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LAWYERS’ LEGAL PROFESSIONAL PRIVILEGE IN EUROPE

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Abstract

This paper aims at analyzing the professional secrecy of lawyers within European States, both theoretically and practically. The right to defence – the corollary of any real democracy – is unconceivable in the absence of the service provided by lawyers, while the rights and freedoms of people would be seriously damaged were there not a guarantee for their protection and defence, including through means specific to the lawyer’s profession. Professional secrecy of lawyers does not have a juridical or contractual nature, but a legal one; it springs from the law and it is contained in the professional status of lawyers. The purpose of this study is to underscore the similarities and differences within the legislations of the countries studied; both analysis and synthesis are fructified in the elaboration of this study. Precisely this analysis in parallel and in juxtaposition will open the way for future effective research.

The European Court of Human Rights has approached the professional secrecy of lawyers indirectly, which is not surprising, considering that no article within the European Convention on Human Rights expressly guarantees the right to professional secrecy. At the same time, I did not find a definition of professional secrecy in any legislative text, except for deontological texts, which may always be suspected of corporatism. It is important to make a first conclusion at this point: professional secrecy must be respected by the lawyer entrusted with it, because he/she is the debtor of an obligation, which is punished in both criminal and civil law within most juridical systems. The Court made a decision first of all regarding professional secrecy in the context of the right to observing private life, concerning the searches of business premises, such as lawyer's offices (case of Niemietz v. Germany, 16 December 1992, series A, no. 251 –B, case of Wieserand Bicos Beteiligungen GmbH v. Austria, no. 74336/01, case of Xavier Da Silveira v. France, no. 43757/05, 21 January 2010, case of Turcon v. France, 30 January 2007, case of Jacquier v. France, decision no. 45827/07 of 01 September 2009, case of Tamosius v. Great Britain, no. 62002/00, 19 September 2002, case of Smirnov v. Russia, no. 71362/01, 07 June 2007, case of Roemenand Schmit v. Luxembourg, no. 51772/99, 25 February 2003, case of Iliya Stefanov v. Bulgaria, no. 65755/01, 22 May 2008, etc). In most cases, in terms of searches in lawyer's offices, the issues concerned the level of proportionality principle: the Court was analyzing whether the interference was in conformity with legal requirements. For instance, in the case of Petri Sallinen v. Finland, 27 September 2005, The Court assessed that the Finnish law failed to provide proper juridical guarantees, because it did not state the circumstances under which confidential documents may make the subject of searches. The tapping of telephone conversations (Favreau, B., 2008), the control of lawyer-client privileged correspondence, as well as the observance of the right to a fair trial generated a rich correspondence of the Court (e.g., case of Campbell v. Great Britain, 25 March 1992, series A, no. 233, case of Erdem v. Germany, no. 38321/97, 5 July 2001, case of Kopp v. Switzerland, 25 March 1998, Chadimova v. Czech Republic, no. 50073/99, 18 April 2006, case of Jankauskas v. Lithuania, no. 59304/00, 24 February 2005, case of Kepeneklioglu v. Turkey, no. 73520/01, 23 January 2007, case of Schonenberger and Durmaz v. Switzerland, 20 June 1988, series A, no. 137, case of Foxley v. Great Britain, no. 33274/96, 20 June 2000, case of Brennan v. Great Britain, no. 39846/98, case of Ocalan v. Turkey, no. 46221/99, 12 March 2003, case of Sarban v. Moldova, no. 3456/05, 4 October 2005, case of

Modarca v. Moldova, no. 14437/05, 10 May 2007). The relative jurisprudence of the European Court of Human Rights underlines the specific status of lawyers and their privileged regime in the relationship with their clients. The observance of professional secrecy of lawyers is an aspect of their private lives and of the clients' private lives; at the same time, it represents an indispensable guarantee of the right to a fair trial. All interference must be stipulated by the law and well justified, proportionate in a democratic society.

