Pázmány Péter Katolikus Egyetem
Jog- és Államtudományi Kar
Doktori Iskola

Patyi Gergely

ATTORNEYS AT LAW ON THE BORDER OF PUBLIC AND PRIVATE LAW

Theses of doctoral dissertation

<u>Consultant:</u>

Professor Dr. Tamás András

Budapest, 2012

I. Targeted field of research

An attorney at law as a professional and the bar as a public body are facing several challenges in our days. These challenges hold surprises as examined topics are finding their position on the boundary of public and private law. Since World War II scientific works in this regard were published with mainly and only with an attitude to history of law but the reconsideration of some issues or research of answers to the challenges of our modernizing world may bring some new results.

By using the possibility of abstraction with regard to the organization and system of the bar and the daily practice of attorneys at law in my dissertation I made efforts to formulate theoretical answers considering also that public and private law fade into another also in this field. Further my ambition was to come to theoretical conclusions from practical approach, since my main purpose was to make an examination of scholarly character.

Fifty years of pressing back attorneys at law after World War II did not favourably serve a practice on sound theoretical foundations therefore after the change of regime it became necessary to repeatedly create the theoretical base by using previous results of science. New trends and tendencies arise partly from European integration partly from modernization and technological development but also changes in society in past years may not be ignored.

Considering historic traditions highly respected by myself I found essential and important to show main milestones of development of the attorneys' profession being important part of the history of law concisely and in general, but I did not undertake to elaborate the complete development of the history of law as to the institute itself by attempting to be comprehensive.[1]

In the course of dissertation I considered the structure and system of the Act on Attorneys at Law[2] being in force now as the basis on condition that historical and constitutional basis and examinations regarding the bar are mentioned earlier than in the Act. After these parts one can find the elements as to comprehensive examination of the attorneys' activities considering that on positions where the Act on Attorneys at Law does not provide for a completely logical order, the theoretical systematization became primary and decisive.

---

[1] Elaboration of the history of law is partly because of reason of length limits partly because of approaching methods differing from research tendency of the dissertation is not complete. With regard to description of historical development I lean on legal history studies that could be found and on results published recently. See please – among others – *doctoral dissertation* of KORSÓSNÉ DELACASSE KRISZTINA: Creation and start of attorneys autonomy in civil era of Hungary, Pécs, 2009. .

[2] Act XI. of 1998 on Attorneys at Law (hereinafter: Act)

II. Short description of examinations completed, method of research and collection of materials, exploration and use of sources

In the course of my work my aim was that the beyond the historical part of the dissertation the descriptive method appears only in making the subject matters introduced and understood and I focused mainly on applying an analytical and comparative method. Consequently, I approached the topic primarily from its public law definition using perceptible European trends and tendencies comparing those with Hungarian legislation and practice.

Along with review of supranational regulation [3] I examined significant national regulations having an impact on Hungarian development. I studied German, Austrian and partly French regulations – being in the focus of Hungarian attorneys for centuries and as a matter of curiosity the Russian impact that had a significant effect on our recent past. Due to significant impact of British regulations on the legal materials of the EU I consider also important to examine British regulations – despite belonging to a different legal family. As I had an opportunity to participate in a survey related to handling of deposits organized by the Budapest Bar Association therefore beyond my experiences I could also lean on an empirical research supported by questionnaires.

At the beginning of research when defining the topic and examining essence of attorneys it became clear that in everyday use of the word this expression has double meaning. On the one hand it means the attorneys' activity itself and on the other hand it means the circle of persons who pursue this activity, therefore in the course of examination of development history of the profession of attorneys we can reach back to early antiquity. The activity of attorneys can be considered basically equal in age with existence of statehood. In first stages of legal development the present form of attorneys characteristic for Europe could not be found yet. Already at the beginning moral norms ruling coexistence in society also legal norms got an important role therefore they had an impact on development of law and on multiplication of rules of legal character.

In ancient Greece main actors of a court procedure were not educated attorneys in the present sense of the word. At the beginning – as usual – the principle of verbality, publicity and cotradictority was prevailing.[4]

[3] SOÓS EDIT: Cohesion policy of self-governments and EU. *Előadásanyag a C – 8 Önkormányzatiság, EU regionális politika, intézményi reformok című kurzushoz.* Szeged: Szeged Biztonságpolitikai Központ, 2007. 2.
[4] MAX DUNCKER: *Geschichte des Alterthums*. Berlin: Verlag von Duncker & Humblot. B. V., 1881, 339.

Attorneys appeared as a body organized by the state first in ancient Rome. Similarly to Greeks primary form of attorneys' activity was the attorney of relatives, next step of it was the institute of patronate that led to attorneys working on assignment[5]. The patron not only represented the interests of his client but also provided explanations to the law. The client was expected to pay – in form of a gift or a service - to the patron representing him before court. This process can even be considered the actual formation of Roman attorneys.

Romans occupying Germania brought with themselves the institute of attorneys beyond other institutes. On the territory of Germania the advocate was not an educated lawyer but a person being well acquainted with formal rules of a law procedure. Later during the centuries in European development of law the lawyer became a legal consultant well knowing the law and an authorized representative of the client. By that time the discrimination between the attorney and the authorized person for court procedure disappeared.

