

Chapter XI

Legal paternalism and the identity of Polish legal culture

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1. Constitutional identity is a broadly discussed issue on the border of philosophy of law, political philosophy and doctrine of constitutional law. The significance of this issue goes beyond the problem of how organs of public authority are organised, which after all is the basic constitutional matter. The issue is more about the consciousness of separateness and legal-constitutional uniqueness. The key question in this respect, is whether there is a single universal and rational constitutional model — meaning the Western model of liberal democracy — or whether this rationality depends on the system being adapted to historically formed constitutional identity.

This question was of fundamental importance in times of the creation of new states due to decolonisation, when systems were being built from scratch. Systems based on the Western model of liberal democracy often proved dysfunctional precisely because of maladjustment to local legal and political culture. The issue is also vital in a time of integration of states. In Europe, for instance, states — being part of the union's legal system and adjusting their laws accordingly — aim to preserve their legal identity at the same time. Tension between the constitutional independence of EU member states and the primacy of union law is a manifestation of this. The main sphere in which the tension is visible is the way of understanding the rights of an individual, when legal systems of particular states meet that of the European Union and the system based on the European Convention on Human Rights. Thus, the attitude to an individual's rights may be treated as the basic indicator of constitutional identity.¹

Constitutional identity may be regarded as the central element of a broader category of legal culture identity, because the way in which a given society

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¹ Marek Zirk-Sadowski, *Tożsamość konstytucyjna a prawo europejskie*, “Analizy Natolińskie”, 1/2012, p. 3–5.

understands its own constitutional and political institutions as well as the status of the individual and their rights determines basic meanings in legal culture. Legal professions may also be indicated as a category deciding on cultural identity. The aim of these reflections is to explain the predominant way of understanding the identity of Polish legal professions, through interpreting their history in relation to fundamental transformations of Polish political and constitutional ideas, which may reveal both functional and dysfunctional elements of this professional identity.

Primarily, legal paternalism is such an element. Most generally speaking, it is to be seen as lawyers' attitudes when they take independent actions on behalf of and for the good of a client, without prior approval from that client, and often against the client's will. In normatively understood legal ethics, paternalism in this sense is present in the way that client-lawyer relations are formed despite the existence of various limitations protecting the client's autonomy.² The present discussion attempts primarily to analyse historical sources of this paternalism in the development of the identity of Polish legal culture, and in the history of legal professions within it.

This analysis shows that deep roots of legal paternalism in our legal culture are due to combination of two discourses, the egalitarian, in the social and political spheres, and the elitist, in regard to the social status of legal professions. According to the former, the main task of lawyers is to provide all citizens with equal legal assistance in order to protect rights and freedoms, while in the latter this is possible only via the special intellectual and ethical competences of lawyers. Hence the tension between, on the one hand, the universal character of rights, and on the other, their comprehension, and consequently the sole possibility of protecting them effectively, which are limited to professional lawyers.

2. However, deliberations on Polish legal culture should be preceded by discussing another way of explaining this phenomenon. It draws on sociological theories pointing to the sharp increase in the importance of expert systems and the role of experts in modern societies; as Przemysław Kaczmarek points out, accepting that lawyers are one of the professional expert groups allows such fundamental issues of legal ethics as the moral responsibility of lawyers, trust in them and the problem of their identity, to be shown in a new light.³

² See Paweł Labieniec, *Paternalizm w prawie i etyce prawniczej*, "Filozofia Publiczna i Edukacja Demokratyczna", 2013, Vol. 2, No. 2, p. 181–195. Legal paternalism may be discussed analogically to paternalism in medicine. For more about this, see Paweł Łuków, *Granice zgody: autonomia zasad i dobro pacjenta*, Wydawnictwo Naukowe Scholar, Warszawa 2005, p. 104 et seq.

