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Selected legally protected goods as a source of professional secrecy in the lawyer profession in Polish law

Wybrane dobra prawnie chronione jako źródło tajemnicy
w adwokackiej w prawie polskim

Abstract

The subject of the article is selected legally protected goods, which are the source of legally protected secrets – including lawyer secrets. Goods that are particularly important in this matter are freedom, freedom of communication, right to privacy, and dignity. The article also presents some aspects of the conflict of these goods with goods that are essential for the state and social interest.

Keywords

right to privacy, confidentiality, freedom, freedom of communication, dignity

Streszczenie

Tematem artykułu są wybrane dobra prawnie chronione, będące źródłem tajemnic prawnie chronionych – w tym tajemnicy adwokackiej. Dobra szczególnie istotne w tej materii to wolność, wolność komunikowania się, prawo do prywatności, a także godność. W artykule ukazano też pewne aspekty konfliktu tych dóbr z dobrami istotnymi dla interesu państwowego oraz interesu społecznego.

Słowa kluczowe

prawo do prywatności, poufność, wolność, wolność komunikowania się, godność

1. Introduction

The issue of goods subject to juridical protection, which is one of the sources of lawyer's secrecy, is undoubtedly noteworthy. Z. Duniewska notes that respect and protection should be the *ratio legis* of every law, the main purpose of which should be to do good. They delineate the direction and shape of regulation, “giving it meaning, becoming its core and subject”¹. The author emphasizes that the purpose of the law should be to care

¹ Z. Duniewska, *Introduction*, [in:] *Dobra chronione w prawie administracyjnym*, ed. Z. Duniewska, Łódź 2014, p. 9–10.

for goods as values worth protecting it. Legally protected goods are associated with terms that build positively marked emotional associations², and in British doctrine they are also identified with the concept of riches that are the object of desire and that satisfy human needs in a direct or indirect way³. Undoubtedly, therefore, these goods are the foundations for individual legally protected institutions, including legal secrets.

Legally protected goods that can be considered as additional sources of professional secrecy in Poland are primarily: freedom, freedom of communication, right to privacy and the principle of citizen's trust in the state derived from it, and also indirectly – dignity. Freedom is a principle without which a democratic rule of law could not exist. A man by birth is self-reliant, his action is completely free and can only be limited by social obligation⁴. In addition, freedom is the ability to decide about yourself and your existence. As a rule, it can mean either 'democratic freedom', 'personal freedom' or 'freedom as a civil right'. The ambiguous concept of freedom should be understood in the most important sense for the individual, i.e. through the prism of the active occurrence of human abilities and creative activities – those that are suppressed by the state and those that are supported by them. As the state develops, the sphere of activity of the individual increases⁵. According to J. Jellinek, the expansion of this sphere of the individual is so-called relative goal of the state, i.e. clearly delineating the limits of state activity in relation to the individual. The author also notes the clear difference between ancient and modern freedom. In ancient times, the individual served the state and took part in the government, and through this service indirectly pursued its goals and satisfied its needs. Not everyone had the status and rights of "person". The following were excluded from this privileged group: foreigners or infidels. Modern freedom lies in the fact that the pride of the state is the good of the citizen and the freedom of the individual lies in the fact that the interference of state governments in its existence is as small as possible and that it is clearly recognized by the state in statutes. However, it was not until the nineteenth century that Western states guaranteed the victory that "man is a person"⁶.

2. Legally protected goods – shield for professional secrecy

Freedom in a democratic state is described in the doctrine as "a specific right of citizens designated by the common good which is a social and variable phenomenon,

² P. Chmielnicki, *Dobra (korzyści) pozyskiwane dzięki normom prawa administracyjnego a funkcje administracji*, [in:] *Dobra chronione...*, p. 23.

³ A. Marshall, *Zasady ekonomiki*, Wydawnictwo M. Arcta (wydanie polskie) 1988, p. 51.

⁴ *Supra note*, p. 77.

⁵ J. Jellinek, *Ogólna nauka o państwie. Ks. II i Ks. III*, 112–120, (1924), Księgarnia F. Hoesicka (Zakł. B. Wierzbicki i S-ka) 1924, p. 112–120.

