

ORGANIZATION OF ADVOCACY IN VARIOUS LEGAL SYSTEMS: COMPARATIVE ANALYSIS

**ORGANIZACIÓN DE LA ABOGACÍA EN DIVERSOS SISTEMAS JURÍDICOS:
ANÁLISIS COMPARATIVO**

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Abstract

This article observes organization of providing legal services in different countries, such as the US, the UK, Germany, France, China and Russia. The authors describe the procedure of admitting to the legal profession and the sphere of legal activity. They also pay attention whether there are public associations of lawyers or not in the mentioned countries. The article draws attention to a lawyer «monopoly» in most countries across the full range of legal services. The article points to the main directions of development of advocacy in Russia.

Keywords

Lawyer – Advocate – Attorney – Barrister – Solicitor – Legal services – Organization of advocacy

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Introduction

The institution of advocacy is inextricably linked with the judicial system, since it cannot exist if there aren't any of judicial institutions.

Lawyers are defenders of the of people's interests in court disputes. Thus, the bar is a public institution that arose as a result of the improvement of the judicial system of the human community.

Currently, the advocacy in Russia has been still reforming. In 2017, the Ministry of Justice of the Russian Federation proposed a public discussion on The Concept of regulating the market of professional legal aid. This Concept is a system of views on priority goals and directions of activities for reforming the national legal services market. We believe this process should take into account the development of advocacy in foreign countries with developed market economies. The study of advocacy systems in foreign countries helps to predict the development of the advocacy institute in Russia. In addition, it contributes to the understanding of the goals and objectives of this institution, which is a part of the law culture.

The organization of the advocacy (bar) in various countries is historically due to the peculiarities of the respective state development and depends on the type of legal system. All modern legal systems can be divided into systems with a high proportion of statutory law (for example, Germany, France, Italy, etc.) and systems with a high proportion of case law (first of all, the United Kingdom, the United States)¹. In legal systems with predominance of case law, it is very difficult to immediately determine the applicable law. It is easier to do this in states of state law; therefore the number of lawyers is less there than in case law systems. In accordance with the foregoing, it is advisable to analyze the different types of organization of the bar in the states of continental Europe, the United Kingdom and the United States, China and Russia.

Lawyers in different countries do not hold the same titles or share the same role and status [8]. In this article we will use the universal term – lawyer (advocate). We will also refer to special terms that are used in the respective country.

Methods

Various general scientific methods and the methods of logical cognition are used in the work: analysis and synthesis, systemic, functional and formal-logical approaches. The development of conclusions was facilitated by the application of formal-legal and comparative-legal methods.

Discussion and results

We should start to analyze the advocacy development with the United States. The number of lawyers in the United States is higher than in other countries in absolute and relative terms. The complex legal system of the United States, as well as the high role of legal regulation in American society, determine the special place of the bar. Lawyers hold

¹ G. A. Borisov; E. Yu Tsukanova; E. E. Tonkov; S. V. Sinenko and M. A. Zinkovskiy, "The place of the Russian legislation in the modern legal systems", *Revista Publicando* Vol: 5 NUM 16 (2018): 822-828.

many key positions in the economy and the state political mechanism of the United States. 60% of the total number of all lawyers in the world work in the United States.

Future lawyers in the USA need to study for four years in college and after graduation pass the Law School Admission Test. Then they attend a law school for 3 years to get law degree. However, in order to practice law in a particular state, they need to be admitted into the state bar. This is done by passing the bar examination. After passing the bar examination they are officially allowed to practice law in that state. Each state has a state bar association. Most states have established mandatory membership in the association for all persons admitted to law practice.