Professional secrecy is extremely important from a practical perspective and in terms of principle. In all the States of the European Union, the confidentiality governing the lawyer-client relationship is legally protected. There is only one purpose in this sense: protecting the person who needs counselling and legal assistance from a lawyer (Laguette, S.P., 1978).

The legal basis of professional secrecy in Austria is legislative: the relevant professional law (sect. 9, Lawyers Act, Rechtsanwaltsordnung – RAO) and the provisions in the different procedural laws are federal laws (Bundesgesetze). According to Section 9, paragraph 2, of Lawyers Act, the lawyer is bound by professional secrecy in matters which have been confided to him/her and which have otherwise become known to him/her in his/her capacity as a lawyer, whose confidentiality is in the interest of his/her party. He/she is entitled to claim legal professional secrecy in legal and other official proceedings. In addition, Section 157, paragraph 1, subparagraph 4, of the code of Criminal Procedure and Section 104, paragraph 2, of the Finance Criminal Act, rule that a lawyer is entitled to refuse to give evidence in matters which have been confided to him/her in his/her capacity as a lawyer. This also applies to the staff of a lawyer and to candidate lawyers. This right of the lawyer, of his/her staff and candidate lawyers may not be circumvented and could otherwise lead to nullity of investigative measures (section 157, paragraph 2, Code of Criminal Procedure). Since confidentiality is one of the foundations of the entire profession, a lawyer commits the disciplinary offence of violation of professional rules – which can even be committed by negligence – if he/she does not comply with these requirements or tries to breach secrecy with regard to other persons subject to the duty of confidentiality. Furthermore, he/she disrespects the honour and reputation of the lawyers' profession.

In Denmark, the question of duty of confidentiality and the exclusion of witnesses has been decided by the Danish High Court in a judgement of 29 July 2009, SKM2009.489.HR. A lawyer who had refused to be examined as a witness, citing his/her duty of confidentiality, was ordered by the High Court judgement to give evidence and to present a complete transcript of the

articles of association of a fund in Liechtenstein. The legal opinion of the Danish Law Society against the duty to give evidence did not lead to another result. Under section 129 of the Administration of Justice Act, the rules of the Danish Penal Code on misuse of confidential information in public offices also apply to lawyers and assistant lawyers. From sections 152-152f of the Penal Code, it appears that a person who acts or has acted in a public duty or office and who is not entitled to pass on or exploit confidential information of which he/she has obtained knowledge is subject to penalty or imprisonment for up to six months. In 2007, a lawyer acting as counsel for the defence was subject to 30 days of suspended prison sentence and disqualification of his right to be engaged in criminal cases for one year as he – in a criminal case concerning violation of Section 191 of the Penal Code – as counsel for the defence had passed onto his client's wife, during three phone conversations, information from a Court meeting held behind closed doors and from the case documents about the defendant's point of views and explanations concerning the charges raised.

In Spain, professional secrecy of lawyers originates in the legal texts known as *Partidas de Alfonso X el Sabio*, dating to the 12th century. In the modern era, Article 543.3 of the organic law that consecrates constitutional rights (LOPJ, N.6/1985) mentions the professional secrecy of lawyers, confirmed by the jurisprudence in numerous decisions. The most important of such decision was taken on 17 February 1998 by the Spanish Supreme Court. Unfortunately, the regulation of professional secrecy is dispersed in different legal texts, reason for which it is difficult to delimit it in the context of domestic legislative framework. In this sense, I mention Article 24 of the 1978 Constitution, Article 6, 32.1 within the General status of Spanish lawyers (ECGAE), Articles 199.2 and 467.2 of the Criminal Code, as well as the provisions of the Code of Criminal Procedure, Articles 263, 416, 464 and 707. In the lawyer-client relationship, the interpretation of the aforementioned norms must be absolutely restrictive, because a lawyer, through his/her social function, is the guardian of his/her client's private life (Fenoll, N.J., 2010). Through decision no. 302/2008 of 27 May 2008, the Supreme Court sentenced two lawyers who had disclosed of professional secrecy to one year and a half in prison.

