SEARCH FOR TRUTH AND DEFEND THE CLIENT: CAN A LAWYER DO BOTH?*

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Abstract: A deontological model of legal ethics took shape over the course of the Middle Ages and early modern period, thanks to contributions from both jurisprudence and moral theology. With bans on defending unjust causes and resorting to unjust means to defend a cause, the defense lawyer became part of a legal process that sought to ascertain the truth – a key contributor to the administration of justice. However, jurists and theologians made some compromises when it came to these rules, affirming that a lawyer also had a duty to defend his client to the fullest.

Key words: Lawyer ; legal ethics ; truth ; defense

Summary: 1. Introduction: Medieval and early modern legal ethics. – 2. The lawyer's oath. – 3. From the lawyer's oath to the ban on defending unjust causes. – 3.1. The definition of an 'unjust cause'. – 3.2. Doubtful causes. – 4. Criminal trials: The duty to defend a client. – 4.1. Lawyer-client privilege. – 5. The ban on resorting to unjust means to defend a cause. – 6. The relationship between the defense lawyer and his client. – 7. The accused under questioning: Conflict between the search for truth and the right to counsel. – 8. Concluding remarks.

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1. *Introduction: Medieval and early modern legal ethics*

The role of a defense lawyer has always been quite ambiguous. Indeed, a defense lawyer is often at the center of conflicting values and interests, which are sometimes even openly at odds. Thus, he is continually forced to make choices.

On the one hand, a lawyer contributes to the administration of justice through his defense by helping the judge reach the correct ruling. The judge, while technically attempting to reconstruct the formal legal truth, always aspires to get as close as possible to the substantive truth. On the other hand, a lawyer promotes and defends the interests of his client, who is not interested in a just sentence but rather a favorable one.

Indeed, this 'dual loyalty' is part of the current judicial system: loyalty to the client on the one hand, to the judicial system itself on the other.

As stated in the Code of Conduct for Italian Lawyers (art. 1), ethical rules are 'essential' in order that a balance can be struck between these two ostensibly contrasting principles. Only by respecting the Code of Conduct can lawyers maintain this dual loyalty to the defense of their client and to justice itself.

From a historical perspective, in what ways and to what extent have ethical rules achieved a balance between these values? And what role has been assigned to the lawyer as a result of this balance?

First and foremost, it must be clarified that a deontological model of legal ethics began to take shape in the Middle Ages and early modern period thanks to contributions from both jurisprudence and moral theology (although it is a well-known fact that the term 'deontology' was coined by Jeremy Bentham, we shall nonetheless use this expression in reference to the Middle Ages and early modern period, as many of the principles and issues at the center of the current debate were dealt with in those centuries).

Morality has contributed so much to the formation of this model that it still influences the current debate over whether ethical rules are legal or moral in nature. Indeed, up until the enactment of the Code of Conduct for Italian Lawyers in 1997, these rules were considered essentially moral in nature; as such, they were interpreted subjectively and at one's own discretion, to paraphrase the criticism of Remo Danovi. Only upon approval of the Code of Conduct was it possible to move beyond this view and

establish the legal nature of ethical rules for lawyers (despite the fact that, as the term itself suggests, their content was primarily ethical in nature). This was subsequently reaffirmed by Italy's Court of Cassation.

Regulation of the legal profession was shaped by a broad range of sources: texts from Justinian's compilation and canonist collections, scholarly contributions to the doctrine of civil law and canon law, the *ordines iudiciorum*, royal decrees, statute law; but also works in moral theology, in particular the *Summa theologiae* by Thomas Aquinas (II^{a} II^{ae} q. 71), the *summae confessorum*, and texts from the School of Salamanca.

In the early modern period, these sources gradually converged in treatises on advocacy, which took a specialized look at the legal profession beginning at the end of the fifteenth century. Mostly written by lawyers and judges, and sometimes even by ecclesiastics, these treatises represented scholarly work conducted outside of a university context. The aim was not only to provide defense lawyers with practical advice for their everyday practice, but also to collect the rules of professional conduct in one place, which up until then had been scattered among various legal and theological texts (yet another reason for this was to curb abuses and failings among lawyers, which the writers themselves reported as being quite frequent).

Thus, these precepts applied to the internal forum just as much as they did to the external forum. In this regard, it is important to remember that the separation of law and morals began in the sixteenth century but would not be complete until the end of the eighteenth century; and though this process would eventually lead to a distinction between legal rules and moral rules, it meant that between the sixteenth and seventeenth centuries, the entire debate over legal ethics was centered around the potential conflict between the internal and external forums.

In their treatises, these writers set out the duties of lawyers in terms of their relationships with colleagues, judges and clients. And while they have been adapted to the times, these same principles and rules can still be found today in the Code of Conduct for Italian Lawyers.

Some specific examples are the duty of loyalty (art. 10) and the duty not to disclose confidences and secrets (art. 13), the violation of which is a criminal offense (articles 380, 381 and 622 of the Italian Penal Code); the duties to carry out the profession with diligence (art. 12) and to represent

the client competently (art. 14), which not only ensures the quality of a lawyer's professional performance, but also implies civil liability; the duty of independence (art. 9); and issues concerning legal fees (currently at the center of a legislative debate), in particular the ban on contingent fee agreements (art. 25).

