Jurnalul de Studii Juridice

Journal of Legal Studies

ISSN: 1841-6195 (print); e-ISSN: 2067-8509 (electronic)

Covered in: Index Copernicus, Ideas RePeC,

EconPapers, Socionet, CEEOL

CRIMINAL LIABILITY OF LAWYERS

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Jurnalul de Studii Juridice, Year X, No. 1-2, June 2015, 43-53

Published by:
Lumen Publishing House

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Abstract

The legislative deficiencies and the rules governing the lawyer's profession do not regulate clearly enough the fate of criminally convicted lawyers; the lawyers within the board of the Bar must decide the fate of a fellow lawyer of the Bar. Law no. 51/1995 – regarding the organization and exercise of lawyer's profession, as well as the Statute of the lawyer – shows that the lawyer's capacity shall end if the lawyer has received a final sentence for an action criminalized by the criminal law, which renders him/her "unworthy of being a lawyer". The first condition for a lawyer to be "judged" by the board of the Bar is for the court that decided his/her conviction to send the final sentence to the said Board. Upon receiving the motivation of the court, the Board will be able to take a decision. At that point, the board of the Bar to which the convicted lawyer belongs will analyze whether the actions for which he/she was convicted affect or not his/her lawyer profession (the prestige of the lawyer's profession). If it is determined that the actions did affect the profession of lawyer, then he/she can be excluded from the Bar. On the contrary, if it is determined that his/her actions did not affect the profession of lawyer, the person can still be part of the body of lawyers.

These anomalies have brought and underlined a serious issue of the system: criminally convicted lawyers who – based on unclear and permissive legal provisions and benefiting from the protection of fellow lawyers within the boards of the Bars – still exercise their professions and plead before courts with no impediments whatsoever.

Keywords:

Lawyer; Bar; Criminal liability; Convicted; Court.

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The obligations imposed to the lawyer - by the law and the Statute of the profession – do not lead to the conclusion of lawyer's criminal non – liability regarding his/her professional activity. For instance, the non respect of provisions under the Article 37 paragraph (5) of Law no.15/1995 – regarding the obligation to observe the solemnity of the court being held, not to use words or phrases liable to harm the authority, dignity and honour of the court, the public prosecutor, the other lawyers and the parties or their representatives to the law suit – may entail the criminal liability of the lawyer. Obviously, the act is an offence only if all elements of the offence have been committed, according to criminal law. However, a lawyer is not criminally liable for statements made before courts of law or other bodies only if such statements are "in connection with that cause's defence and necessary for establishing the truth" – Article 37 paragraph (6) of Law no.51/1995. During the exercise of his/her profession, the lawyer may commit certain offences, such as fraud, blackmail, tax evasion, or corruption (e.g., influence peddling or bribe offering). The lawyer may also be the author of other offences provided in the criminal law, and the liability in this case is determined according to common law provisions. The commission of such offences may determine - in the conditions provided under Article 13 subparagraph (a) of Law no.15/1995 – the professional non-dignity of the lawyer (Toader, T., 2014).

According to the same law, (Article 14) "The following persons shall be deemed unworthy of being a lawyer: (...) a) a person having received a final sentence by court decree, for an intentional crime, which is likely to harm professional prestige". As in the case of suspension, the statute of the lawyer regulates the possibility of a suspension from this profession. Hence, the Bar "can" suspend the lawyer convicted for crimes that are "likely to harm professional prestige". However, the law does not define the phrase "professional prestige". In addition, it fails to explain what a crime "likely to harm professional prestige" means, reason for which the board of the Bar to which the convicted lawyer pertains is free to interpret this provision. Practically, the Bar decides to suspend and/or exclude a lawyer from the profession. More precisely, lawyers within the board of the Bar assess whether the acts based on which the lawyer was convicted are "likely to harm professional prestige". The same lawyers decide whether the convicted lawyer, who belongs to the same Bar, will be excluded from the profession. In practice, these assessments actually treat several aspects (not necessarily related to the acts for which the lawyer was convicted) and they are usually not limited to taking into account that the lawyer in question has received a

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final sentence, mostly for corruption offences. In other words, the Board may consider that the acts for which the lawyer was convicted – regardless of whether they are related or not to corruption – are not likely to harm professional prestige and it may not exclude the lawyer from the profession, which means that the lawyer is free to keep pleading in court, though having been criminally convicted. For instance, such a case was based on the following argument: as long as the criminal court – through the conviction sentence – did not forbid the lawyer from exerting his/her profession for a number of years, thus letting the board of the Bar decide on this matter, the representatives of the said board decided that the person should not be excluded from the profession.

