ATTORNEY'S INDEPENDENCE.
THE EVOLUTION OF ATTORNEYS' POSITION IN THE PAST 20 YEARS

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In this article, I would like to outline, in a preliminary and tentative way, what lawyers historically have meant by professional independence and how they have pursued their vision of independence in their practices. I will explore how we may assess the very frequently made claim that lawyers' professional independence has declined in Romania, and not only there, in the last 20 years. If the independence of lawyers is desirable - we need to discover why this profession has changed and what we have to do about it.

I wish to start with the legal bases of the principle of independency of attorneys as stated in the Romanian laws: Law no. 51/1995, Article 1 "The lawyer's profession shall be free and independent, based on an autonomous organization and functioning, under the terms of the law and the by-law of the profession", Article 2 "In the exercise of his/her profession, a lawyer shall be independent and only subject to the law, the by-law of the profession, and the code of conduct. A lawyer shall promote and defend human rights, freedoms, and legitimate interests".

Under the Lawyers' Statute, Art. 7.

"(1) In a society based on the rule of law and democratic values, the lawyer has an essential role. The lawyer is indispensable to justice and to litigants, and has the task of defending their rights and interests. He is both the adviser and the defender of his client.

(2) The lawyer, exercising the rights conferred upon him by law and this Statute, carries out his duties and obligations towards the client in relation to the authorities and institutions before which he assists or represents his client, towards his profession, in general, and towards each fellow lawyer, in particular, as well as the public. The lawyer has a duty to fulfil conscientiously, with honour and professional probity, his obligations towards the client, in relation to individuals, public or private institutions and authorities, other legal entities, other lawyers, as well as in his relation to the public, in general.

3) In the exercise of his profession a lawyer cannot be subject to any restriction, pressure, coercion or intimidation from the authorities or public institutions or other individuals or entities. Freedom and independence of lawyers are guaranteed by law."

In European laws, in CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION AND CODE OF CONDUCT FOR EUROPEAN LAWYERS, adopted by Council of Bars and Law Societies of Europe, and the Principles of General Application in the International Bar Association's Code of Ethics is stated:
"a) Principle of the independence of the lawyer, and the freedom of the lawyer to pursue the client's case: *a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent from his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed, without this independence from the client there can be no guarantee for the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence and bar associations must play an important role in helping to guarantee lawyers' independence. Self regulation of the profession is seen as vital in buttressing the independence of the individual lawyer.
b) Principle of the right and duty of the lawyer to keep client's matters confidential and to respect professional secrecy: It is of the essence of the lawyer's function that the lawyer

should be told by his or her client things which the client would not tell to others – the most intimate personal details or the most valuable commercial secrets – and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle – observing confidentiality is not only the lawyer's duty; - it is a fundamental human right of the client. The rules of "the legal professional privilege" prohibit communications between lawyer and client for being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. That principle encompasses all these related concepts – legal professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act."

Historical comparative aspects on attorneyship position in society

Attorneyship in Romania 20 years ago was characterized by the independent lawyer, acting in small offices, grouped according to various law domains. Now, after 20 years, the aspect of our profession has changed. More and more attorneyship is mostly structured in huge law firms, oriented towards business law, huge law offices that are structured around politicians. A lot of lawyers are politicians as well, and that is a well-known fact.

Hence, from independent, free lawyer, sincerely focused on the respect of order, justice, equity, fairness and honour, the centre of interest has moved slowly towards huge law firms, impersonal organisations, law firms which are not centred on the individual, but are oriented towards protecting successful businesses, no matter the sacrificed values. In Romania, the pleading attorney is worth less and less. For pleading attorneys, 20 years ago, it was an honour to bring legal arguments orally, in an outstanding constructed pleading, to have a main contribution in making justice through his arguments, pleadings that sometimes were published in books, and studied by students and young lawyers, and

read by most intellectuals, as fundamental creations. Now, more and more pleading attorneys have fallen into desuetude, now the first violin of the concert are law firms that have main expertise in fusions, insolvency, contracts, not in bar pleadings. Something from the profession's charm was lost along the way. And from its honour. Even from the main role that it had in front of Justice. Now more than ever, attorneyship has lost its romantic side. But, that is a natural evolution, if we look into the general social context. As a result, if 20 years ago Romania still had legislative stability, a civil society closed between national borders, since then things have evolved rapidly through social globalisation, which brought about also a flow of ever changing, almost entirely new legislation. Another aspect that we are not entitled to ignore is that social aspect of deepening differences between social classes. So is notable the apparition and consolidation of very wealthy people, a thinning-out of the middle class stratum, and a pauperization phenomenon and a dramatic increase in volume of the poor class. Definitely, prolonged economic crisis (2009 – 2014) had his role in accelerating and accentuating of these social phenomena. Since attorneyship is a liberal profession, the tendency of focusing towards money source, towards increasing income, towards business attorneyship is natural. That means that main focus actually is on consultancy and contracts activity and less towards bar pleading and trial cases.