³ Paweł Kaczmarek, *Zaufanie do zawodów prawniczych w społeczeństwie ryzyka*, in: Hubert Izdebski, Paweł Skuczyński (eds.), *Etyka prawnicza. Stanowiska i perspektywy 2*, LexisNexis, Warszawa 2011, p. 11 et seq.

Most generally speaking, “an expert is a person who can successfully claim the right to certain skills or to a command of certain spheres of knowledge that are inaccessible for a laic”.⁴ Simultaneously, each expert is a specialist and beyond his specialisation is a laic. Moreover though expert services are rarely used, expert systems function continuously. Therefore they replace tradition as a source of knowledge.

Expert systems are systems of every area of specialist knowledge. They are passed on from some individuals to others. They are also based on procedural rules.⁵ In order to function, they rely on the constant trust of laics, which is a kind of entrustment, so it is not only based on generalisation of hitherto experiences in which trust was not abused. Characteristically, what is more crucial here is the general trust in expert systems, rather than in any individual expert. For one may lose trust in a particular expert, who simply loses the status of an expert in the eyes of the laic, but this need not lead to loss of trust in the whole expert system, while the consequences of losing trust in the whole system are typically enormous, and may entail its collapse.⁶

In the presented view, legitimisation of practice relies on the expert's claim to knowledge. However, disputes are frequent in expert systems. There are no ultimate authorities, and for this reason, experts in mutual relations resemble laics.⁷ Apart from the post-traditional character of expert knowledge and the significance of trust in expert systems, the following traits of such systems also draw attention. First, knowledge is embedded in methodological scepticism, assuming the possibility of advancing knowledge, and accumulation of expert knowledge is connected with specialisation. This means that expert systems improve themselves by incessant criticism and specialisation of experts, and this is accomplished by their joint, and in fact impossible to co-ordinate, effort. Such a dispersed nature of expert knowledge does not preclude the existence of professional organisations, the aim of which is primarily protection of ‘impartiality of knowledge’ and trust in the expert system.⁸ From this perspective, their role is not the supervision of experts and control of their actions — which may be significant as regards protection of laics’ trust — but the creation of conditions for the development of the entire expert system.

Thus expert knowledge is connected with reflexivity of institutions. The term is crucial for the discussed concept.⁹ Put simply, it means that experts in

⁴ Ulrich Beck, Anthony Giddens, Scott Lash, *Modernizacja refleksyjna. Polityka tradycja i estetyka w porządku społecznym nowoczesności*, trans. by Jacek Konieczny, PWN, Warszawa 2009, p. 114.

⁵ Anthony Giddens, *Nowoczesność i tożsamość: „ja” i społeczeństwo w epoce późnej nowoczesności*, trans. by Alina Szulżyńska, PWN, Warszawa 2010, p. 310.

⁶ Ulrich Beck, Anthony Giddens, Scott Lash, *op. cit.*, p. 120–122.

⁷ Anthony Giddens, *op. cit.*, p. 191.

⁸ Ulrich Beck, Anthony Giddens, Scott Lash, *op. cit.*, p. 115.

⁹ *Ibidem*, p. 36.

development of expert knowledge must constantly consider the consequences of actions relying on this knowledge, which is why it may never be complete. This phenomenon is also related to the existence of double hermeneutics, which means that advancement of knowledge is based on terms set by laics, on the basis of which terms in scientific meta-languages are formulated, which in turn influence the reality and are reused by laics.¹⁰

In applying the above reflection to lawyers, it should be noted first of all that they may naturally be seen as experts, and law as an expert system. Their primary task in this view is providing society, that is, laics as regards law, with knowledge allowing various kinds of decisions to be made. Laics expect that, by drawing on knowledge provided by lawyers, they avoid many sorts of risk concerning their future cases. So they trust lawyers in general. By this they gain a sense of security as regards their cases. However, lawyers' tasks are not limited only to applying law to specific situations. This is due to the connection between action and knowledge. Thus the task of lawyers is also a reflexive development of legal knowledge through constant criticism, taking into account the consequences of actions using this knowledge.

