

THE INCOMPATIBILITIES IN EXERCISING THE PROFESSION OF LAWYER FROM THE ECHR JURISPRUDENCE PERSPECTIVE

Roxana MATEFI¹

Abstract: *This article aims at analyzing specific incompatibilities and prohibitions of the legal profession, in light of domestic regulations in force (mainly the Law no. 51/1995 on the organization and exercising the profession of lawyer, modified and amended and the Status of the legal profession), and in terms of the influence that such a decision finding incompatibility may have in terms of ECHR jurisprudence. ECHR practice is consistent in considering that professional activity cannot be considered independent in relation with private life, actually being an essential component of the latter, so that restrictions or limitations to the professional life were qualified by the European Court of Human Rights as violations of art. 8 of the Convention, which has held that "everyone has the right to respect for his private and family life, his home and his correspondence.*

Key words: *incompatibility, interdiction, violation, independence, ethics.*

1. Introductory notes

Incompatibility is described in the legal literature as the prohibition to "carry out certain activities that might affect the exercise of the profession" [4] or as "legal impossibility to cumulate certain public functions or specific elective mandates or a public function or an elective mandate with certain private occupations or two private activities" [3].

According to the Romanian Language General Dictionary, incompatibility was defined as the „situation of two functions or professions which can't be occupied or exercised by someone at the same time”.

According to article 15 of Law no. 51/1995 republished, the exercising of the profession of lawyer is incompatible to:

- paid activity within another profession than lawyer;
- occupations which impair the dignity and independence of the profession of lawyer or ethics;
- exercising acts of commerce.

2. The incompatibility between being a lawyer and exercising a paid activity within another profession

As for the first case of incompatibility mentioned by the Law for organizing and exercising the profession of lawyer, we must mention that this incompatibility does

¹ Law Department, *Transilvania* University of Braşov.

not operate in regard to lawyers who are paid within the profession.

Thus, this incompatibility refers only to the lawyer who is being paid outside the profession.

The lawyer who is paid within the profession maintains his professional independence in activities he must undergo, the subordination to the person who hired him in regard to his work conditions.

He can't have clients of his own, in exercising his profession he must inform the offices of lawyers, the civil society for which he works, as the professional contributions of lawyers to the Bar and social services are paid by the person who hired him; any litigation regarding the work contract of the paid lawyer within the profession is solved according to the provisions of the Statute. [7]

3. The incompatibility between being a lawyer and exercising professions which impair the advocacy dignity, independence and ethics

In regard to the second case of incompatibility, neither the Law, nor the Statute clarifies the content of this incompatibility. However, we can conclude without a doubt that the lawmaker refers to any occupations which impair the dignity and independence of the profession of lawyer, on one hand and ethics, on the other hand.

The doctrine [6] expressed opinions according to which this incompatibility refers to „activities which are forbidden by law or whose exercise would harm the values mentioned in article 15 letter b) of Law no 51/1995”.

4. The incompatibility between being a lawyer and exercising acts of commerce

The Statute brings along some addendums in article 29 alignment (1) which establishes that the following are incompatible with exercising the profession of lawyer, if not otherwise stated by special laws:

- Acts of commerce performed without authorization;

- The quality of associate in a company regardless of the form of organization;

- The quality of administrator in a company;

- The quality of sole administrator or, in case there are several administrators;

- The quality of administrator with full power of representation and administration, president of the board, member of the board of a company;

- The quality of president of the board or member of a supervising council within a company.

However, the lawyer can act as member of the board or supervising council of a company, provided he informs the dean of the Bar about this fact, as stated by article 29 alignment (3) of the Statute.

5. Activities which are incompatible with exercising the profession of lawyer

Article 16 of the law clearly states those activities which are compatible with exercising the profession of lawyer, as follows:

The quality of representative or senator, adviser in local or county councils;

Teaching activities and functions in universities;

Literary and publishing activity;

The quality of arbiter, mediator or negotiator, local adviser, intellectual property adviser, authorized interpreter, administrator or liquidator in bankruptcy procedures, according to the law.

In regard to the compatibility of exercising the profession of lawyer with being a representative or a senator, as well as adviser in local or county councils, we must mention the fact that by Government's Ordinance no. 77/2003, passed by Law no. 280/2004, several limitations were introduced in regard to the exercising of the profession of lawyer by members of the parliament.

Thus, „the representative or senator, who, throughout his mandate in parliament, wishes to exercise the profession of lawyer, can't argue in cases tried by judges or provide legal assistance in those courts"- article 821 (1) of Law no. 161/2003 [5].

Thus, lawyers who are also members of the parliament will not be able to file any complaint before the judge, be it civil or criminal.

Also, the lawyer who is also a member of the parliament „can't argue in civil or commercial cases against the state, public authorities or institutions, national companies or companies in which they are a part of.