In the first centuries of Hungarian statehood members of ruling class settled their legal disputes by arms and in lower social classes the fist-law was decisive. Later it was the purpose to give at least a semblance of legality to these violent acts for which they needed laws and then people who know and understand to apply them.[6]

Pursuing the profession of attorneys in Hungary started in early Middle Ages and archetypes of this profession can be found already in the eleventh century. In charters of the eleventh and twelveth centuries, in the laws of King Kálmán and in the Golden Bull we can find a regular actor of legislation mentioned under the name of pristaldus.[7]

Educated attorneys appear only many centuries later. As of 14th century lawyer- intellectuals who graduated in foreign universities and then returned to Hungary through the knowledge of legal manuals, formulabooks and collections had already some kind of qualification of professional attorneys. Although they performed representation and consultation with regard to their employees if it was necessary, we cannot speak of an attorney at law yet. King Zsigmond made first step to formation of the profession of attorneys, when with his decree of 1405 he separated activities of church and worldly legal professionals[8].

---

[5] ÉTIENNE ANDRÉ THÉODORE GRELLET-DUMAZEAU: *Le Barreau romain*. Paris: Moulins, 1851. 42.
[6] SZENDE PÁL: *Crisis of the Hungarian Attorneys Part I. Huszadik Század*, 1912/1. 32.
[7] NAGY ALADÁR: Pristaldus. *Centuries*: Budapest: Hungarian Histroical Society, 1876/4. 339.
[8] ZLINSZKY JÁNOS: Establishment of attorneys' profession in Hungary and its history in Fejér county. In *Fejér Megyei Történeti Évkönyv 8.* Székesfehérvár, 1974. 14.

In 15th century a professional attorneys' strata emerged also in Hungary, the members of which pursued actual activity of attorneys, they regularly and professionally as a gainful occupation represented persons before courts and engaged themselves in legal consultation. In 1486 King Mátyás was already forced to restrict activities of attorneys. By mid sixteenth century in Hungary in some disputed matters also legal customs and legal science were helping beside legal rules in effect. The institute of lawyer's oath was introduced first by the Act 27 of 1576[9]. The Statutum Per Advocatus Causarum, sen Procuratores Regni Observandum patent issued by Lipót I in October 1694 can be considered the first Hungarian statutes of attorneys at law Hungary, that regulated the activities of attorneys in detail.

Passsing a long distance in time it can be stated, that main element of the Act of 1874 was the setting up of bar associations,[10] and as a result of this regulation, still having an impact in 1875 historically simultaneously with other chambers of professions, the safeguarding and self-governing organs of attorneys, the bar associations were founded.[11]

The Act of 1937[12] made restriction of admission to the bar possible as a result of rush increase in attorneys' number, avoiding that existence of fair attorneys' work could not become impossible on the long run. In the era after 1945 significant changes have happened also in legal materials with regard to attorneys' profession.

A new legal rule regarding organisation of attorneys, the law-decree[13] no. 12 of 1958 on practising attorneys' profession and organisation of attorneys defined a basically new structural and operational system for attorneys at law. Organisation of the bar associations remained similar to the previous system. Attorneys' fee was theoretically a subject of free negotiations. As to attorneys' fee the minister of justice stipulated general legal rates and limits of these rates could not be exceeded. The statutes of 1958 were in force with two amendments until 1983.

Following the change of regime the Act XXIII[14] of 1991 made activity and profession of attorneys free.

[9] DR. MANDEL KÁROLY: *Hungarian provisions of law on attorneys at law (1000-1927).* Pécs: Pécsi Irodalmi és Könyvnyomdai Rt., 1928. 42.
SZABÓ ISTVÁN: Survey of attorneys' profession In CSERBA LAJOS (szerk.): *Memorial album on 125th anniversary of Bar Associations.* Miskolc: Borsod-Abaúj-Zemplén Megyei Bar association, 2000.18.
[11] FAZEKAS MARIANNA: *Some issues of regulation of public bodies.* Budapest: Rejtjel kiadó, 2008. 21.
[12] Act IV of 1937. on statutes of attorneys. 51§-53§.
[13] Law-decree no 12 of 1958 on practising attorneys' profession and on organizations of attorneys
[14] Act XXIII of 1991 on amendment of law-decree no 4 of 1983 on attorneys

Social and professional importance of attorneys has been changing since the regime-changing and the specific role of a bridge of attorneys between private and public spheres is reflected in respective legislation of the constitutional state. [15] In the course of examination of constitutional position of attorneys it could be stated that attorneys can be considered an institute regulated by constitution and if the attorneys' profession and basic rights and values being indispensable for pursuing this profession were violated[16], attorneys could receive constitutional protection.

In the constitution still in force neither the attorney at law, nor the profession itself, nor expression of bar association can be found[17]. At the same time in Chapter XII it is stated that persons being involved under criminal procedure are entitled in every stage of the procedure to the right of protection. An attorney defending the accused may not be called to account for his opinion expressed during defence process[18]. For the expression of defending attorney there can be found additional explanations in the criminal law[19] and the Act on Attorneys at law. Based on law on criminal procedure it can be stated that the word defence is partly a synonime in the narrow meaning of the expression of attorney at law in the constitution.[20] The constitutional expression of "defence" is a part element of the notion of attorney at law, in the course of defence activity related to criminal procedures.

