General considerations regarding the criminal liability of the lawyer in Romania

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Abstract

The paper proposes an analysis regarding the possibility of the criminally convicted lawyers to keep pleading before the court without bearing the consequences of criminal liability, by speculating the lack of imperative law provisions in this sense. The legislative inflation affects not only the guarantees that the legality principles provide to the citizen, but it also reflects on the activity of specialists, theoreticians, or practitioners. They are overwhelmed by the abundance and obscurity of certain texts, reason for which it has become more and more difficult to interpret the law. The legislative deficiencies and the norms governing the profession of lawyer do not regulate clearly enough the fate of the criminally convicted lawyers; the lawyers within the board of the Bar must decide the fate of a fellow lawyer of the Bar. The law No. 51/1995 – regarding the organization and exercise of the lawyer’s profession, as well as the statute of the lawyer – shows that the lawyer’s capacity shall end if the lawyer has received a final sentence for an action incriminated by the criminal law, which renders him/her “unworthy of being a lawyer.” Concerning the method that constitutes the grounds of my research, I will use the comparison with other professions within the legal system; this will lead to comparatism, meaning to rapportos between de jure and de facto situations. After analyzing the jurisprudence and the legislative framework corresponding to this phenomenon, I believe that punctual modifications should be brought to the texts of law; they must be circumscribed to an imperative force, thus leaving no room to interpretations.

1. Main text

The first condition for a lawyer to be “judged” by the board of the Bar is for the court that decided his/her conviction to send the final sentence to the said Board. After receiving the motivation of the court, the Board will be

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able to take a decision. In that moment, the board of the Bar to which the convicted lawyer belongs will analyze whether the actions for which he/she was convicted affect or not his/her lawyer profession (the prestige of the lawyer profession). If it is determined that the actions do affect the profession of lawyer, then he/she can be excluded from the Bar. On the contrary, if it is determined that his/her actions did not affect the profession of lawyer, he/she can still be part of the body of lawyers.

According to the same law, (art. 14) “The following persons shall be deemed unworthy of being a lawyer: (...) a) a person having received a final sentence by court decree, for an intentional crime, which is likely to harm professional prestige.” As in the case of suspension, the statute of the lawyer regulates the possibility of a suspension from this profession. Hence, the Bar “can” suspend the lawyer convicted for crimes which are “likely to harm professional prestige.” However, the law does not define the phrase “professional prestige”. In addition, it fails to explain what a crime “likely to harm professional prestige” means, reason for which the board of the Bar to which the convicted lawyer belongs shall interpret this provision. Practically, the Bar decides to suspend and/or exclude a lawyer from the profession. More exactly, the lawyers within the board of the Bar assess whether the acts based on which the lawyer was convicted are “likely to harm professional prestige”. The same lawyers decide whether the convicted lawyer, who belongs to the same Bar, will be excluded from the profession. In practice, these assessments actually treat several aspects (not necessarily related to the acts for which the lawyer was convicted) and they are usually not limited to taking into account that the lawyer in question has received a final sentence, mostly for crimes of corruption. In other words, the Board may consider that the deeds for which the lawyer was convicted – regardless of whether they are or not related to corruption – are not likely to harm professional prestige and it may not exclude the lawyer from the profession. Thus, he/she would be free to keep pleading in court, though he/she was criminally convicted. For instance, such a case was based on the following argument: as long as the criminal court – through the conviction sentence – did not forbid the lawyer from exerting his/her profession for a number of years, thus letting the board of the Bar decide on this matter, the representatives of the said Board believed that the person should not be excluded from the profession.

Unlike the magistrates, the lawyers are not suspended from their function and they can work at ease while they are criminally prosecuted and then during the trial. The alarming aspect of the national practice is that these lawyers do not suffer any consequence professionally, not even after being convicted, because they keep on speculating the lack of imperative law provisions on this matter.

According to art. 14 let. a) of the Law No. 51/1995 regarding the organization and exercise of the lawyer’s profession, a person having received a final sentence by court decree, for an intentional crime, which is likely to harm professional prestige, is unworthy of being a lawyer. Regarding this text, the practice in the field presented the following dilemma: does the elimination of the consequences of the conviction as effect of rehabilitation, stipulated in the Criminal Code (according to art. 133 par. (1) of the Criminal Code, “Rehabilitation terminates loss of rights and prohibitions, as well as incapacitation resulting from conviction”), confer to the convicted person the vocation of becoming a lawyer again? The matter does not concern an obligation of automatically reintegrating the convicted within the body of lawyers as effect of rehabilitation, taking into account that the Criminal Code actually stipulates that the rehabilitation does not result in the obligation of reintegrating the offender in the former profession (article 133 par. (2) of the Criminal Code). In fact, the matter refers to the possibility of the person who lost the capacity of lawyer to be part of the body of lawyers again.

