

THE LAWYER - BETWEEN THE STATUTE OF LIBERAL PROFESSION AND THE NORMATIVE LIMITATIONS

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ABSTRACT: *It is too simplistic to say that, traditionally, the legal profession is placed within the “free” or “liberal” professions, exercised solely based on an inherent statute and without “a chief”. Normative, statutory or deontological limitations have been outlined even from the moment the lawyer started to impose as a law practitioner.*

In Romania, the legal profession enjoys a certain tradition, and acquired professional status starting with 1864. Currently, the core legislation consists of the Law no. 51/1995 on the organization and practice of the lawyer profession, with the subsequent amendments and supplements, the Statute of profession, approved by Decision no. 64 of 2011 of the National Association of Romanian Bars with the subsequent amendments and the Lawyers’ Code of Ethics in the European Union adopted in the plenary session on 28 October 1998 and subsequently amended in the plenary sessions of the Council of Bars and Law Societies of Europe (CCBE) on 28 November 1998, 6 December 2002 and 19 May 2006. The delineation of the current statute of the lawyers’ profession is circumscribed, whether we like it or not, by other regulatory texts such as the Fiscal Code and the Fiscal Procedure Code, the Civil Code and the Civil Procedure Code, even the Criminal Code and the Criminal Procedure Code etc.

This article contains an overview of the current statute of the legal profession, the way it is outlined (or “influenced”) by regulations (statutory or normative), but also by the Constitutional Court of Romania case law.

KEY WORDS: *lawyer, statute, liberal profession, Constitutional Court case law.*

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1. SHORT HISTORY

In Romania, regulatory requirements regarding the legal profession have appeared along with the implementation of Law no. 1709 of 4 December 1864 for the establishment of the Corps of lawyers, a law which provided the first regulations on the organization and exercise of this liberal profession (Naubauer, Șt., 2014:39).

Subsequently, the statute of this profession and the regime of its organization evolved exclusively under the dome of certain special normative regulations and of social and

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legislative changes¹ occurred (Law of 12 March 1907 on the organization of the Corps of lawyers, the Law of 21 February 1923 on the organization and unification of the Corps of lawyers, Law of 28 December 1931 for the organization of the Corps of lawyers, Decree-Law of 26 October 1939, Law no. 509 of 5 September 1940 on the organization of the Corps of lawyers in Romania, Law no. 3 of 19 January 1948 for the dissolution of Bureaus and the establishment of Colleges for lawyers in Romania², Decree no. 39/1950 on the profession of lawyer, Decree no. 281/1954 on the organization of legal practitioners in the Romanian People's Republic).

Obviously, the events of 1989 have enabled new approaches on the status of the legal profession in Romania, the first steps being taken in order to set up again the law practice as a liberal profession by implementing the principle of autonomy in what concerns the organization and the exercise of the legal profession by removing the profession from the "guardianship" of the Ministry of Justice (guardianship exercised in the period 1948 - 1990), including by returning to the name and to the established forms of organization and practice of the profession.

The Decree-Law no. 90 of 28 February 1990 regarding certain measures for the organization and practice of the legal profession in Romania³ has expressly devoted the principle of the lawyers' independence in practicing the profession⁴, the enjoyed protection received from the state authority without being assimilated to the civil servant or other categories of employees, but also the principle of professional autonomy (Art. 3). At the same time, the mentioned regulation allowed the reestablishment of the Bars, with legal personality, as a form of organization of the legal profession.

Legislative headquarters

The current framework for the exercise of the legal profession is established by Law no. 51/1995 on the organization and practice of the legal profession with the subsequent supplements and amendments⁵; the Status of the Legal Profession adopted by Resolution

¹ <http://www.juridice.ro/166131/gheorghe-florea-despre-istoria-si-prezentul-avocaturii.html>;

<http://e-juridic.manager.ro/articole/tendinte-in-dezvoltarea-profesiei-de-avocat-7407.html> (seen on 1.12.2015)

² Amended by the Law no. 16 of 10 February 1948, published in the Official Gazette of Romania no. 33 of 10 February 1948.

³ Issued by the Interim Council of the National Union, published in the Official Gazette of Romania no. 32 of 1 March 1990 and repealed by Law no. 51/1995.