The profession of the attorneys is related not only to legal applications and public authority of legislation, since in the private sphere when lawfully settling life circumstances an attorney at law is present with his legal expertise and in case of lack of legal expertise he is acting as a legal counsel with his legal knowledge.[21] A distinctive feature of attorneys' profession that as an intellectual free professional it is a private activity that is separated expressly as a private activity from the public executive power in the circle of public power's activities due to guaranty reasons. Guarantee reasons and constitutional legal security make necessary and reasonable that defence attorneys and legal representatives pursuing their profession as private activity against organised public power be secure institutional prestige, institutional legal protection and institutional counterbalance.

---

[15] SULYOK TAMÁS: Some current questions regarding constitutional position of attorneys *Magyar Jog.* 2008/6. 414.
[16] TRÓCSÁNYI László – SULYOK Tamás: Lecture on constitutional position of attorneys held on November 29, 2008 on occasion of the Day of Hungarian Attorneys *Ügyvédek Lapja*, 2009/1. 2-6.
[17] Remark: there are no expressions: „notary public" and „court bailiff" l.
[18] Indent (3) § 57 of the Constitution
[19] Act XIX of 1998 on criminal proceedings (hereinafter: Be.)
[20] BALOGH Zsolt – HOLLÓ András – KUKORELLI István – SÁRI János: *Explanation of the Constitution.* Budapest: KJK-Kerszöv, 2003. 561-562.
[21] SULYOK i. m. 416-417.

Public bodies can be worthily considered organisations with mixed image, partly of social character that play the role of public power and exercise official rights, that have to perform important and ever extending roles. I regard the recent researches and classification[22] by Fazekas Marianna on definition of public bodies as basic. According to other studies chambers and bar associations may be sorted also in a different way. *Chambers* and bar associations *pursuant to private law*, the so called Anglo-Saxon model is essentially a lobby organisation without public tasks. Such bar associations are active e.g. in Great Britain and in the Scandinavian countries, where players of a given economic or profession organization may freely decide, whether they want to join a chamber striving to make themselves attractive with various services, or not. These chambers are submitted to act on freedom of association. They are first of all performing representation of interests and may freely decide on their structure. *Public law chamber* (continental model) can be interpreted by its structure as an institute. Its ruling is that of a public body, members are automatically organised by the fact that it is compulsory that affected groups and individuals join them. Chambers with regulations similar to public bodies are destined to support realization of professional standpoints, based on decisions of those interested. They render numerous services allowed by their public body status and financial resources arising out of income from automatic membership. They have a right assured by the law to influence decisions affecting members both on national and local levels. Their operation is regulated, leaders are elected by members and they also perform specific tasks of authorities.[23] Chambers are not creations of civilians but of the state, therefore the professional self-government was considered a form of decentralisation of government and state power. In their opinion these representations of interests are real carriers of economic self-governments, but in order to stay as they are it is by all means necessary to maintain the institute of compulsory membership in chambers.

With regard to bar association it can be stated, that the compulsory membership in bar associations does not violate the freedom of association, because bar association is not an organization established on basis of freedom of association. Bar associations were not founded by private individuals, their aims and purposes, tasks were not defined by private persons. The bar association was established by law, its tasks, operational order and activity is ruled by law.

[22] See please in detail in FAZEKAS MARIANNA: *Some questions of regulation of public bodies.* Budapest: Rejtjel kiadó, 2008. 18-19.
[23] PÓLA PÉTER: Chambers of Commerce in globalization. *Tér és Társadalom*, 2006/3. 21-22.

Thus, a bar association is not an association founded pursuant to the right of association by individuals, it is not a union of persons, or social organization, but a public body, the establishing of which was ordered by law.

Bar associations as public bodies institutionally guarantee for the public seeking law that their members are professionals, they are lege artis competent in legal defence and representation matters and also institutionally guarantee that the tasks performed by the members as private activity are pursued independently. Independence of the attorney at law is emphasized and guaranteed by the bar association as a public body.

Studying the constitutional bases and international aspects of this topic it can be stated that theoretical foundational work by the Constitutional Court of Hungary performed since the change of regime the main framework of constitutional foundation of the attorneys profession was elaborated in today's actual sense of the word. Following numerous cases appearing before European Court and affecting practise of attorneys profession the Community found it timely to define legal framework in community law for continuous pursuing of attorneys' profession that can be included in the freedom of settlement. For this purpose European Parliament and Council issued on February 16, 1998 guidelines on the implementation of the establishment directive (98/5/EC) issued by the CCBE on supporting actual and continuous provision of attorneys services in a different member state from the member state, where qualification was obtained. In 1977 it issued the Council Directive 77/249/EEC to facilitate the effective exercise by attorneys[24] of freedom to provide services with a permanent character in any other member state based on professional title obtained in own member state.

In course of my work I studied some significant cases of the European Court, that assisted the practise completing legal rules be live and understandable. As an example the issue no. C-359/09 may be interesting on the subject of Donat Cornelius Ebert versus Budapest Bar Association, in which following the statement of the Court of February 3, 2011 it became clear that the national regulation is not against Community regulation, where in order to pursue attorneys' profession with a title of receiving member state the compulsory membership in an organisation similar to the bar association is prescribed.[25]

---

[24] Council Directive 77/249/EEC of March 22, 1977) on actual promotion of freedom of provision of attorneys Official Journal of the EU 06/1 volume 52-53.

