

A GOOD DEFENCE – A COMBINED EFFORT OF THE STATE AND THE ATTORNEY

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ABSTRACT: *The responsibility of the attorney lays in his good training and moral conduct. The compelling of these demands is traditionally supervised by the professional body of the attorneys. Romania has a recent history of parallel professional associations of attorneys, a situation insufficiently solved by the state, with important repercussions. On the other hand, procedure rules have improved in the attempt to combine the need for an efficient public service of justice with the right to defence, according to the rules of a fair trial. Like for other liberal professions, confidentiality between the client and the professional is an important issue. In the legal area, the protection of confidentiality is very important, as it may influence the result of the service provided. Both the state and the attorneys, through their professional body worked to protect it. The paper presents an insight of the struggle of attorneys in the Romanian legal system, both at an institutional and a personal level, in respect with the above mentioned problems that affect a high quality defence. It is a continuation of other studies focusing on different issues in connection with the principles governing the profession of attorney, like independence of the professional and continuous training.*

KEY WORDS: *attorney, defence, confidentiality, legal system, liberal professions*

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1. INTRODUCTION

Creating the possibility of compensation in case of a poor service delivered by a member of a liberal profession is important. Minimising the general risks of a poor service takes precedence, as a good service is the desired goal for each client. Liberal professions are organised for providing different public services. For a high quality public service of justice the possibility of a good defence is important, both in civil and criminal cases. Although being an attorney means the exercise of a liberal profession, the effort of the attorney alone is not enough for a high quality service. The state plays an important part too, regulating the organisation of the profession, the right to defence, the protection of attorney-client confidentiality, the protection of the liberal profession.

Maximizing the conditions for a high quality service of all liberal professions is a concern at the European Union level. Some researchers believe that free movement of

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professionals exercising liberal professions inside the European Union creates a trend towards the deregulation of such professions (Moreira & Toshkov, 2013, pp. 34-36). This can be a reason for the action taken by different unions of liberal professions. In 2013 CPME (Comité Permanent des Mediciens Eurpéens) along with the Council of European Dentists (CED), the European Council of Engineers Chambers (ECEC) and the Federation of Veterinarians of Europe (FVE) adopted the „Charter for Liberal Professions” (CPME 2013/140 FINAL) (Anon., 2013).

The opening statement of the Charter shows that, as liberal professions become more and more important both for the state and citizens due to the increasing complexity of a knowledge-based service society, such professions are a key social and economic factor in all member States in the European Union. At the same time, the social importance of liberal professions is still not acknowledged at the EU level, when developing European legislation and policies. The „Charter for Liberal Professions”, supported by European organisations representing professionals across Europe, aims therefore to set recommendations for the European Institutions to consider possible implications for the liberal professions of any new or amended legislation and policies, and to enable the provision of high quality services for every citizen in Europe.

Among the principles set out by the Charter there are:

- *Liberal professions accept responsibility and serve the common good:* Liberal professions are responsible for important public services in areas such as health, justice, security, language and art. By offering their services in these areas liberal professions fulfil an important role in society and create value for society as a whole.
- *Liberal professions protect trust:* For the liberal professions the protection of their relationship of trust with their clients/patients has the highest priority. This includes absolute confidentiality by maintaining professional secrecy, acting in the interest of the client/patient and avoiding any possible conflict of interest.
- *Liberal professions provide high quality services:* Liberal professions provide a high standard of knowledge-based services. Quality is assured through demanding requirements concerning training, continuing professional development and a system of self-regulation by colleagues.
- *Liberal professionals are independent:* Liberal professions are independent in their area of expertise and from the interests of third parties and practice their professions autonomously. They are independent in arriving at their judgment and in performing their individualized service and bear full professional responsibility for their actions. Professional responsibility is not only relevant in terms of self-regulation, but also in terms of accountability to clients/patients. This balance of autonomy and responsibility is a reflection of a free, democratic society.
- *Liberal professions invest in training:* Liberal professions fulfil an important responsibility towards society in that they offer young people training opportunities in professions with above-average prospects in the labour market. In this way they contribute to skill enhancement and job creation in Europe.

Our study focuses on the way Romanian legislation defends some of the above mentioned principles in case of the legal profession of attorney, in order to secure the quality of the legal service provided by such professionals. It is a continuation of other studies focusing on different issues in connection with the principles governing the

profession of attorney like, independence (Fodor, 2008, pp. 315-326) and continuous training (Fodor, 2010, pp. 5-18).