⁶ *Supra note*, p. 161–174.

social interest and legal order, which is constantly gaining a new dimension, not always beneficial for man”⁷. The idea of freedom was expressed in the constitution of the Republic of Poland in the catalog of individual freedoms and rights. In the light of the provision of article 30 of the Polish Constitution, the inherent and inalienable human dignity is a source of human and citizen freedom and rights. It is inviolable, and its respect and protection is the responsibility of public authorities. The principle expressed in article 31 is a guarantee that human freedom is subject to legal protection.

It is impossible not to mention one of the constitutional principles – the principle of freedom of choice of profession. In the light of article 65, everyone shall be guaranteed the freedom to choose and practice a job, and to choose the place of work, and exceptions shall be laid down by law. The catalog of duties imposed even on adepts of the lawyer profession is a set of quite restrictive requirements that not everyone is able to meet. However, this is by no means contrary to the freedom to choose a profession. The legislator simply reserves specific prerequisites, the fulfillment of which makes it possible to admit a person to the bar. After these conditions are met, this freedom is still being exercised, because then one cannot refuse performing such profession.

The principle of citizen’s trust in the state and its law should be emerged from the principle of freedom binding in a democratic state of law. The principle of openness comes into conflict with this principle, for which the notion of secrecy and confidentiality is of special importance. It may seem positive that even before the system transformation, the Constitutional Tribunal referred to the principle of citizens’ trust in the state, describing it as a constitutional principle, which underlies many provisions of the Constitution and raises specific obligations in the sphere of state activity⁸. W. Sadurski distinguished two types of determinants describing the status of an individual in law: guarantees of individual independence – incl. autonomy, privacy and guarantees of the individual’s influence on public decisions. In modern political philosophy, great importance is attached to determining the primacy of one of these guarantees, because between them there are both conflicts and positive interactions. The conflict is the result of democratic collective actions that may limit individual freedoms⁹.

The concept of public interest is ambiguous. W. Jellinek states that the public interest will almost always be the same as the interest of the state¹⁰, however, the doctrine

⁷ B. Jastrzębski, *Podstawowe zasady demokratycznego państwa prawa i administracji publicznej : studium prawno-polityczne*, Płock 2009, p. 57.

⁸ J. Oniszczyk, *Państwo prawne w orzecznictwie Trybunału Konstytucyjnego. Zasady państwa prawnego*, Wydawnictwo Helsińska Fundacja Praw Człowieka 1996, p. 9.

⁹ W. Sadurski, *Status jednostki w prawie: refleksje filozoficzno-prawne na temat prawowitości demokracji proceduralnej*, [in:] *Prawa stają się prawem. Status jednostki a tendencje rozwojowe prawa*, ed. M. Wyrzykowski, Warszawa 2006, p. 9–12.

¹⁰ A. Mednis, *Prawo do prywatności a interes publiczny*, Wolters Kluwer Polska 2006, p. 25.

is dominated by the conviction that public interest is the interest of the whole society or the interest of many non-individualized entities treated jointly as one entity, which J. Boć supports among others in his considerations¹¹. He distinguishes three categories of interest: social, state and individual. The social interest can be the sum of existing or future interests or a completely new value. The author expresses the postulate under which the social interest should be conducive to the realization of the individual interest and not vice versa. The state interest can, in turn, dominate the social interest only if it is necessary to achieve the goals of those citizens who constitute society. The conflict between the individual and the community is characteristic of almost every concept of law. It has increased especially during the last two centuries. It is worth noting that mainly the societies of the European Eastern Bloc, including Poland, remember the Marxist doctrine, which assumed – at least in the sphere of declarations – the general advantage over the interests of the individual. The deeper and stronger human ties are, the higher is the level of the socialization of a person, what was supposed to be a measure of their humanity. Supporters of the socialist idea demanded the primacy of social issues over individuals and the concept of collectivism over the self-centered one¹².