[25] Decision of February 3, 2011 of the Court (fourth council) (Budapest Council of Justice (Republic of Hungary) petition for previous decision) – Donat Cornelius Ebert kontra Budapesti Bar association. *Az Európai Unió Hivatalos Lapja,* 2011. C 103/6

In the dissertation I compared position of the attorneys with position of relational professions, the result of which was summarized in a chart so that similarities and differences became visible.

Additionally, I paid special attention to showing present number of Hungarian attorneys at law. As of the beginning of nineties the state made made education of attorneys easier by loosening cconstraints of admission requirements and simultaneously it terminated self protecting exclusivity of national organisations of the attorneys by amendments of law. Consequently, at the turn of the millennium annually 2000-2200 new graduates left legal faculties which process coincided with opening new legal faculties. Number of attorneys can be well followed and documented from 1875 till 2010 by the Budapest Bar Association. From the change of situation consequences may be drawn which are valid still today.

The previous strongly restricted number of the attorneys' profession secured "appropriate" state influence and on the other hand this assured for attorneys permitted to practise their profession exceptable living standards. With change of regime exactly this previous known and widely accepted situation changed basically. Upon performance of requirements pursuant to law the admission to the Bar Association may no longer be reasonably refused. This significant change, increase in numbers showed at that time some problems in advance that became more obvious by now and influence considerations as to numbers of attorneys. Economic crisis starting in 2009 made completely obvious for everybody that number of cases to be dealt with does not unconditionally assure a living for every lawyer, which can highly influence also 'quality' of the service.

Number of members in national bar association is estimated at approx. 13600 members, from which number of attorneys at law outside Budapest is approx. 5000 persons[26] , number of attorneys in Budapest 8589 members. As a consequence of these data it can be stated that alone Budapest Bar association registers more attorneys than all other chambers on the countryside totally.

[26] Bács-kiskun Megyei Bar association: 450 members, Békés Megyei Bar association: 95 members active és 13 members suspending legal practice, Miskolci Bar association 425 members, Fejér Megyei Bar association 291 members, Debreceni Bar association: 394 members, Heves Megyei Bar association: 166 members, Jász-Nagykun-Szolnok Megyein Bar association: 198 members, Pécsi Bar association: 369 members, Somogy Megyei Bar association: 263 members, Szegedi Bar association: 490 members active és 38 attorneys suspending legal practice, Tolna Megyei Bar association: 124 members, Vas Megyei Bar association: 161 members active and 8 members suspending legal practice, Veszprém Megyei Bar association: 229 members, Zala Megyei Bar association: 227 members active és 14 members suspending legal practice.

Similarly to all other chambers of the country the Budapest Bar Association is a chamber of 'small' attorneys at law, from which the economic volatility, defencelessness of the profession of attorneys is clear. Diminishing of defencelessness calls for partly direct, partly indirect tasks to be performed by the state.

The task of the state as creator of law is to develop legal environment and by that to speak out that attorneys on the border of public and private interests should pursue their activities on the long run as mediators.

I thoroughly analyzed the institute of deposit performed in the course of pursuing the attorneys' activities, being of emphasized importance and being partly part of private and public law. Pursuant to present law the deposit may be accepted as performance of the engagement, as cover for costs connected to the procedure acts or related to the engagement for safeguarding. Subject of the deposit may be cash or valuables, receipt of the deposit has to be included in a contract.

During the time of preparing my dissertation I actively participated in a survey on handling of deposits organized by the Budapest Bar Association at the beginning of 2009. [27] During the research we made efforts to thoroughly learn the present situation as to handling of deposits by attorneys and to make evaluation relatively clear. an insignificant part, approx. 2 %[28] of the members of Budapest Bar Association returned the questionnaire therefore a statements meeting requirements of statistical methods could not be made for the whole of the attorneys, at the same time answers showed a rather interesting picture.

Survey related to deposits was made necessary by the fact that main part of complaints and disciplinary procedures related to the activity of attorneys were connected year by year to violation of the rules on handling of deposits and some corrupt practices caused particularly significant loss by attorneys have a seriously negative impact on judgement of the legal profession. In Europe we have examples for handling deposits by the attorneys being on the border of two worlds on basis of regulation and within public law framework. Therefore in my dissertation I dealt with French CARPA (Caisse des Règlements Pecuniaires des Avocats) model as a possible solution.

[27] Hereby I wish to express my thanks for the opportunity to leaders of the Budapesti Bar Association before all to Chairman Dr. Réti László.

[28] It should be mentioned that number of attorneys completing the questionnaires show almost equality with those participating in the annual and regular general meeting of the Bar, i.e. members do not participate in those more actively.

The essence of CARPA system was summarized in a flow chart of activities in order to see the system easily. In order to avoid misunderstandings I have to emphasize that CARPA is not a bank and it is supported by the bank system mainly only by transfers. Its essecence is that it is operated on basis of liability by some Attorneys' Bodies (territorial chambers). CARPA is exercising supervisory and controlling activities in the complete process over third party's money from entering until leaving the system.[29] The cashier is controlling and supervising each and every financial movement of the lawyer.