All those changes had certainly also a negative impact. Lawyer's position in judicial system was deeply affected. As a consequence it is mandatory to ask ourselves about what is the actual role of attorneys in this newly changed judicial system.

- Do attorneys still have a main position in the judicial system or have they become just auxiliaries of the system?
- Are there any recent historical causes that have led to a repositioning of attorneys in society, and implicitly in the judicial system?
- What consequences may have the movement of legal services through the business area?
- What kind of changes may bring the political implication of top attorneys in the attorneys' position within the judicial system?

• May that situation have some negative outcomes upon of the prestige of attorney profession?

At present the lawyer does not hold as high of a position with the people as he held twenty years ago. Attorneyship is mostly structured in huge law firms. Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either party, to a large extent, lawyers have allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.

The causes of the decline of professional independence are many and complex but essentially reflect the attitudes and lack of vision of the judicial system as well as of a significant group of Romanian lawyers who view the practice of law mainly as a source of revenue. The other contributing causes can be summarized as follows: economic pressures on lawyers and law firms which have contributed to a "business" orientation, a remarkable increase in the sheer number of lawyers; the competition "for business," bringing aggressiveness and incivility; the growth of lawyer advertising, soliciting; the pyramiding trends toward multistate and multinational law firm partnerships; the narrowing of the lawyers' education and forced specialization, in detriment of general culture; the perceived failure to discipline lawyers for abuses to each other, to the courts, to the client, and to the public interest; the general decline of trust and confidence in the Romanian society, impacting on members of the law profession; and the influence of heavy-handed administrative bureaucracies upon lawyers. These factors combine to induce the metamorphosis of the Romanian legal profession from an art to a business.

A second meaning of independence is ideal to be the distinctive core of "professional" occupations, that is, a large degree of discretion, of autonomy from outside direction, in determining the conditions of one's work.

The aforementioned law firms have in their centre attorneys who are politicians as well. For nearly a generation, those attorney-politicians, with few exceptions, not only failed to take part in constructive legislation designed to solve in the public interest our social, economic and industrial problems, but they have failed likewise to oppose

legislation prompted by selfish interests. More than that, they have approved such changing of laws that also affects our law field of activity. For example, Fiducial activity is permitted to be done now by attorneys, not only by financial companies, but some fields from civil laws no longer need attorneys to be done. For example, I mention family law that gives competence for divorce to Town Halls and to notaries as well, along with the custody and visitation decisions, according to the settlement of parents. But not every time this is in the best interest of the child, as our Civil Code as well as the United Nations Declaration of the Rights of the Child require. That helps the celerity of proceedings of divorce, reduces costs, but not necessarily preserves the best interests and rights of the child or the parties. Another indicative situation is the right that was given to the Register of Commerce to draw up constitutive documents of a company. In our country, the Register of Commerce draws up, verifies and registers Companies. And I ask, where is then the principle of separation of powers? 20 years ago those constitutive papers were drawn up by attorneys. Personalised constitutive acts that are able to protect shareholders from future litigations, according to the law and their own wishes and needs. All constitutive documents are now standardised papers, with limited contents, which only give the right to establish companies. Standardized, quick, cheap, but not the optimal solution for protecting companies or shareholders.

Another loss for law practice is the fact that according to the new civil procedure code, there is a preliminary written procedure that affects the principle of orality and contradictoriality of a trial. It is more technical, gives the lawyer the chance to prepare his papers in tranquillity, but it is a loss in the prestige of that profession given by the oratorical talent, doubled of a high professionalism and knowledge. The principle of contradictoriality is also affected. Lawyers have the right to reply at every claim, but there is a delay of a few days between claim and reply. And essential for our profession is the debate. All adverse positions to be stated at the same time, orally. If one party position is presented before a judge a priori, the psychological effect is more pregnant than the effect of the reply a judge has read after one week. In my opinion, the prestige of attorneyship is also affected. In this profession, an essential element of prestige was an outstanding pleading, that made the notoriety of an attorney. Definitely, attorneyship had

a romantic side. Sadly, now prestige is given only by the extent of income instead of professionalism. Times have changed, and attorneys are known and appreciated through their incomes, not through their excellence and virtuosity.

Independence of lawyers is affected by law itself. According to art. 8 of Law no. 656/2002, "lawyers and other persons exercising independent legal professions, when they assist in planning or executing transactions for their customers concerning the purchase or sale of immovable assets, shares or interests or good will elements, managing of financial instruments or other assets of customers, opening or management of bank, savings, accounts or of financial instruments, organization of contributions necessary for the creation, operation, or management of a company, creation, operation, or management of companies, undertakings for collective investments in transferable securities, other trust activities or when they act on behalf of their clients in any financial or real estate transactions, are obliged to apply standard customer due diligence measures. Suspicious transaction means the operation which apparently has no economic or legal purpose or the one that, by its nature and/or its unusual character in relation with the activities of the client of one of the persons referred to in Article 8, raises suspicions of money laundering or terrorist financing."