At the same time, we notice that, in regard to the unworthiness stipulated in art. 14 let.a), there is also a case when the lawyer’s capacity is ended, that is art. 27 let.d) of the Law. These dispositions are also corroborated with the provisions of art. 15 par.(1) let.e), art. 16 par. (3) let.b) and art. 23 par.(3) let. a) of the Statute. According to them, the request of the person who wishes to be a lawyer must be accompanied by an express statement of the applicant, mentioning that he/she does not fall into any of the unworthiness cases stipulated by art. 14 of the Law.

In order to ensure the application of the Law, the statute of the lawyer’s profession mentions – in art. 26 par. (1) – that the unworthiness cases are investigated when a person becomes a lawyer, when he/she re-enrolls in the table of the lawyers entitled to practice the profession, as well as throughout the exercise of the said profession. That also includes the ending of the lawyers’ profession (except for death) or the suspension.

The doctrine (Buiai, C., 1997) states that, as consequence “of the moral disapproval and condemnation of the offender who was convicted criminally, he/she does not benefit from the necessary reputation and confidence, even after executing his/her sentence, as he/she is still regarded as an ex-convicted. Thus, he/she is denied certain offices,
functions or activities […], such extra-penal consequences of the conviction […] being stipulated by laws regulation special activities and functions, which involve the moral integrity of the persons fulfilling them, such as magistrate, lawyer, and others. The status of ex-convicted is thus considered incompatible with certain State offices, mostly with those with a great impact on the social conscience.”

Hence, the former lawyer is still seen as a convicted person, regardless of whether he/she was or not rehabilitated according to the Criminal Code. Similar issues can be noticed concerning the magistrates, in Law No. 303/2004, art. 14 par.(2) let.c), corroborated with art. 33 par. (1). Actually, one of the conditions of being admitted to the magistracy is for the applicant to have no criminal or fiscal record and to benefit from a good reputation.

De lege ferenda, I believe that the texts of art. 14 let.a) and of art. 12 par.(1) of the Law should be altered similarly to the regulations within the statute of magistrates(art. 14 par. (2) let. c) corroborated with art. 33 par. (1) of the Law. No. 303/2004), of the notaries public (art. 22 let.d) of the Law No. 36/1995) or of the bailiffs (art. 15 let.d) in Law No. 188/2000), texts that stipulate the absence of a record. Hence, a person who lost the lawyer’s capacity after having received a final sentence by court decree, for an intentional crime, likely to harm professional prestige, should not be able to work again as a lawyer. He/she should not be a lawyer again not even after being rehabilitated under the circumstances of the Criminal Code, which is very different from the unworthiness case mentioned by art. 14 let.c) of the Law, where the unworthiness is time-limited (corresponding to the duration determined by a court decree) or disciplinary (a sanction prohibiting him/her from practicing the profession), and it ends when the period in question is over.

Concerning the procedure of taking into account the unworthiness cases, the art. 26 par. (4)-(7) of the Statute shows that – after examining the court decrees or the disciplinary decisions formulated according to art. 14 of the Law – the board of the Bar decides whether to maintain or to end the lawyer’s capacity. The board of the Bar immediately motivates and communicates the decision to the lawyer in question, as well as to the president of the N.U.R.B., alongside the court decrees or the acts based on which the unworthiness was concluded. The decision of ending the lawyer’s profession is enforceable, but it can be appealed by the president of the N.U.R.B. and/or by the lawyer in question, within 15 days from the notice, to the N.U.R.B. Board. As for ending the lawyer’s profession, this will be properly mentioned in the table of lawyers.

In addition, it is worth mentioning the dispositions of art. 50 within the Statute, which include a case of optional suspension of the right to exercise the profession of lawyer, if criminal proceedings were initiated against the lawyer or if he/she is arraigned for a crime likely to harm the prestige of the profession, until a final court decree is pronounced.

The criminal liability is always determined by a court decree. Except for the particular situations mentioned by the law, when the criminal proceedings can be initiated only after a complaint from the aggrieved party, the principle applied de facto in the case of criminal liability is for the documents necessary for the trial be drafted ex officio (art. 2 C.crim.proc.). Concerning the criminal liability, the public Ministry exercises the criminal action ex officio, except for certain limitative cases mentioned in the criminal law; the criminal sanction involves an effective intervention of the State in all cases.

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