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MAIN OFFENCES ENTAILING THE CRIMINAL LIABILITY OF LAWYERS

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MAIN OFFENCES ENTAILING THE CRIMINAL LIABILITY OF LAWYERS

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Abstract

In all jurisdictions, Bars play a central role in disciplinary surveillance. The Bar or its official representatives study the complaints initially and they are entitled to take disciplinary measures. Often, committees deal with complaints, such a duty is performed by disciplinary authorities, comprising the members of Bar Council or mixed committees created to this end. In almost all jurisdictions, a disciplinary committee that may comprise members of the legal system is entitled to appeal, even to file an appeal in civil court. Sanctions are quite similar, ranging from threatening with fines to temporary or permanent suspension. Execution is important in this matter; the Bar is in charge with collecting the fines. The violation of certain sanctions can represent grounds for criminal liability (e.g., in the case of a suspended lawyer who still exercises his profession).

The economy of legal provisions suggests that the law regulating the profession of lawyer does not exclude legal responsibility overlapping. In other words, the criminal liability of lawyers can overlap civil (patrimonial) liability. The civil and criminal liability is entailed by an illicit act, which brings prejudice to a moral value. Whereas, in the past, the two forms of criminal liability could not be distinguished, their differentiation has increased over time and it has been accepted by all law systems. Therefore, civil liability is involved whenever a person – in our case, the lawyer – commits an illegal act that causes a prejudice (e.g., to the State). If an illicit act is mentioned in the criminal law, it entails the criminal liability of the wrongdoer, though the act may not have brought prejudice to a certain person.

Within criminal liability and disciplinary liability, the form and degree of guilt represent an essential element, both for the characterization as offence or disciplinary infringement of the lawyer's illicit act, and for the application of criminal punishment or disciplinary sanction. However, in terms of moral responsibility, the essential element is the lawyer's behaviour related to the ethical and social principles imposed by special regulations and by the community to which the lawyer pertains.

Keywords:

lawyer, criminal, liability, offence, overlapping.

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Law No. 51/1995 concerning the profession of lawyer does not mention expressly the criminal liability of lawyers, which means that the general principles of criminal law apply in this case. Therefore, I will systematize the offences committed by a lawyer or related to him depending on the person who represents the active subject of the said acts.

The economy of legal provisions suggests that the law regulating the profession of lawyer does not exclude legal responsibility overlapping. In other words, the criminal liability of lawyers can overlap civil (patrimonial) liability. The civil and criminal liability are entailed by an illicit act, which brings prejudice to a moral value. Whereas, in the past, the two forms of criminal liability could not be distinguished, their differentiation has increased over time and it has been accepted by all law systems (Birsan, C., Statescu, C., 1994). Therefore, civil liability is involved whenever a person – in our case, the lawyer – commits an illegal act that causes a prejudice (e.g., to the State). If an illicit act is mentioned in the criminal law, it entails the criminal liability of the wrongdoer, though the act may not have brought prejudice to a certain person.

Regarding the tendency to extrapolate the concept of corruption, also by including all offences stipulated in the Criminal law and in special laws, the legislator delimited promptly the notion of corruption by passing Law No. 78/2000. This is the Law on preventing, discovering and sanctioning of corruption acts, with subsequent amendments and completions, which limits the criminal concept of corruption to only four offences: bribe taking (Article 254 – Criminal Code), bribe offering (Article 255 – Criminal Code), accepting undue advantages (Article 256 – Criminal Code) and influence peddling (Article 257 – Criminal Code). After passing Law No. 161/2003, two more offences were added, stipulated in Article 6 paragraph 1 and Article 8 paragraph 2, introduced in Law No. 78/2000. The particular danger represented by corruption within society requires a general presentation of the concept of corruption as a social and legal phenomenon. In general, in the Romanian criminal legislation, corruption has been considered an abuse of power with the purpose of gaining material or other undue advantages. All societies – irrespective of their social and economic development degree, nature of political regime, or State and government organization – have had to deal with corruption and its effects.

The successive legislative amendments brought to Law No. 78/2000 on preventing, discovering and sanctioning of corruption acts have influenced the unitary application of the law and the expedient solutions for cases. Corruption offences per se, as they have been regulated by the

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Criminal Code, have not been amended by Law No. 78/2000; hence, the special law simply reprised all these offences without altering their structure or constitutive contents.

Law No. 78/2000, with subsequent amendments and completions, comprises the corruption offences stipulated under Articles 254-257 of the Criminal Code, Article 6 paragraph 1 and 8 paragraph 2, as well as offences stipulated by special laws, as specific modalities of offences included in Articles 254-257 of the Criminal Code and in Article 6 paragraph 1 and Article 8 paragraph 2. Offences assimilated to corruption offences are represented by offences stipulated under Articles 10-13 of the special law.