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

Concerning Article 14 subparagraph (a) of the Law no. 51/1995, the practice in the field presented the following dilemma: does eliminating the consequences of the conviction as effect of rehabilitation – stipulated in the Criminal Code – provide to the convicted person the possibility of becoming a lawyer again? According to Article 169 paragraph (1) of the Criminal Code, "Rehabilitation terminates loss of rights and prohibitions, as well as incapacitation resulting from conviction". The matter does not concern an obligation of automatically reintegrating the convicted person within the body of lawyers as effect of rehabilitation, taking into account that the Criminal Code actually stipulates that rehabilitation does not result in the obligation of reintegrating the offender in the former profession, article 169 paragraph (2) of the Criminal Code (Vlasceanu, A., Barbu, A., 2014). In fact, the issue at stake here is the possibility for the person who lost the capacity of lawyer to be reintegrated in the body of lawyers.

At the same time, we notice that, in regard to the unworthiness stipulated under Article 14 subparagraph (a), there is also a case when the lawyer's capacity is ended, that is Article 27 subparagraph (d) of the Law. These provisions are also corroborated with the provisions of Article 15 paragraph (1) subparagraph (e), Article 16 paragraph (3) subparagraph (b), and Article 23 paragraph (3) subparagraph (a) of the Statute. According to these provisions, the request of the person who wishes to be a lawyer must be accompanied by an express statement of the applicant, mentioning that

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he/she does not fall into any of the unworthiness cases stipulated under Article 14 of the Law.

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

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

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

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

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

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

Concerning the criminal prosecution phase, in Belgium, police searches at private addresses (domicile, office etc.) is conditioned, on principle, by the existence of a search warrant issued by the investigating judge who supervises the criminal investigation (besides exceptional situations stipulated by law). As for the search of a lawyer's office, the dean of the local Bar (or his representative) must be present throughout the entire search operation of the firm's premises. The presence of the dean allows the searching of lawyer's files, but it is mandatory to maintain lawyer-client privilege: this aspect is essential for protecting the lawyers while exercising their profession.

In Luxembourg, it is possible to conduct searches at a lawyer's office in all situations, even without a search warrant issued by the investigating judge regarding all flagrant offences or infractions. However, such an operation can be conducted only in the presence of the Bar's president, in the sense of the subsequent explanations. Otherwise, it is possible to search a lawyer's office only if such a measure is taken by an investigating judge within a criminal action. The last may refer to a lawyer directly (as defendant, co-defendant or accomplice) or indirectly (as a third party), insofar as the criminal prosecution refers to one of his/her clients. According to the Law of 10 August 1991 regarding the lawyer's profession, the president of the Bar must be present during all searches to lawyer's offices; otherwise, there is the possibility of declaring it null (https://e-justice.europa.eu/content_legal_professions-29-lu-en.do?member=1).

In Slovakia, all searches to lawyer's offices must meet the general regulations within the Criminal Procedure Code of Slovakia