In Estonia, the obligation to maintain professional secrecy proceeds from the Bar Association Act and the Code of Conduct of Estonian Bar Association. The relationship between lawyer and client is founded upon trust. Therefore, all information given or received by him/her in the course of rendering legal services is confidential. A

lawyer shall accordingly respect the confidentiality of all information given to him/her by his/her client, shall ensure that no third person had access to the client's documents drafted by the advocate in the course of rendering legal services to the client, which are in his/her possession in connection with handling the client's matter. The obligation of confidentiality is not limited in time. The lawyer shall comply with the confidentiality obligation also after the termination of his/her professional activities. The violation of the confidentiality obligation cannot be justified by public interest or the fact that this would allow better protection of the client's interests (Bar Association Act, Section 45, Penal Code Section 157, Code of Criminal procedure, Section 72, subsection 1, clause 2) .

In the Swiss law, the professional secrecy of lawyers is mentioned in four federal laws and in the Ethical Code of the Swiss Bar association. Article 13 under Lawyers Law (LLCA) sets forth the lawyer's duty of professional secrecy concerning all information disclosed to him/her by his/her client. In case of ATF 125 I 46 of 30 November 1998, the Federal Court decided it is inadmissible to use phone recordings between lawyer and client if the defendant is the client-suspected of procuring. To the same extent, the Court posits that, if the defendant had been the lawyer, the interest of criminal prosecution would have prevailed, hence weaving lawyer-client privilege. Therefore, the person bound to professional secrecy cannot use it in court if he/she is the one prosecuted.

In the French law, (Dalloz, 1977) the main legislative acts of this principle are Law no. 71 – 1130 of 13 December 1971 on the reform of certain judiciary and legal professions (Articles 66-5), Code of Criminal Procedure, (Articles 226-13) Decree no. 2005-790 of 12 July 2005 (Article 4), National Regulation (R.I.N.) of the lawyer's profession (Article 2) (Barbieri et al., 2014). In criminal law, searches of a lawyer's office can only be conducted by an instruction judge, in the presence of the Bar's dean; the latter has the possibility of opposing to the taking of certain documents susceptible of violating professional secrecy (Conseil de L'Europe, 2011). Concerning telephone tapping, the criminal jurisprudence of the Court of Cassation decided that all telephone conversations between lawyer and client are null if they regard the right to defence (Daoud, E. & Bouche, B., 2014).

In Germany, professional secrecy is a duty and right which has a constitutional, legislative and professional basis. It is defined in Article 203, paragraph 1, no. 3, of the Criminal Code (Strafgesetzbuch), Article 43a, paragraph 2 of the German lawyers Act (Bundesrechtsanwaltsordnung), Article 2 of the Rules of Professional Practice (Berufsordnung für

Rechtsanwälte). There is a duty to create a privacy sphere for professional secrecy. A lawyer, who – for promotional reasons – arranges for the first consultation with his potential client to take place in a coffee bar, breaches his/her duty of in relation to professional secrecy. This was held by the Higher Regional Court of Dusseldorf (OLG Dusseldorf, decision of 17 July 2007, I-20 U 54/07, 20 U 54/07). The Court held that a lawyer should not bring his/her clients to a position in which they might waive compliance to confidentiality without being aware of it. On one hand, it can be assumed that someone who asks for consultation in a coffee bar knows that other people can listen to their conversation. Therefore, the client's agreement is generally assumed. On the other hand, inexperienced clients are often not aware of the consequences of their consent.