Being responsible for important public services, in the case of liberal professions, restrictions on the professional freedom are admissible. The European Court for Human Rights found in the case of *Pompiliu Bota v. Romania* that the orders of liberal professions are institutions governed by public law and follow aims of a general interest; for these reasons liberal professions do not enter under the provisions of art. 11 of the European Convention of Human Rights regarding the freedom of association. Thus, dissolving, in accordance with legal provisions, an illegally founded association of attorneys was proportional with the importance given to the role of the attorney in the structure of the judicial system and the need of preserving the quality of the judicial assistance. The European Court of Justice also concluded that the freedom to pursue a trade or profession might be legitimately restricted if such restrictions correspond to the overall objectives pursued and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (Moreira & Toshkov, 2013, p. 36). The self-administration of liberal professions mediates between the freedom of professionals to exercise their profession free from state interference, and the regulatory interest of the state in securing the public interest orientation of the liberal professions. According to the principles established by the ECJ in *Wouters and Others* (C-309/99) mandatory professional rules set by chambers must serve the public interest, the essential principles must be established by the state itself and the state must maintain the final decision-making authority on the application of a norm. Otherwise, the chamber remains subject to the rules for business associations and there is a risk that professional associations could be guided by extraneous considerations in the performance of their legal duties and serve a particular interest group to the detriment of consumers.

In order to convince the state to recognise all the above mentioned principles, the Romanian attorneys fought a long battle.

2. THE INSTITUTIONAL STATUS OF THE ATTORNEYS AND THE QUALITY OF DEFENCE

After 1990, when the democratic society started to be build, the Decree-Law no. 90/1990 regarding measures for organising and exercising the attorney profession in Romania entered into force. It mentioned in art. 12 that the name of the structure defined by the Decree no. 281/1954 (the legal act in force at the time organising the attorneys' profession at the time) as "college of attorneys" is changed into Bars. At the same time, the name of the old "collective office of legal assistance" was replaced with "office of attorneys". But the names referred to the same structures, settled in the beginning of the 19th century (Ionescu & Miron, 2012, pp. 21-25), within which attorneys from the same county were exercising their profession, the traditional Bars¹.

Between 1990 and 1995, using Law no. 21/1924 regarding associations and foundations, or Law no. 31/1990 regarding the commercial companies, several

¹ Law no. 3/1948 mentions the disestablishment of the existing Bars and the establishment of the Colleges of attorneys. However, doctrine recognises that the Colleges of attorneys are the continuators of the Bars established at the beginning of the 19th century (Popescu, 2006, p. 48). Later on, in 2015, the same idea was sustained by the general prosecutor of Romania in an Appeal on points of law (*Recurs în interesul legii*) concerning the interpretation of art. 348 from the Criminal Code in respect to the profession of attorney.

associations and commercial companies were registered with a status providing among many other activities to be performed, the possibility to give legal assistance and establish bars. Bars later established in this way were called “parallel bars”. Both according to Law no. 21/1924 and Law no. 31/1990 the registration was obtained through a court decision. So, the state, through the judicial power, decided against the provisions of the old norms regulating the attorney profession at the time, namely art. 3 of the Decree no. 281/1954, which stated: “Legal advice is given through the legal assistance collective offices organised within the attorney colleges. The exercise of the attorney profession is possible only within the legal assistance collective offices”. Perhaps such a violation of legal norms and customs was possible due to the inexplicable fact that the same state has abrogated, through the dispositions of the Decree-Law no. 90/1990 regarding measures for organising and exercising the attorney profession in Romania, the dispositions of art. 2 of the Decree no. 281/1954 that stated: “Outside the exceptions provided by law, only attorneys may give legal assistance; they are performing in the exercise of their profession a service of collective interest”. Instead, the Decree-Law no. 90/1990 stated in art. 2: ” Legal assistance is given only by attorneys, except when the law states otherwise”. It is noticeable that public interest is no longer mentioned as a character of the attorneys’ activity. Unfortunately, the abrogation of the dispositions of the old Decree no. 281/1954, was perceived as a discontinuity of the structures of attorneys, otherwise, such a behaviour of the judicial power being difficult to understand.