In considerations on the conflict of individual interest with the public interest, one cannot ignore the civil-law approach. The doctrine recognizes that civil law is, however, focused on protecting individual interests. All activities in the field of civil law relations are an expression of the autonomy of the will of the parties. The Civil Code itself, as the basic legal act in the field of civil law, does not use the concept of individual interest, but only sets out the general framework for its implementation¹³, specifying the interests of individual entities of civil law relations, e.g. creditor, principal, consumer or seller. The Civil Code also refers to the interests of interested parties and parties and having a legal interest.

Also the reference to public interest is not explicit in the Civil Code. Instead, the legislator uses the terms social interest, socio-economic interest, and the interest of the national economy. Although the individual and public interests sometimes coincide, they are in principle contradictory. However, their balance is not necessarily desirable. It is impossible to cite the value of the state good in absolute terms, because contemporary understanding of the state requires respect for the rights and interests of the individual and their protection. However, one should not absolute the individual interest, which, according to A. Zieliński, aims only to love himself and extreme self-centeredness¹⁴.

¹¹ J. Boć, *Prawo administracyjne*, Wydawnictwo Kolonia Limited 2007, p. 20–24.

¹² R. Tokarczyk, *Współczesne doktryny polityczne*, Wolters Kluwer Polska 2006, p. 143.

¹³ A. Zieliński, *Cywilnoprawne aspekty godzenia interesu indywidualnego z interesem publicznym*, [in:] *Prawa stają się prawem...*, p. 99–100.

¹⁴ *Supra note*, p. 101–102.

Recalling the principle of openness at this point, it is worth noting that it may have a positive aspect in relation to society, it may be an expression of the willingness of representatives of power to share information with citizens. However, it may also severely violate the rights and freedoms of individual entities to which this information relates. It is at this moment that the individual's confidence in authority breaks down. It is impossible to deny that in many different situations a person needs to remain anonymous and keep some information about themselves secret.

The foundations of the good, which is freedom of communication, should be sought in the Constitution in article 49, according to which freedom and protection of the secret of communication are guaranteed. In turn, article 51 section 1 stipulates that no one may be obliged otherwise than under the Act to disclose information about them. Thus, the highest legal act in Poland states a rule prohibiting interference in the act of exchange of information between individuals, regardless of its form, and this rule applies not only to the sphere of privacy of the individual, but to all information related to the broadly understood situation of the individual¹⁵. In addition, as the Supreme Court stated in its judgment of 24 September 2010, "freedom of communication is one of the consequences of broadly understood civil and personal freedom, covering all forms of communication between people"¹⁶. In addition, the Constitutional Tribunal explains in its judgment the essence of "communication": It is no accident that the Constitution provides for "freedom of communication" and not for "freedom of communication" [...]. The phrase "communicate" means staying in touch with someone, communicating, and not just making something public, providing some information or notifying about something [...]. Thus, the freedom of communication is essentially about the freedom of communication of certain people and is associated with confidentiality, which is traditionally covered by the term "secret" [...] in addition, the Court found in relation to article 51 of the Constitution that within the scope of the right to the protection of personal data, there is also the freedom of the individual from disclosing information about his person, not disclosing it to other persons, especially public authorities. "The indicated freedom includes, at its starting point, the freedom from disclosing all information regarding each of the manifestations not only strictly personal, but also the public behavior of the individual [...]. At the same time, the constitutionally imposed restrictions on the disclosure, acquisition and availability of information about private individuals are an important element of the right to privacy [...]"¹⁷.

¹⁵ M. Rusinek, *Tajemnica zawodowa i jej ochrona w polskim procesie karnym*, Warszawa 2007, p. 36.

¹⁶ Judgement of the Supreme Court of 24 September 2010, IV CSK 87/10.

¹⁷ Judgement of Constitutional Tribunal of 15 July 2009, K 64/07.