The terms attorney and lawyer are often used interchangeably in the United States. There is very little distinction made between the two. This difficulty to differentiate is a result of the fact that in the United States, unlike in other countries, this distinction is not made. An attorney at law or attorney-at-law is typically abbreviated to attorney in everyday conversation. An attorney is considered the official name for a lawyer in the United States. The first known use of the term attorney-at-law was in 1768. An attorney-at-law is defined as a practitioner in a court of law who is legally qualified to prosecute and defend actions in such court on the retainer of clients. An attorney actually practices law in court whereas a lawyer may or may not. An attorney has passed the bar exam and has been approved to practice law in his jurisdiction. Although the terms often operate as synonyms, an attorney is a lawyer but a lawyer is not necessarily an attorney. To the general public, these terms may be used interchangeably but to the American Bar Association, the slight distinction is significant².

The American Bar Association is the all-national organization of attorneys with voluntary membership. The American Bar Association (ABA), founded August 21, 1878 is a voluntary bar association of lawyers and law students, which is not specific to any jurisdiction in the United States. The ABA's most important stated activities are the setting of academic standards for law schools, and the formulation of model ethical codes related to the legal profession. The ABA has 410,000 members.

In the US, there is no legal act that determines the lawyer's rights in legal proceedings. The status of counsel arises from custom, case law, and professional ethics. The fundamental condition for the participation of an attorney in legal proceedings is defined in Amendment VI (1791) to the US Constitution: «In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the Assistance of Counsel for his defense»³.

The organization of the bar in the UK is one of the most complex in the world. This is the result of tradition and English conservatism. Currently, the status of a lawyer in the UK is determined by Courts and Legal Services Act 1990⁴. This act first introduced such

² V. S. Attorney, Lawyer Definition en <https://www.lawyeredu.org/attorney-vs-lawyer.html> (accessed 09 February 2019).

³ The Constitution of the United States of America, en <https://wipolex.wipo.int/ru/text/177216> (accessed 09 February 2019).

⁴ Courts and Legal Services Act 1990, en <https://www.legislation.gov.uk/ukpga/1990/41/contents> (accessed 09 February 2019).

concepts as: «advocate» and «advocacy». In the UK, the bar is divided into barristers and solicitors.

Barristers are members of the Bar Council of England and Wales and they generally operate in sets of 'chambers' but are not employed by a law firm as such. To become a barrister you first must obtain either an undergraduate degree in law (LLB), or an undergraduate degree in any other subject followed by the conversion course. The second step involves one-year Bar Professional Training Course. The last stage is completed by pupillage, i.e. one year spent as a pupil in barristers' chambers.

Solicitors are members of the Law Society. The legal status of solicitors is determined by The Solicitors act 1974⁵ The regulation of solicitors is done by an independent body called the Solicitors Regulatory Authority (SRA). Solicitors do not generally have rights of audience in court but there are some exceptions, they generally do the legal research and can represent their clients in legal negotiations but then pass the case over to a barrister if it is necessary to take action in court. It is rare that a client will directly employ a barrister⁶.

To become a solicitor, you must complete a vocational 1-2 year course called the Legal Practice Course (LPC) which is designed to prepare you for solicitor practice. Following this, you must complete a 2 year training contract, which is practical legal work experience (typically carried out in a law firm) which must be completed in order to qualify as a solicitor.

The key legislation in Germany governing the legal profession is the Federal Lawyer's Act (Bundesrechtsanwaltsordnung)⁷. It defines the basic rights and duties of lawyers and sets a framework for the practice of lawyers. It is supplemented by the Rules of Professional Practice, passed by the Federal German Bar Association as an act of self-regulation of the legal profession. There is only one category of lawyer (Rechtsanwalt). A Rechtsanwalt is a private practice lawyer, advising clients on all legal matters and representing them before authorities and courts or other dispute resolution bodies. The Rechtsanwalt takes part in the administration of justice with the duty to abide by professional ethics principles, especially the principle of independence.

Lawyers must pass two state exams. The first state exam concludes the academic education at university and the second concludes a subsequent two-year traineeship (Rechtsreferendariat). This requirement is the same for private practice and in-house lawyers.