Informing the client about that standard customer report is forbidden being considered as a criminal offence and shall be punished by imprisonment till 7 years. More than that, law claims that confidentiality lawyer-client privilege cannot be opposed to criminal investigation authorities and to court.

Independence of lawyers is affected as well from inside, by those attorneys who are politicians as well. Many of them serve only political interests. Therefore sense of duty, honour, justice and fairness are sacrificed on the altar of politics and business. More than that, some lawyers who are politicians as well, use their political power and influence to have politically - directed clients and... to influence judge decision as well....

Attorneyship profession and judicial system in Romania

More and more judicial authority that is submitted to a profound reform process ignores the lawyers' profession. We should be social partners, how it is declared, but in fact, we are less and less. The declaration of partners of justice is contradicted by all the other legal provisions. We are treated like some auxiliary of justice. Some time ago, a career as a lawyer was a hallmark of prestige. Impressive degrees and an authority over others have placed lawyers in an elite circle of professionals who demand respect. But after 20 years, the system does not respect us anymore.

But any deep reform on democratic bases of our judicial system is impossible, and therefore confidence of people in judicial system will be affected if attorney professionals will be excluded from this process.

It is mandatory that some measures of organisation of procedure should be adopted, in order for attorneys to be institutionally involved through specifically regulated rights and obligations.

Attorneys should benefit of special treatment in their access to registries, archives, for studying files, so that they can plan their activities, including their presence before the courts for hearings.

The current system, which allows lawyers 2 hours' access to archives and registries at the same time when hearings are held, as well as the organisation of hearings (60 cases scheduled at the same hour in the same hearing room!) is a sign of disrespect for lawyers and their time, as well as for all parties involved. This situation transforms lawyers in auxiliaries to justice, rather than main actors.

It is also mandatory to establish fixed hours for hearings, in agreement with the attorney, so that lawyers will be able to attend all their hearings scheduled for a day. In my opinion, it is also a sign of respect that puts the lawyers in their main position of partner for justice, not auxiliary as they are treated for now, by the system.

That demand is mandatory in order to ensure a proper exercise of lawyers' responsibilities and, in particular, the need for lawyers to receive sufficient training and to find a proper balance between their duties towards the courts and those towards their clients.

Summa summarum, the fact is that:

1. In the entire legislation concerning judicial organization there is no reference to attorneys' rights from the point of view of their relations with organisational structures of judicial authorities.

2. The recruitment and promotion system for judges and prosecutors disclose a major reticence towards attorneys.

3. Regulations concerning the activity of courts do not state a single rule in the benefit of attorneys that would create the possibility that attorneys honour their position of partner for justice; the lack of any mentioning of attorneys in those regulations denotes a structural despise towards lawyers.

- Paralegal professions have emerged and have been very enthusiastically promoted by the administrative leadership of courts, judges showing much more trust in experts, mediators, and trustees than in lawyers.

- Advocacy is conceived and treated by the legislative system as being utterly outside judicial authority. Regulations about the activity of courts only use the term defender, despite the fact that the law on the organisation of the attorney profession only uses the term "advocate".

The only instance in which attorneyship reclaims a central position in the judicial system is in the framework of legal aid.

Thus, all situations presented above lead to the conclusion of a decline in our prestige and role in the judicial system. A further aggravation of the situation is caused by the lack of cohesion within the profession, and the lack of existence of concerted activities, through which lawyers' representatives should promote and confirm the status that this profession should have in the judicial system and in society.

The causes of the decline of professional independence are many and complex, but essentially they reflect the attitudes and lack of vision of the judicial system as well as of a significant group of Romanian lawyers who conceive the practice of law mainly as a source of revenue. The other contributing causes can be summarized as follows: economic pressures on lawyers and law firms which have contributed to a "business" orientation, a remarkable increase in the sheer number of lawyers; the competition "for business," bringing aggressiveness and incivility; the growth of lawyer advertising, soliciting; the pyramiding trends toward multistate and multinational law firm partnerships; the narrowing of the lawyers' education and forced specialization; the perceived failure to discipline lawyers for abuses - against each other, the courts, the client, and against the public interest; the general decline of trust and confidence in the Romanian society, impacting on members of the legal profession; the influence of heavy-handed administrative bureaucracies upon lawyers, and, last but not least, political influences. These factors combine to induce the metamorphosis of the Romanian legal profession from art to business. A technical occupation. Much of the honour, pride, and the romantic side of this wonderful profession was lost. And it is a pity. And we have to do something. We want to bring back the importance and the honour of attorneyship. We want people to know and appreciate our pleadings at the bar, to renew their trust in us and in our powers. We want attorneyship, one more time, to become the main violin in the orchestra of justice. And we have to act accordingly.