Other rules have undergone more significant changes since the Middle Ages and early modern period, including in the actual language used to describe them: specifically, I am referring to what was known in the age of the *ius commune* as bans on defending unjust causes and resorting to unjust means to defend a cause. These rules helped create a specific, deontological model of legal ethics in which the defense lawyer became part of a legal process that sought to ascertain the truth – a key contributor to the administration of justice. Today, we know these rules as the duty to act honestly and the duty to act truthfully.

2. *The lawyer's oath.*

As stated above, the ban on defending unjust causes could be linked to the duty to act honestly, which is currently established in article 9 of the Code of Conduct (included among the other fundamental duties of a lawyer), as well as in article 88 of the Italian Code of Civil Procedure and article 105 of the Italian Code of Criminal Procedure. In particular, there was a rule in the previous Code of Conduct wherein this duty was described using similar words to those used in article 96 of the Code of Civil Procedure on vexatious/frivolous litigation (art. 6 of the 1997 Code of Conduct for Italian Lawyers).

More of a general principle than it is a rule, it concerns all activities that a lawyer is to carry out during trial. It obliges the lawyer to contribute to the administration and efficiency of justice: that does not mean that a lawyer must make sacrifices in defending his client to the fullest, but rather that he must not defend the client to such an extent that he loses awareness of the institutional purpose of the trial.

This principle was developed over the course of the Middle Ages through jurists' reflections on the lawyer's oath, which was required in accordance with Justinian's constitution *rem non novam* of 530. Justinian wanted to avoid abuse of process: as such, the oath *de calumnia* was to be taken immediately after the *litis contestatio* to demonstrate that the

parties were acting in good faith. Lawyers were thereby bound not to accept the charge if they believed the cause was dishonest (*improba*), unfounded (*penitus desperata*) or fraudulent (*ex mendacibus allegationibus composita*); if such were to emerge during the trial, they were to immediately abandon their defense:

> Patroni autem causarum, qui utrique parti suum praestantes ingrediuntur auxilium, cum lis fuerit contestatam, post narrationem propositam et contradictionem obiectam in qualicumque iudicio maiore seu minore vel apud arbitros sive ex compromisso vel aliter datos vel electos sacrosanctis evangeliis tactis iuramentum praestent, quod omni quidem virtute sua omnique ope quod iustum et verum existimaverint clientibus suis inferre procurent, nihil studii relinquentes, quod sibi possibile est, non autem credita sibi causa cognita, quod improba sit vel penitus desperata et ex mendacibus adlegationibus composita, ipsi scientes prudentesque mala conscientia liti patrocinantur sed et si certamine procedente aliquid tale sibi cognitum fuerit, a causa recedant ab huiusmodi comunione sese penitus separantes[1].

Nonetheless, the oath seemed to have fallen into desuetude by the middle of the twelfth century. Indeed, the sources tell of an episode that reportedly centered around two of the four doctors studying under Irnerius and Emperor Frederick Barbarossa: according to Odofredus, the Emperor was said to have asked Bulgarus and Martinus whether an oath was still required and practiced in their time, and they answered that it had become customary not to take the oath in court:

> Or signori, in ista secunda parte huius legis nota quod dum quadam die dominus Fredericus senior quesivisset a domino Bulgaro et Martino: Dicatis mihi, ego intellexi quod lite contestata a litigatoribus, patroni causarum debent iurare quod non fovebunt iniquam litem, et si in processu cognoverit iniustam litem fovere clientulum suum, quod deferent causam illam: cur non facimus quod advocati in foro nostro ita iurent? Ad quod ipsi respondent hoc iure cavetur, licet consuetudine non habetur[2].

[1] Cod. 1.3.4.

[2] Odofredus, *Lectura super Codice*, Lugduni, 1552, f. 133rb, n. 3.

A debate on the relationship between law and custom was already under way in the Bologna school, leading the glossators to describe this custom of not taking the oath *de calumnia* as a general custom, seeing as how it was in practice everywhere. According to the original distinction introduced by Bulgarus and then subsequently adapted by Johannes Bassianus, Azo and lastly Accursius, the glossators believed that this custom had nullified the constitution *rem non novam*. Indeed, according to Azo,

> generalis consuetudo pro hoc est, quod nec in Italia nec in Francia vides observari, quod iurent advocati in causis. Unde haec consuetudo tollit legem[3].

Medieval jurisprudence attempted to reinstate the oath-taking requirement in order to reaffirm the fundamental principles of the profession and curb abuse. What arguments were used to achieve this goal?