The regulatory authorities responsible for lawyers are the Federal German Bar Association and the regional bar associations (Rechtsanwaltskammern). The Federal German Bar Association consists of the 27 regional bar associations and the bar association of lawyers at the Federal Court of Justice. A lawyer must be a member of the regional bar association of their place of business (section 12, Federal Lawyer's Act).

⁵ The Solicitors act, en http://www.legislation.gov.uk/ukpga/1974/47/pdfs/ukpga_19740047_en.pdf (accessed 09 February 2019).

⁶ United Kingdom Law: Legal Profession, en <http://ox.libguides.com/c.php?g=422832&p=2887402> (accessed 09 February 2019).

⁷ Federal Lawyer's Act (Bundesrechtsanwaltsordnung), en <http://www.gesetze-im-internet.de/brao/index.html> (accessed 09 February 2019).

However, being registered with a regional bar association does not impose any geographical restrictions on a lawyer's work.

German law allows law firms to be organised in various forms. Law firms may be incorporated as a joint stock company or a corporation under foreign law (for example, as a limited liability partnership under English law). However, the traditional and still most common forms of organisation are a sole practice, a civil law partnership (*Gesellschaft bürgerlichen Rechts*).

Lawyers are not limited in their capacity to advise or represent their clients, either geographically or regarding the area of practice. The only exception is the representation of clients in civil proceedings before the Federal Court of Justice (*Bundesgerichtshof*), Germany's highest court in civil and criminal matters. In this case, the litigating party must appoint a lawyer who is specifically admitted to the Federal Court of Justice

Lawyers (*avocats*) in France are officers of the court and members of an independent self-employed profession. The rules that govern them are in the main laid down in Act (*loi*) No 71-1130 of 31 December 1971 reforming certain judicial and legal professions⁸, and Order (*décret*) No 91-1197 of 27 November 1991 structuring the profession of lawyer⁹.

It is necessary to pass the examination for entry into a Law School (EDA), which universities administer as part of the Institute of Judicial Studies (IEJ), as a condition of access to the profession. This examination may be taken only three times, and a candidate must have completed the first year of a four-year master of laws degree or have an equivalent qualification. Still, most candidates hold a second year law degree. There is no national association of lawyers, as lawyers wish to retain a proper representation of all bar associations. There are 161 bar associations (*barreaux*) in mainland and overseas France, each attached to a regional court (*tribunal de grande instance*).

Lawyers' professional activities in France are divided into two areas: the activities on which lawyers have a monopoly, and those they can perform concurrently with other types of professionals. Article 4 of Act 71-1130 of December 31, 1971 on reforming certain judicial and juridical professions, set forth the principle that lawyers have a monopoly on assisting and representing parties, as well as postulation [full and binding legal representation] and pleading before courts of first instance and appeals courts, judicial and administrative jurisdictions, and all jurisdictional or disciplinary bodies. This monopoly has no territorial limitations. All lawyers may represent, assist, and plead before all French jurisdictions or administrative commissions.

In China, the activities of the Bar are regulated by Law of the People's Republic of China on Lawyers¹⁰.

⁸ Act 71-1130 of December 31, 1971 reforming certain legal and judicial professions en [http://encyclopedie.avocats.fr/GED_BWZ/197521391570/CNB-2014-06-00_aei_Textes-Profession-avocat-LG-eNG\(P\).pdf](http://encyclopedie.avocats.fr/GED_BWZ/197521391570/CNB-2014-06-00_aei_Textes-Profession-avocat-LG-eNG(P).pdf) (accessed 09 February 2019).

⁹ Order (*décret*) No 91-1197 of 27 November 1991 organizing the legal profession en [http://encyclopedie.avocats.fr/GED_BWZ/197521391570/CNB-2014-06-00_aei_Textes-Profession-avocat-LG-eNG\(P\).pdf](http://encyclopedie.avocats.fr/GED_BWZ/197521391570/CNB-2014-06-00_aei_Textes-Profession-avocat-LG-eNG(P).pdf) (accessed 09 February 2019).