In Hungary, this professional confidentiality is called *ügyvédi titoktartás* (the closest translation would be “secrecy of lawyers”) and is regulated by the Act XI of 1998 on Lawyers (the Lawyers Act). In criminal procedures, the protection of privileged information and data is even stronger because a defence lawyer in a criminal procedure cannot be questioned as a witness with regard to what was revealed to him/her (Article 81b of the Act XIX of 1998 on Criminal Procedure). That is the case even if the client has waived him/her from the obligation of keeping the secret. The Supreme Court also pointed that out that it is irrelevant whether the defender is a lawyer, a junior lawyer or an appointed lawyer and it is also not important whether the lawyer acted only in certain stages of the procedure or during the entire procedure because the prohibition to testify adheres to the function of being a defence lawyer.

In Italy, this principle is regulated by article 9 – Duty of secrecy and confidentiality – within the Italian Code of Conduct (Codice deontologico forense), Article 622 within the Italian Criminal Code (Codice Penale), Article 200, Article 256 within the Italian Criminal Procedural Code. The Italian Constitutional Court had to intervene to state that the obligation of keeping professional secrecy concerns both full lawyers and candidate lawyers with whom they collaborated in the past.

In Liechtenstein, it is a criminal offence – according to Article 121 of the Liechtenstein Act on Criminal Law – if a lawyer breaks a secret of information he/she has acquired in his/her position as lawyer, and if this disclosure may violate a client's eligible concern. Case law regarding professional secrecy is neither very frequent nor does it cover very different topics. Leading case STGH 2007/130 (judgement of 30 June 2008 of the Liechtenstein Constitutional Court) reflects the importance of protecting the client's identity

through the legal professional secrecy (which is regulated in art. 15, Act on Lawyers) and the lawyer's right to refuse making a statement before Court (which is regulated in 107, paragraph 1, subparagraph 3, Liechtenstein Act on Criminal Procedure).

In Norway, the Criminal Procedure Act (Section 119) regulates that, without the consent of the person entitled to the preservation of secrecy, the Court may not receive any statement from clergymen in the State church, priests or pastors in registered religious communities, lawyers, defence counsels in criminal cases, conciliators in matrimonial cases about anything that has been confided to them in their official capacity.

Confidentiality in the Dutch law system consists of the obligation of secrecy (*geheimhoudingsplicht*), backed by the right to refuse to testify in Court (*verschoningsrecht*). The first aspect can be found in article 272 of the Dutch Penal Code: “who wilfully infringes any secret of which he knows, or can reasonably be presumed to know, that he is obliged to keep, on the basis on his office, profession or statutory provision.” The second aspect is provided by article 218 of the code of Criminal Procedure, stating, “He who, by virtue of his appointment, profession or office is bound by confidentiality can be excused from the obligation to testify with regard to information that he has been entrusted with in that quality.”

In Portugal, rules regarding professional secrecy not only protect the specific interests of the client but also play an important role in protecting social and public order. Therefore, it is regarded as a duty of the lawyer and a right of the client. In some situations, it is also regarded as a right of the lawyer (e.g., even if the client waives professional secrecy and thus authorises the lawyer to disclose information protected by legal privilege, and even if he/she obtained the permission of the President of the Regional Office of the Bar (Conselho Distrital) to reveal information covered by law, he/she may still choose not to disclose that information).

There are two categories of privilege in the United Kingdom: legal advice privilege and litigation privilege. The first essentially protects all communications between lawyer and client which make up the process of seeking and obtaining legal advice. This type of privilege is applicable even if the client does not bring legal proceedings. Litigation privilege is a wider concept and protects communications (including those not generated by lawyers) which come about for the main purpose of collecting evidence for use in legal proceedings.

There are similarities in all national legislations, because the professional secret has three foundations: legal basis – depending on the country, it is established either in the Constitution (or else in a basic law of similar scope) or in

criminal law, in procedural law, which provides sanctions for its infringement), professional basis and contractual basis. Professional secrecy has become an increasingly delicate topic due to the technological development of our times. Is the lawyers' use of social networks compatible with the Ethical Code? Additional guarantees are required concerning the safety of professional secrecy. The observance of private life must always prevail to the right to information (Benichou, M. et al., 2014).