The commentators continued in the glossators' footsteps for what concerned the relationship between law and custom. They introduced a distinction between custom and desuetude: if a norm was constantly and repeatedly in practice, and that norm was different from the one provided for by written law, then it would nullify the written law; however, the mere inobservance of a written law would not nullify it. Therefore, as affirmed by Cynus (in reference to Pierre de Belleperche), the constitution *rem non novam* was to be considered still in force:

> Secundo quaeritur nunquid observandum sit quod haec lex dicit sic de iure isto scripto, sed Bul. dicit quod de consuetudine non servatur et sic de facto cum peteretur a beo iuramentum respondit. Sed Pe. dicit quod Bulg. male dixit, quia iura non abrogantur, licet non fuerint usitata, nisi consuetudo contraria irrepserit, nam si sic tollerentur leges, multae leges infortiati essent sublatae[4].

[3] Azo, *Lectura Codicis*, Parisiis 1577, f. 171.

[4] Cynus Pistoriensis, *Super Codice et Digesto veteri Lectura*, Lugduni, 1547, Comm. in Cod. 3.1.14, f. 94va, n. 3.

The canonists maintained that the institute was still in force based on the principles of canon law. It should be noted that on a local level, canon law also provided for oaths that were similar to the Justinian oath, and that in 1274, it became required for all lawyers who worked in ecclesiastical courts to take an oath (nonetheless, this rule was not included in the *Liber Sextus*). Failure to comply would result in disbarment from the profession:

> Properandum nobis visum est, ut malitiosis litium protractionibus occurratur: quod speramus efficaciter provenire, si eos, qui circa judicia suum ministerium exhibent, ad id congruis remediis dirigamus. Cum igitur ea, quae ad hoc salubriter fuerant circa patronos causarum legali sanctione provisa, desuetudine abolita videantur: nos sanctionem eamdem, praesentis redivivae constitutionis suffragio, cum aliqua tamen adiectione, nec non et modera mine renovantes, statuimus ut omnes et singuli advocationis officium in foro ecclesiastico, sive apud sedem apostolicam, sive alibi, exercentes, praestent, tactis sacrosanctis evangeliis, iuramentum, quod in omnibus causis ecclesiasticis, et in aliis in eodem foro tractandis, quarum assumpserunt patrocinium, vel assument, omni virtute sua, omnique ope, id quod verum et iustum existimaverint, suis clientulis inferre procurent; nihil in hoc studii, quod eis sit possibile, relinquentes, quodque in quacumque parte judicii eis innotuerit improbam fore causam, quam in sua fide receperant, amplius non patrocinabuntur eidem, immo ab ea omnino recedent, a communione illius se penitus separantes, reliquis quae circa haec sunt in eadem sanctione statuta, inviolabiliter observandis[5].

Although the canonists did not contest the glossators' theory – namely, that the custom of not taking an oath could nullify the law – they nonetheless warned that the enforcement of such a rule would provide lawyers with an occasion of sin. Indeed, while Hostiensis referred to the custom of not taking the oath *de calumnia* as an example of a very widespread («generalissima») custom, he believed that *aequitas canonica* called for an exception to the rule (which, as mentioned above, would have nullified the constitution *rem non novam*): such was justified by the need to guarantee honest conduct on the part of defense lawyers:

[5] *Concilium Lugdunense II - 1274*, in *Conciliorum Oecumenicorum Decreta*, J. Alberigo, P. P. Joannou, C. Leonardi, P. Prodi (edd.), Bologna, 1991, p. 324.

> per hanc dicunt abrogatam legem quae dicit quod patroni sive advocati iurare debent in initio litis quod contra conscientiam causam non foveant desperatam Cod. de iud. rem non novam unde dixit Bul. Quod iuramentum lege cavetur sed in consuetudine non habetur […] quamvis advocati pro magna parte cavilosi et malignari volentes et sibi adinvicem deferentes hanc glossam Bul. Amplectant, ipsam tamen non approbo, quia contra legem illam non puto valere consuetudinem vel desuetudinem, sicut nec valet consuetudo quod de calumnia non iuretur infra de iura. calu. ceterum et est ratio in utroque ne per talem consuetudinem peccata mortalia nutriant et quicquid velant vel palliant pessimi advocati quamvis non iurent si contra conscientiam foveant edificant ad geennam[6].

The fact that the oath was not actually taken led to two consequences.

On the one hand, there was an institutional response. Local judicial systems developed alternative or additional kinds of oaths in place of the one required by the *ius commune*.

European monarchies required lawyers to take an oath, not only to remind them of their fundamental duties, but also to make it clear that they were subservient to the judges.

For example, as part of his efforts to centralize power, Frederick II introduced an oath that was very similar to the Justinian oath, though much more detailed. It was to be taken upon admission to the legal profession and renewed yearly:

> Advocatos tam in curia nostra quam etiam coram provinciarum justitiariis et bajulis statuendos necnon et per partes singulas regni nostri, ante receptum officium tactis sacrosanctis evangeliis corporalia volumus sacramenta prestare: quod partes quarum patrocinium susceperint cum omni fide et veritate sine tergiversatione aliqua adjuvare curabunt, ipsas de facto instruent, contra veram conscientiam nullatenus allegabunt, et quod causas non recipient desperatas, et si quas forte receperint partis fortasse mendaciis coloratas, que juste sibi in principio videbantur, et in processu judicii vel de facto vel de jure compareant ipsis injuste, ipsarum patrocinium incontinenti dimittent; sprete parti, prout priscis legibus et statutum, licentia convolandi ad alterius patrocinium deneganda. Jurabunt etiam quod

[6] Henricus de Segusio, *Summa*, Lugduni, 1542, f. 155ra, n. 11.