For this reason such an explanation of legal paternalism may be regarded as interesting, though it raises some doubts too. Fundamentally, it seems that the domination of experts need not necessarily be paternalistic. For specialisation and professionalisation are common phenomena, and each expert is simultaneously a laic in other spheres. This is why the indispensability of expert systems need not lead to elitism, as experts realise that their advantage occurs only in a professional context, and bestows no extraordinary social status.

Moreover, it is not fully possible in this explanation to grasp a gradable and historical nature of paternalistic relations between lawyers and their clients. For it turns out that a higher level of paternalism, that is less sensitivity to client's expectations and lower standards of communication with them, occurs in societies less advanced in development of modern forms of society, thus with a lower degree of specialisation of particular professional groups.

Hence it may be assumed that legal paternalism flows rather from a given culture's identity and is related to its history, and modernity may either foster or diminish it. That appears true as regards Polish legal culture.

3. The identity of the Polish legal professions, and of the whole legal culture, was formed from the age of noble democracy, through the insurrection epoch and the formation of modern political movements, until the times of Solidarity. This tradition determined the understanding of politics, state and citizenship, which is present in our comprehension of them and remains influential today.

¹⁰ Anthony Giddens, *Konsekwencje nowoczesności*, trans. by Ewa Klekot, Wydawnictwo Uniwersytetu Jagiellońskiego Eidos, Kraków 2008, p. 11.

It appears that the age of noble democracy is, apart from the debates of professional historians of law, especially underestimated in this respect. However, it has recently begun to be regarded as a source of original legal and political concepts characteristic to our identity. What is meant is that the so-called Polish republicanism is in great measure a contemporary interpretation of the achievements and significance of noble democracy for contemporary identity.¹¹ This significance can apparently be expressed by three basic claims. First, we have the historical heritage of Polish republicanism, which is original in comparison to other epochs and cultures. Second, despite difficult and distinctive history of Polish statehood, this heritage carried on, and its continuity was never broken. Third, its democratic character means that it is worth propagating in contemporary conditions. All these statements jointly form a thesis on the republican nature of Polish constitutional identity.

The classic republican idea is based on an antique ideal expressed by Aristotle and Cicero, in which the state is seen as something held in common by all free and equal citizens. A state is an organisation of primary character in relation to other communities such as family or commune. Managing state affairs is allocated to the political sphere, as a distinguished kind of activity within which the common good is realised. Such management requires special preparation and ethical virtues. Citizens cherish equal freedom of political character, namely opportunity to participate in making political decisions. In relation to this, decisions taken have primacy over individual interests, since the former are means of enjoying freedom serving the accomplishment of the common good.

This idea relies significantly on the notion of an assembly engaging in debate involving equal citizens, and reaching consensus, which, thanks to the engagement of citizens, is always a concretisation of the idea of the common good in given circumstances. Simultaneously, all citizens are responsible for achieving this. Thus they have duties to the state, which in this tradition are heavily stressed. Fulfilment of one's civic duties is a condition of freedom. In this, the republican idea differs from, for example, the liberal understanding of freedom.

For instance, this way of making and executing political decisions could concern warfare. In practice this meant that everyone shared responsibility for the outcome of the debate, since all citizens are obliged to engage equally in an armed struggle, even if they were previously against starting war. Historically, the ethos of deliberation was here tightly connected with the ethos of warfare.

¹¹ It is worth stressing that in American debates on legal ethics its sources may be clearly indicated in the role of lawyers they played in the period when the republican model of society dominated, namely mainly in the first half of the 19th century. Similarly to the situation in Poland, this was connected with the elitist character of these professions; however, due to some social and political changes this model has been replaced with a more egalitarian one. See, for example, Anthony T. Kronman, *The Lost Lawyer. Failing Ideas of the Legal Profession*, Harvard University Press, Cambridge, MA 1995.