Upon evaluating CARPA it should be mentioned that this system brought positive results in France. Since start of operations the attorneys' insurance events have significantly decreased, which is shown by the fact that in past 10 years number of such cases decreased by 96 %. The directives elaborated by the French Bar provoked the interests in several Eurpean countries, as e.g. Belgium or Italy, where some groups of attorneys already came to establish their own cashiers by following the French model. I consider worth examining, whether such system – similar to French CARPA - in Hungary would be necessary and desirable? For the start I have to emphasize that violation of rules related to handling of deposits make out significant part of disciplinary procedures and the attorneys' insurance company pays the highest amounts of damages for infringement of rules related to handling of deposits. Based on the survey and study of questionnaires it could be stated, that formation also in Hungary of a system eventually similar to French CARPA is not an idea to be rejected.

Obviously regulation on law level would be necessary in order to build a system acceptable and appropriate from all aspects. A uniform financial handling of funds could bring significant additional income to the attorneys as a whole, event the attorneys handling the deposits, respectively, by inviting some trading banks for tender and by depositing substantial capital. An advantage of implementing the system may be, that controlling tasks related to money laundering could be left out of responsibilities of some attorneys – exercised only with limitations for the time being – integrating the tasks in one unified system and pecuniary liabilities of attorneys could also be restricted to limits.

---

[29] See Décision judiciaire de Conseil d'Etat, 5 juillet 1996 (cas Conseil d'Etat, 9 / 8 SSR, du 5 juillet 1996, 115275), 8. cikkelye – http://legimobile.fr/fr/jp/a/ce/ad/1996/7/5/115275/

The character of responsibility of an attorney was also subject of my review. For desrcription of the quality of responsibility I state only most necessary factors. As to Hungarian private law I used the system elaborated on responsibilies by Lábady Tamás.[30]

With regard to effective rules on responsibility the Section 10 of the Act on Attorneys at Law refers to the Civil Code. Pursuant to reference rule the attorney at law is liable to pay indemnification for damages caused during pursuing his activity. Namely, MÜBSE (Association of Insurance and Support of Hungarian Attorneys) providing liability insurance for significant part of attorneys uses three compulsory liability insurance forms.

The third highest grade of compulsory liability however may not exceed fifteen million HUF, from which amount today one can hardly purchase a real property. Another interesting fact is that the attorney at law shall be held responsible even in case of lack of actionable conduct for money and valuables taken over with the responsibility of returning them back or of accounting with them. He will be exempt of responsibility if he proves that deficiency occurred due to an unavoidable cause that falls beyond the realm of his activities. It is however indisputable that meaning of exemption of exculpation liability may only be marginal.

As to attorneys' office the above described form of liability can be completed by itemizing background liability. Consequently, the attorney at law pursuing actual activity – irrespective of the fact whether he is working as an individual lawyer or as a member of a law office – is liable with his whole wealth without limitation for damages caused by him. Law makers added to this provision that they ordered that attorneys causing damage are also actionable together with the law office – without affecting background liability.

Pledge of independence, responsibilities of attorneys is the legislative regulation of disciplinary issues. A lawyer commits a disciplinary offence if he violates his obligations from exercising his lawyer's activities, or obligations stated in legal or ethic rules, and commits disciplinary offence also, if his infringing conduct beyond his activities as a lawyer impairs prestige of profession. Disciplinary offence can be mentioned only if violation of obligations or conduct is careless, wilful or culpable. By this the intended purpose of ethic rules have been changed, too and as a result only prohibitions and obligations may be described, the violation of which realizes a disciplinary offence by all means. [31]

---

[30] LÁBADY TAMÁS: *Hungarian private law (civil law)* – General part, Version 2 unchanged publication. Budapest – Pécs: Dialog Campus Kiadó 1998. 278-279.

[31] MIKLÓSSY SÁNDOR ZOLTÁN: (Legal) status of attorneys. *Company and Law*. 2001/7-8. 47.

Confidentiality is a basic pillar and guarantee element of the attorneys' activities, i.e. dynamics. It is obligation of a state under the rule of law to secure that the knowledge transferred to the lawyer by the client be protected. This protection is of two directional characters, on the one side it obliges the attorney, holder of the secret to keep it, and on the other hand it forces own bodies of the state and all outsiders to self-restraint obliging them to respect the obligation of the attorney. Confidentiality and right to secrecy are inseparable, because the protection of the client can be assured only this way.[32] In course of engaging an attorney at law, the client communicates most confidential information to the lawyer and trust in him that he will keep it in secret.