It is worth referring to legal and political doctrines as well as philosophy as part of the conflict of interests related to individual interests and those regarding the public interest. One of the planes of the conflict is the discussion between liberals and communitarians¹⁸. Communitarian concepts are currently the most expressive formula of anti-individualism. Community values in terms of tradition and culture are those that unite the supporters of this philosophy. Michael Sandel is one of the representatives of this trend, according to which man is a being “radically embedded” in the community, and not an autonomous and self-sufficient individual¹⁹. Similarly, Alisdair McIntyre indicates that society in the light of individualistic concepts resembles a group of survivors, and each individual is foreign to each other. Representatives of the seventeenth-century concept of social atomism, such as Charles Taylor, emphasize that the affirmation of autonomy and decision-making independence of an individual means its social alienation and lack of embedding it in community. In my opinion, however, individualistic concepts should have primacy over community trends, because the community, through a consensus, constituting a compromise of individuals, will always inhibit these individuals in their full pursuit of happiness and achievement of goals. Therefore, the state contributes significantly to limiting the sphere of freedom of the individual, trying to give priority to the principle of openness and state interest over the principle of trust and the individual’s right to privacy. In my view, however, only a free person who fulfills their needs can then successfully meet the needs of the community. However, when describing this dispute, it is impossible to ignore Taylor’s important thought that individualism means focusing on oneself, which leads to detachment from religious, political or historical problems, which, as a consequence, condemns the individual to narrow their views and flatten their lives²⁰.

The concept of privacy, which is one of the sources of lawyer’s secrecy, appeared in the doctrine of American law at the end of the 19th century. Noteworthy is the article, published in the “Harvard Law Review” by two lawyers – Samuel D. Warren and Louis D. Brandeis, in which they criticized the excessive and onerous reporting of facts from Warren’s life, whose wife – the daughter of Senator Thomas Francis Bayard – often organized social meetings. Lawyers pointed out the need to redefine the concept of privacy, which, in their opinion, weakened along with the growing interference of the external world in the internal world of individuals. They also invoked the universal principle

¹⁸ A. Mednis, *op. cit.*, p. 183.

¹⁹ M. Chmieliński, *Atomizm a indywidualizm. Rozważania nad myślą polityczną i prawną Wilhelma von Humboldta*, Łódź 2004, p. 10.

²⁰ *Supra note*, p. 11.

of case law, which is to provide protection for a person and their property²¹. During this period, the right to privacy was called by the authors of the right to leave alone – right to be let alone – as it turned out it was so apt that it remained in the doctrine for many years to come.

It is worth noting, however, that before its release, Judge Thomas McIntyre Cooley aptly described the state of retreat as the right to be let alone (“the right to be left alone”), referring to personal immunity and having every citizen a kind of immunity in his own home. The right to be alone is nothing more than the right of the individual to be in the sphere of privacy, freed from interference from the outside world²². According to the definition of privacy derived from the jurisprudence of English and American courts, privacy protects products of emotions and intellect, as well as appearance, activities and relationships²³. The state of New York was the first to adopt the right to be let alone formula in 1903, saying “no one may use the name, likeness or photograph of someone else for commercial or advertising purposes without his prior written consent”²⁴. This law emerged as a result of the birth in the society of libertarian instincts, the desire to have a separate, individual sphere of life, which is an expression of the uniqueness of the individual²⁵. It was so-called utilitarian individualism in the light of which every citizen has the equal right to act for profit. American lawyers emphasized that the right to protection and respect for someone else’s value is a basic value, and its separation will increase the protection of the individual’s psyche, which as a result of public disclosure of circumstances from private life is exposed to suffering²⁶.

The terminological definition of the right to privacy is related to the outline of the borders of this right. In addition to vague and indistinct terms – such as: the personal sphere of a person, the sphere of personality – there are also more expressive terms such as: sphere of intimacy, area of secrecy, sphere of individuality. What is considered private is also personal, intimate, secret, confidential²⁷. It seems obvious that in the age of globalization and computerization, the right to privacy is particularly valued. The more the external world wants to interfere in our internal sphere, the more it becomes a valued value. The speed of information flow means that we not only need to protect them in a unique way, but also prevent their excessive dissemination. The right to pri-

²¹ W. Kacprzyk, *Prawo do prywatności w prawie kanonicznym a prawo do prywatności w prawie polskim*, Lublin 2008, p. 18.

²² *Supra note*, p. 36.

²³ *Supra note*, p. 37–38.

²⁴ R. Tokarczyk, *Prawo amerykańskie*, Warszawa 2009, p. 187–188.

²⁵ A. Mednis, *Prawna ochrona danych osobowych*, Warszawa 1995.