> augmentum salarii in processu judicii non requirent nec de parte litis ineant pactiones[7].

The communes did the same thing.

For example, the 1331 statute of Bergamo simply reaffirmed that the oath *de calumnia* was required, in accordance with the *ius commune*. In all probability, the only purpose for doing so was to strengthen the oath's effect:

> Item statuerunt et ordinaverunt quod in qualibet causa, coram quacumque iudice ventilanda, iurare debeant partes de calumpnia. Et quod procuratores et advocati iurent quod malitiose non calumpniabuntur in causis, in quibus erunt advocati et procuratores. Que sacramenta prestentur in initio cuiuslibet cause[8].

Other communes introduced a lawyer's oath in order to respond to specific needs. Such was the case in Lucca, where the statutes of 1308 forbade lawyers from bringing or continuing with an appeal if they believed that the original sentence was just:

> Et omnibus iudicibus et causidicis lucanae Civitatis, qui feudum et beneficium a Comuni lucano vel Camera Lucani comunis habent, precipiam per sacramentum infra mensem mei introytus, ut nullum consulent appellare vel appellationem prosequi, nisi eidem iudici vel causidico videtur quod appellans iniuste fuerit condemnatus[9].

3. *From the lawyer's oath to the ban on defending unjust causes.*

Many of these oaths would meet the same fate as Justinian's.

In the sixteenth century, for example, Matthaeus de Afflictis recounted how not taking the oath had long been customary practice

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[7] *Constitutiones regni Siciliae a Friderico secundo apud Melfiam editae, in quibus leges tam a suis praedecessoribus quam ab ipso antea publicatae concluduntur*, in *Historia diplomatica Friderici Secundi*, J.L.A. Huillard-Breholles (ed.), Paris, 1852-1861, vol. IV, parte I, pp. 1-178 (pp. 62-63).

[8] *Lo Statuto di Bergamo del 1331*, C. Storti Storchi (ed.), Milano, 1986, p. 107.

[9] *Statuto del comune di Lucca dell'anno MCCCVIII*, Lucca, 1867, p. 265.

(«vetustissima»), and how the rule in the *Liber Augustalis* requiring such an oath had fallen into desuetude at least a century beforehand[10].

This brings us to the second consequence of the inobservance of the oath: jurists independently redeveloped the rules contained in the oath's wording, requiring that it be respected regardless of whether it had formally been taken or not.

However, there was a change in the expression used to describe the causes that a lawyer was not allowed to defend. While the constitution *rem non novam* (as well as the majority of other legislative texts) spoke of *causa improba* or *desperata*, jurists now almost always referred to *causa iniusta*, taking their cue from theology.

In his *Summa theologiae*, Thomas Aquinas affirmed that any lawyer who defended an unjust cause would commit a sin[11].

A lawyer was to rely on his own conscience to determine whether a cause was unjust and thus one that could not be defended. This meant that a lawyer could not defend a cause if, deep inside, he felt that it was 'unjust'. Indeed, the ban on defending unjust causes also entailed a ban on defending *contra conscientiam*.

3.1. *The definition of an 'unjust cause'.*

The problem was when a legal action was juridically legitimate, but unjust according to the lawyer's conscience.

One clear example is a *nudum pactum*. According to Roman law, a mere promise does not give rise to action; however, it does oblige the promisor in conscience, and indeed canon doctrine recognized it as actionable. Could a lawyer defend someone who was taken to court because he had not honored his promise? Such a defense would have been legitimate from a juridical point of view, but in its essence it was still unjust.

Another example can be found in so-called 'natural obligations'. The debtor is not legally bound to fulfill such an obligation, but he is morally bound to do so (and indeed, in the Italian system, a creditor cannot take action against a debtor in order to enforce the fulfillment of a natural

[10] M. de Afflictis, *In utriusque Siciliae, Neapolisque Sanctiones, et Constitutiones novissima Praelectio*, Venetiis, 1588, f. 208vb, n. 21.

[11] Thomas Aquinas, *Summa Theologiae*, II^{a} II^{ae} q. 71 art. 3.

obligation, but in the event that the debtor fulfills the obligation of his own volition, he cannot reclaim the amount paid to the creditor). Could a lawyer defend a debtor who was taken to court because he had not fulfilled a natural obligation?

In other words, it was a matter of determining what an 'unjust cause' really meant: only one which had no legal basis, or also one which went against a moral truth?

Jurists tended to limit the category of unjust causes to those that had no legal basis.

A good example of this can be found in the action for recovery of possession, as demonstrated by Innocent IV. Indeed, the legal system protected the possession of the *spoliatus*, even if he was not the rightful owner of the property; in this case, could a lawyer defend the *spoliatus* against the *spoliator*, even when the latter was actually the real owner (and thus the action for recovery of possession occurred in order to restore the property to its rightful owner)?