⁴ Art. 2 of the Decree-Law no.90 of 28/1990: „In the exercise of his profession the lawyer is subject only to the law and his conscience. For the opinion of the defense lawyer to be freely expressed, the lawyers are protected by law in their exercise of the profession, before any court or tribunal or in connection with their work in the Bars and law offices as persons performing functions that imply the exercise of the authority of the State but without being assimilated with the public servants or other employees”.

⁵ Law no. 51 of 7 June 1995 for the organization and exercise of the legal profession, published in the Official Journal no. 116 of 9 June 1995, republished in the Official Gazette of Romania no. 113 of 6 March 2001, respectively the Official Gazette of Romania no. 98 of 7 February 2011. Subsequently, Law no. 51/1995 had been again amended: G.E.O. no.10 of 9 February 2011 regarding the repeal of para. (8) Art. 39 of Law no. 51/1995 on the organization and practice of the lawyer profession, published in the Official Gazette of Romania no. 113 of 14 February 2011 (approved by Law no. 26/2013); Law no. 71 of 3 June 2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Journal no. 409 of 10 June 2011; Law no.76 of 24 May 2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, published in the Official Journal no. 365 of 30 May 2012; G.E.O. no. 44 of 23 August 2012 on the amendment of Art. 81 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, published in the Official

no. 64 of 2011 of the Council of the National Association of Romanian Bars, with the subsequent amendments⁶; the Code of Conduct for lawyers in the European Union adopted in the plenary on 28 October 1998 and subsequently amended in the plenary sessions of the Council of Bars and Law Societies of the European Union (CCBE) on 28 November 1998, on 6 December 2002 and on 19 May 2006⁷, and also the Rules of organization and operation of the National Union of Bars in Romania Council and the Rules of conducting the meetings of the National Association of Romanian Bars, with the subsequent amendments⁸.

The statute of the liberal profession. Liberal profession - free profession

Although currently the lawyer's activity is considered a "liberal" activity, the expression "free profession" is also frequently used (especially when speaking about regulations).

Regarding the activity of lawyers, the Romanian law uses also the notion of "regulated profession"⁹. Thus, according to Art. 31 para. 1 of Law no. 200/2004 the recognition of

Gazette of Romania no. 606 of 23 August 2012; Law no. 187 of 24 October 2012 for the implementation of Law no. 286/2009 on the Criminal Code, published in the Official Journal no. 757 of 12 November 2012; G.E.O. no. 4 of 30 January 2013 on the amendment of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Civil Procedure Code, but also for the amendment and addition of certain related regulatory acts, published in the Official Gazette of Romania no. 68 of 31 January 2013. We also must take into account the Romanian Constitutional Court Decision no. 1.519 of 15 November 2011 regarding the constitutional challenge of the provisions of Art. 21 para. (1) of Law no. 51/1995 on the organization and practice of the lawyer profession, published in the Official Gazette of Romania no. 67 of 27 January 2011; Decision no. 297 of 22 May 2014 regarding the constitutional challenge of the provisions of Art. 25 para. (2) of Law no. 51/1995 on the organization and practice of the lawyer profession, published in the Official Gazette of Romania no. 521 of 14 July 2014; Decision no. 15 of 21 September 2015 regarding the examination of the appeal in the interest of Law filed by the general Prosecutor of the Prosecution Office attached to the High Court of Cassation and Justice considering the interpretation and unitary application of the provisions found in the Art. 348 of the Criminal Code (correspondent of Art. 281 of the previous Criminal Code), in the framework of exercising the specific activities of legal profession by persons who are not part of the professional organizing bodies acknowledged by the Law no. 51/1995 on the organization and practice of the lawyer profession, republished, with the subsequent amendments, published in the Official Journal no. 816 of 3 November 2015.

⁶ http://unbr.ro/ro/wp-content/uploads/2013/10/Statutul_Profesiei_de_Avocat_041013.pdf (seen on 25.11.2015).

⁷ Implemented in Romania based on the Decision no. 1486 of 27 October 2007 of the Permanent Commission of UNBR (http://unbr.ro/ro/wp-content/uploads/2013/10/Codul_Deontologic_al_Avocatilor_din_UE_041013.pdf) (seen on 25 November 2015).

⁸ Decision no. 5 of 11 July 2011 of the UNBR Council, amended by the Decision no. 301 of December 2011 (http://unbr.ro/ro/wp-content/uploads/2013/10/Regulament_Organizare_si_Functionare_UNBR_041013.pdf) (seen on 25 November 2015).

