

Lawyers' Professional Secrecy and Justice

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Abstract

Professional secrecy is a fundamental right that many professionals, including doctors, notaries and lawyers, must observe. Within the lawyer-client relationship, professional secrecy is a privilege which ensures that any information you provide to your lawyer is kept confidential. It also applies to verbal or written opinions provided to you by your lawyer. Under professional secrecy, your lawyer is forbidden from revealing this information, even if questioned before a judge.¹ This serves to create trust between you and your lawyer. It also means that you can entrust your lawyer with all types of information, even things you wouldn't tell your best friend.² This article concerns lawyers' professional secrecy and provides therein analysis on a possibility of the justice denied in case the provisions on professional secrecy of lawyers are sustained as recorded. This might as well be termed as concealing an offence or failing to assist a person in danger which is also a crime punishable under Rwandan law.

Key words: Professional secrecy, lawyers, Justice, concealing an offence

¹<http://www.barreau.qc.ca/en/public/relation/secret/>

² Ibid

1. Introduction

In any profession there are or ought to be some secrets that must by no means be disclosed anyhow to any party. Even in medical profession it is clearly stated that; “it is a practitioner’s obligation to observe the rule of professional secrecy by refraining from disclosing voluntarily without the consent of the patient to any third party information which he has learnt in his professional relationship with the patient”³. This is comprehensible and obvious simply because nobody would wish his secrets to be disclosed and nobody is hurt. However when it comes to lawyers professional secrecy, it should be treated quite differently due to the likely consequences. In as far as lawyers’ professional secrecy is concerned, it is likely to cause injustice in some jurisdictions depending on its application, simply because the secret deemed not to be disclosed contains enough evidence to help a judge to render a case transparently. In as far as human rights is concerned, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of

freedom, justice and peace in the world,⁴ which means that without justice human rights is not protected. In this paper I will talk about the lawyers’ professional secrecy as opposed to justice that must not only be done but also seen being done.

As it was mentioned above, professional secrecy is a fundamental right that many professionals, including doctors, notaries and lawyers, must observe. This makes it compulsory observation and the law sanctions failure to do so with a punishment. Within the lawyer/client relationship, professional secrecy is a privilege that ensures that any information you provide to your lawyer is kept confidential; it also applies to verbal or written opinions provided to you by your lawyer. Under professional secrecy, your lawyer is forbidden from revealing this information, even if questioned before a judge.⁵ The concern however is that there are circumstances which require that unless a person discloses the information, injustice is going to prevail and this will result into a society where the wrongdoers go

³Lee Yong K. Professional secrecy and the law. Medical Unit III, General Hospital, Singapore. Singapore Medical Journal. Vol. 8 No 2, June 1967.

⁴ See the preamble of 1948 United Nations Universal Declaration of Human Rights

⁵1948 Professional secrecy available at <http://www.barreau.qc.ca/en/public/relation/secret/>

unpunished instead the innocent suffer the punishment meant for criminals.

According to article 56 (1) of the law n°83/2013 of 11/09/2013 establishing the Bar Association in Rwanda and determining its organization and functioning, it is clearly stipulated that: An advocate⁶ shall have an obligation not to reveal any matters of professional secrecy,⁷ while article 54 of the same law states that: Professional secrecy shall cover correspondences exchanged between an advocate and his/her clients and those between advocates. It shall also concern discussions and negotiations between advocates as well as the grounds for such negotiations unless the fact of the existence has to be revealed for a sound reason, at the discretion of the President of the Bar Association.⁸ However paragraph 2 of article 51 of the said law provides that “In performing his/her profession, an advocate shall have the obligation to exercise probity, dignity, delicacy, diligence, loyalty, to say the truth and to act for the benefit of his/her

⁶ Here an advocate refers to a professional lawyer who represents or assists individuals or organizations in courts of laws and may provide any other legal service whenever deemed necessary.

⁷Article 56 (1) of the law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning

⁸Article 54 of the law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning.

clients”⁹. This draws my attention and makes me wonder if the obligation to tell the truth should not include disclosing some facts in case it is evident that unless it is disclosed injustice is going to prevail and some one’s life is in danger as a result of that injustice.

2. A case study on the matter

The following case study draws attention on the seriousness of this matter: *Imagine that you are a criminal lawyer defending a client who is on trial for aggravated homicide contrary to Art 145 of the Criminal Code in Rwanda. You are quite certain that she is innocent of the crime. The trial is going in her favor and the probability of acquittal is very high. You have established a good relationship with her and (bolstered by prospect of acquittal) she tells you that although she did not commit this homicide she did commit another homicide four years earlier. She goes on telling you that another woman with long criminal record was convicted of that homicide and is serving life imprisonment for it. You attempt to persuade her to confess to crime but she adamantly*

⁹Article 51 (2) of the law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning

*refuses. What would be your decision?*¹⁰ In this case suppose the lawyer has all facts leading to the truth and may never be obtained from anywhere else.

Although it is also provided that an advocate may reveal any professional secrecy when so required by those entrusted with the enforcement of the code of ethics of the Bar Association in the performance of their duties and only for the purpose of their duties,¹¹ there must be provisions which provide the circumstances through which the evidence may be disclosed when it is the only way that would lead to the truth and eventual justice, like appointing a person whose duties include receiving such information. This might work better if a person from National Public Prosecution Authority is selected such as the Prosecutor General or the Inspector General of Prosecution. The reason being that if an advocate waits for the other superior authorities to ask him/her to disclose the information, this may never happen due to the fact that apart from the lawyer, there is no one informed about the situation hence

¹⁰ This is a case study given to students in Rwanda perusing a post graduate diploma in legal practice.