The real difficulties begin to appear when – general principles aside – factual situations where secrecy, by force of circumstances, conflicts with other values. This explains the actions of certain legislators who, for various good reasons (such as fighting terrorism, drugs, human trafficking, money laundering) adopt texts that limit or eliminate secrecy. In the view of many national laws, such exceptions must be strictly justified by the need to respect values which are higher clearly proportional to the goal pursued. However, the freedom of national legislators is also limited by the international standards accepted by the Member States of the Council of Europe and of the European Union. Furthermore, search and seizure at a lawyer's office should be legally justified and it should comprise specific procedural safeguards. The legality of such measures implies pursuing a legitimate goal (e.g. the prevention or prosecution of criminal offences, the defence of order or economic well-being) subject to the criteria of necessity and proportionality. In regards to specific procedural safeguards, these at least imply that the measure should be ordered and led by a judge, in the presence of the president of the Bar or his/her representative, who must have the effective power of confiscating documents he/she deems to be protected by secrecy, under the supervision of an independent judge (who should not be the judge in charge of the investigation). The Strasbourg Court, while making lawyers' professional secrecy a part of the right to privacy, does not limit these principles to searches at a lawyers' office or professional domicile, but extends them to his/her private domicile or ancillary offices, even in other States. Similarly, being a lawyer regularly registered with an Order is sufficient, and the authority undertaking the search does not need to determine whether the lawyer is acting within his/her traditional mandate as representative in court or legal counsel or whether he/she has complied with the compulsory secondary registration procedures in case he/she is established in a host country under his/her home title. The point is not to bestow any privilege or immunity on lawyers, but simply to ensure that, on the occasion of a perfectly legal and legitimate search – whether against a lawyer for infringement suspicions,

against one of the his/her clients, or during his/her practice of another activity or mandate other than that of his/her profession – confidentiality, to which all other clients or third parties who are not concerned by the matter are entitled, is not adversely affected. It therefore falls to the European Bar to redefine legal privilege, to draw its outlines by emphasising on all its common points and by overcoming differences in details, guided only by the interests of clients, the profession and the rule of law. Its survival will then no longer be at risk. The case law of European courts offers us good reasons to hope and solid ground for thought.

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References

- [1] Barbieri, J.F., Maurel, C.B. & Lepeltier, D. (Eds.). (2014). *Professions libérales (Liberal Professions)*. Levallois: Éditions Francis Lefebvre.
- [2] Benichou, M., Bollet, M., Chambel, B., Ducasse, M., Eydoux, P., Forget, J.L., Frison – Roche, M.A., Rolland, G., Medina, J.L. & Wickers, T. (2014). *Avocatsetordre du 21 e siècle. Lawyers and Order of the 21st Century*. Paris: Dalloz.
- [3] Conseil de L'Europe (2011). *Perquisitionsetsaisies au domicile d'un avocat (Searches and Confiscations at a Lawyer's Domicile)*. *Journal du droit international*, no. 4, pp. 1331 – 1333.
- [4] Daoud, E. & Bouche, B (2014). *Interceptions judiciaires: "Mais qui gardera les gardiens?" (Judiciary Interceptions: "But Who Guards the Guardians?")*. *Actualité juridique pénale*, pp. 133.
- [5] Favreau, B. (2008). *L'avocatdans le droiteuropéen (The Lawyer in the European Law)*. Brussels: Bruylant.
- [6] Fenoll, N.J. (2010). *Les déontologies des professions du droit :approcheespagnole (Deontologies of Law Professions)*. France: ÉditionsLamy.
- [7] Laguette, S.P. (1978). *L'avocatdans les neufétats de la communautéeuropéenne (The Lawyer in the Nine States of the European Community)*. Paris: APIL.
- [8] *Répertoire de Droitpénal (Criminal Law Repertory)* (1977). Dalloz.