²⁶ J. Sieńczyło-Chlabicz, *Prawo do ochrony prywatności osób powszechnie znanych w świetle Europejskiej Konwencji i w prawie prywatnym*, [in:] *Dylematy praw człowieka*, ed. T. Gardocka i J. Sobczak, Toruń 2008, p. 134.

²⁷ J. Braciak, *Prawo do prywatności*, Warszawa 2004, p. 5–12.

vacy is equated with the notion of individual interest as the one that prevails over the general interest. In the case of protection of the intimate sphere, and therefore privacy, we are dealing with care for the good of the individual. It is worth emphasizing that the Latin word *intimus* means “internal”, “deepest”, “trusted”, “closest”²⁸.

The American philosopher M. C. Nussbaum emphasizes the role of a liberal society, which should create a citizen’s protective sphere of intimate life. Actions of this society should also limit the possibilities of law enforcement surveillance of citizens and respect for private life. The scope of this protection depends on the degree of precision in determining the boundary between the relevant interference and abuse²⁹. The American philosopher T. Nagel attempted to draw the boundaries between private and public interest. Restraint is the key activity here, or rather the failure to implement disturbing content in public life, to convey negative and harmful opinions about it to others, and to disclose information that has a destructive impact on relationships³⁰. It is worth noting that the constantly observed unit not only loses privacy, but also the ability to self-development and innovative action, and to put creative ideas into practice.

However, M. Nussbaum does not agree with building the definition of privacy on the basis of opposing the private interest to the public interest. She suggests setting own goals and an area of personal freedom, and then take into account the goals of others. The restriction of the sphere of privacy will be the potentially harmful nature of our actions towards other people³¹. Based on the definition of A. Koppf, the sphere of private life is divided into the sphere of intimate personal life and the sphere of private personal life. The sphere of intimate life includes those experiences and information with which, in principle, people do not share or share only with their loved ones. Information from the sphere of personal life is shared only with family and friends. This concept has been accepted, and, among other things, as a result of its adoption, the sphere of private life belongs to personal rights protected by civil law³².

Performing professions of public trust, especially in the aspect of protection of professional secrecy, therefore involves a legal and moral dilemma of their representatives. They are faced with the contact of two opposing values: the individual’s right to protection of the sphere of private life and public interest. There may be situations in which the right to privacy is in the public interest, even if the elections are secret and guarantee their fairness³³.

²⁸ W. Kacprzyk, *op. cit.*, p. 5.

²⁹ B. Chyrowicz, *Prywatność w dobie globalizacji*, Lublin 2009, p. 5.

³⁰ *Supra note*, p. 8–9.

³¹ *Supra note*, p. 10–11.

³² W. Kacprzyk, *op. cit.*, p. 21.

³³ A. Mednis, *Prawo do prywatności...*, p. 21.

Why is the right to privacy such a sensitive area of human rights? The impact of history on this aspect is not without significance. J. Gauck emphasized in his speech at the International Conference on Privacy and Personal Data Protection in Wrocław in 2004 that totalitarian power unlawfully violated the essence of the right to privacy and human dignity. In turn, L. Kieres referred to the current policy of accounting for the past in the aspect of human rights protection. In his paper he negated the tendencies to hastily disclose information contained in the documents of the Institute of National Remembrance regarding victims. Even the disclosure of this information in good faith may result in such persons being subjected to further harm and the violation of their personal rights. However, the solution introduced in relation to the personal data of officers as well as employees and associates of state security bodies seems justified. These entities are subject to the relative protection of personal data, because at the request of a person having the status of a victim, the Institute of National Remembrance is required to provide, among others names and other personal data of those who collected or evaluated data about them³⁴. The Act on the Institute of National Remembrance provides for anonymization of personal data³⁵. Article 3 and 32 of this Act shows that in documents made available to the victim, the personal data of other victims or other persons should be anonymized, unless this would be technically impossible³⁶.

At the above-mentioned Conference, an attempt was also made to stress the importance of continually shaping public awareness in terms of the right to privacy. R. Tang pointed out the need to consolidate the view that privacy is a value that everyone should respect. This is a long-term process because community members still take the issue of privacy for granted, and only when it is violated do they feel anxious. This process consists of several elements, including: strengthening the social value of privacy, creating a culture characterized by a sense of privacy and developing an active attitude in the matter of personal data protection³⁷.