⁹ Within the regulated professions there are also the one traditionally named liberal, among which there is also that of a lawyer – Law no. 200/2004 on the recognition of diplomas and professional qualifications for regulated professions in Romania, published in the Official Gazette of Romania no. 500 of 3 June 2004.

Art. 3 para. 1: "The regulated profession is the activity or the ensemble of regulated professions according to the Romanian law, that form the respective profession in Romania."

Art. 2 Law no. 200/2004:

Para. 1: "The regulated professional activity represents the professional activity for which the access or its practice in Romania is conditioned, directly or indirectly, according to the Romanian legislation in force, by owning a document that should certify the level of professional training".

Para. 2: "Regulated professional activities are considered the activities exercised with a professional title, if using such a title is reserved only to the holders of some documents that certify the level of professional training."

Para. 3: "Moreover, regulated professional activities are the activities deployed by the members of a professional organization if the respective organization:

diplomas and professional qualifications for the regulated professions in Romania and of Appendix 3 to the Law no. 200/2004, the legal profession is a regulated profession (see Appendix no. 3, UNBR is the appropriate competent authority).

According to the Romanian Explanatory Dictionary (DEX), the free profession is defined as the “profession practiced by a person on its own (without being permanently employed in an institution or enterprise)”¹⁰.

Liberal profession is defined “in that it depends on an Order, on a professional body and whose remuneration does not have a trading feature.” (Baiaș, F., 1995: 36; Naubauer, Șt., 2010:66).

Romania is not the only member state of the European Union which did not impose a uniform regulation on the liberal professions (excluding the tax issues), but on the level of the union decision making, there is an interest regarding these professions and areas of activity related to them, a justified interest at least from the perspective of ensuring the freedom of movement for the persons and services. Thus, by the Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications¹¹, the first step had been taken being developed a definition of liberal professions (placed in the broader context within the regulated professions¹²) “*liberal professions are those that are exercised on the basis of relevant professional qualifications with personal title, with their own responsibility and professionally independent providing intellectual and conceptual services in the interest of the customers and public.*”¹³

Taking as starting points the provisions of the Directive 2005/36/EC and the domestic regulations, a series of criteria were synthesized that should be fulfilled so as to consider certain professions as “liberal”:

- a) they are practiced individually;
- b) they are intellectual, artistic or conceptual by nature;
- c) they require training or a specific professional qualification at university level;
- d) they are assigned to a professional body;
- e) they are governed by a specific legislative act of organizing and exercising the profession¹⁴.

a) has as a fundamental scope the promotion and maintenance of a high level in a certain professional field;

b) is acknowledged by the Romanian law with the purpose to achieve this scope;

c) issues to its members a document certifying the level of professional training;

d) requires its members to comply with certain professional conduct rules drawn up by this organization;

e) confers to its members the right to use a professional title or its abbreviation and to benefit from a status corresponding to the level of professional training”.

¹⁰ The Romanian Academy, the Linguistic Institute „Iorgu-Iordan – Al. Rosetti”, *DEX – Dictionar explicativ al Limbii Române*, Univers Enciclopedic Gold Publishing House, Bucharest, 2012, p. 588.

¹¹ Published in the Official Journal of the E.U. L 255/22 of 30 September 2005 entered into force on 20 October 2007.

¹² The regulated profession is defined as „an activity or an ensemble of professional activities for which the access, practice or one of the exercising ways are conditioned, directly or indirectly, based on the legal rules and administrative rules, on the ownership of certain professional qualifications, on using a personal title limited by legal enforcing rules and administrative rules to the holders of such professional qualifications that constitute a special form of exercitation” – Art. 2 para 1 of the Directive 2005/36/EC.

¹³ Directive 2005/36/EC, Preamble, pct. 43.

¹⁴ Ministry for Economy, Trade, Industry and Business Environment, 2010, *Evaluarea dimensiunii pieței profesiiilor liberale. Qualitative and quantitative study* -

Therefore it can be easily seen, the lawyer and its activity meet all of these criteria.

Recently, the liberal professions are legally defined, according to Art. 7 section 37 of Law no. 257/2015 on the Fiscal Code¹⁵ as “those occupations performed by individuals on their own, according to special normative acts regulating the organization and the practice of that profession.”

Starting from the two definitions, and taking into account the evolution of the legal profession and the current regulation, the most appropriate name is that of *liberal profession* because, its organization and practice are exclusively within the framework established by its own statute of the profession and the special legislative acts, all the other criteria imposed being fulfilled.