¹¹ Article 56(2) of the law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning

even the prosecution proceedings may never be initiated.

3. Justice denied

Basing on the above mentioned case, here is an innocent woman serving a life imprisonment sentence, there is another woman presumed innocent but with full knowledge that she herself murdered the victim and another person is serving the sentence she deserves. There is a lawyer that should help justice to be done and whose obligations includes to exercise probity, dignity, delicacy, diligence, loyalty, and to say the truth¹² but knows the truth and has evidence that can lead to justice, but is being bound by the law not to disclose the truth.

If there is no new law or amendment to the existing law as a remedy for that injustice, it would mean that in any case that involves similar circumstances, the innocent person is more likely going to spend like fifty, hundred or the rest of his or her life in prison then dies from there, yet the truth that would

¹²Article 51 (2) of the law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning

set the person free from imprisonment is known by individuals (lawyers and the actual criminals) who must not reveal it simply due to the so-called professional secrecy.

4. Professional obligations of Advocates

Advocates, apart from being professionals, are also officers of the courts and play a vital role in the administration of justice, that's why the advocate ought to always keep in mind that he is an auxiliary to the Justice and the oath he takes before practicing, implies that the advocate took commitment not to be disrespectful to courts and public institutions. Being an auxiliary to the Justice must be his commitment to support in attaining justice for all; hence files, data and any other information deemed to contain facts that can lead to justice should be deposited to the right authority by any lawyer in possession. The relationship between advocates and judicial legal authorities must be characterized by deference and mutual respect as it is provided by the rules and regulations of the Rwanda Bar Association¹³. However it

should not end in just a mere respect, rule of law must be observed in such institutions.

5. Concealing an offence

In as far as Rwandan criminal law is concerned, concealing an offence or failing to assist a person in danger is a crime punishable under Rwandan law. As a matter of fact it is clearly stated that "*Any person who has knowledge of a felony about to be committed or that has been committed and fails to inform security organs, judicial or administrative authorities while this information could help prevent or limit its consequence, shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of one hundred thousand (100,000) to one million (1,000,000) Rwandan francs.*"¹⁴ However this is violated under the umbrella of another law in which an advocate has an obligation not to reveal the so-called professional secrecy as seen above.

Here is the only lawyer with full knowledge, evidence and all information that someone has committed a crime and another person is innocently serving the sentence of life imprisonment, and the lawyer shall never disclose the information. The result might be

¹³ Article 153 of the rules and regulations of the Rwanda Bar Association

¹⁴ Article 570 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code *Official Gazette n° Special of 14 June 2012.*

that people may innocently end up dying in prisons while the criminals that committed the crimes are enjoying their lives continuously.

One of the fundamental principles as outlined in article ten of the constitution of the republic of Rwanda states that “building a State committed to promoting social welfare and establishing appropriate mechanisms for equal opportunity to social justice”¹⁵. Equal opportunity to social justice must be manifested in all areas of life and all stake holders must play their respective roles.

6. Conclusion

The practice of the so called professional secrecy in some jurisdictions cause injustice simply because in some circumstances the secret deemed not to be disclosed contains enough evidence to help a judge render a case transparently. There are circumstances in which if the lawyer refrains from disclosing the information, injustice is going to prevail and this will result into a society where the wrongdoers areunpunished

instead the innocent suffer the punishment meant for criminals.

The obligation of lawyers to exercise probity, dignity, delicacy, diligence, loyalty, and to say the truth should include disclosing some facts in case it is evident that unless it is disclosed injustice is going to prevail and some one’s life is in danger as a result of that injustice. As a matter of a fact Rwandan law punishes concealing an offence where it states that “Any person who has knowledge of a felony about to be committed or that has been committed and fails to inform security organs, judicial or administrative authorities while this information could help prevent or limit its consequence, shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of one hundred thousand (100,000) to one million (1,000,000) Rwandan francs.”¹⁶

It is against this background that there ought to be provisions which provide the circumstances through which the evidence may be disclosed when it is the only way that would lead to the truth and eventually justice. A person from National Public Prosecution Authority such as the

¹⁵ Article 10 al. 5 of the constitution of the republic of Rwanda of 2003 revised in 2015. *Official Gazette n° Special of 24/12/2015.*

¹⁶ Article 570 of the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code *Official Gazette n° Special of 14 June 2012.*

Prosecutor General or the Inspector General of Prosecution may be selected to receive such information because if an advocate waits for the other superior authorities to ask him to disclose the information, it may never happen due to the fact that apart from the lawyer, there is no one informed about the situation hence even the prosecution procedures may never commence.

Lee Yong K. Professional secrecy and the law. Medical Unit III, General Hospital, Singapore. Singapore Medical Journal. Vol. 8 No 2, June 1967.

Professional secrecy available at <http://www.barreau.qc.ca/en/public/relation/secret/>

7. References

The constitution of the republic of Rwanda of 2003 revised in 2015. *Official Gazette n° Special of 24/12/2015*

the Organic Law N°01/2012/OL of 02/05/2012 instituting the penal code *Official Gazette n° Special of 14 June 2012*

The law n°83/2013 of 11/09/2013 establishing the bar association in Rwanda and determining its organization and functioning

the preamble of 1948 United Nations Universal Declaration of Human Rights the rules and regulations of the Rwanda Bar Association a case study given to students in Rwanda perusing a post graduate diploma in legal practice.