The goal of passing the new Criminal Code was to find solutions to contradicting issues in practice and to bring to a common denominator the provisions concerning corruption offences within the framework law and within special laws. The purpose was partially attained, but not all offences within the special laws were included in the new Criminal Code. I refer here to assimilated offences and to offences related to corruption, regulated by Law No. 78/2000 (Law No. 78/2000 was amended by the following: Ordinance No. 83 of 29 August 2000, amended and completed by Law No. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and businesses, preventing and sanctioning corruption; Law No. 521 of 24 November 2004, on amending and completing Law No. 78/2000 on preventing, discovering and sanctioning of corruption acts; Emergency Ordinance No. 124 of 6 September 2005 on amending and completing Law No. 78/2000). The preserving – within a special law – of offences assimilated or related to corruption offences requires, again, the correlation of the special law with the provisions of the framework law (the new Criminal Code), which entails a new legislative modification.

The American criminologist Edwin Sutherland posits that in general, profession and function create the context, occasion and sometimes even motivation for committing offences; the application of illicit acts takes place directly or indirectly within a relational setting. The social position of the person and his social, economic and political environment stand in the way of criminal justice (Sutherland, E., 1996). Each attempt to or actual violation of the law is determined by the same goal: obtaining, for yourself or for another person, a material advantage or other values or services. This is entailed by the individual's need (in our case, the lawyer) to satisfy certain daily needs, by ignoring the rigors of legal provisions or by speculating the law in order to justify the behaviour.

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Of course, the violation of legal provisions – an obligation for both the lawyer and any other individual – can also be due to negligence; the person does not aim for undue advantages, but his offence does bring prejudice to the image and prestige of the profession (the community to which he pertains).

The phenomenon of criminality is closely connected to that of corruption; in general, the latter emphasizes on the lawyer's attitude toward morals and ethics, in all situations when they manifest themselves in his relations with both the clients and the clerks that he contacts during his investigations. A brief analysis of the corruption phenomenon brings to light at least two favouring causes: on one hand, the individual's desire to become rich quickly, effortlessly and at all costs (by using his profession); on the other, the excessive restrictions in diverse fields, which create and lead to corruption.

There are additional causes that generate and favour corruption, as follows: the lack of credibility of certain institutions or bodies and the low influence of legal norms upon individual behaviour; the rejection of social order and norms; the economic liberalization of public institutions and economic agents, in the context of the weak firmness and authority of control bodies. Among the causes, it is also worth noting the crisis concerning authority, emotional implication and the correlation of legislative activity with newly emerged social phenomena, as well as the political incoherence on passing the laws necessary for the rule of law.

Time has proven that – considering the competitive market economy, which is the goal of all societies – other risk factors have emerged. Furthermore, corruption tends to become a structured, specialized and professional phenomenon, which can "stain" the highest levels of decision factors, within the legislative, administrative or judicial systems. In the case of these offences, victims have no reason to respond to such acts, because benefits are mutual (one party demands and the other provides). Real criminality is more common than legal criminality, and the cause is not represented only by the wrongdoer's ability, but also by the victim's passivity. Actually, in this case, the real victim is the institution which functioning is affected by the misguided approaches and influences of a lawyer. This situation persists also because of the lack of reaction or the weak reaction of those who are legally in charge with preventing and sanctioning such offences.

Several main acts may entail the criminal liability of lawyers. The first is the exercise without right of a profession, stipulated under Article 281

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Criminal Code. The text of the article mentions: *the exercise without right of a profession or of any other activity requiring authorisation according to the law, or exercise in other conditions than the legal ones, if the special law provides that the commission of such acts shall be sanctioned according to criminal law*. This article refers to all persons who exercise a profession without meeting the legal requirements to do so. In legal practice, the wrongdoer commits an offence if he repeatedly conducts actions specific to the profession of lawyer without the right to do so (Toader,T., 2009). I refer here to the offence of deceit, stipulated under Article 215 Criminal Code, and I highlight paragraph (1) – *The act of deceiving a person, by presenting a false fact as being true or a true fact as being false, in order to obtain unjust material benefit for oneself or for another and if damage was caused* and paragraph (3) – *The act of deceiving or maintaining the deceit of a person, when concluding or executing a contract, if without this deceit the person would not have concluded or executed the contract in the conditions stipulated*. I also refer to the following: the offence of disclosure of professional secrecy, stipulated under Article 196 Criminal Code: *Disclosure, without right, of data by a person to whom they were entrusted, or which he learned by virtue of profession or office, if the act is likely to cause prejudice to a person*; the offence of bribe giving, mentioned in Article 255 Criminal Code: *The act of promising, offering or giving money or other benefits in the manners and for the purposes shown in Article 254 Criminal Code*; the offence of influence peddling, stipulated under Article 257 Criminal Code: *The receipt of or request of money or other benefits, or the acceptance of promises, gifts, be it directly or indirectly, for oneself or for another, committed by a person who is influential or who gives to believe that he is influential upon a clerk, in order to determine him to perform or not to perform an act included within his service prerogatives*; finally, the offence of tax evasion regulated by Law No. 50/2013 concerning the amendment of the Law No. 241/2005 on preventing and combating of tax evasion, published in Official Gazette, issue 146 of 19 March 2013.