Beyond the doctrinal discussions (without minimizing their importance), in order to determine the status and the legal nature of the legal profession we should consider the legal regulations. Even the initial normative acts regarding the lawyer and the work undertaken by it imposed an organizational framework and an inherent status (eg. “the Corps of Lawyers” and “the table of the lawyers in the county Bar”, including a national structure of the order of lawyers)¹⁶.

Moreover, the status of liberal profession is shaped with the aid of the fundamental principles and rules of the legal profession. And all converge on the same conclusion: the legal occupation is a liberal profession (Baiaș, F., 1995:36). Aspect confirmed also by the Constitutional Court of Romania¹⁷.

Thus, Law no. 51/1995 on the organization and practice of the lawyer profession regulates the legal profession as a *free and independent profession, with an autonomous organization, operation and management*, determined exclusively by law and by the statute of the profession. The legal profession may only be exercised by lawyers enrolled in the table drawn by the Bar where the lawyers are part of (Art. 1). However, according to Art. 2 para. 1 of Law no. 51/1995 the lawyer in exercising his profession is independent and subjects only to the law, Statute and the Code of Ethics.

Even related to these provisions alone, it is clear that the legal profession should be classified within the category of the liberal professions. To support this assertion, there are other provisions brought, such as the Art. 1 para. 2 of the Statute of the legal profession, which establishes the *fundamental principles* which are the basis for the exercise of the legal profession:

- a) the principle of legality;
- b) the principle of freedom;
- c) the principle of independence;
- d) the principle of autonomy and decentralization; e) principle of professional secrecy.

<https://www.scribd.com/document/32638454/Studiul-4-Strategia-DMA-Piata-Profesiilor-Liberale-Final-Draft> (seen on 22 September 2016).

¹⁵ The Fiscal Code of Romania implemented by Law no. 257/2015, published in the Official Gazette of Romania no. 688 of 10 October 2015.

¹⁶ Law of 6 December 1864 for the establishment of the Corps of lawyers, Law of 12 March 1907 for the organization of the Corps of lawyers, Law of 21 February 1923 for the organization and unification of the Corps of lawyers.

¹⁷ Constitutional Court Decision no. 45 of 2 May 1995, published in the Official Gazette of Romania no. 90 of 12 May 1995; Decision of the Constitutional Court no. 161 of 22 May 2001, published in the Official Gazette of Romania no. 473 of 17 August 2001.

Being a liberal profession par excellence (“genuine liberal” according U.N.B.R.¹⁸), one of the most important requirements is the *independence* (of both the profession and the lawyer) which excludes “any interference of the state regarding its organization and its leadership”¹⁹. The independence of the legal profession is legally devoted in Art. 1 para. 1 of Law no. 51/1995, according to which “the legal profession is free and independent, with autonomous organization, operation and management”²⁰. Moreover the legislative independence of the lawyer is legally enshrined in Art. 2 para. 1 of Law no. 51/1995, according to which “while practicing his profession, the lawyer is independent and subjects only to the law, statute and the rules of the code of ethics.”²¹ It assumes that the lawyer must not “exercise any activity that would place him in a state of legal subordination or different rules would imposed to him that could impede the performance of his profession.”²²

In order to make a precise outline of the lawyer’s status, another relevant issue is also the autonomy of the form of organization for the practice of this profession, which requires also an autonomous organization and functioning of the Bars, both in relation to the UAR (UNBR – o.n.) and with its bodies (Baiaș, F., 1995:29-30).

Even the Constitutional Court by its jurisprudence has contributed to the devotion of liberal profession status. Thus, in the opinion of the Constitutional Court, the Romanian legislature has regulated the legal profession as “a public service that is organized and operates under a special law and the legal profession may be exercised by a professional body selected, which operates under different rules established by law.”²³ Although the work carried out is regarded as a public service, however, the lawyers cannot be assimilated to civil servants, the provisions of Law no. 51/1995 on the organization and practice of the lawyer profession “excluding unequivocally the assimilation of the legal profession, free and independent to that of the public servant”²⁴. The very nature of the public service nature of the lawyer’s activity entails the need of a special regulation and the practice of the legal activity under the dome of an inherent status²⁵. And the nature of public service has as a prerequisite the lawyer’s role in regard to the right to defense, a right to defense which, in its turn, is a prerequisite for a fair trial and thus inevitably highlights the role of the lawyer in the administration of justice (Deleanu, I., 2005:28), a role that requires not only an “aura” but it also forces the lawyer to professionalism, dedication, an assumption of the responsibility and status.