According to Innocent IV, a lawyer could even defend a bad-faith *spoliatus*. He maintained the reference to a lawyer's conscience, but he introduced a distinction between *conscientia legis* and *conscientia hominis*: when forbidding a lawyer to defend a cause that went against his conscience, one could not refer to the human conscience (understood as the ultimate goal of justice), but rather to the *ratio* of the laws (which presumably would emerge in the judge's sentence):

> Advocatus licet faveat iniusto possessori olim qui petit restitui: non tamen dicitur propter hoc habere conscientiam lesam […] quia est pica et organum legis scripte: et advocatus non debet habere conscientiam hominis, sed legis: certe lex bona est si quis ea ratione utatur[12].

Indeed, the sentence would determine *a posteriori* whether the cause defended by the lawyer had been a just cause or not (and thus, whether he had violated ethical rules).

[12] Innocentius IV, *Apparatus super V libris Decretalium*, Lugduni 1543, Comm. in X 2.1.14, f. 86vb, n. 6.

Theologians adopted a different solution, which was also outlined in treatises on the legal profession.

In order to determine the justness or unjustness of a cause, a lawyer's only point of reference was to be his own conscience, regardless of what the possible outcome of a dispute might be.

Thus, returning to the example of the action for recovery of possession, the treatises stated that a lawyer could not defend the *spoliatus* in the event that the *spoliator* was without question the rightful owner[13].

A similar stance was adopted regarding the above-mentioned examples of a *nudum pactum* or natural obligation: a lawyer could not defend a person whose position was unjust «in foro conscientiae», even if the legal system technically protected that person[14].

Nonetheless, it should be noted that any violation of this ban on defending unjust causes did not lead to legal sanctions. Indeed, the only consequence for a lawyer was that he would commit a sin.

3.2. *Doubtful causes.*

Jurists and theologians recognized that it was difficult to evaluate the justness, or better the unjustness of a cause *in limine litis*. Based on their common experience, they found that in the majority of cases, there were always some critical issues to address.

A compromise would have to be reached in the practical application of the rule: in those frequent cases of doubt, a lawyer would be allowed to represent the defendant, as it was not his task to determine the justness or unjustness of the cause (the judge was responsible for doing that); rather, he was to defend the client in the best way possible (provided there were at least some grounds for taking on the case).

In the fourteenth century, Albericus de Rosate concluded that if a defense lawyer accepted a charge despite harboring doubts about the justness of the cause, he would not commit a sin:

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[13] E. Nazius, *Dissertatio de conscientia advocati*, Francofurti ad Viadrum, 1683, p. 60, n. 17.

[14] G.P. Ala, *Tractatus brevis de advocato, et causidico christiano*, Mediolani, 1605, p. 116; P.P. Guazzini, *Tractatus moralis ad defensam animarum advocatorum, iudicum, reorum*, Venetiis, 1650, p. 23a, n. 23 e ss..

> ultimo quaero utrum advocatus peccet iuvando partem cum dubitat quod non sibi aperiat veritatem causae suae. Et videtur quod peccet […] Ad hoc facit quod dicitur vasallum non teneri iuvare dominum si dubitat utrum iuste moveat bellum vel non […] Circa hoc vide, quod non peccat, supponere enim debet, quod iudex causam diligenter examinabit, et pronuntiabit, quod iustum fuerit et aliud est in bello aliud in iudicio nam in bello viribus vincitur, in iudicio iuribus[15].

The only duty that the lawyer was obliged to uphold was to inform his client of his chances of winning the case. This was part of a more general duty to keep the client informed, which is still recognized today in article 27 of the Code of Conduct. Giovanni Pietro Ala, a jurisconsult from Cremona, recommended the same thing in the early seventeenth century, when he wrote two treatises on what it meant to be a 'good lawyer'[16].

4. *Criminal trials: The duty to defend a client.*

When it came to criminal trials, jurists and theologians pondered what might be the ultimate test of a lawyer's conscience: namely, what to do if the client were to confess to the lawyer that he committed the crime.

This case presented a defense lawyer with two choices: either continue to defend the client, which might even mean hindering the search for truth; or withdraw his defense and help restore justice, which might even lead a lawyer to take the extreme measure of reporting the client to the authorities.

In the same way seen above, jurists resolved this problem by referring to the judge's sentence. At the beginning of the sixteenth century, Matthaeus de Afflictis affirmed that, even if the lawyer was aware of his client's guilt, defending such a case would not go against professional rules as long as the judge acquitted the defendant in his sentence:

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[15] Albericus de Rosate, *In Primam Codicis Partem Commentarii*, Venetiis, 1586 (rist. anast. Bologna, 1979), Comm. in Cod. 4.3.1, f. 185va, n. 9.

[16] Ala, *Tractatus brevis de advocato*, cit., p. 58.

> si advocatus habet conscientiam quod Titius interfecit hominem et ex processu apparet qupd non fuit ipse, licet eum defendat, non dicitur facere contra conscientiam legis [17].