In the view of A. Sakowicz, the concept of the right to privacy is inseparably connected with its source – dignity – an inalienable value inherent in every human being. Chapter II of the Polish Constitution on the freedoms, rights and obligations of man and citizen precedes article 30 “being a kind of preamble” to this chapter. It contains a provision on human dignity as a constitutional value requiring public authorities to respect

³⁴ *Międzynarodowa Konferencja Ochrony Prywatności i Danych Osobowych. Prawo do prywatności – Prawo do godności*, ed. The Office of Inspector General for the Protection of Personal Data, Warszawa 2006, p. 71.

³⁵ Act of December 18, 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, Journal of Laws from 2016, position 1575 as last amended, (based on: Dz.U. Polish Journal of Laws of 2016, items 152, 178, 677, 749), online source: <https://ipn.gov.pl/en/about-the-ipn/documents/327/The-Act-on-the-Institute-of-National-Remembrance.html>, access: 02.02.2019.

³⁶ *Supra note*, p. 77.

³⁷ *Supra note*, p. 115.

and protect it. “Inherent and inalienable” human dignity is the only “inviolable” status, and its respect and protection is the responsibility of public authorities. The concept of human dignity exists both in international documents and in many modern Constitutions, e.g. Belgium, Finland, Greece, Spain, Germany, Portugal, Sweden, Switzerland. From the countries of Central and Eastern Europe, the provisions on human dignity include, among others Constitutions of Ukraine, Slovenia, Lithuania, Estonia, the Czech Republic, Slovakia and Croatia³⁸. Under Polish law, it is generally accepted that human dignity is a fundamental principle of law. The supremacy of the principle of inherent human dignity results from the fact that dignity is defined as a source of rights and freedoms, the catalog of which is in Chapter II of the Constitution. In the literature, the principle of dignity is seen as the supreme principle of the Constitution, placing it even above the principle of a democratic state ruled by law. In the Polish Constitution, the order to protect dignity is contained in article 30, which states that respect for and protection of dignity is the responsibility of public authorities. This provision establishes on the side of the state an obligation to protect human dignity in relations with other people as well as with public authorities, and the scope and manner of compliance with this obligation may be controlled by a court. Human dignity in the form of personal dignity is a source of human and citizen freedoms and rights, and individuals enjoy, regardless of the will of the legislator, certain inherent and inalienable rights and freedoms, the basis and justification of which is the dignity of the human person, which is the highest value of the entire constitutional order³⁹. In the Polish language dictionary, however, dignity appears in three meanings: a sense of self-esteem, self-respect, honor, pride; an honorable position, title or office; name. As Z. Duniewska notes, dignity is perceived as a kind of objective value assigned to each individual and at the same time to all beings that make up the human species. It is an inseparable value of man, his self-esteem, the core of humanity⁴⁰.

Dignity cannot be understood as a set of features or rights granted from above, because it is the supreme value in relation to the state, and thus the authorities of that state. They should take into account the existence of the sphere of autonomy of the individual. Under this autonomy, man should fully realize himself socially⁴¹.

³⁸ Online source: http://lex.pl/raporty/21_05_01/rz01_43.pdf, 23rd of March 2011.

³⁹ *Supra note*.

⁴⁰ Z. Duniewska, *Poszanowanie i ochrona godności człowieka w działaniach podmiotów administracyjnych*, *Facultas Iuridica Universitatis Ressoviensis*, „Ius Et Administratio” 2005, vol. 8, nr 4, p. 13–15.

⁴¹ A. Sakowicz, *Prawnokarne gwarancje prywatności*, Zakamycze 2006, p. 13.

3. Conclusion

Personal rights are an unquestionable value for the legal systems of states. What's more, they are also a source for professional confidentiality in Polish law. In constant opposition to the public interest, state interest and good justice stands the right to privacy – as one of the most important rights for the individual – and dignity. In order to protect him, it is important in my opinion that these contrasting goods are each time properly considered by public authorities and the judiciary. There is a temptation to favor goods opposed to the individual due to its weaker position.

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