¹⁸ <http://unbr.ro/unbr/prezentare-general-a-istoric/> (seen on 1 September 2016).

¹⁹ Constitutional Court Decision no. 45 of 2 May 1995, published in the Official Gazette of Romania no. 90 of 12 May 1995.

²⁰ Provision reiterated by Art. 1 para. 1 of the Statute of the lawyer’s profession.

²¹ Provision reiterated by Art. 3 para. 1 of the Statute of lawyer’s profession.

²² Constitutional Court Decision no. 45 of 2 May 1995, published in the Official Gazette of Romania no. 90 of 12 May 1995.

²³ Constitutional Court Decision no. 391 of 14 October 1997, published in the Official Gazette of Romania no. 143 of 8 April 1998; Constitutional Court Decision no. 44 of 4 February 2003, published in the Official Journal no.161 of 13 March 2003.

²⁴ Constitutional Court Decision no. 161 of 22 May 2001, published in the Official Gazette of Romania no. 473 of 17 August 2001.

²⁵ Constitutional Court Decision no. 233 of 25 May 2004, published in the Official Gazette of Romania no. 603 of 5 July 2004.

Belonging to the nature of the lawyers' profession²⁶ is also the confidentiality of the lawyer-client relationship and the obligation of keeping professional secrecy, coordinates imposed and protected by legal texts and in particular by the ECHR jurisprudence. Confidentiality and professional secrecy is a fundamental obligation of the lawyer. According to Art. 11 of Law no. 51/1995 "the lawyer is bound to keep professional secrecy concerning any aspect of the case which has been entrusted to him, unless there are cases expressly provided by law". The statute of the legal profession details what means "any aspect of the case entrusted" and the specific ways of protecting the professional secrecy as long as one of the principles underlying this activity is precisely the principle of professional secrecy (Art. 1 para. 2 letter e) of the Statute of the legal profession. Moreover the professional secrecy is elevated to the value of "public order" (Art. 8 para. 1 of the Statute). Firstly, according to Art. 228 of the Statute, the lawyer has the obligation to use a professional office and other spaces where his professional activity would ensure professional secrecy. Secondly, the professional secrecy aims at any form of preservation or storage of information and data provided to the lawyer by the client within their relationship as well as any documents drawn up by a lawyer that contain or underlie the information or data provided by the client in order to offer legal assistance and whose privacy was requested by the client. Thirdly, in order to ensure secrecy, the lawyer has the obligation to keep information only at the professional office or only in areas approved for that purpose by the Bar Council. Fourthly, to ensure secrecy, the lawyer is obliged to object to home search, to the main and secondary professional office and body search, in what concerns the documents of professional nature found on him or at the above mentioned places. The lawyer is obliged to oppose also to the seizure of documents and goods consisting of professional documents and works, if the conditions of Art. 35 of the Law are not met. The lawyer must, immediately, notify the dean of the Bar about what happened. Last but not least, the professional secrecy covers even the strategies, tactics and actions planned and carried out for the client (Art. 134 para. 4 of the Statute).

Such an obligation is set also for the lawyers from the member states of the European Union and European Economic Area which may unfold in Romania, under the law, professional activities such as supply of services (Art. 111 para. 3 of Law no. 51/1995).

The failure of keeping professional secrecy constitutes a serious disciplinary offense (according to Art. 8 of the Statute of the legal profession) and entails disciplinary sanctions (Art. 89 para. 1 of Law no. 51/1995).

According to Art. 35 para. 1 of Law no. 51/1995 "to ensure professional secrecy, the documents and papers, professional in nature, found at the lawyer or at his office shall be inviolable. Searching the lawyer, his home or his office or the seizure of documents and goods cannot be done only by the prosecutor, based on a warrant issued under the law". Art. 35 para. 2 of Law no. 51/1995 stipulates that "The lawyer's phone conversations shall not be heard and recorded by any technical means and neither his professional phone conversation shall be intercepted and recorded unless on terms and procedure provided by law".

²⁶ According to Art. 113 of the Statute "Confidentiality and professional secrecy ensures the trust in the lawyer establishing the fundamental obligations of the lawyer".