Law no. 51/1995, that replaced both the Decree no. 281/1954 and the Decree-Law no. 90/1990, recognised the independence of the national forum of the attorneys (the National Attorneys’ Union) from the Ministry of Justice, acknowledging the liberal character of the profession. According to art. 43 from the Law no. 51/1995 the Bar comprised all the attorneys within a county or within Bucharest, a provision similar with the one in art. 3 of the Decree-Law no. 90/1990. The law did not mention explicitly that the bars it was referring to were the ones already established by the Decree-Law no. 90/1990, which in turn were the college of attorneys referred by the Decree no. 281/1954. The dispositions of art. 76 par. 3 stated that “The existing offices of attorneys, regulated by the Decree-Law no. 90/1990, may continue their activity, in the same conditions for a period of 3 months starting with the enforcement of the present law.” The continuity of the already existing structures of the professional order of attorneys resulted from the section of transitory and final dispositions. Art. 76 letter a) stated that until the election of the new leading structures, the leading and other activities regarding the exercise of the profession will be carried out by the existing structures. It was obvious that only the leading structures were changed, and the old leading structures were disestablished, not the bars. Also, the dispositions of art. 76 par. 3, saying that the offices of attorneys established according to the Decree-Law no. 90/1990 may continue their activities for 3 years starting with the day of the enforcement of this law, should have been interpreted in the sense that within a Bar, attorneys were to be organised further on in one of the independent professional forms of activity provided by the new Law, no. 51/1995, instead of “offices of attorneys” controlled by the Ministry of Justice.

Becoming aware, at the time, of the illegal establishment of the so-called “parallel bars”, the legislator tried to put things right and in art. 76 para. 2 stated that, starting with the day this law is entering into force, the natural or legal persons that have been authorised on the basis of other laws to give legal advice will no longer perform this

activity. Based on these dispositions the Bars that, according to the Decree-Law no. 90/1990, were continuing the old structures organised on the basis of the Decree no. 281/1954, and were seen by the legislator as the legitimate structures of the liberal profession of attorney, started to fight the parallel structures. The bars filed numerous criminal complaints to the prosecutor's offices all over the country against the persons that presented themselves as attorneys before courts without being their members, accusing them of illegal practice of a profession, according to art. 281 of the Criminal Code in force at the time². On one hand, an injury was produced to the right of property of the members of the traditional Bars, as reputation and clientele are considered property under the European Convention of Human Rights (case of *Buzescu v. Romania*, para. 81). On the other hand, it was alleged by the traditional Bars that the existence of parallel bars represents a danger to the public service of justice, as the so-called attorneys from the parallel bars, despite the fact that were law graduates, face neither serious examination in entering the profession, nor requirements of organised and supervised continuous training, and because of that, they may produce serious prejudice to their clients. The parallel bars, especially the one established by the Bonis-Potra Association, known as the "Constitutional Bar", initiated by Pompiliu Bota, responded with the fact that they belong to bars established according to the Law 51/1995 and presented the court decisions authorising their activities. At the same time, they claimed that traditional Bars cannot produce incorporation documents and, for this reason, these Bars do not perform a legal activity. On such grounds, once again the judiciary system failed to protect the profession of attorney and the public interest. The criminal complaints filed by the traditional Bars were dismissed either by the prosecutor's offices or by courts. Until September 2006 as many as 93 non-prosecution resolutions were pronounced on criminal complaints filed by traditional bars against Pompiliu Bota and his followers, and over 36 of these resolutions were subsequently confirmed by Courts (Konrad Adenauer Stiftung, 2006, p. 57). Furthermore, Bota obtained the legal recognition of certain professional logos, such as the Justice logo (with the Patent Office as well), of certain Bar names, and even of the term "robe" (Konrad Adenauer Stiftung, 2006, p. 57). All this was happening while the legislator tried to set things in order, by issuing Law no. 255/2004 that introduced in the art. 1 of Law no. 51/1995 provisions stating that: "The profession of attorney is exercised only by attorneys members of the bars that compose the National Union of Bars from Romania" and that "Establishing and functioning bars outside the National Union of Bars from Romania is forbidden. The incorporation acts of such bars are null by law". Article 82 of the Law no. 51/1995 was modified, stating that, after the enforcement of Law no. 255/2004 the activity of natural or legal persons authorised through other legal acts or court decisions to provide legal counselling, legal representation or assistance, in any field, ends as a consequence of the law, and that continuing such activities constitutes criminal offences sanctioned by criminal law.