¹⁰ Law of the People's Republic of China on Lawyers en http://english.gov.cn/archive/laws_regulations/2014/08/23/content_281474983042459.htm (accessed 09 February 2019).

In accordance with article 2 of this Act, an advocate means a professional who has acquired a lawyer's practice certificate pursuant to law, and is authorized or designated to provide the parties with legal services. An advocate shall protect the lawful rights and interests of parties, ensure the correct implementation of law, and safeguard fairness and justice of the society.

A person who intends to apply for the legal practice of a lawyer shall meet the following conditions: (1) upholding the Constitution of the People's Republic of China; (2) having passed the unified national judicial examination; (3) having completed a full year's internship at a law firm; and (4) being a person of good character and conduct.

A person who has not obtained a license for advocacy cannot work as a lawyer. A lawyer with a license can work throughout China. There are three types of law firms in China: 1) a law firm with public funding; 2) cooperative law firm; and 3) joint-stock law firm. These organizations have the right to hire lawyers to carry out their activities.

Legal services in the Russian Federation are not licensed. Actually, legal services can be provided by a person who does not have a legal education. Such a person may be a representative in court in civil and commercial matters. However, he cannot be a criminal defense counsel.

At the same time Russia has an institution of advocacy (bar). Advocacy in Russia is based upon the principles of legality, independence, self-governance, corporate nature, as well as equality of the advocates rights. The advocacy is a professional community of advocates and, as a civil society institution, is not a part of the system governmental authorities or local authorities. The organizational forms of the Bar as a self-governed community of advocates are regional chambers of lawyers – the Russian Federal Chamber of Lawyers (Advocates) of the Russian Federation and 85 regional bar chambers.

The Federal Chamber of Lawyers (Advocates) of the Russian Federation was formed on January 31, 2003 by decision of the First All-Russian Congress of Lawyers. The Federal Chamber of Lawyers acts on the basis of the Constitution of the Russian Federation, the Federal Act «On the practice of law and the legal profession in the Russian Federation»¹¹ and the Charter of the Federal Chamber of Lawyers. An advocate in the Russian Federation is a person who has received the status of an advocates and a law license in accordance with the Federal Act.

A law license in the Russian Federation is available to a person with a law degree obtained in a government-accredited course or a postgraduate law degree. Said person must also have at least two years of practice of law or have completed his apprenticeship in a legal practice. The applicant must pass a qualifying exam. After that, he is allowed to practice law. A person who has been granted advocate status may be a criminal defense counsel. At the same time, in 2017, the Ministry of Justice of the Russian Federation developed the Concept for regulating the legal services market. This document assumes access to representation in court only by advocates. This idea is currently under public discussion.

¹¹ Federal Law "On the practice of law and the legal profession in the Russian Federation" (May 31, 2005) en <https://en.fparf.ru/documents/test/21156/> (accessed 09 February 2019).

Conclusion

A brief analysis of the organization of the bar in various countries shows the centralization of providing the legal aid. Despite some differences, in most countries there is a special tolerance for the legal profession. According to the study made by the Federal Chamber of Lawyers of the Russian Federation, there is an advocate's monopoly on all legal services de jure or de facto in the absolute majority of countries. In Russia, lawyers have the only exclusive right to represent a client in criminal cases in court. The introduction of the advocate's monopoly has been discussed in Russia for the past few years. This will help improve the quality of legal services. However, the cost of legal services will increase. In many countries there is a public organization that unites persons of the legal profession.

The advocacy (bar) in most countries is based upon the principles of legality, independence, self-governance, corporate nature. In the Russian Federation, such an organization is the Federal Chamber of Lawyers. It brings together regional chambers of lawyers who hold a qualifying exam for applicants pretending to be an advocate.

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