Moreover, other legislations also regulate various aspects related to the confidentiality of client-lawyer relationship: Art. 89 para. 2 Criminal Procedure Code; according to which “the arrested or detained person has the right to contact a lawyer, having the confidentiality of communication ensured, with the necessary visual surveillance, security measures being taken, without their conversation being intercepted or recorded. Evidence obtained in violation of this paragraph shall be excluded”.

The procedure and conditions for “violation” of secrecy and confidentiality of the lawyer-client relationship are determined by the provisions of the criminal procedure law. Thus, according to Art. 139 para. 4 Criminal Procedure Code “the relationship between a lawyer and the person whom he assists or represents cannot be the subject of the technical surveillance unless there is evidence that the lawyer commits or prepares the commission of an offense referred to in para. (2).²⁷ If during or after execution of the measure it appears that the technical surveillance activities were focused on the relationship between the lawyer and the suspect or defendant he defends, the evidence obtained can not be used in any criminal proceedings therefore they shall be destroyed immediately by the prosecutor. The judge who ordered the measure shall be informed immediately by the prosecutor. When necessary, the judge shall inform the lawyer.” According to Art. 146¹ para. 6 Criminal Procedure Code, it is prohibited to obtain data regarding the financial transactions between the lawyer and the suspect, defendant or any other person that he defends, unless there is evidence that the lawyer commits or prepares the commission of an offense referred to in Art. 139 para. (2). And according to Art. 147 par. 2 Criminal Procedure Code “the retention, the delivery and search of mails or postal items sent or received in the relations between the lawyer and the suspect, defendant or any other person that he defends is prohibited, unless there is evidence that the lawyer commits or prepares the commission of an offense referred to in Art. 139 para. (2)”.

The provisions of Art. 36 of Law no. 51/1995 are also included in the sphere of measures meant to protect the confidentiality of the lawyer-client relationship, according to which the contact between the lawyer and his client can not be hindered or controlled, directly or indirectly, by any organ of the state. The insurance of confidentiality of discussions are guaranteed even if the client is under arrest or detention. The legal text establishes an obligation on the administration of the arrest or detention that must take the necessary measures to respect the rights referred to in para. 1 of the article mentioned above.

Obviously, the question is how effective are the legal provisions ensuring the protection of the lawyer and the privacy of his relationship with the client compared to those legal texts that still allow an interference in this relationship and the lawyer’s activity as well as the provisions of Art. 139 para. 4, Art. 147 para. 2 Criminal Procedure Code etc. or the provisions of Art. 159 para. 12 and para. 17 Criminal Procedure Code

²⁷ Art. 139 para. 2 Criminal Procedure Code: “Technical surveillance may be ordered for crimes against national security under the Criminal Code and special laws, as well as in cases of crimes such as drug trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeiting money or other securities, forgery of electronic payment instruments, crimes against property, blackmail, rape, deprivation of liberty, tax evasion offenses in case of corruption offenses and of other offenses assimilated to corruption offenses, crimes against the financial interests of the European Union, the crimes committed through computer systems or means of electronic communication or for other crimes for which the law provides imprisonment for 5 years or longer”.

which allow the judicial body that carries out a domicile search to use even force to open or enter various spaces, obviously given that, according to Art. 228 para. 4 and 5 of the Statute of the legal profession, he would oppose. We consider that guarantees regarding confidentiality and professional secrecy “lose ground” even when facing certain “primary” interpretations of certain legal texts, interpretations that, dangerously, allow the inclusion of the lawyer who acts in his profession (for example, when he advises his client concerning his legal state) within the domain of “criminal participation” related to the criminal activity of his client.²⁸

As there is no legal definition for the legal profession, the literature embraced the role to draw one. “It is the liberal profession whose members - lawyers enrolled in bars - give consultancy, legal in its nature, draw up legal documents, assist and represent individuals and legal persons in the courts, public authorities and institutions, as well as regarding any other legal subject in order to protect and enhance, within the law, the rights, freedoms and interests of their clients. (Baiaș, F., 1995:36)”

Regarding other normative regulations applicable to law practice²⁹, the ones that have the greatest impact are the tax and criminal regulations.