A first recognition from the judiciary system of the fact that Bars are performing an activity of public interest and their organisation ensures a quality service, came from Decision no. 27 of 16.04.2007, ruled by the High Court of Cassation and Justice in appeal on points of law (*Recurs în interesul legii*), which stated that legal assistance given in a criminal trial with a defendant or accused by a person which did not obtain the status of

² The Criminal Code entered into force in 1968.

attorney under the provisions of Law no. 51/1995 (meaning a person who did not enter a traditional Bar), equals lack of defence. But odd enough, this decision was not able to persuade the whole judiciary system of the importance of a quality defence, and the means to ensure it. Unable to understand the fact that the traditional bars do not have to produce incorporation documents based on the Law no. 51/1990, that these Bars are not constituted by this law, but continued by it, the judicial system continued to maintain a majoritarian opinion in the sense that due to the confusion in the regulations of the attorney profession producing a legal uncertainty, there is no intention to commit a crime by the ones claiming to be attorneys outside the traditional Bars, so their conduct may not be sanctioned according to the criminal law (Fodor, 2010, pp. 13-15)³. In our opinion, the confusion was produced by the judiciary, and it was only fair to expect that they would set things in order.

In these circumstances actions were taken in courts by the traditional Bars to dissolve the associations or companies that were illegally performing the legal assistance activity, together with the parallel bars they had established. These actions finally proved successfully. The creator of the “Constitutional Bar” sought a contrary opinion at the European Court of Human Rights, but the complaint was found manifestly unfounded for the reasons mentioned above regarding the case *Pompiliu Bota v. Romania*.

In 2013, a representative of the Ministry of Justice from Romania informed the professional order of attorneys from Tivoli that the union of bars led by Mr. Bota is not a legal professional order of attorneys in Romania. As several persons from Romania and Italy that were registered in these illegal structures were facing exclusion from the lists of Tivoli Bar, they filed a petition to the European Commission for the procedure of infringement against Italy, Romania, the Italian Ministry of Justice, the Romanian Ministry of Justice and the Italian National Juridical Council (Consiglio Nazionale Forense). The European Commission responded by accepting the request for starting the infringement procedure only against the Romanian state (nr. ref. 7059/14/MARK) and transferred it to the application EU Pilot. The choice of the commission was right. The whole confused situation was the fault of the Romanian judiciary system, so the state was responsible.

It is sad that, after the enforcement of the Law no. 225/2004, and after the Decision no. 27/2007 of the High Court of Cassation and Justice, courts could claim that other associations of persons could be established with the name of “bars” according to the Law no. 51/1995, and form a union with the name of “The National Union of Bars from Romania”, while it was clear that Law no. 51/1995 gave legitimacy to the traditional bars established way before 1995 and the High Court of Cassation and Justice ruled in a compulsory manner that only members of these traditional structures are to be recognised as lawful defenders. But this was the case even in the spring of 2015, when the Court of Appeal Cluj⁴ acquitted again one of the prominent members of the “Constitutional Bar” alleging the legitimacy of the bar he was inscribed in, referring to the infringement

³For instance see Court of first instance (*Judecătoria*) Bacău, Criminal Section, Criminal Sentence no. 2015/10.11.2009, inedited.

⁴ Court of Appeal Cluj, Criminal Decision no. 462/A/26.03.2015, <http://oradeccluj.oradestiri.ro/victorie-importanta-a-baroului-constitutional-la-cluj-buha-contra-gidro-motivare#.VjI16H7hBD8>.

procedure mentioned above, and laying the blame for the “confused situation” on the Ministry of Justice.

Finally, the High Court of Cassation and Justice forced the whole judiciary system to understand that the existence of parallel bars constitutes a threat not to the welfare of the attorneys members in the traditional Bars, but to a quality defence of the claimants and defendants, by ruling in Decision no. 15/21.09.2015 pronounced in another appeal on points of law (*recurs în interesul legii*), that the conduct of a person that exercises activities specific to the profession of attorney and is not a member of the professional structure *recognised* by the Law no. 51/1995, is a criminal offence in the sense of art. 348 of the Criminal Code⁵. Searching into the reasoning of the decision we can see that it explains the continuity of the traditional Bars, established from the end of the 19th century, pointing out that these were the structures recognised as legal and reorganised by a number of laws, ending with Law no. 51/1995. Thus, in Romania existed a continuity in organising and exercising the profession of attorney, the law being the incorporating document for the successive organised forms of the legal professional order, without any other formalities⁶. The document also mentioned that generally, the legislator has regulated by special laws all the activities contributing to the fulfilling of a public interest, organising professional orders that are given the status of legal persons by such laws.

Unfortunately, members of the illegally established “bars” are still present in courts. If the opposite party does not bring a motion of illegal representation, the judge allows such persons to act as attorneys (Anon., 2015).

In our opinion, judges should start to act with vigilance, as a crime can be committed in relation with them. Criminal judges do verify if the person assisting or representing the defendant is an attorney from the legal bar, as otherwise their decision will be void. The same possibility exists for judges of all specialities, the only thing missing being their will to ensure themselves that a crime is not committed in their court.

