Principles Of Lawyer’s Profession Exercise

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Abstract

In order to solve the issue of clandestine lawyers, it is necessary to accept and acknowledge the ambiguous situation *de lege lata*: there are no clear legislative elements for the identification of the U.N.B.R. [National Association of the Romanian Bars] or of the bars affiliated to the U.N.B.R. Therefore, by taking advantage of this legislative fault, persons who practice this profession clandestinely claim to be members of bars affiliated to the U.N.B.R.; they also posit that the real U.N.B.R. has no legitimate grounds. Only Law No. 51/1995 included a real reform concerning this profession, but this reform has been subjected to permanent alterations, adjustments, and readjustments to the social realities encompassing the acts of justice.

Keywords: principle, lawyer, legality, clandestine, profession.

1. Introduction

A defender of the rights, liberties, and legitimate interests of physical and legal persons, the lawyer (pertaining to public or to private law) must accomplish his/her functions with “perfect moral integrity” and by observing the following fundamental principles: principle of legality, principle of freedom, principle of independence, principle of autonomy and decentralization, and principle of keeping professional secrecy (Statutul profesiei de avocat ([Statute of Lawyers], Chapter I, Article 1.)

The Code of Conduct of the Romanian Lawyers stipulates, among the basic principles of the professional activity, independence, moral integrity, and the preserving of professional secrecy or confidentiality. “Professional secret is acknowledged as both a right and a fundamental duty of the lawyer” (Codul deontologic al avocatului roman [Code of Conduct of the Romanian Lawyers], II, General principles, Article 2.3, Paragraph 1). Whereas a
lawyer’s professional behaviour is assessed in relation to legal, regulatory, or administrative norms governing this activity, a lawyer’s moral behaviour is assessed in relation to a set of moral – written or oral – principles, which differ from one society to another or even from one social group to another. Until Law No. 51/1995 on the organization and exercise of the lawyer’s profession passed, the legislative path had been marked by Law No. 3 of 17 January 1948 – which dissolved bars and replaced them with Lawyers’ Colleges in Romania – and by various decrees. These decrees concerned as follows: organization of lawyers’ insurance company; legal accumulated service of Law graduates with positions in the system of local State administration bodies; fees for the legal assistance of persons residing abroad; pensions and other social insurance rights of lawyers (Nedelcu & Cristina, 2004).

Professional secrecy is a mandatory condition for exercising this profession; a lawyer does not benefit from trust if he/she does not guarantee the confidentiality of professional relations (Floander & Ion, 2007). The obligation of keeping professional secrecy is public, absolute, and permanent, and it concerns all activities conducted by the lawyer, his/her associates, collaborating lawyers, or employees, including other persons with whom the lawyer collaborates; he/she is bound to make them aware of this condition. The lawyer cannot weave professional secrecy, not even with the consent of his/her client or at the request of any authority, except for cases of strict necessity for his/her defence or when he/she is prosecuted criminally, disciplinary, or when a contestation regarding due payments is formulated.

Professional secrecy was first introduced in the field of medical practice: Hippocrates was the one who set the grounds of medical secrecy, by stating, “If in the practice of my profession […] I chance to see or hear anything that should not be told abroad, I will hold it a secret”. Essentially, the lawyer’s professional secrecy is similar to the professional secrecy of religious confession. The professional secrecy of the lawyer is not juridical and contractual, but legal; it derives from the law and it is included in the professional Statute of the lawyer (Danila & Ligia, 2007). The first expectation of a client from a lawyer is a counsel, a piece of advice based on understanding and familiarity; a lawyer cannot offer a counsel without utmost sincerity and openness from both parties. The Lawyer’s office must be like a confessional, as pinpointed in the scientific literature.

All professional communication or correspondence between lawyers, between lawyer and client, between lawyer and professional bodies is confidential. Correspondence and information transmitted between lawyers, or between lawyer and client, cannot be used as evidence in court. The obligation of keeping professional secrecy does not prevent the lawyer from using information on a former client if the said information already became public. Paragraph 1 under article 1 within Law No. 51/1995 for the organization and practice of lawyer’s profession outlines the principles of freedom, independence, and autonomy of lawyer’s profession practice.

The Romanian Constitutional Court also analyzed the principle of freedom and independence within Decision No. 45/1995 regarding the constitutionality of certain provisions within the Law for the organization and practice of lawyer’s profession. The Court stipulated the following fundamental principle: “The lawyer’s profession is a liberal and independent profession”. Therefore, it becomes obvious that an essential feature of lawyer’s profession is its liberal character (Baiaș, 1995), which means that this profession depends on a decision, on a professional body; payments do not have a commercial nature. At the same time, the Law uses the phrase free profession, which denotes that a lawyer does not need an indefinite employment agreement with an institution or company (“Iorgu Iordan” Institute of Linguistics, 1999) and that the State is not allowed to intervene in the organization and functioning of this profession. The Law, the Statute, and the Code of Conduct include various guarantees that ensure the lawyer’s independence.