Thus, the Romanian tax law contains bushy regulations regarding the taxation of this activity. Since the legal activity is considered a liberal profession (and implicitly regulated) the revenues are considered revenues from self-employment³⁰ and taxed as such. According to Art. 67 of Law no. 257/2015, the income from independent activities include income from production, trade, services, income from liberal professions and income from intellectual property rights, achieved individually and/or in a form of association, including adjacent activities. Revenues from liberal professions are the revenues obtained from the professional services, according to special normative acts regulating the organization and the profession practice in question. Thus, the income achieved by lawyers (along with other categories of persons carrying out so-called independent activities, for example, public notaries, bailiffs etc.) fall into this category. The lawyer, once enrolled in a bar becomes a subject of tax law, with the obligation to register to the tax Authorities, to register and declare income from activity, to pay the tax liability relative to the income, and to keep the records required by tax law (Cătuna L. and others, 2012:208).

Also, the legal activity is subject to certain legal and statutory pecuniary regulations by its obligations consisting of the payment of taxes and contributions to the budget of the Bar where the lawyer is part of, to the budget of U.N.B.R. and to the budget of the

²⁸ See UNBR Referral registered under no. 355-DIV 2016 of 21 November 2016.

²⁹ For instance, G.E.O. no. 44/2008 regarding the performance of the economic activities by the self-employed persons, individual enterprises and family enterprises, published in the Official Gazette of Romania no. 328 of 25 April 2008, with the subsequent amendments and supplements; G.E.O. no. 49/2009 on the freedom of establishment of service providers and of freedom to provide services in Romania, published in the Official Gazette of Romania no. 366 of 1 June 2009, with the subsequent amendments and supplements; Law no. 287/2009 on Civil Code expressly devotes the legal institution of the legal person transformation (Art. 241 – 242) as a way of reorganization and clarifies the way in which the legal provisions should be interpreted and applied, provisions that have consecrated the legal profession and which intervened consecutively starting with 1864 for the organization and legal amendment of the Lawyers’ Order - <http://www.juridice.ro/166131/gheorghe-florea-despre-istoria-si-prezentul-avocaturii.html>

³⁰ Romanian Fiscal Code implemented by Law no. 257/2015, published in the Official Gazette of Romania no. 688 of 10 October 2015.

security system of lawyers (according to Art. 44 para. 1 of Law no. 51/1995 and Art. 235 on the organization and practice of the lawyer profession). Failure to comply with these obligations entails the disciplinary sanction of suspension.

Regarding criminal liability, the special legislation operates on two levels: in terms of protection for the lawyer and his profession, but also the criminal responsibility for any crimes committed by the lawyer.

According to Art. 7 on the organization and practice of the lawyer profession, the lawyer is not criminally responsible for the allegations made orally or in writing before the courts, other organs of jurisdiction, the prosecuting authorities or other authorities, if those allegations are related to the defense and they are necessary to establish the truth. The prosecution and indictment of the lawyer for criminal offenses in the course of or in connection with the practice of his profession may only be made in cases and under conditions provided by law. Therefore it is established the so called "immunity for the plea" (Stoica, M.O., 2015).

However, Art. 26 para. 1 of Law no. 51/1995 related to Art. 348 of the Criminal Code³¹ punishes by calling a crime the exercise of any profession of legal assistance specific to the legal profession provided in Art. 3 by an individual or legal person who does not have the position of a lawyer registered in a Bar and the Bar's table of lawyers.

As a measure of protection for the legal profession we have to take into consideration the regulations which impose certain conditions regarding the admission in this profession or the maintenance of the lawyer capacity, conditions designed to protect the dignity of such professions, respectively the statutory limitations on incompatibilities and the avoidance of conflicts of interest. Thus, Art. 14 letter a) of Law no. 51/1995 considers "unworthy of being a lawyer the person convicted with final judgment to imprisonment for committing an intentional crime, that would prejudice the prestige of the profession". It is a condition of admissibility in the profession and which should be performed upon the start of the profession. And after being accepted in this profession, throughout its exercise, the dignity of this profession is protected by Art. 27 letter d) of Law no. 51/1995³² according to which the "final conviction of the lawyer for the commission of an offense under criminal law that makes him unworthy of being a lawyer draws termination of his capacity as a lawyer". In relation to Art. 14 letter a) of Law no. 51/1995, the conviction for intentional crimes (Radu, F., 2012) that could affect the prestige of the profession, makes him unworthy of being a lawyer. The opinion on undermining the prestige of the profession, which can entail unworthiness, lies within the jurisdiction of the legal bodies. The findings of unworthiness and the termination of the lawyer profession are made exclusively based on the legal and statutory provisions (Art. 17 and Art. 25 of Law no. 51/1995, Art. 26 and 30-32 on the organization and practice of the lawyer profession).

