg 1875.

[37] A. Chmurski, *The History of the Bar's Statute*, "The Bar" 1931, No. 10–11, p. 519. The commission, besides Mogilnicki, consisted of: Stanisław Bukowiecki, Henryk Cederbaum, Stanisław Car, Stefan Dziewulski, Nikodem Likiert, Jan jakub Litauer, Czesław Mejra, Feliks Ochimowski and Leon Papieski.

[38] A. Redzik, *An Outline of the History of Barristers' Self-management in Poland*, Warsaw 2010. The commission consisted of Dominik Anc, Stanisław Car, Antoni Chmurki, Cezary Ponikowski, Bolesław Pohorecki.

[39] The Decree in the subject of the provisional statute concerning the Bar Association of Poland, "Journal of Laws of Poland" 1918, No. 23, pos. 76, www.isap.sejm.gov.pl [access: 10.05.2016].

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the appropriate body to take disciplinary proceedings. Under art. 52 and 53 of the statute the disciplinary court appointed by the Governing Council was the appellate instance dealing with the affairs of honor and dignity of legal profession. The senate appointed by the Supreme Court functioned as an appellate body dealing with the cases of the abuse of letters and words[40]. The senate consisted of three judges (including the chairman) and three members of the Bar.

The government showed an intense dislike for the Bar at the end of the 1920s and the beginning of the 1930s, which probably resulted from the uncompromising stance of some barristers as well as all other members of the Bar on the so-called "Brzesk Case"[41]. This case constituted a significant test of character and power of Polish Bar Association which could be observed during the trial that was held at the end of 1931 and the beginning of 1932. Mogilnicki as a witness criticized all the activities of the government that aimed at the infringement of law and order[42].

Mogilnicki as an active barrister who realized all the hardships of this profession intended to facilitate the work of barristers. That was the reason why he opted for the codification of ethical rules so much. However, his initiatives did not bring the expected results. They only resulted in the fact that his colleagues had drawn their attention to the problem.

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[40] Art. 34 of the provisional statute concerning the Bar of Poland, provided: "Every year the Governing Council chooses from its members the disciplinary court of the second instance consisting of five members and two deputies".

[41] Among others, Zdzisław Krzemiński shares this opinion in *Famous Warsaw Barristers*, ed. 1, Cracow 2000, pp. 123–124.

[42] A. Kisza, Z. Krzemiński, R. Łyczywek, *The History of Polish Bar Association*, Warsaw 1995, p. 118.

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STRESZCZENIE

Etyka adwokacka w czasie zaborów i w okresie międzywojennym na terenie Polski nie była tematem popularnym, co nie znaczy, że nie była ważna. Pojawiły się w tym czasie nieliczne teksty dotyczące tego zagadnienia. Celem niniejszego artykułu jest przedstawienie stanowiska Aleksandra Mogilnickiego (adwokata, sędziego Sądu Najwyższego) dotyczącego spisania zasad etyki adwokackiej, które zwyczajowo obowiązywały wśród adwokatów. Jako jeden z pierwszych podniósł ten problem na łamach prasy, przekazując wytyczne, jakimi winni kierować się adwokaci, tworząc własny kodeks etyki. Wizja A. Mogilnickiego stworzenia kodeksu nie ziściła się jednak w tamtym czasie. Dopiero lata 60. XX w. przyniosły adwokatom pierwszy *Zbiór zasad etyki adwokackiej i godności zawodu*.

Słowa kluczowe: etyka adwokacka; kodyfikacja; kodeks etyczny adwokatów