3. THE PERSONAL STATUS OF THE ATTORNEYS AND THE QUALITY OF DEFENCE

A long status of tension has been manifest in the last years between attorneys on one hand and judges and prosecutors on the other hand. Among the reasons contributing to this state was the responsibility for the usurpation of their profession attributed by the attorneys to judges and prosecutors in relation to the activity of parallel bars, as described before (Popescu, 2006, p. 126). Other sources of tension came from the fact that there were a great number of repetitive cases with different solutions spread not only across the country, but even within the same court, generating insecurity and a difficult evaluation of the outcome of a trial. In some situations, attorneys complained about a disrespectful conduct of the judges towards them, or about the fact that the judge did not intervene when the adverse attorney manifested a disrespectful conduct towards them. This situations made difficult the choice of the line of defence for a great number of problems and worn out the trust of the clients in the skills of their attorneys.

In situations when the attorneys perceived the conduct of some judges in the court room as disrespectful, much of the blame was cast on the National Institute for Magistracy

⁵ The reference is made to the new Criminal Code, Law no. 286/2009.

⁶ Decision no. 15/2015 was published in the Official Gazette of Romania, Part. I, No. 816, 3rd November 2015.

that was thought to train judges in a concept of adversity, not partnership with attorneys⁷. No real proof has been delivered for such a statement. On the contrary, for several years now, the National Institute for Magistracy, introduced for trainee judges the compulsory stages in offices of attorneys, for a better understanding of the problems the attorney is facing in contact with the judiciary system. In most cases the lack of social experience of some young judges, or attorneys, as a law graduate may start to practice as an attorney, a prosecutor or a judge at an age between 25 and 30 years old, was responsible for the misconducts.

An incident, developed in September 2014 at the first instance court (*Judecătoria*) of Cluj-Napoca, inflamed the spirits across the country. An elderly well respected attorney was shouted at by a young judge (“Out, get out!”) and then removed from the court room with the help of the gendarme. The Cluj Bar filed a complaint to the National Council for Magistracy, asking for an investigation and the sanctioning of the magistrate. The judge addressed a petition to the National Council for Magistracy for protection of independence and reputation, alleging that the interviews, the press releases, the protest of the attorneys wearing white armbands between September the 15th and 19th, the Resolution of the Cluj Bar for filing the complaint demanding a disciplinary action against her that was made public, were affecting her independence. The investigation conducted by the national Council of Magistracy concluded that the attitude of the magistrate was “an excusable excess”, due to her young age and the attitude of the attorney who insisted that the judge was pursuing a wrong procedural decision, thus undermining the solemnity of the court session. It was also found that although the magistrate expressed herself in a manner that is not suitable with the prestige of her position, there are no signs of a disciplinary misconduct. The Judiciary Section issued Resolution no. 3959/IJ/3285/29.09.2014 for closing the file. The request of the magistrate for protection of independence and reputation was admitted. The Cluj Bar contested Resolution no. 3959/IJ/3285/29.09.2014 and the Bucharest Court of Appeal admitted the contestation and decided to return the file to the Superior Council of Magistracy for continuing the disciplinary procedure⁸. The ruling is not yet final.

At an institutional level, on September 23rd 2015, the Interprofessional Charter of the Romanian judges, prosecutors and attorneys was adopted. Attorneys were represented by the National Union of the Bars from Romania (the traditional professional order). The other parties were the Superior Council for Magistracy and the Highs Court of cassation and Justice. The Charter states the importance of the attorneys in protecting people’s rights and the judicial procedures, and calls for mutually respect between the members of the legal professions. It also establishes that a continuous dialog has to be maintained between the three legal professions in issuing and modifying legislation in the field of justice, and for cooperation with other legal professional groups from the EU countries, for promoting common values and good judicial practices.

In June 2015 a project for modification of Law no. 51/1995 was voted by the Senate. Offending, threatening, intimidating and hitting an attorney are conducts defined as criminal offences. Addressing offending words or gestures to an attorney during a judicial

⁷ <http://www.juridice.ro/337148/magistrati-vs-avocati-razboiul-rece-din-justitie.html> [Accesed 25 10 2015].

⁸ Bucharest Court of Appeal, the VIIIth Section Administrative and fiscal litigation, sentence no. 1519/2015 27.05.2015, http://portal.just.ro/2/SitePages/Dosar.aspx?id_dosar=200000000320101&id_inst=2.

procedure is proposed to be punished with one to six months imprisonment or criminal fine. Also, persons who give false statements during a judicial procedure, with the purpose of revenge against an attorney, are sanctioned with imprisonment between three months and one year or criminal fine. Such provisions already existed in art. 39 of the Law no. 51/1995 and in the art. 279 para. (4) of the Criminal code, referring to threatening, hitting or other violent actions against an attorney. The novelty resides in also incriminating the offending words and gestures, as well as the intimidation.