The client is aware that the lawyer is representing his interests within the framework of law and he is not enforcing the will of state. [33] This statement supports that the institute of attorneys' profession is somewhere in between public and private world. It can be mentioned that the concept of the confidentiality has not changed for centuries. An exemption from adhering to confidentiality can be given by the client, the legal successor or legal representaive.[34] An exemption from confidentiality should always be definite and expres, that is the principle of 'silence is consent" may not come into question.[35]

Basis for independent attorneys' activity is guaranteed beyond legal environment by the possibility of enforcing appropriate extent of legel fee. I found that the issue of financial consideration of individuals being on two ends of the engagement relationship is maybe the topic dealt with by most authors of legal literature both in national and international regulations. Considering various different definitions for the sake of clearness of the concept I found important to define the consideration paid for the activity of the lawyer. The lawyer starts his/her activity as a main rule on basis of an engagement, therefore following the character of the legal relationship the widely used expression "attorneys' fee" seems to be erroneous and - in my opinion - it should be avoided, because this expression is inaccurate. The basis of the attorneys' activity is not an obligation to reach a good result, therefore inaccurate use of fee may raise erroneous idea in those seeking legal remedy. Erroneous ideas, because the use of fee makes attorneys' work, having special characteristic features equal with everyday services, to which it is although similar, however the differences to those give their essential element. For a correct expression I would rather recommend engagement fee,

[32]DR. BÁNÁTI JÁNOS: Attorneys' confidentiality *Gazette of Attorneys*, 2010/2. 2.
[33] PAPP SÁNDOR: Confidentiality and its protection. *Gazette of Attorneys* . 4/97. 29.
[34] Ütv. 8 § (3) bekezdés
[35] DR. BÁNÁTI i. m. 5.

or any version of it. The expressions of retainer, reward more accurately indicate the specific features of engagement obligation and also would express the respect and appreciation – as important element of confidentiality – partly lost by today.

Also European Union is dealing with regulation of attorneys retainer, fee. Although the freedom to provide services is before all in the focus of Community legal literature, but they are also affected by national legal regulations as to attorneys' consideration, the rules on Community competition law, the freedom to provide services and the litigation practice of European Communities Court. It is not contrary to EU Articles No. 10., 81. 82. that any member state may approve rates, that state lower limit of reimbursement to be paid to individuals pursuing attorneys' profession. In order to show already existing minimum tariffs I defined item by item the extent of smallest income of attorneys being in force at present.

Pursuant to explanation of Ethic Rules the uncontrolled and irregular use of success fee is against principle of careful jurisdiction because it motivates speculative starting of law suits and it is easy to take an unfair advantage of it. [36]

In Anglo-Saxon legal literature three cases of financial interestedness can be distinguished related to outcome of the procedure. It is possible that no remuneration is due to the lawyer of losing party, or the originally stated fee is significantly diminished, or in given case the lawyer completely waives the fee. In most cases fee is due only if the lawsuit is victorious to the client's lawyer. This fee however contains a basic fee and a success fee equal with the basic fee to be paid by the client. In the third case the lawyer's fee dependes on the victorious outcome and is proportionate to the amount adjudged to the represented client that is the lawyer is entitled to a certain percentage of compensation or amount adjudged under any title to the client. The first two types of financial interestedness are used in the UK and the third is accepted mainly in the US. [37]

France is expressly prohibiting use of a lawyer's fee based on success fee. Since 1971 consultation with an attorney at law, legal counselling, drawing up a petition and representation before court have been subject of free agreement between the lawyer and the

[36] DR. SZABÓ Péter – DR. BELÉNYESI Pál: Role of a specific type of attorneys' fee, the so called contingency fee in enforcing claims from the competition law before courts In BOYTHA GYÖRGYNÉ DR. (editor.):*Private law claims enforceable in case of offences of competition law* Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2009.

[37] DR. SZABÓ – DR. BELÉNYESI i. m. 300-302.

client. Any method of stating attorneys' remuneration is prohibited that makes remuneration of the lawyer exclusively dependent on result of a decision on a legal dispute.[38]

Sections of § 16 (1), 27. § (1) g) and 37. § (2b) (3.) of the Austrian Act on Attorneys deal with remuneration of attorneys. The attorney at law freely defines his remuneration – including flat rate.

Upon statement of flat rate the fee should be proportionate to the service to be provided and the client's interests. A client may agree on per hour fee besides appropriate keeping of records and may issue an invoice on actual hours spent. It is prohibited in each case to stipulate or accept provision. It is recommended to conclude and agreement with the client, where the attorney at law will be entitled to interim settlement of accounts and to claim part-payment at a definite period at least once a year. [39]

In Germany the section § 49 b[40] of the federal act on attorneys deal with remuneration of attorneys at law, which says that it is prohibited to agree on lower fees and costs than prescribed by the law on attorneys' remuneration [41], unless provided for otherwise. In some case the attorney at law may setoff special circumstances of the client, particularly if the client is a needy person, by decreasing or cancelling fees or costs after fulfilment of the engagement. The act additionally says that it is also prohibited to sign an agreement, under which remuneration or its extent depends on outcome of the case or the success of the lawyer's activity (success fee) or on basis of which the lawyer receives a part of disputed amount as fee (quota litis). It is prohibited by law to give or accept consideration for engagements for third party or a lawyer, it is however permitted to appropriately remunerate the lawyer's activity under section 3400, par 4 enclosure 3 of the act on remuneration of the attorney at law.[42]

In Russia the law in force on attorneys at law the activity of a lawyer is pursued based on written agreement between the attorney at law and the client. Among the compulsory content elements of the agreement the conditions of remuneration for legal assistance, extent and order of paying costs related to performance have to be stipulated in a written form. Consideration and/or costs of compensation for the attorney at law should be immediately paid to the till of the given lawyer or transferred to his/her bank account as stated in the