Theologians affirmed that any lawyer who received a confession from his client could nonetheless continue with his client's defense, and that he should seek an acquittal – or at least a reduction in the sentence – by pointing out procedural errors, for example. This was asserted in the middle of the sixteenth century by one of the most famous exponents of the School of Salamanca, Domingo de Soto; indeed, he believed that in the most serious of criminal trials, a lawyer could represent a defendant even if there was little to argue before the judge and the chances of an acquittal were slim, so long as the defendant did not represent a particular threat to society:

> Quando enim est causa mortis, aut sanguinis, aut ubi honor alicuius percìiclitatur […] in hisce casibus potissimum causa capitis, nisi reus perniciosissimus haberetur pium esset eius suscipere patrocinium, etiam si eius causa minoris esset probabilitatis[18].

Juan Pablo Xammar followed in the footsteps of Domingo de Soto. In a treatise on judges and lawyers published in 1639, the Catalan judge stated that a lawyer was to withdraw from a case only if there were no arguments to be made in the client's defense («si nullum eum colore tueri posset»)[19].

In other words, the ban on defending unjust causes did not apply to criminal trials. Giuseppe Zanardelli would affirm as much at the end of the nineteenth century, when he limited the ban on defending unjust causes (he still used those words at the time) to civil cases only, citing that «in the criminal justice system, not only is it legitimate to defend an evil cause, it is obligatory, because humanity commands it, mercy demands it, custom establishes it, and the law requires it»[20].

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[17] de Afflictis, *In utriusque Siciliae, Neapolisque Sanctiones*, cit., f. 208ra, n. 10.
[18] D. de Soto, *De iustitia et iure*, Venetiis, 1584, p. 492a.
[19] J.P. Xammar, *De officio iudicis et advocati*, Barcinonae, 1639, f. 197vb, n. 41.
[20] G. Zanardelli, *L'avvocatura. Discorsi (con alcuni inediti)*, Milano, 2003, p. 166.

4.1. *Lawyer-client privilege.*

In the event that a lawyer decided to withdraw his defense, the problem was whether to reveal what he had learned and thereby ensure that truth prevailed, or maintain the secret but thereby obstruct identification of the culprit.

Lawyer-client privilege was recognized as far back as the Middle Ages, when it was forbidden for a defense lawyer to reveal facts that he had learned while representing a client[21], even if he was called to testify in court[22], and despite the fact that the very act of withdrawing from the case would have made it clear that there were irreconcilable differences between the lawyer and the client.

However, this duty of confidentiality was not as important as preventing serious harm from befalling third parties: for that reason, if it became necessary to disclose information provided by a client in order to avoid exposing the other party or the community to irreparable harm (the primary concern at the time was any crime of lèse-majesté, which threatened public order), then the lawyer was authorized (and actually required) to reveal that information. In any case, he was to make disclosures only to the extent necessary to prevent harm, which is still a rule today (art. 28 of the Code of Conduct)[23].

5. *The ban on resorting to unjust means to defend a cause.*

Once a lawyer decided to represent a client, what defense strategies could he resort to based on the rules examined up to this point? In other words, were there any limits as to what he could do in defense of his client?

These questions have to do with the ban on resorting to unjust means to defend a cause, which, as stated above, can be linked to today's duty to act truthfully (art. 50 of the Code of Conduct).

It should be noted that the duty to act truthfully is an ethical rule only, as a defense lawyer and defendant are not required to do so according to

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[21] Thomas Aquinas, *Summa theologiae*, II^{a} II^{ae} q. 71 art. 3.

[22] *Statuti di Verona del 1327*, S.A. Bianchi, R. Granuzzo (edd.), Roma, 1992, p. 324; V. De Franchis, *Decisiones Sacri Regii Consilii Neapoletani*, Venetiis, 1616, dec. 222, f. 122v.

[23] Xammar, *De officio iudicis et advocato*, cit., f. 197va, n. 39.

procedural rules. Although preliminary drafts of the Italian Code of Civil Procedure considered including such a rule, the final version opted to require simply a generic duty to act fairly (the same applies to the Italian Code of Criminal Procedure): indeed, it was feared that the inclusion of a duty to act truthfully would have forced the lawyer and defendant to produce evidence *contra se*.

In the Middle Ages and early modern period, canon law was used as the basis for affirming that a lawyer could resort to any defense techniques necessary to win a trial if it was a just cause. In other words, any means was justified if it meant that the justice would prevail.

Indeed, the ordinary gloss on the *Decretum,* completed by the first half of the thirteenth century, allowed a lawyer to deceive the counterparty («decipere adversarium suum»)[24]; in particular, the gloss on the *Liber Sextus* pointed out that «qui habet ius in principali, cavillationes et malitias adversarii potest per alias repellere»[25].

Canonist theory referred to the art of rhetoric – or at least, jurists and theologians would continue to come back to rhetoric as they debated defense strategies in the centuries that followed. Basically, lawyers were allowed to make their case in any number of ways, for example by embellishing their defenses with «colorata et persuasiva», because it had been observed that even if a certain topic was not entirely relevant to the dispute, it could nonetheless influence the judge's opinion[26].