At a more personal level, some magistrates from the Cluj Court of Appeal initiated a series of communication seminars between magistrates from all the instances in the area of the court and attorneys. Although the tensions we have mentioned above were sensed during all the seminars, the meetings converged to attaining a common goal: the awareness of the difficulties encountered by each party and finding solutions for a overcoming them. The result was a Project of a Guide to Good Practice regarding the Communication between Judges and Attorneys. A set of procedural customs were shaped, for a better time management of both parties during the court session, reciprocal respect, means for focusing on the main issues of the case, cooperation during the court session. Other rules referred to the relations outside the court sessions, like organising common professional and leisure events, discussions on controversial legal issues, conduct rules outside the court rooms that will strengthen the idea of impartiality and fairness of the judges and loyalty of attorneys towards their clients.

All the above mentioned problems, contributing to the personal status of the attorneys, influence the outcome of their activity in court and the trust of their clients.

4. CONFIDENTIALITY – RESPONSIBILITY OF THE ATTORNEY AND OF THE STATE

Confidentiality has traditionally been a characteristic of liberal professions, as it was a moral requirement specific for a certain professional body (Popescu, 1995, pp. 577-592). Economic globalisation, doubled by the mobility of professionals led to the need of unification of deontological codes and issuing of codes valid within the superstate structures. In 1998 the Deontological Code of the attorneys from the European Union was adopted by the Council of Bars and Law Societies of Europe (CCBE) applying to international activities of attorneys inside the Union. At that time, discussions were started about a global code, founded on the model of the Code of professional conduct of the American Bar Association (ABA), the Deontological Code of attorneys from Japan and the Deontological Code of the attorneys from the European Union. An International Ethics Code has already been adopted since 1956 by the International Bars Association (IBA), containing rules for attorneys exercising their profession outside the country where their professional association was registered, which was completed by the rules the attorney had to obey in the state of origin. Confidentiality is one of the most treasured values of the profession, mentioned in the deontological codes. The Statute of attorneys from Romania mentions in art. 8 para. 2 that the attorney has to maintain professional secrecy about every aspect of the case he was entrusted with, and in art. 118 that confidentiality and professional secrecy guarantees clients trust towards the attorney and are fundamental obligations of the attorney. Divulging, the professional secret, without any right, is punished by the Criminal code with imprisonment between 3 months to 3 years or criminal fine, action being taken following the victim's complaint. For the

attorney, the professional secret extends to communication, correspondence, council, and generally speaking all the pieces of the attorney's file (Saint-Pierre, 2013, p.220).

Para. 2.3.1. of the Code of Conduct for lawyers in the European Union states that "Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer". But it is not only up to the attorney to fulfil this requirement. The possibility of maintaining the confidentiality is influenced by the way the state protects this right of the client. This is why, the same para. from the Code of Conduct for lawyers in the European Union shows that "The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state".

For preparing a good defence the secrecy of communication has to be absolute, as the lawyer has to account only to himself for the strategy, and the client is confiding to his attorney only under the guarantee of confidentiality. For these reasons the law has to forbid explicitly for everybody the breach of the professional secret, without exception, judiciary authorities included. The actual respect of such legal protection by the investigative bodies, prosecutors and judges is a criteria for being a state of law, based on the full exercise of personal rights and liberties, the right of defence included (Mateut, 2015). Nevertheless, it is a reality that the professional secret of the attorney is under continuous threat everywhere, the judiciary intensifying the phone tapping and searches of the offices of attorneys. It cannot be contested the fact that one of the reasons is the continuous threat of terrorism and organised crime against important values of the global society, but this cannot justify abuse.

Violations of the right to confidentiality in the relations between clients and attorneys have been the subject of numerous convictions pronounced by the European Court of Human Rights, in relation with art. 8 of the European Convention of Human Rights, due to searching of correspondence, phone tapping, search and seizure in the offices of attorneys (Bârsan, 2005, pp. 650-662). Romania has been convicted on such grounds (*Acatrinei v. Romania*, *Ulariu v. Romania*, *Bucur and Toma v. Romania*, *Pruteanu v. Romania*).

Not only individuals fought for the protection of confidentiality in the attorney-client relation, but also the professional bodies. The Council of Bars and Law Societies of Europe successfully intervened before The Hague District Court in a challenge brought against the Dutch State by the law firm Prakken d'Oliveira and the Dutch Association of Criminal Defence Lawyers (NVSA). The court ruled that, according to the case law of the European Court of Human Rights, surveillance activities must be subjected to review by an independent body with the power to prevent or terminate potential infringements of professional secrecy. The court also stressed that information obtained from tapping attorneys may not be shared with prosecutors until an independent review has taken place regarding the legality of that information and the way it was obtained, as even the possibility that information is shared with the public prosecutor can result to people refraining from contacting a lawyer. The court also ruled that the protection of client confidentiality is not limited to communications with Dutch attorneys but extends to communications with all European attorneys rendering services in The Netherlands as referred to in Directive 77/249/EC⁹. This ruling has been brought to the attention of the

⁹ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_pr_0615pdf1_1446127708.pdf.

French Constitutional Council by The Council of Bars and Law Societies of Europe (CCBE) as part of the comments submitted in regard to the bill on intelligence. The bill sets out that intelligence services may intercept private communications and bug rooms in order to defend and promote the fundamental interests of the nation. Concerns have been expressed both about the broad formulation of the various public interest reasons that could justify this approach, and the absence of any independent judicial control mechanism, especially regarding the provisions mentioning that in case of emergency, there will be no need to consult the National Commission of Intelligence Techniques Control (CNCTR) in advance, even regarding members of protected professions such as journalists, judges and attorneys¹⁰.

In recent cases the European Court of Human Rights has condemned undifferentiated search and seizure of documents and correspondence of a lawyer (*Vinci v. France*, *Yuditskaia v. Russia*). In another case (*Michaud v. France*), although the Court stressed out the importance of the confidentiality of the lawyer-client relations and of legal professional privilege, it considered however, that the obligation to report suspicions pursued the legitimate aim of prevention of disorder or crime, since it was intended to combat money laundering and related criminal offences, and it was necessary in pursuit of the aim. Regarding the proportionality of limitations of the rights and intrusion of the state upon the right to private life it has been shown that sometimes regulations on the subject are perceived by the citizens in accordance with the trust or distrust in the state institutions, due to the specific historical and political context. Romania is one of the states with the lowest level of trust (Fodor, 2015, pp. 237-238). It has also been pointed that the rule of law is affected in any situation when the same powers which enacted the regulations are also the ones to enforce it, interpret it and decide whether the enforcement was in accordance with the law; this is why the control of the judiciary on taking and establishing the legality of surveillance measures, searching and seizure, will not only increase the level of trust in the fact that a truly independent structure is checking the proportionality of a measure, but will also help to a better preservation of state's sovereignty (Fodor, 2015, pp. 242-243).

In the Romanian Code of criminal procedure (Law no. 135/2010), according to art. 89 para. 2, the person who is detained or arrested has the right to contact the attorney, in conditions of confidentiality of communication, without tapping or interception of their conversation. Any evidence obtained in breach of these dispositions is excluded. According to art. 95 of the Code of criminal procedure in case the dispositions of art. 89 para. 2 are disregarded, the attorney may address a complaint to the hierarchic superior prosecutor, who has to solve the complaint and transmit the solution and the reasoning in 48 hours (Volonciu & others, 2014). There is no direct access to court for such a complaint, but the illegally obtained evidence can be excluded from the file by the judge of the preliminary chamber, according to art. 342 of the Code of criminal procedure. The provisions of art. 89 refer to situations where a person is already facing a criminal charge. Other provisions of the Code of criminal procedure refer to the general conditions of technical surveillance. According to art. 139, technical surveillance is granted by the judge of rights and liberties if certain conditions are present, including the proportionality of the measure with the aim pursued, when there is a suspicion in regard with serious

¹⁰ http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_pr_0515pdf1_1437381732.pdf

crimes, mentioned by the legal text. The judge may grant the technical surveillance even if there is no criminal charge brought yet, if a reasonable suspicion exists that a crime from the ones mentioned by para. 2 of art. 139 is prepared or has been committed. The relation between the attorney and his client can only form the subject of technical surveillance if data exists on the fact that the attorney is preparing or is committing such crimes. If during or after the technical surveillance it is discovered that the activities of surveillance envisaged relations between the attorney and his client, such evidence may not be admitted in any criminal trial and have to be immediately destroyed by the prosecutor. Also, the prosecutor has to immediately inform the judge that granted the technical surveillance, and the judge will inform the attorney if he considers appropriate.