[38] DR. SZABÓ – DR. BELÉNYESI i. m. 302-303.
[39] Rechtsanwaltsordnung (RAO) – Stand: 1.1.2009 – http://www.rechtsanwaelte.at/
[40] Bundesrechtsanwaltsordnung BRAO Ausfertigungsdatum: 01.08.1959 (Zuletzt geändert durch Art. 1 G v. 22.12.2010 I 2248). 49 b § – http://bundesrecht.juris.de/
[41] Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte (Rechtsanwaltsvergütungsgesetz – RVG) /Act on remuneration of attorneys/ vom 5.5.2004 BGBl. I S. 717,788 – http://www.brak.de/seiten/pdf/
[42] RVG. Enclosure no.3, clause 4, par 3400

agreement.. To the account of remuneration received the attorney at law can account his professional costs.[43] The Code of Ethics of attorneys at law declares that attorneys should refrain from an agreement on fee depending on outcome of the case. This rule does not refer to disputes on wealth, where the reward may be defined in proportion of claim in case of successful outcome.

III. Short summary of the scientific research, utilization of results, possibilities of utilization

1. Summarizing the profession of attorneys it can be stated, as follows: attorneys are constitutional
self-employed professional-intellectuals under the force of private law, and ruled partly by norms of public law connected to jurisdiction and law enforcement following the compulsory prescription of general rules of administrative procedure. One of specific features of this profession is that an individual has subjective right to pursue this activity and another is that under observance of basic constitutional requirements of impartiality, unbiased and fair procedure it is at the same time a position of public confidence following confidentiality. By creation of and filling with the rules of settlement by the European Union the attorneys' activities become more and more uniform. Bar associations are public bodies not founded on basis of freedom of association,[44] and they authentically guarantee professional performance of tasks by members of bar associations towards the public seeking legal remedy and at the same time guarantees – on a regular basis – independent pursuing of their activities. It follows from definitions that attorneys as a whole pursuing a profession and activity and the Bar Associations being on the border of public and private law are expressions connecting these worlds and when examining them approaches both from private and public law aspects should be acceptable.

2. By establishing an institute similar to French CARPA the trustworthy handling of deposits by attorneys could be assured. CARPA could provide additional services to attorneys and their clients, who do not directly belong to their professional activities. As an example the selling under court's decision (auction sale) or promotion of distress selling in the course of

---

[43] Federálnij zakon № 63-ФЗ. Ob advokatszkoj dejatelnoszti i advokature v Rosszijszkoj Federácii. Sztatja 25. – http://law7.ru/legal2/se14/pravo14009/index.htm

[44] „Public bodies are associations of persons pursuing identical activities or unions of persons based on identical interests, they are founded by public power acts, they are unions with legal personalities, performing their tasks under self-government however under state supervision, in possession of public power rights which tasks affect its members or its members' activities". FAZEKAS (2008) i. m. 181.

attachment can be mentioned. Upon evaluation of CARPA it should be pointed out, that this system brought positive results in France. Since starting of operations insurance events have significantly decreased, thus implementation of it in Hungary may even bring similar results because significant part of disciplinary procedures are cases of violation of rules on handling of deposits in Hungary. Decrease of extent of compensations could have a direct impact on decrease of insurance premiums, and also and even to greater extent to increase of insured value limits at same insurance premiums.

From answers to survey questionnaire prepared by the Budapesti Bar Association – maybe not surprisingly – the Budapest Attorneys are rather divided as to handling of deposits. Beside few colleagues handling annually small amounts of deposits, there are several – mainly bigger law offices – which handle big amounts of deposits regularly and on the long run and almost every attorney at law handles deposits transferred for procedural duties for a shorter or longer period. A preparation of regulations on law level would be necessary so that the system be construed appropriately from all aspects and at the same time uniform financial funds would assure significant additional income to the bar and even attorneys handling deposits by having the opportunity to make some commercial banks compete and by allocating considerable funds. Additionally, an advantage of implementing the system may be that the tasks of attorneys to control money laundering – that are performed by them only in a limited form at present – may partly be cancelled from obligations of some attorneys at law and could be integrated in one uniform system and also the financial responsibility of attorneys at law may also be limited by that way.

3. Increase in number of attorneys to a critical mass and activity of the attorney made attorneys' profession into distribution of product, where the attorney is product and distributor at the same time. The result of increase in the number of attorneys is that unprepared and not properly educated attorneys become attorneys at law within a very short time and an inexperienced seekers of legal remedy experience frequently at their own expense that not each and every lawyer named attorney at law provides service of appropriate and required quality. A kind of solution may be, if those studying for a uniform qualification examination may also gain practical experiences in other professions and the attorney's activity should not be started without practical experiences collected from a practising attorneys.[45]

Another consequence of the situation regarding number of attorneys, which situation is bearing great risks is the satisfaction of requirements of the public seeking quality legal

[45] Legal regulation has already been changed in this issue.

service, in a more exact form the assuring of quality services. As with increase in numbers of attorneys at law the maintenance of quality can be assured with much difficulty, the Bar Associations are greatly challenged in this regard. In my opinion in order to provide quality assurance the most urging task is an elaboration of compulsory professional advanced training and start of the system as soon as possible. Strengthening the official control function of Bar Associations for the sake of quality assurance cannot be neglected therefore, the public law functions of Bar Associations should be strengthened.