Article 39, Paragraph 7 within Law No. 51/1995, posits: “A lawyer shall not be criminally liable for statements made orally or in writing, in an adequate form and in compliance with the provisions of Paragraph (6), before courts of law, criminal inquiry bodies or other jurisdictional administrative bodies, only if such statements are in connection with that cause’s defence and necessary for establishing the truth”. Insults, slandering, or threats against a lawyer while exercising his/her profession and in connection with it shall be punished by the law, as stipulated under Article 39, Paragraphs 2, 3 within Law No. 51/1995. A search of a lawyer may only be made by a public
prosecutor, based on a warrant issued under the terms of the law, Article 35, Paragraph 1 of the Law.

Article 26 within Law No. 51/1995 states: “Practising any legal assistance activity typical of the lawyer’s profession and stipulated under Article 3 by a natural or legal entity that has not the capacity of lawyer registered with a bar and does not figure on the table of that bar shall constitute a crime and shall be punished under the criminal law”.

The independence of the lawyer – stipulated under Article 2, Paragraph 1 of the Law – derives from the independence of the lawyer’s profession, but it must not be mistaken for the latter (Naubauer, Stefan, 2013). The principle of freedom can also be considered from another perspective: each person has the right to choose the lawyer, who conducts all legally permitted actions in his/her client’s interest. The lawyer’s primary concerns should be freely accessing justice, finding a solution to the matter in a reasonable amount of time (without influences or discriminations), and fighting for a free trial.

According to Paragraphs 2 and 3 under Article 1 of the Law, the lawyer’s profession shall only be practised by lawyers appearing in the table of the bar they belong to, a bar which is part of the U.N.B.R. The establishment and functioning of bars outside it shall be prohibited. These provisions consecrate the principle of legality within the lawyer’s practice; therefore, the main regulatory documents for the lawyer’s profession are the special Law, the Statute, and the European Union Code of Conduct of the lawyers. A lawyer cannot be registered in more than one bar (Article 3, Paragraph 3 of the Statute). All legally founded bars in Romania are rightful members of the National Association of the Romanian Bars (U.N.B.R.), a legal entity of public interest, founded by the Law and declared as unique successor of the Union of Romanian Lawyers**, according to Article 1, Paragraph 2, corroborated with Article 60 Paragraphs 1, 2, 4, and 5 of the Law, and with Article 5, Paragraphs 2 and 3 of the Statute.

Out of the need to prevent the emergence and dissemination of parallel lawyer structures, the legality of bar constitution and functioning was conditioned by a membership in the U.N.B.R. As the Constitutional Court states, “...The organization of the lawful practice of the lawyers’ profession – and of any the activity of interest for the society – is natural and necessary, in order to determine the competence, means, and manner of practicing a profession, as well as the limits beyond which one would violate the rights of other persons or professional categories”. Decision No. 321/2004, published in the Official Gazette, issue 1144 of 3 December 2004, rejected the exception of unconstitutionality under Article 48, Paragraph (1) thesis 1 and Article 57, Paragraphs 1 and 4 of the Law. In the same matter, the Decisions of the Constitutional Court No. 234/2004 published in Official Gazette issue 532 of 14 June 2004 and No. 233/2004 published in Official Gazette issue 603 of 5 July 2004. The exercise of the lawyer’s profession outside the framework determined by the Law is a criminal offence. According to Article 60, Paragraph 6 of the Law, “the misuse of the names ‘Bar’, ‘National Association of Romanian Bars’, ‘U.N.B.R.’ or ‘Union of Romanian Lawyers’ or the names specific the practice of lawyer’s profession by any natural or legal entity, irrespective of the object of the said activity, as well as the use of signs specific to profession or the wearing of robes in other conditions than those stipulated by this law represent criminal offences and they are punishable by imprisonment from 6 months to 3 years or by a fine”.

The provisions under Article 1, Paragraph 3 of the Law – introduced by Law No. 255/2004, corroborated with Article 5, Paragraph 4 of the Statute – stipulate that the documents for the constitution and registration of such entities shall be null and void. According to this definition, null and void entities operate pursuant to the law (no decision stating they are invalid is necessary), unlike legal nullities, which affect the procedure act only if a court’s decision gives such a sanction. According to the doctrine (Ionascu, Barasch, 1978) and to the jurisprudence, nullities have either an absolute or a relative character; they must be acknowledged by a judge (Cosma, 1969) because, until a court pronounces otherwise, the act – irrespective of the nature of nullity (absolute or relative) – is valid. Therefore, irrespective of the null character and though essential dispositions may have been transgressed, the intervention of justice is always necessary. Though promoted mainly in the matter of civil juridical acts, these doctrine-related solutions can be fully applied in civil procedural matter, too; competent courts must acknowledge the ineffectiveness of the procedure even in case of absolute nullities (Les, I., 2005).