But was there any limit to what a lawyer could do with his oratory skills? Could he claim factual circumstances that did not actually correspond to reality? Or did he have to limit himself to providing a partial account of the facts or an incomplete description of what legal doctrine had to say about the issue?

In that regard, the duty to act truthfully served as a limit. Out of respect for his key role in the administration of justice, a lawyer could not produce false evidence or make false statements during legal proceedings. This meant that he could not produce false documents, suborn witnesses, or

[24] Gl. *insidijs* ad Decr. C. 23 q. 2 c. 2

[25] Gl. *malignantium* ad VI 1. 6. 16.

[26] Ala, *Tractatus brevis de advocato*, cit., p. 45

procure a client to commit perjury (fraudulent conduct of this nature was a criminal offense).

However, the duty to act truthfully did not require a lawyer to produce evidence if this might be detrimental to the client. Thomas Aquinas had already made this clear in his *Summa theologiae*, wherein he stated that the astute lawyer could conceal that which might be favorable to his opponent, making reference to an analogy between military defense and legal defense:

> militi vel duci exercitus licet in bello iusto ex insidiis agere ea quae facere debet prudenter occultando, non autem falsitatem fraudolenter faciendo […] Unde et advocato defendendti causam iustam licet prodenter occultare ea quibus impediri posset processus eius, non autem licet ei aliqua falsitate uti[27].

Nonetheless, there was sometimes a very fine line between employing methods of argumentation (lawful) and resorting to falsehoods (unlawful). Alciatus highlighted just that in his commentary on *de verborum significatione* in the Digest, wherein he clarified that there was always an element of falsehood in sophistry:

> Cavillari variis modis accipitur. Cavillatur, qui calumniose agit. Cavillatur, qui breviter et false adversarium sermone captat, aut irridet. Cavillatur, qui sciens, ut suam sententiam tueatur, falsa prodit […] Sed an huiusmodi cavillationibus uti advocatum deceat? Et gravi viro convenit numquam uti 23 q. 2 dominus, nec enim debet quis de victoria magis quam de veritate esse sollicitus[28].

6. *The relationship between the defense lawyer and his client.*

In criminal trials, the issue of acting truthfully also applied to the relationship between the lawyer and his client, and specifically as regarded the advice a lawyer could give his client in preparation for questioning.

There was a real chance that a lawyer could instruct his client to deny having committed the crime, and indeed criminal law scholars had debated over the possibility of having a court official be present whenever a lawyer

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[27] Thomas Aquinas, *Summa Theologiae*, II^{a} II^{ae}, q. 71 art. 3.

[28] A. Alciatus, *De verborum significatione*, Francofurti 1617, col. 1044.

met with his client in order to monitor the lawyer's conduct. Nonetheless, this possibility was flatly rejected towards the end of the sixteenth century in the *additio* to Claro' *Liber quintus*, wherein it was stated that the conversations between lawyer and client were to be free from external influence or interference. In this way, the client could state all of the facts to his lawyer without concealing any details, and the lawyer could thus prepare the most appropriate line of defense:

> Adde quod dato termino defensionis reus debet reduci ad carceres inferiores, idest ad largam, ut possit loqui cum Procuratoribus et Advocatis et ordinare suas defensiones […] ut per Straccham in adnota. ad Cravet. in consil. 35 ubi tamen laudat illos iudices qui aliquo officiali Curiae assistente admittunt defensores rei ad alloquendum, ne instruantur rei et ne occasio detur veritatem occultandi […] Ego autem hoc non approbo quia si libera non est locutio libere non sunt defensiones, nam advocati et procuratores timore illius officialis, seu potius fisci, vel accusatoris exploratoris non audenìbunt dicere omnia quae facerent ad defensionem[29].

In the first half of the sixteenth century, Egidio Bossi had posed the question of whether a lawyer could instruct his client to remain silent if the latter risked capital punishment:

> quaero an quando ingeritur poena sanguinis possit advocatus vel causidicus instruere reum ad tacendam veritatem? […] ubi advocatus videt clientem suum fovere iniustam causam, non debet eum docere ut veritatem taceat, imo debet ei consilium dare ut restituat quod indebite tenet, sine scandalo tamen[30].

The objective of a criminal trial at the time was to ascertain the truth, and that required a contribution on the part of the defendant as well. Thus, the defendant was considered a witness, leading Bossi to forbid a lawyer from counseling his client on what answers to give (or not to give) during questioning, because doing so would have amounted to fabricating evidence.

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[29] G.B. Baiardi, *additio ad* G. Claro, *Liber quintus sive Practica criminalis*, Venetiis, 1626, p. 426b, n. 3.

[30] E. Bossi, *Tractatus varii*, Lugduni, 1562, p. 142a, n. 18

Although it was acknowledged that a defendant would be naturally inclined to lie (this was connected with the principle of *nemo tenetur se detegere*, which was beginning to be recognized as a natural right of the accused), treatises on the legal profession reaffirmed that a party under questioning could not deny the crimes he committed. Consequently, the lawyer, too, could not build his defense on lies. At most, a lawyer could counsel his client on how to answer questions without admitting to the crime, but without expressly denying it either[31].