The republican idea thus understood was markedly present in noble democracy, but it was complemented with one very important trait, which gave the idea its originality and contemporary value. It contains a mechanism for the constant spread of its fundamental terms, such as citizen, nation, etc., to successive social groups. The inclusion of groups into the political nation, first vast groups of nobility, then, at the time of the Four Year Sejm, the bourgeois, and, during the 19th century, the peasantry, is evidence that a very significant mechanism of inclusion was integrated in the Polish republican identity. The mechanism is decisive for relevance of this tradition.

In this tradition, equal freedom of particular individuals is thus in the centre of interest. There are mechanisms of inclusion and deliberation serving achievement of settlements on the community level. However, from perspective of lawyers, a series of drawbacks becomes noticeable, but only on the grounds of political and constitutional practice.

The most obvious weakness of this tradition is its ineffectiveness. Naturally, the weakness meant here comes not from the very understanding of the core of politicality, but rather from its concrete materialisation in the constitutional model of nobility. For, in practice, equation of the common good with protection of each individual's freedom, along with narrowing down the understanding of civic duties, caused weakness of political institutions. This was because a strong institution appeared as a threat to, rather than precondition of, freedom. Practically, this meant fear of a monarch's absolute power, and attachment to the principle of unanimity in making political decisions.

In consequence, all sorts of extraordinary institutions flourished. For example, confederations were set up to prevent the General *Sejm* being thwarted and disrupted by *liberum veto*, since a confederated *sejm* could pass laws by a simple majority. Therefore it may be said that "confederations became a by-form of state parliamentarianism".¹² During the whole period of noble democracy, the postulate of convoking a *sejm* of the Crown, in which all members of the noble estate could participate in order to carry out reforms, was raised.¹³ The lack of a standing army was compensated for by *levée en masse*, which is an extraordinary institution by nature. Even the Executionist movement, being a major political achievement, shows that execution of a monarch's rights required an extraordinary movement rather than a standard, institutional practice.

The focus on extraordinary institutions is reflected in the domination of the social ethos of deliberation and the ethos of struggle, over ethos of work. In the Sarmatian culture, reluctance towards systematic effort, postponing consumption and actions other than military defence of the Commonwealth are widely known and characteristic. It may be said that

¹² Julisz Bardach (ed.), *Dzieje Sejmu Polskiego*, Wydawnictwo Sejmowe, Warszawa 1997, p. 20.

¹³ *Ibidem*, p. 62 et seq.

In the eyes of the gentry, not only was the very fact of being born without a coat of arms disgracing, but also the profession [one] practised. From the so called free professions, only the lawyer found approval among members of this estate [...] [because] this profession was related to the functioning of the noble state.¹⁴

Engagement in legal disputes, and ability to win them, were hence to some extent valued the same as military activity. However, they were not related solely by the function, namely an effort for the common good, but also the extraordinary or even incidental nature of this effort, and the ethos of struggle.

4. The next two centuries witnessed reinforcement of certain elements of Polish republicanism, especially of focusing on extraordinary actions and the ethos of struggle in defence of the rights of the individual. Nevertheless, this was accompanied by a reversal of the scheme of action, primarily due to changed circumstances. Lack of sovereignty was naturally of utmost significance and had a series of consequences. The first, in terms of the extraordinary, arose from both political and social institutions, including the legal profession, which significantly improved its functioning in comparison to the previous age, and was now beginning its golden age. Apart from simple legal aid provided to various entities, it focused on three other areas. This additional activity was decisive for the identity of lawyers, and is still visible now.

The first area is defence in political trials. The category of political trials in itself is not naturally homogeneous and encompasses all kinds of legal cases — not only criminal — connected with deeds that are both political crimes, including against the state and against the constitution, as well as common crimes inspired by some extrajudicial subjects in order to further some specific political interest. So the political character of a legal case is always due to the context. Therefore, lawyers acting for the defence in such cases meant not only the necessity to show courage in the face of threats of repression, but typically required the lawyer to take a clear stance towards the circumstances that draw the political character of a case from the context.