Also, he can't argue in trials against the Romanian state, before international courts"- Article 821 alignment (3) of Law no.191/2003 [5].

According to article 82, index 1, alignment (2) of Law no 161/2006, the lawyer who is a member of the Parliament can't provide legal assistance to suspects or defendants nor can he assist in court criminal cases regarding:

- crimes of corruption, crimes assimilated with crimes of corruption, as well as crimes against the financial interests of the UN, stated in Law no 78/2000 for the prevention, discovery and sanctioning of corruption crimes, with the latest changes and addendums;
- crimes stated by Law no 143/2000 regarding the prevention and fighting drug

smuggling and illegal drug use, with the latest changes and addendums;

- crimes of traffic and exploitation of vulnerable persons, stated in article 209-217 of the Criminal Code;

- the crime of money laundering, as regulated by Law no 656/2002 for the prevention and sanctioning of money laundering, as well as for instating some measures for preventing and fighting terrorist acts, republished;

- crimes against national security, stated in article 394-410 and 412 of the Criminal Code, as well as those regulated by Law no 51/1991 regarding the national security of Romania;

- crimes against the performing of justice, regulated by article 266-288 of the Criminal Code;

- crimes of genocide, against humanity and crimes of war, stated in article 438-445 of the Criminal Code.

The crimes mentioned above are not be applied in case the lawyer who is also a member of the parliament is a party in the trial or provides legal assistance or representation for the spouse or for relatives until the fourth degree inclusively.

6. The acknowledgement of the lawyer's state of incompatibility

The Council of the Bar is at liberty to check and state the incompatibilities, even by office. The lawyer who finds himself in an incompatibility case is obliged to bring this aspect to the knowledge of the Council of the Bar, in writing, with the request to be registered to the board of incompatible lawyers.

The decision to be registered to the board of incompatible lawyers can't be taken without hearing from the lawyer, who will be summoned. If the lawyer fails to appear, the measure will be taken.

The registration back to the board of lawyers who are allowed to exercise the profession will be made by request, when the state of incompatibility ceases - articles 31 and 32 of the Lawyer Profession's Statute.

7. Case law- *Mateescu vs. Romania*

Findings cases of incompatibilities in the exercise of a profession can be an extremely sensitive issue, especially if the particular case is likely to be given several interpretations in light of the legal texts governing the incompatibility.

Therefore it requires increased rigor in achieving this objective, the ECHR practice in this area indicating repeated violations of art. 8 of the European Convention on Human Rights, in the event of unjustified limitations on the exercise of a profession.

Based on the absence of an exhaustive definition of the term "private life", regulated by art. 8 of the Convention, it was considered that "the respect of private life should include, to some extent, the right of the individual to establish and develop relationships with peers, (...) and there is no reason to lead to the conclusion of the exclusion of commercial and professional activities from the notion of privacy, according to art. 8 of the Convention; because, ultimately, most people have the opportunity at their place of work, to establish contacts with the exterior world" [1].

It was considered that "the restrictions on the professional life of a person may fall under the provisions of art. 8 when they are passed in such a way that the individual builds social identity by developing relationships with others", while stressing that "employment is essentially in the area of interaction between the individual and others, so even

in a public context, this may be a part of her private life"[2].

Such a case brought before the ECHR, was *Mateescu vs. Romania*, the applicant lodged with the Court, alleging breach of the above mentioned article 8 of the Convention, for reasons that will be outlined below.

"The applicant, Mircea Mateescu, is a doctor with substantial experience, having been a general practitioner for more than eighteen years. In 2006 the applicant graduated from law school; one year later, he registered to become a lawyer, after having passed the annual entrance examination organized by the Bucharest Bar.

On 18 December 2007 the Bucharest Bar issued a decision validating the results of the examination and declaring that the applicant was admitted to the Bar. The Bucharest Bar further decided on 14 February 2008 to register the applicant as a trainee lawyer (*avocat stagiar*) as of 15 February 2008.

A two-year traineeship period being an obligatory condition for obtaining a licence to practise as a lawyer, the applicant signed a traineeship agreement (contract de colaborare) with the B.P. private law firm. On 15 February 2008 the Bar approved the applicant's traineeship within the firm. On 13 March 2008 the applicant submitted a request to the Dean of the Bucharest Bar to be allowed to pursue his two-year traineeship (*stagiu*) in compliance with section 17 of Law no. 51/1995 regulating the legal profession, notwithstanding the fact that he simultaneously had his own private medical practice.

He considered that "the medical profession was not incompatible with the dignity of the legal profession or the lawyers' rules of conduct in the sense of Rule 30 of the Rules governing the Legal Profession". On 20 March 2008, applying section 14 (b) and section 53 (2) (e) of

Law no. 51/1995, the Bucharest Bar rejected the applicant's request. In its decision the Bar held: "the applicant's request to practice simultaneously as a lawyer and as a doctor is dismissed, and the applicant must consequently opt for one of the two professions."