The overlapping of the two liabilities is possible considering the existing difference between civil and criminal liability. Whereas civil liability is based on the idea of repairing the prejudice brought to a certain subject, criminal liability is based on the idea of punishing the person who committed the illicit act, which the law considers an offence. Criminal liability is based on the principle of incrimination legality; this liability concerns only the acts seen expressly as offences. In the case of civil liability, there is an obligation to recover the prejudice for all illicit acts that had brought any prejudice. Both civil and criminal liability are based on the guilt of the wrongdoer; the form of guilt – intention, only guilt or negligence – has no relevance in this case (Statescu, C., Barsan,C., 1994).

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Most commonly, legal liability overlapping is possible when a single illicit act – committed by guilt or negligence – violates the criminal and the disciplinary regulations, as well as the behaviour norms within the Code of Deontology. As for the overlapping of legal liability and disciplinary and moral liability, the entailing of disciplinary and moral liability depends upon the characterization of the act: it must not be considered an offence. Therefore, if the lawyer is prosecuted for a criminal offence that renders him incompatible with the exercise of his profession, disciplinary investigation or any investigation concerning the breach of the Code of Deontology is not possible. If such proceedings already began, they will be suspended until the trial is over.

In Romania, a lawyer may not represent parties whose interests are in conflict in the same cause or in cases related to each other; moreover, he may not plead against someone who already acted concerning the litigation pertaining to the same case.

A lawyer cannot be called as witness against the client and/or he cannot be forced to provide details about his client without his written consent. If a lawyer already testified in one case, then he may not represent any of the parties involved. Furthermore, in France, a lawyer cannot act on the behalf of two or more clients whose interests are in conflict or prone to conflict. The rule extends to the partners, associates, students or employees of the lawyer. The condition is the presence of a prejudice brought to any of the parties. When a new client consults a lawyer and the latter concludes that there may be a conflict with the interests of another client (past or current), he must refuse the client. Otherwise, he will almost inevitably get into a situation where he is bound to disclose classified information. Theoretically, should a conflict arise, the lawyer must cease representing all parties involved; in practice, however, he sometimes keeps on representing one of the parties, but only after announcing the parties and after obtaining their consent (stipulated by the Règlements Intérieurs).

In Belgium, the regulation of the legal profession is mainly the task of Bars. Flemish-speaking and French-speaking Bars establish ethical rules within their Codes of Conduct and they apply disciplinary sanctions is the lawyer is guilty of violating such a rule. Furthermore, the violation of an ethical rule within an official deontological code (e.g., forging documents) may also constitute an offence sanctioned by law, case in which the lawyer may be criminally prosecuted and brought before criminal courts (as well as before the disciplinary committee of his Bar). The violation of lawyer-client privilege is punished by the law (imprisonment from 8 days to 6 months

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and/or paying a fine between 600 and 3,000 Euros). It is worth adding that not only lawyers, but members of any other profession are obligated to keep the professional secrecy (physicians, pharmacists, nurses, accountants, public notaries, internal legal advisers, etc) and they may be found guilty of committing this offence. Belgium does not have criminal law provisions that apply to lawyers specifically. General criminal law provisions apply to lawyers to the same extent as to any other citizen.

In Germany, the main offences susceptible of being committed by lawyers are as follows: abuse of titles, professional classifications and symbols stipulated under Article 132a of the Criminal Code; omission to bring planned offences to the attention of the authorities – Article 138 of the Criminal Code; violation of private secrets – Article 203 of the Criminal Code; extortion – Article 257 of the Criminal Code; receiving stolen property – Article 259 of the Criminal Code; money laundering; concealment of unlawfully acquired assets – Article 261; fraud – Article 263; overcharging of fees – Article 352; betrayal of a party – Article 356 of the Criminal Code. The greatest risk of a lawyer is his client. This conclusion is correct insofar as a lawyer – by supporting his client non-fraudulently – can easily be suspected of involvement as accomplice to his client. "*Hindsight bias*" – an economic term that stands for the "lack of impartiality" (*bias*) in relation to subsequent examination, which entails the difficulty of showing subsequently a circumstance that may have (or may have not) existed beforehand – leads us back to the aforementioned statement. More precisely, lawyers should not only have admitted the punishable offence committed by his client, but they also should have admitted it positively. The limit between culpable ignorance and potential fraudulent knowledge is a very thin one. The higher the extent of his client's criminal liability, the higher the lawyer's risk of being involved in his client's criminal prosecution, as an accomplice.