In consequence, participation in political trials, though part of lawyers' activities, was a form of their involvement in public affairs. It was regarded by society as an expression of patriotism, and contributed to the significant growth in respect to particular lawyers and the prestige of the whole professional group. In Poland's difficult situation in the 20th century, this element of a lawyer's identity proved important and was additionally reinforced.

Another area of the activity of lawyers was direct public activity in various forms. The legal profession was also troubled by dilemmas of the time, which demanded a choice between military service in successive uprisings and peaceful

¹⁴ Janusz Tazbir, *Kultura szlachecka w Polsce. Rozkwit — Upadek — Relikty*, Wiedza Po-wszechna, Warszawa 1978, p. 32.

social and political activity, such as grassroots work. Lawyers engaged in both kinds of activity. They could be found in conspiratorial organisations, on uprising committees, among deportees to Siberia, in countless social organisations acting openly, and also in Berlin, St Petersburg and Vienna, for example, where circles of Polish lawyers functioned.¹⁵

It may be said that

in altered conditions, new tasks, which exceeded normal professional functions, emerged before lawyers. Lawyers undertook political tasks. Having had a formal education they served a considerable role in independence movements, which was seen in the November Uprising and January Uprising. The position of the legal profession in society increased, and with it the associated responsibility.¹⁶

Later, just as the role of Polish lawyers in Russia “ended almost abruptly in short period between the 1917 Revolution and the 1920 War”,¹⁷ it also ended in other occupying states.

The third sphere of activity of Polish lawyers in the 19th and beginning of the 20th century were endeavours to establish professional self-regulation and self-organisation among the community, compensating for the lack of a professional body to fulfil these roles. It is noticeable that all of these areas are decisive for the identity of Polish legal professions, to an extent that is probably greater than the mere provision of legal aid.

Another consequence of the change in political circumstances for the nonetheless preserved *modus operandi* was the perception of state institutions as opponents. Whereas in the previous age, the effort was primarily to strengthen the emaciated and endangered state (the weakness of which was seen as an advantage, or even strength, as it guaranteed freedom of an individual), during times of struggle for independence the perception was just the opposite — it was all about weakening the occupying states and ultimate liberation from them.

Among many various effects of this state of things, which are perceptible even today, one should point out that, in the sphere of legal professions, this caused a separation of the legal community into lawyers, focused on the principle of helping an individual, and a body of judges and prosecutors, threatening an individual. Political trials characteristic of the time also caused the formation of a lawyer’s moral responsibility for an individual, as opposed to an expectation of help from the law or the state. Consistent law enforcement seemed a threat.

¹⁵ Roman Łyczywek, *Adwokaci polscy w b. Cesarstwie Rosyjskim na przełomie XIX i XX wieku*, in: idem (ed.), *Szkice z dziejów adwokatury polskiej*, Wydawnictwo Prawnicze, Warszawa 1976, p. 17–19.

¹⁶ Zdzisław Krzemiński, *Historia warszawskiej adwokatury*, Wydawnictwo C.H. Beck, Warszawa 2005, p. 13.

¹⁷ Roman Łyczywek, *op. cit.*, p. 29.

This situation recalls circumstances in which the French tradition of legal ethics was formed,¹⁸ and indeed this tradition had a great influence on the identity of the Polish bar. However, the sources of these influences are not only the historically strong contacts between both societies, but the similarity of circumstances. Namely, the French bar was formed during the *ancien régime*, and it understood its task to be the protection of individuals against the absolute power of a monarch. It was a kind of buffer between state and society.