In order to avoid the emergence of certain conflicts of interest - as a guarantee for the protection of the confidentiality between lawyer and client and of the professional

³¹ Art. 348 Criminal Code „The unlawful practice of a profession or of any other activity for which a permit is required by law, or the practice thereof in conditions other than the legal ones, if the special law provides that the commission of such acts is punishable under criminal law, shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine.” Relevant is also Decision of the HCCJ (Appeal in the interest of law) no. 15/2015, published in the Official Gazette of Romania no. 816 of 3 November 2015.

³² Provision reiterated in Art. 58 para. 1 letter d) from the Statute of the lawyer's profession.

secrecy, Art. 115 of the Statute of the legal profession list situations where the lawyer, in the exercise of his profession, was found in conflict of interest with his client. Thus, according to this regulatory text, there is conflict of interest in the following situations:

“a) in the activity of advising, when, on his request, the lawyer who has the obligation to give his client a comprehensive, sincere and unreserved information cannot fulfill his mission without compromising the interests of one or more clients by analyzing the presented situation, by using stipulated legal means or through the incarnation of the outcome pursued;

b) the activity of assistance and defense, when, on his referral, assisting several parties would entail the lawyer to submit another defense, different from that for which he would have adopted if he had been entrusted with defending the interests of a single party, including in what concerns the professional techniques and means of defense;

c) situation when, by the change or evolution of the situation that was originally presented to him, the lawyer discovers one of the difficulties shown in letter a) and b).”

To ensure an effective protection, and taking into consideration the lawyer's role of provider of a public service, there were criminalized and punished by legal provisions a number of antisocial acts against the lawyer in connection with the practice of this profession. Thus, the criminal law regulates and punishes the judicial assault under Art. 279 of the Criminal Code³³, thus assigning even greater efficiency to the protection measures for the lawyer.

On the other hand, the lawyer, like any other person shall be criminally liable for the acts committed. Compared to the situation where the lawyer can be an active subject of a criminal offense we should make a distinction between the situation where the lawyer commits a crime in his capacity as a lawyer or in his capacity as an individual.

Therefore, the law specifically penalizes certain criminal acts committed by a lawyer (special active subject of the offense) in the course of or in connection with the specific activity. Issues falling into this category are: unfair assistance or representation (Art. 284 Criminal Code); disclosure of professional secrecy (Art. 27 Criminal Code); violating the solemnity of the hearing (Art. 278 Criminal Code).

Although both the special law with the statutory rules of the profession and the doctrine and jurisprudence³⁴ have imposed and confirmed the non affiliation of the lawyer to the category of public servants, even in the exercise of his attributions, the lawyer can be found in the categories of persons observed by the measures of prevention, detection and sanction of corruption deeds “generous defined by general provisions of Article 1 of Law 78/2000” or found in “the constituent content of the offenses punished by the same special law” (Stoica, M.O., 2015) or of other offenses punished by the criminal law: aiding an offender (Art. 269 Criminal Code); influencing the statements (Art. 272 Criminal Code), etc.

Of course, the lawyer will be criminally liable for the offenses committed outside or unrelated to his professional duties.

³³ Art. 279 Criminal Code on the judicial assault concerning the lawyer, his goods or the family members absorb the offences regulated by Art. 39 para. 2, 3 and 5 of Law no. 51/1995.

³⁴ The High Court of Cassation and Justice, criminal section, Decision no. 6003/2007, published in the Review „Buletinul Casației”, no. 3/2008, pp. 36-37 – „the lawyers cannot be qualified as public servants or clerks (in the acceptance of the criminal law)”.

And procedurally, the lawyer capacity entails a special jurisdiction, according to his profession, that of the Courts of Appeal (Art. 38 para. 1 letter d) Criminal Procedure Code), respectively, depending on the case, the jurisdiction of the National Anticorruption Directorate.

CONCLUSIONS

In conclusion, the legal profession is a profession closely related to the pursuit of justice and that is exactly why it is a profession that inherently implies a legislative intervention from the state, intervention that should automatically impose a certain professional conduct.

And a profession that is legitimized by its inherent content – the lawyers are legal professionals – cannot be exercised only within the limitations and the protection provided by fundamental principles, the ethical conduct and a set of inherent qualities such as dignity, probity, seriousness, honesty and loyalty.

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