On 21 April 2008 the applicant contested that decision before the National Bar Association. He challenged the reason for the dismissal of his request, which, citing section 14 (b), referred to ineligibility to practise as a lawyer for anyone who already pursued a "profession that infringes the dignity and the independence of the legal profession or is contrary to good morals".

He contended that his professional CV, including a Ph.D. in medicine, a career of teaching at the university and the authorship of several books on medicine, could on no account infringe the dignity of the legal profession. At the same time, he pointed to the fact that he was neither an employee nor a trader, as proscribed by the legislation regulating the activities of lawyers.

On 18 June 2008 the National Bar Association upheld the Bucharest Bar's decision, this time on the basis of section 15 of Law no. 51/1995, which enumerated "exhaustively" the professions that were compatible with the profession of lawyer. As the practice of medicine was not specified among those professions, the applicant's request was dismissed. That decision was contested before the Bucharest Court of Appeal.

On 20 January 2009 the court allowed the applicant's claims, holding that section 14 (b) was not applicable, in so far as "the profession of doctor does not impinge on the independence of the profession of lawyer". The court further held that any restriction on practising a profession must be expressly and unequivocally prescribed

by law, which was not the case in this situation.

Moreover, the Romanian Constitution protected the right to work, which could not be subject to any limitations, with a few exceptions expressly enumerated in section 53, such as national security reasons, protection of public order, health and public morals or protection of individual rights and freedoms, none of which was applicable in the applicant's case.

Furthermore, the prohibition on practicing as a lawyer while also practicing as a doctor was not included in the text of section 14 (b) of Law no. 51/1995, which referred only to professions that infringed the dignity and the independence of the legal profession or were *contra bonos mores*. The court further held that section 15 of the Law did not contain an exhaustive list of the professions compatible with the profession of lawyer, in spite of the National Bar Association's interpretation of that provision to the effect that if the medical profession was not included in the text among the compatible professions, this meant, by converse implication, that it was not compatible with the profession of lawyer. The incompatible professions were enumerated exhaustively in section 14, and the profession of doctor was not among them.

The assertion that practicing a liberal profession required total dedication and implicitly a lot of time on the part of the practitioner could not be taken into consideration for the assessment of the lawfulness of the decisions taken by the local and national Bars; not having enough time to devote to clients' cases had nothing to do with the independence of the legal profession. The court thus confirmed the applicant's right to practice both professions simultaneously, annulling the Bars' decisions.

The National Bar Association appealed against that judgment to the High Court of Cassation and Justice. It argued that while section 14 of the Law listed the professions that were incompatible with the profession of lawyer in a generic manner, giving examples, section 15 regulated, strictly and restrictively, the exceptions that were allowed, among which the profession of doctor was not mentioned.

At the same time, the simultaneous practice of both professions infringed the principle of the independence of lawyers. In wanting to practice both professions, the applicant demonstrated only his extreme mercantilism, as he “minimized the importance of these professions, treating them as mere sources of income”.

On 24 June 2009 the High Court allowed the appeal and dismissed the applicant’s request, holding that the combined interpretation of sections 14 and 15 led to the conclusion that the list of compatible situations was exhaustive and thus section 15 referred to the only professions that by law were compatible with that of a lawyer; the High Court pointed out that even if the provisions of Rule 30 of the Rules governing the Legal Profession, relied on by the applicant in his defence, also enumerated other situations of incompatibility and compatibility, they were of inferior rank to a law and therefore they could not contradict those of the law itself.

Relying on Article 6 § 1 of the Convention and Article 1 of Protocol No. 1, the applicant complained that the national authorities’ decision not to allow him to practice simultaneously as a lawyer and as a doctor was wrongful and in breach of the principles of international law guaranteeing the individual right to work.

In the present case the Court considers that the applicant’s complaints are to be examined under Article 8 of the Convention.

The Court recalls that Article 8 of the Convention “protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world” (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002- III), and that the notion of “private life” does not in principle exclude activities of a professional or business nature (see *C. v. Belgium*, 7 August 1996, § 25, Reports of Judgments and Decisions 1996- III).

It is, after all, in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251- B).

The Court has further held that restrictions on registration as a member of certain professions (for instance, lawyer or notary) which could to a certain degree affect the applicant’s ability to develop relationships with the outside world undoubtedly fall within the sphere of his or her private life (see *Campagnano v. Italy*, no. 77955/01, § 54, ECHR 2006- IV).