Law No. 255/2004 ensured the organizational and institutional autonomy of bars; hence, a national institutional structure was created – U.N.B.R. – to ensure unitary solutions for profession-related issues, which was a very
difficult task before the existence of this institution. However, recent practice has underlined serious faults in the observance of this principle, because different sentences are pronounced in similar situations; for instance, lawyers who received a final sentence were still mentioned as active members by the Bar Council to which they belong, though the U.N.B.R. denied their right to practice. However, the real problem is that of very different decisions of the U.N.B.R. in identical situations.

The conditions stipulated under Article 1, Paragraph 1 of the Law corroborate with the provisions of Article 49, Paragraph 1 and of Article 50, Paragraph 2. According to them, lawyer’s profession is organized and functions based on the principle of autonomy, within the limits of competencies stated by the Law (more precisely, the bar has a legal personality, a patrimony, and a budget).

In 2004, according to Bradu, “the attempts – for such attempts did exist – of constituting bars outside the U.N.B.R. received a strong reply from authorities and courts: they pointed out the illegality of such organizations and they ordered their immediate dissolution” (Bradu, Gheorghe, 2005). However, the current manner of interpreting legal provisions has acquired new dimensions, which take into account concrete circumstances. There are numerous cases pending before the courts of law, such as the association comprising the Botomei or the Pompiliu Bota Bar, which was constituted by a court’s order dating before the amendment of Law No. 51/1995, through Law No. 225/2004; it is registered in the Registry of Associations, and this bar is part of a union called the U.N.B.R. The court order stipulating the constitution of the bar to which these persons pertain remained definitive and irrevocable, and it was not dissolved pursuant to a law, meant to take this entity outside the law. In addition, the civil law does not apply retroactively; hence, the amendments to Law No. 225/2004 do not apply to already-constituted bars; on the other hand, the bar to which these lawyers pertain is called the U.N.B.R., and there is no legal document to have contested or dissolved this particular denomination.

Decision No. 27/2007 of the High Court of Cassation and Justice – taken for referral in the interests of the law – stipulates that legal assistance provided during the trial to a suspect or defendant by a person who failed to acquire the capacity of lawyer (according to Law No. 51/1995 amended and completed by Law No. 255/2004) is equivalent to a lack of defence. However, it does mention the dissolution of the Bar the person pertains to; therefore, it does not stipulate that the said bar acts outside the law. The content of the above-invoked Law implies that the only condition that a person who wants to provide legal assistance has to meet is having the capacity of lawyer. Under these circumstances, it is incontestable that the legitimacy of acquiring this capacity by a person cannot be questioned, taking into account that the legal path of this person is based on a definitive and irrevocable decision of the court, which no law has annulled thus far. The legislative modification is null and void concerning the court decision that authorized the functioning of the bar in question and the decisions of granting the capacity of lawyer to such a person.

The issue of “clandestine” lawyer practice originates in Law No. 3/1948, which legally dissolved all the “traditional” bars. Thus far, there have been several attempts to amend Law No. 51/1995: the first such modification was materialized in Law No. 255/2004, which states that all bars functioning outside the U.N.B.R. are illegal, null and void. Pompiliu Bota founded the so-called “parallel” bars in 2003. For this reason, the courts of law admit that the application of provisions of Law No. 255/2004 would violate the principle of non-retroactivity of laws.

Moreover, considering the lack of clear, legal, and unique elements for the identification of the U.N.B.R. and of the bars affiliated to it, as well as the legislative ambiguity, magistrates often deny initiating criminal proceedings or they annul the criminal proceedings initiated against persons guilty of exercising a profession without any right to do so. They also often acquit the persons who committed such an act, because the law does not stipulate this type of infraction. The dignity and reliability of a profession – lawyers included – are also provided by the ethical behaviour of the members of this socio-professional category, a behaviour assessed in relation to a set of moral and professional norms, which members must observe even in the lack of legally binding limitations.

Indeed, Law No. 51/1995 has been amended and completed several times. Law No. 255/2004 – which granted full autonomy to bars and which founded the National Association of the Romanian Bars – represented the most important amendment and completion of regulations concerning the lawyer profession. This Association is the lawful successor of the Union of Romanian Lawyers.

In a democratic society, the role of lawyers always depends on the harmony between the national regulations on their status and the international principles on the practice and organization of lawyer’s profession. These national and international regulations on lawyer’s profession represent the expression of both values acquired throughout history and current, modern conditions, specific to an effective European integration. The importance of the role played by lawyers in society is stipulated in the Romanian Constitution, under Article 24: “The right to defence is
guaranteed. All throughout the trial, the parties shall have the right to be assisted by a lawyer of their own choosing or appointed ex officio”.

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