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(http://www.legislationline.org/documents/section/criminal-codes). Searching the office of a lawyer is possible if there is reasonable doubt that a certain object or another element relevant to a criminal investigation is found at that office or if a person suspected of having committed a crime is found at that office or if that office contains a mobile item that must be confiscated for satisfying a claim of the injured party. At the trial stage, the search of a lawyer's office may be authorized by a presiding judge; at the pre-trial stage, such search warrant may be issued by a prosecutor or, with the prosecutor's consent, by a police investigation officer. Each search warrant must be issued in writing and it must explain clearly the reason for the search in question. It shall be served on the owner or the user of premises or property, or an employee thereof, at the time of the search. In exceptional cases (mentioned by the law), the search may also be conducted without a warrant. Furthermore, lawyers must meet the obligations and requirements within the regulations of the Ethical Code of the Slovak Bar Association (Rules of Professional Conduct). During the search of residential spaces or any other searches based on the Slovak Criminal Procedure Code and provided that such a warrant should be conducted at a location where a lawyer exercises his/her duty or in a space where there may be documents or storing devices for information pertaining to the lawyer's statutory duty of confidentiality, then the lawyer in question is obligated to inform the police investigation officer of his/her statutory duty of confidentiality and of the limited duty to provide belongings, as well as of legal rules applicable to the protection of personal data. During the search of residential spaces or other spaces based on the Slovak Criminal Procedure Code, the lawyer must insist that a representative of the Bar or that another lawyer within the same Bar be present throughout the search, thus accompanying the police officers who conduct the search in question. By including the aforementioned requirement within their own Rules of Conduct, the Slovak Bar has the objective of ensuring that the presence of the Bar's representative or of any other lawyer consolidates and supports the position of the lawyer being searched, because the Bar's representative or another lawyer would supervise the search and, if applicable, would inform the law enforcement authorities on their responsibilities in terms of observing the confidentiality principles.

In Romania, in conformity with the provisions under Article 11 of Law No. 51/1995 for the organization and practice of the lawyer's profession, the lawyer must keep the professional secrecy concerning all aspects of the cause, except for cases expressly stipulated by the law.

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According to Article 35 of the aforementioned law, *in order to ensure professional secrecy, the professional documents and paperwork found on the lawyer or in his/her law office shall be inviolable. A search of a lawyer or of his/her residence or law office, or taking writs and goods in custody may only be made by a public prosecutor, based on a warrant issued under the terms of the law. No one shall be allowed to listen to or to record, using any kind of technical means, a lawyer's telephone conversations, or to intercept and record his/her professional correspondence, except for the conditions and using the procedure stipulated by the law.*

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

In the Czech Republic, the legislation does not include special offences associated with the lawyer's profession. If a lawyer violates a criminal rule (by committing an offence), he cannot benefit from his status and he is not granted any privilege. However, he must keep his professional secrecy duty, but this is applicable as institution for the protection of the lawyer's client, not for the lawyer per se, as stipulated under Article 21 of Law No. 85/1996 Rec., regarding the organization and functioning of lawyer's profession, which also includes trial stages for waiving attorney-client or regarding its violation. The lawyer is obligated to notify the Czech Bar on being criminally prosecuted. Article 9 paragraph 2 sub-paragraph a) stipulates as follows:

(2) The Bar may suspend the practice of the legal profession of a lawyer if

a) an indictment, a proposal for approval of an agreement on guilt and punishment, or a proposal for punishment of an intentional crime has been filed against

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him, or if criminal prosecution has already started against him for such a crime and the circumstances appear to suggest that such a crime was committed and may endanger trust in proper practice by that lawyer; the legal practice may be suspended for these reasons for no longer than by the date of the legal effect of the decision closing the criminal proceedings (...)". Special trial regulations on the limitation of domicile search or search of other spaces, as well as the so-called obligation of the lawyer to hand over the documents are also included in the lawyer's duty of confidentiality throughout criminal proceedings ((http://www.czechlegislation.com/en/85-1996-sb).

The legal conditions for searches upon a lawyer's office are regulated by Article 85 of Law No. 141/1961 Rec., Code of Criminal Procedure the version amended by subsequent laws (http://www.legislationline.org/documents/id/3850). If the criminal prosecution bodies ceased all legal measures, such an action would be sufficient. However, for the subsequent activity of lawyers and their offices, such a situation requires the adoption of certain special measures, which allow to lawyers to resume their activity even if the documents or data necessary for the exercise of the lawyer's profession were withheld by criminal prosecution bodies. Each office must benefit from a system that guarantees protection in case of losing data (which does not work just prior to their confiscation during legal proceedings) and that allows the lawyer to resume his work. This system is the lawyer's responsibility, and the obligation to ensure such measure is not regulated. Practically, only a deontological rule states that the lawyer has the general obligation of filing the documentation regarding his legal assistance services, for a period of five years from the day he completed the services for one client. The lawyer must inform the staff concerning the proper conduct to adopt during a potential search upon the lawyer's office.