7. *The accused under questioning: Conflict between the search for truth and the right to counsel.*

It must be understood how a lawyer's position can be reconciled with that of the client, given that the former is bound to respect the truth in accordance with ethical principles, while the latter is not. It would also be interesting to do a comparative study of this issue with common law systems, where the defendant is required to tell the truth if he decides to talk.

Indeed, the relationship between a lawyer and his client in a criminal trial has been the subject of debate since the early modern period. Throughout the nineteenth and twentieth centuries, this issue influenced the debate over whether a defense lawyer was to be barred from assisting his client during questioning[32]. Not only did this represent an attack on the professional values of the legal profession, it also affected the public's trust (or distrust) of lawyers.

The issue came to the fore in 1970, when the Italian Constitutional Court ruled that a lawyer was finally allowed to counsel his client during questioning. The ruling highlighted the key role played by legal ethics in balancing the search for truth with the right to counsel – indeed, on no

[31] Ala, *Tractatus brevis de advocato*, cit., pp. 95-96; Xammar, *De officio iudicis et advocati*, cit., f. 232*r*a, n. 39

[32] L. Garlati, *Silenzio colpevole, silenzio innocente. L'interrogatorio dell'imputato da mezzo di prova a strumento di difesa nell'esperienza giuridica italiana*, in *Riti, tecniche, interessi. Il processo penale tra Otto e Novecento. Atti del Convegno (Foggia, 5-6 maggio 2006)*, M.N. Miletti (ed.), Milano, 2006, pp. 265-339.

other occasion were these two principles more at odds than during questioning[33].

The Constitutional Court's ruling concerned the constitutionality of article 304 bis of the 1930 Italian Code of Criminal Procedure, which appeared to violate article 24 of the Italian constitution because it barred defense lawyers from assisting their clients during questioning. Specifically, the Constitutional Court ruled on the so-called 'small reform' of 1955, which had expanded a defendant's right to counsel in the investigatory phase of legal proceedings – allowing defense lawyers to assist during the re-enactment of crimes, the gathering of expert evidence, house searches, and eyewitness identification (basically a return to the 1913 Code of Criminal Procedure) – but which continued to bar lawyers from assisting clients during questioning[34].

The Constitutional Court stated that excluding a lawyer in this way was ascribable to the «utter distrust of a defense lawyer's work», that is the fear that a lawyer could influence a defendant's statements and thus hinder the search for truth. However, such fear was «in stark contrast with the constitution, which clearly postulates that the right to counsel, far from being a hindrance, is perfectly in line with the aims of justice which a trial seeks to fulfill».

Nonetheless, the Constitutional Court affirmed that an expansion of the powers of a defense lawyer needed to be accompanied by an expansion of their responsibilities as well, so that the right to counsel would not hinder the search for truth during trial. To that end, disciplinary bodies would have to ensure that lawyers respected their ethical duties.

8. *Concluding remarks.*

The affirmation of these constitutional values only highlights the difficult situation facing a defense lawyer as he seeks to balance conflicting

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[33] Corte Cost., 16 dicembre 1970 n. 190.

[34] It should be noted that this expansion of the right to counsel only applied to formal preliminary investigations; see C. Storti, *Magistratura e diritto di difesa nell'istruzione penale. Il dibattito sui periodici giuridici (1955-1965)*, in *Diritti individuali e processo penale nell'Italia Repubblicana. Ferrara, 12-13 novembre 2010*, D. Negri, M. Pifferi (edd.), Milano, 2011, pp. 179-198.

interests during trial. Indeed, on the one hand he must act in the interests of his client, while on the other hand he must contribute to the administration of justice.

The question is: can a defense lawyer do both?

Luigi Ferrajoli has stated that although these values seem to be in conflict, they can actually be compatible thanks to a lawyer's duty of independence towards both the judge and the client. Indeed, a lawyer is not 'a conscience for hire', as Dostoyevsky once wrote[35]. He does not need to comply with his client's requests if he does not think it appropriate; rather, he must independently make choices of both a technical and non-technical nature regarding how to best carry out the defense, while still respecting the interests of his client[36].

Such choices are often the result of outright dilemmas facing a defense lawyer. Ethical rules provide criteria and limits to deal with these quandaries, but in certain circumstances the lawyer can also rely on his own ethical principles. Thus, legal ethics do not end with the Code of Conduct; on the contrary, as Aldo Caslinuovo once stated, a lawyer must «first and foremost feel it deep inside his soul, in the vibrations of his own conscience»[37].

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[35] F. Dostoevskij, *I fratelli Karamazov*, Milano, 1974, p. 257.

[36] L. Ferrajoli, *Sulla deontologia professionale degli avvocati*, in «Questione Giustizia», 2011, pp. 90-98.

[37] A. Casalinuovo, *Deontologia del difensore*, in «Rassegna Forense», 1981, pp. 447-460.