In the present case, the Court notes that the national authorities’ decision to condition the applicant’s right to practice as a lawyer on his renouncing his medical career came at a moment in his professional life when he expected to be able to make good use of the legal skills he had acquired by dint of considerable academic effort and after having been admitted to the Bar.

In view of the above, the Court considers that the impugned measure impaired the applicant’s chances of carrying on the profession of lawyer, and thus had particular repercussions on benefitting from his right to respect for his private life (see again *Bigaeva*, cited above, § 25) which attracted the applicability of Article 8 of the Convention.

The Court considers that the authorities' decision to condition the applicant's practicing as a lawyer on his giving up his medical career, when he had already been accepted in the Bar after passing the admission exam, constitutes an interference with his right to respect for his private life.

Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned.

The expression "in accordance with the law" requires, firstly, that the impugned measure should have a basis in domestic law.

Secondly, it refers to the quality of the law in question, requiring that it should be formulated with sufficient precision so as to be accessible to the person concerned, who must moreover be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, among other authorities, *The Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30, and *Michaud v. France*, no. 12323/11, §§ 94-96 ECHR 2012).

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323).

In the present case, the Court notes that the measure contested was based on sections 14 and 15 of the Law regulating the legal profession.

Therefore, the interference had a basis in domestic law. The Court has no reason to doubt that these texts were accessible. It remains, therefore, to be determined whether the application of these provisions was foreseeable.

The Court notes at the outset that neither text expressly referred to the medical profession.

While section 15 establishes cases of compatibility with some precision, section 14 defines cases of incompatibility in more general terms, referring to "occupations affecting the dignity and independence of the profession or good morals". This section does not refer at all to medical practice as included in those occupations, nor gives any indication thereof; moreover, the Romanian court did not reasonably establish why the dignity and independence of the lawyer would be affected by the exercise of the medical profession.

The Court further observes that the domestic authorities' views on which text was relevant, and on its implication for the applicant's request, diverged; in fact, the courts applied the same legal texts in a contrasting manner, reaching totally opposite conclusions.

It was considered that in such circumstances, it is unlikely that the applicant could reasonably have foreseen that – in spite of the fact that he was admitted to the Bar and registered as a trainee lawyer, and that the law governing the legal profession did not explicitly mention that the practice of medicine was incompatible with the profession of lawyer, together with the general principle according to which everything which is not forbidden is allowed – he would, in the end, not be allowed to practise as a doctor and also as a lawyer.

Accordingly, the wording of the legal provisions regulating the practice of the profession of lawyer was not sufficiently

foreseeable to enable the applicant – even though, being an aspiring lawyer, he was informed and well-versed in the law – to realise that the concurrent practice of another profession, not enumerated among those excluded by the law, entailed the denial of his right to practise as lawyer (see, for instance, *N.F. v. Italy*, no. 37119/97, § 31, ECHR 2001- IX; *Sorvisto v. Finland*, no. 19348/04, § 119, 13 January 2009; and *Ternovszky v. Hungary*, no. 67545/09, §26, 14 December 2010).

Hence, the Court concludes that the condition of foreseeability was not satisfied and that, accordingly, the interference was not in accordance with the law.

There has accordingly been a violation of Article 8 of the Convention [8].

References

1. CEDH, 16 December, 1992, *Niemietz c/Allemagne*, Series A nr. 251-B, 23 March 2006, *Campagnano c/Italie*, Recueil 2006-IV; 28 mai 2009, *Bigaeva c/Grece* apud C.Bârsan, European Convention of Human Rights. Coment on articles. 2nd Edition, C. H. Beck Publishing House, Bucharest, 2010, p. 602.
2. CEDH, 23 of March 2006, *Campagnano c/Italie*, Recueil 2006 – V, CEDH, dec. of 11 of April 2006, *Molka c/Pologne*, Recueil 2006 – IV, p. 395, cit. by C. Bârsan, European Convention of Human Rights. Coment on articles. 2nd Edition, C. H. Beck Publishing House, Bucharest, 2010, p. 636. Leş, I.: *Instituţii judiciare contemporane*. Bucharest. C.H. Beck Publishing House, 2007, p. 252.
3. Cornu, G.: *Vocabulaire juridique*. Paris. Quadrige/PUF, 2007, p. 478.
4. Debard, Th., Guinchard, S.: *Lexique de termes juridique*. Paris, 21 edition, PUF, 2014, p. 497.
5. Law no 161/2003 regarding some measures to ensure transparency in exercising public functions and other functions within the business sector, preventing and sanctioning corruption.
6. Leş, I.: *Instituţii judiciare contemporane*. Bucharest. C.H. Beck Publishing House, 2007, p. 252.
7. Poenaru, E., Murzea, C.: *Reprezentarea în dreptul privat*. Bucharest. C.H. Beck Publishing House, 2007, p. 90.
8. <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-139998>. Accessed: 03-03-2015.