It has been argued that the guarantees concerning the professional secret of the attorneys are minimal, as the prejudice of the party has been produced when the prosecutor is listening or even transcribing the conversations he was having with his attorney, in the process of selection, as such conversations may contain important data about the crimes of the suspect that was under surveillance. Even if the evidence illegally obtained during technical surveillance will be destroyed or excluded from the file, the important information, although “secret” is known to the investigator and can lead him to other evidence that are admissible during trial (Volonciu & colectivul, 2014). This is even truer in the case described by art. 141 of the Code for criminal procedure, when the prosecutor may authorise technical surveillance for 48 hours and ask afterwards for the validation of the measure from the judge of rights and liberties. The simple possibility referred to by art. 139 para 4 of the Code of criminal procedure for the interception of conversations between the suspect and his lawyer is a breach of the right to private life, as was stated by the European Court of Human Rights in the case of *Iordachi and others v. Republic of Moldova*.

5. CONCLUSIONS

What any client expects from his attorney is a good defence. Within a service market the client is selecting the attorney based on reputation. Reputation is built on a number of personal qualities. Besides the personal qualities of every attorney, other important factor concur to the quality of the defence. The regulation of the profession and the interpretation given by the courts may prove very important to the quality of defence. The Romanian state proved a regrettable incapacity of clarifying the status of the professional order of the attorneys. Although in the end the legislator imposed its view to the judiciary, the stammering of different institutions led to the initiation of an infringement procedure against Romania. This proves that the state cannot leave the exercise of liberal professions the same freedom as other ordinary professions, due to the importance of the service provided by the professional. Important features that define a liberal profession, such as confidentiality must also be ensured by legal provisions. For the judiciary system, the respect of the confidentiality between the attorney and his client may be of the essence of the right to defence and improper regulation may affect the very substance of this right.

BIBLIOGRAPHY

- Anon., 2013. *CPME/AD/EC/10102013/140_Final/EN*. [Online] , Available at: http://doc.cpme.eu:591/adopted/2013/CPME_AD_EC_10102013_140_Final_EN_Charter_Liberal_Professions.pdf, [Accessed 24 10 2015].
- Anon., 2015. *Clujust*. [Online] , Available at: <http://www.clujust.ro/decizia-iccj-a-fost-publicata-avocatii-din-unbr-bota-intra-in-sala-de-justitie/>, [Accessed 9 11 2015].
- Bârsan, C., 2005. *Convenția Europeană a Drepturilor Omului. Comentarii pe articole*. Bucharest: ALL BECK.
- Fodor, E. M., 2008. Protejarea interesului public în reglementarea profesiei de avocat. *Caietul științific. Secțiunea pentru științe juridice și administrative*, Issue 10, pp. 315-326.
- Fodor, E. M., 2010. The Role of the State in in Regulating the Legal Profession, aiming to Improve the Justice Public Service in the Context of Globalization. *Fiat Iustitia*, Issue 2, pp. 5-18.
- Fodor, G. A., 2015. *The Struggling State: the Impact of Balancing Individual Rights and Data Surveillance Legislation on State Sovereignty*. Cluj-Napoca, Accent.
- Ionescu, M. & Miron, G.-M., 2012. *Istoria Baroului Cluj*. Cluj-Napoca: Argonaut/Mega.
- Konrad Adenauer Stiftung, 2006. *The Justice System in Romania - Independent Report*. [Online] , Available at: http://www.kas.de/wf/doc/kas_11060-544-2-30.pdf, [Accessed 25 10 2015].
- Mateuș, G., 2015. *Unele considerații privind garantarea secretului profesional al avocatului în lumina noului Cod de procedură penală*. [Online] , Available at: <http://bloghamangiu.ro/confidentialitatea-avocat-client/> [Accessed 15 10 2015].
- Moreira, V. & Toshkov, S., 2013. The (De) Regulation of the Liberal Professions in the European Union. In: R. Rego, ed. *The Trend Towards the European Deregulation of Professions and its Impact on Portugal Under Crisis*. UK: Palgrave Macmillan.
- Popescu, C. L., 2006. *Legalitatea, continuitatea și unicitatea ordinului profesional al avocaților din România*. s.l.:s.n.
- Popescu, V., 1995. Deontologia și morală riscului. *Revista de Filosofie*, 09 - 12, Volume XLII, pp. 577-592.
- Saint-Pierre, F., 2013. *Le guide de la défense pénale*. 7ème éd. Paris: Dalloz.
- Volonciu, N. & others, 2014. *Noul Cod de Procedură Penală comentat*. [Online], Available at: <http://idrept.ro/DocumentView.aspx?DocumentId=33014868> [Accessed 01 11 2015].
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