Now we near the third consequence of the changed political situation, namely further reinforcement of the ethos of struggle at the expense of ethos of work, and moreover — with no institution of political deliberation — also at the cost of ethos of deliberation. The professional ethics of Polish lawyers, like those of their French colleagues, began to be understood in the categories of typically chivalric virtues: courage, honour and disinterestedness. Simultaneously, lawyers had to be entirely independent and build a strong community of equal individuals. Jointly, this created a vision of an elite profession held in the highest respect by society. Because of this, it was possible to help endangered individuals. The already formed elitist mechanism of protecting elementary equality before law is clearly visible.

As an aside, one may remark that the aforementioned mechanism of inclusion in the political nation during the time of a fight for independence cannot be seen in the categories of including successive strata in deliberation, but rather into the fight itself, for such institutions of deliberation did not exist. Inclusion was connected with accepting a certain ethos and, typically, at the same time with engaging in a struggle. Because of this, it is hard to describe it as democratisation in the strict sense. This way of reasoning may be described as an insurrection tradition, which began in the end of the 18th century, lasted through successive 19th-century upsurges, and had its epilogue in the Warsaw Uprising. What is characteristic of this is the military mode of action. From the turn of the 19th and 20th centuries, yet another tradition emerged — that of a mass movement of deliberation, rather than physical struggle, which reached its culmination in the Solidarity movement.¹⁹ Naturally, the extent to which these traditions differ is an open and debatable issue. In other words, to what extent is replacing one with another a rupture of the identity of Polish legal culture, which occurred under the influence of Western constitutionalism, and to what extent is it the evolution of the same *modus operandi* due to a once more changed political situation.

5. In this way, one may see the formation of two discourses: egalitarian in the social sphere and elitist in reference to the social position of the legal professions.

¹⁸ See Paweł Skuczyński, *Status Etyki Prawniczej*, LexisNexis, Warszawa 2010, chapter 1.3.1.

¹⁹ See controversy about this view, among others, in: Paweł Rojek, *Semiotyka Solidarności. Analiza dyskursów PZPR i NSZZ Solidarność w 1981 roku*, Nomos, Kraków 2009.

The former is concentrated on protecting the individual and their freedoms and rights, while the latter on the mechanisms of this defence, which require the existence of a group of people undertaking extraordinary actions of supporting character, doing it with courage, honourably and with disinterestedness.

Today, they are greatly present in our legal culture, and lead to a specific approach to human rights, which are the key element of contemporary constitutionalism of Western countries. This attitude is based on understanding the protection of these rights and quarrels over the interpretation in the category of struggle, or at least of dispute. This gives rise to many more specific consequences.

First, conferring protection of rights to professionals means that, of necessity, paternalism becomes an element of the lawyer-client relationship. Laws are treated not as a constitutional element of civic identity but as a complicated instrument safeguarding against the actions of public authorities. Clients expect from lawyers that this instrument is operated effectively. It may be said that they resign in this way from an element of their legal personality, treating it only as objective means of protecting their real personality. Legal paternalism leads therefore to a lack of identification with law, treating it as source of threat, which may be countered only by similarly alien legal instruments.

Second, the issues of legal professions, especially of professional associations as guarantors of this independence, are brought strongly into focus. This focus, understandable to lawyers, is nevertheless often regarded as seeking privileged status for professional groups, replacing real care for a client's legal protection.

Third, paternalism is a stable element of the social image of lawyers. Stereotypes of lawyers found in source literature are not, from this perspective, accidental. Especially opinions concerning the self-interest of lawyers and orientation of their activity towards profit-making in collision with understanding their own activity as based on chivalric values of honour and disinterestedness gain a new dimension when perceived as an expressed reaction of a society attuned to egalitarianism towards paternalism of groups defining themselves in elitist categories.²⁰ Thus it is an expression of deep irony to lawyers' claims understood as paternalistic. Therefore, all attempts at managing this image and its change by using simple tools will meet a barrier which will make them unconvincing.

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²⁰ See Ryszard Sarkowicz, *Amerykańska Etyka Prawnicza*, Zakamycze, Kraków 2004, p. 301 et seq.

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