The Czech Republic transposed into the domestic legislation the so-called "data retention" obligation – based on Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data – through Law No. 127/2005 Rec. on electronic communication. Following the Constitutional Court's decision in the PI. US 24/10 case, the provisions under Article 97 paragraphs 8 and 4 of Law No. 127/2005 Rec. on Electronic Communications and on Amendment to Certain Related Acts (Electronic Communications Act) were abrogated, including the version of subsequent provisions. The same occurred with Decree No. 485/2005 Rec., on the scope of traffic and location data, the period of retention thereof and the form and method of transmission thereof to bodies authorised to use

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them; they were abrogated effective on 03/31/2011. Currently, there is no regulation on any right or obligation in terms of preventive data recording.

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. The limit between providing legal assistance and preparing and committing an offence by a lawyer is anything but clear. In fact, it is analysed depending on the person who interprets the lawyer's obligations. Currently, it is interpreted differently in relation to the criminal prosecution bodies and to lawyers in their capacity as legal assistance providers. Concerning tax and general economic offences, the institution of lawyers goes against the criminal prosecution bodies by sanctioning lawyers through information regarding the client's tax activity and obligations. Thus far, jurisprudence has showed reserve concerning such measures. The Constitutional Court supports a rather limited application and interpretation of criminal legislation. The conclusions of case II. US 491/04 include the following statement: *Insofar as the law institutes limits concerning the interval during which a certain action is to be qualified as preparation for an offence, it is inadmissible to exceed the limits in question.*

In Hungary, special statutory provisions regarding the lawyer's profession, their criminal liability and criminal conviction are mentioned in several legislative acts: Law C/2012 on the Criminal Code (http://www.academia.edu/4602286/Criminal_Code_of_Hungary_2012), Law No. 19/1998 on the Criminal Procedure (http://www.lexadin.nl/wlg/legis/nofr/eur/lxwehun.htm) and Law No. 9/1998 on Lawyer's Activity ("Advocacy Law") (http://www.ecovis.hu/angol/Act_XI_of_1998_Attorneys_at_law.pdf).
The new Criminal Code, which came into force on July 1st, 2013, contains only a couple of special provisions for lawyers, such as those related to malpraxis or to the fact that if a person commits a crime in his capacity as a lawyer, this represents an aggravating circumstance (e.g., a lawyers committing money laundering offences or participating to the illegal purchase of an agricultural field or of a forest sector). In Hungary, common

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offences committed by lawyers include falsifying documents, perjury, fraud, embezzlement, omission to denounce offences or bribing official clerks. The definition of fraudulent legal assistance protects a person who is not aware of the legal framework against lawyers who exercise their profession without authorisation and without meeting the requirements of the Advocacy Law. For instance, should a lawyer be excluded from the Hungarian Bar following a disciplinary procedure and should he continue to exercise his profession, then he commits fraud. Within a criminal case, special privileges granted to lawyers are related to attorney-client privilege and to the defence activity per se. For instance, the information received while setting the defence for a client benefits from higher degree of protection, to ensure the possibility of proper right to defence. Consequently, no lawyer that acts as a defence lawyer in a criminal case can be heard as a witness concerning the information received from the defendant or transmitted to him, in his capacity as a lawyer. If lawyers are criminally prosecuted as accomplices to the commission of an offence, the court must study all facts to determine whether the lawyer's activity was limited to mere legal assistance or whether it was more of an active or passive complicity to the commission of offences. Complicity also involves the existence of a previous offence; in other words, if the lawyer does not contribute to the commission of an offence, then he cannot be considered an accomplice. In most situations, complicity to the commission of offences involves active and positive (not passive) participation. For instance, a lawyer was considered criminally liable for signing a contract which had not been written by him or by his law firm, but which was used to commit a banking fraud by the parties of the said contract.

Acknowledgment

This paper is a result of doctoral research made possible by the financial support of the Sectorial Operational Programme for Human Resources Development, co-financed by the European Social Fund, under the project POSDRU/159/1.5/S/132400 – "Young successful researchers – professional development in an international and international and interdisciplinary environment."

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