Nonetheless, the legislator is yet to take measures for correcting this situation. Concerning lawyers, the same rules apply to them as to any other citizen. For criminal prosecution specifically, it may be useful to obtain – at least in certain situations – an expertise from the competent Bar, because prosecutors and judged are generally not very familiar with the exercise of lawyer's profession. Such an expertise may come handy when it comes too pinpointing the limit admitted for lawyer's activity (the limit of legal admissibility), without exposing the lawyer too much to a possible involvement in a criminal investigation procedure.

In Ireland, lawyers are criminally prosecuted, sentenced and sent to prison for violating lawyer-client privilege, for stealing money from clients or

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for forging documents with the purpose of obtaining benefits. Furthermore, lawyers have also been criminally prosecuted as accomplices of their clients for other offences. There are no special provisions concerning lawyers, which allow their indictment or derogation through an exception.

In Luxemburg, the cases that affect the legal profession the most are represented by embezzlement or even fraud (one case). Concerning the embezzlement of clients' finances, the Luxemburg Bar provides a special insurance to the benefit of potential clients to whom such prejudice is brought. This insurance if funded by all lawyers. Thus far, only one lawyer was criminally convicted after committing a money laundering offence, in association with a criminal case and to funds destined to defend the client.

Starting with July 2015, in Poland legal advisers will have the right to act as defence lawyers in criminal cases. According to Article 6 of the Bar Law, the lawyer is obliged to keep the confidentiality of all information obtained during his legal assistance activity. This provision corresponds to Article 266 of the Criminal Code, according to which whoever, in violation of the law or obligation he has undertaken, discloses or uses information with which he has become acquainted with in connection with the function or work performed, or public, community, economic or scientific activity pursued shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. The highest risk for lawyers concerning criminal liability is abetting the client to give false testimony (Article 233 of the Criminal Code). In conformity with the provision under Article 8 of the Criminal Procedure Code, a person guilty of abetment is a person who encourages another person to commit a criminal offence. Abetment involves the direct intent of the author. We can imagine a situation where a client wishes to present a certain direction of the defence that puts him at higher risk to be sanctioned, for instance when a client who committed an offence intents to present the real circumstances of his criminal offence, and the lawyers intentionally solicits to his client to change his testimony and to present untruthful facts to the court. Such a situation determines the limits of a lawyer's influence concerning the line of defence for the clients. A lawyer may not advise a client to provide a false testimony before the court if the client in question does not want to exercise his right to defence. Hence, the lawyer is not obliged to formulate objections concerning the false testimonies of the client, but he also does not have the right to solicit such false statements.

In the Czech Republic, lawyers are criminally liable for their actions, insofar as those actions are offences, including when lawyers act as such

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based on a request formulated by a client during their legal assistance provision. According to Article 16 paragraph 1, second thesis of the Act on the Legal Profession, the orders of clients shall not be binding if these are contrary to legal or professional regulations; a lawyer shall be obliged to reasonably notify his clients of this principle. Most frequently, lawyers are criminally prosecuted in the Czech Republic for abuse of the right to store belongings, for embezzlement, for violating the obligations related to the management of assets belonging to a third party, for violating the rights of a third party and for blackmail (concerning the frauds committed during public auctions) and for similar offences. First of all, the lawyer is obliged to inform his client that a general action that the latter wants to take is punishable or generally illegal. However, the lawyer is not obliged to denounce the client (Article 8 of the Criminal Procedure Code), but only to avoid committing an offence if he becomes aware of it.

Conclusion

In Romania, legislative inflation does not affect only the guarantees provided to the citizen by the legality principle, but it also reflects in the activity of experts, theoreticians or practitioners, who are overwhelmed by the abundance and obscurity of certain texts. All of these aspects make the interpretation and application of the law more and more difficult (Cioclei, V., 2009).

Even if the current Romanian Criminal Code fails to define the notions of *ill will* and *negligence* in the activity of the lawyer, they are still open for analysis and interpretation from the perspective of criteria defining the intention or easiness in violating legal provisions, which anyone may take into account.

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REFERENCES

Cioclei, V. (2009). Critica ratiunii penale : studii de criminologie juridica si de drept penal, "Despre nevoia de echilibru in justitia penala" . Bucharest : C.H. Beck Publishing, p.9.

Statescu, C. & Birsan, C. (1994). Drept civil. Teoria generala a obligatiilor . Bucharest : All Publishing, pp.116-117.

Sutherland, E. (1996). White Collar Crime New York, Dryden Press 1949, cited by Gh. Nistoreanu and C. Paun, Criminologie. Bucharest : Europa Nova, p.9.

Toader, T. (2009). Drept penal roman. Partea speciala, fourth edition revised and annotated. Bucharest: Hamangiu, pp.332-333.

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