Appropriate financing of this task exceed however the financial means of Bar Associations therefore in my opinion a proposal to move towards creation of possibilities by state financing could be raised.

4. At attorney at law may come into a legal relationship with a party being on the other end of the legal relationship in various ways. Typical form of establishing legal relationship is that of the attorney at law and the client. In this case client decides on electing an attorney at law and following the freedom of contract the parties to the legal relationship may theoretically agree – without limitations – on financial consideration. The other case is when an attorney's *engagement* relationship is created by an authority's decision, by official appointment.

In such cases the individual who is to be represented by the attorney has no voice as to who will be officially appointed and what is more, the remuneration is also defined by some system of rules. In both cases the different character of attorneys' remuneration is arising out of the essence of legal relationship which was also confirmed by the Constitutional Court of Hungary. [46] However the legal relationship may be formed, a fear can also be felt, that as a result of an eventually non-appropriate extent of fee also the respect of the legal profession may decrease and the public seeking law may become more defenceless.[47] The situation which seems to arise with regard to remuneration for engagements may lead to other disproportions for instance to exclusion of restrictions of complete attorneys' responsibility at present, to oversupply of graduates by universities, to the legal profession with a character of forced path of occupation and also to the market competition becoming ever fierce. With more or less regularity attorneys claim from the Bar Association to state standard minimum rates of fee. When describing present situation in Hungary the decision[48] of Hungarian Competition Authority (GVH) as to remuneration of attorneys that came to the conclusion –

[46] ABH 763/B/2001. – Hungarian Official Gazette 2008/4. 587-591.
[47] DR. HIDASI GÁBOR: Attorneys' fees: a law office may not become a „Damascus bazaar" of 11.05.2011 – http://www.origo.hu/uzletinegyed/jog/
[48] Decision no.Vj-180/2004/32.15.7.4. – http://www.concurrences.com/IMG/pdf/2006_09_HungaryDoc01.pdf

erroneously in my opinion – that in order to assure freedom of competition a stipulation of minimum fees is not possible.

Keeping in mind the expectations of the EU the ruling of the Act on Attorneys at Law regarding remuneration seems to be acceptable further on, that is the attorney's fee shall be freely decided and stays like this on the long run. .It cannot be excluded however that in some cases statement of minimum fees could be necessary and unavoidable, however we have not found a better solution since Roman Law on the confidential relationship of client and attorney. Following experiences of „some" years maybe it can be stated that a stipulation of fair and proportional fee is basically a moral and not merely legal responsibility of attorneys at the same time fierce competition and eventually and eventually unreasonably low fees provoked by this competition may involve great risks to the public seeking law. It is by far not sure, that activity of a lawyer offering seemingly cheap fees at first sight will be at lowest cost for the client. Business competition – despite emphasis on it – is distorted in this regard because clients seeking justice can at best only subsequently get into the state to be able to compare actual attorney's remuneration with professional work performed, if comparison in this case is conceptually possible at all.

In the non-expected case when as a result of fierce business competition the attorneys remuneration would not cover actual costs the attorneys not observing compulsory rules and prescriptions can reach a competition advantage against their colleagues respecting and observing the rule and thus loss of confidence of endangered clients may overshadow all legal professionals.

I consider the opinion erroneous that no minimum expected per hour rate can compulsory be stipulated, since in case of considering observance of all legal regulations and actually incurring costs there is already existing a minimum engagement fee at present. At the most the minimum fee appears in a hidden form and can be computed by inference. It can also be stated, that in case any attorney, law office does not enforce even above deducted fees, they act in such case pro bono and distort free competition by such conduct. From this also follows that attorneys and law offices regularly stipulating lower income than the minimum and regularly declaring less than computed monthly income do not observe professional norms or tax regulations, or none of them. The practice where rules are not observed should be terminated and tightened in circle of controlling funtion of the Bar Associations in my opinion. Clear competition should be promoted also by unambiguous stipulation of minimum attorneys' fee to be even compulsorily applied. Instead of restricting clear competition the

stipulation of a compulsory minimum fee for engagements of attorneys would support maintenance of it and would also contribute to legal representation by attorneys at a truly appropriate quality level for the public.

IV. List of publications related to the topic

PATYI GERGELY: Thoughts on new rules of attorneys' costs chargeable in judicial procedures. *Jogelméleti Szemle*, 2002/2. *(Journal of legal theory, 2002/2)*

DR. PATYI GERGELY: Actualities affecting the Bar Association, or wind of change: *Glossa Iuridica,* 2009/1. 29-32.

HALLGATÓ VERONIKA – PATYI GERGELY: Remnants of formalism in the twenty first century *Iustum Aequum Salutare*, V. 2009/1. 233-237.

PATYI GERGELY: Is a minimum fee for attorneys existing in Hungary? In GERENCSÉR BALÁZS – TAKÁCS PÉTER (editor): *Ratio legis - Ratio iuris.*

Festive studies for expressing deep respect for Tamás András on occasion of his seventieth birthday: Budapest: