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Lawyers' Professional Organizations and Their Influence on Regulation

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Abstract:
Legal professions are all over the world subject to a specific regulation that essentially constitutes a restriction of economic freedom and freedom of profession. Such restrictions are justified by the need to protect the public interest as legal services belong to credence goods, information asymmetry occurs and legal profession performance requests guarantees for independence. The traditional element of legal professions' regulation is a self-regulation. The concept bases on the acquisition by organizations *representing lawyers the right to determine the rules of access to the profession, the rules for the performance of legal profession, and the disciplinary jurisdiction. The self-regulatory model of legal professions is differently shaped in different legal cultures.*
In some countries, lawyers' organizations have the character of professional self-government, whose independence is protected by public law, in others they seek to obtain a public-law mandate to regulate the profession or simply to acquire an influence on the legal profession regulation. The paper presents how lawyers' organizations develop their position in the legal system of the United States. In particular the paper analyzes institutional framework of lawyers' regulation in the United States and presents three pillars of this regulation: admission to bar, professional conduct and professional discipline.

Keywords: *lawyer's organization, self-regulation, bar, admission to bar, professional conduct, disciplinary*

1. Introduction

The legal system of the United States was derived primarily from the common law system of England. However, the concept of the legal profession and its regulation is quite different from other common law and civil law jurisdictions. Unlike England and Scotland, where there is a distinction between solicitors and barristers, in the United States there are not separate procedures to be an attorney, prosecutor, or judge. The system is not comparable to most other countries civil law jurisdictions. As there are differences in the meaning of the term "lawyer" in English and Polish, I have made the assumption that a lawyer is a person who has formal qualifications to represent clients in courts and other judicial tribunals.

We may be certain that the legal profession has been regulated since the time of the Roman Republic. Through the ages it has become one of the most regulated professions. The most consistent feature of lawyers' regulations as a professional group is that they try to control their own governance. From the time of the first lawyers and associations, they have aimed to heighten entry barriers. Since the late 1800s, they have focused on a goal of limiting competition with other professions attempting to provide legal services as well as within its own profession.

2. Professional Lawyer Organizations

For purposes of this paper, the term "professional lawyers' organization" is used due to differences between the institutional aspects of regulation in common law and civil law jurisdictions. In the United States, the regulatory system of lawyers is established to carry out the state Supreme Courts' judiciary doctrine responsibilities to supervise the practice of law. These include standards of ethics and rules of professional conduct. In a few jurisdictions, this responsibility is shared with legislators. However, there are professional lawyer's organizations that are a part of the regulatory scheme. The American Bar Association (ABA) is a private voluntary association that does not have public powers, but serves the functions of:

- a Section of Legal Education that is an accreditation institution formally recognized by Department of Education,
- its model rules are adopted by most jurisdictions as formally binding law.

An Integrated State Bar is an official state organization requiring membership and financial support of all lawyers to practice law in that state's jurisdiction with public powers delegated by state supreme courts. Both integrated and voluntary state bar associations have strong influence on supreme courts' policies on lawyers' regulation, especially concerning professional conduct and discipline.

As an example of civil law jurisdiction in Poland, the legal profession is regulated by legislators who set admission procedure and criteria, discipline procedure, and rules of professional self-government. which is an administrative agency that decides about admission and discipline and being sets professional conduct rules. Professional self-government might be compared to integrated state bar, but its independence is guaranteed by the Constitution so that the legislator has to delegate them public enforcement powers.
Although the institutional framework of lawyers' regulation is different between Poland and the United States, the functions performed by professional organizations participating in developing the regulations in most jurisdictions, seem to be quite similar. Lawyers are a powerful interest group in both the United States and Poland, thus they try to lobby for advantageous regulation (Olson 1971). It is not a new concept for an industry to try to maximize benefits, but lawyers perform not only economic functions but also important social functions. As we assume that regulatory influence of professional lawyer organizations is a fact, it is a states' legislative obligation to create mechanisms that will protect public interest if self-regulation fails.

3. Institutional Framework of Lawyers' Regulation in the United States

The legal profession in the United States is heavily regulated at the state and federal level. It is conceivable that Abraham Lincoln would have been negatively surprised if a board of bar examiners had declined him admission to the bar because he was self-educated or if a disciplinary board had disbarred him due to the posters he used to inform customers of his affordable legal services.
In 1870 a regulatory movement began when a group of elite lawyers established the Association of New York City. The goal of the association was to protect the profession's "dignity and honor". Similar state and city associations including the American Bar Association (ABA) were founded during the next decade. Paradoxically, those lawyers first priority was the protection of lawyers' image as a club of gentlemen. The concerns related to the market protection against unauthorized practitioners, immigrants and corporations appeared in the 1910s and rapidly increased in 1930s as a result of the Great Depression.
When legislators began to display resistance to lawyers' lobbying, the ABA and state bar associations changed their policy and tactics into filing lawsuits to prohibit the unauthorized practice of law, which led to a constitutional debate regarding the separation of powers. Using the doctrine originally developed in *re Day* (1899), supreme courts with strong support from professional associations held that it is their exclusive, inherent power to define and regulate the practice of law, including admission to the bar, rules of professional conduct and discipline. Due to institutional capacity and limitations, the state supreme courts delegated most of their authority to state bar associations or regulatory agencies and relied on regulatory proposals drafted by ABA. Following the ruling, legislators' attempts to challenge the inherent power doctrine were for the most part unsuccessful as the supreme courts recognized them as unconstitutional.
Disregarding the shallow justification for the inherent power doctrine, there are other concerns about supreme courts as regulators of legal profession:

- Supreme courts informal independence is questionable. While they are almost inaccessible to lobbying from the public and other professions, they are uniquely vulnerable to lobbying by lawyers (Barton 2003). Most justices are members of ABA and other bar associations, ABA lobbies for justices' higher salaries and benefits and gives endorsement to judicial candidate. Lawyers are important contributors to judiciary campaigns.
- Supreme courts were not intended to be regulatory bodies. Having some institutional constraints (such as the number of justices and caseload crisis), they have an incentive to maximize delegation of regulatory powers to state bar associations and agencies without feeling anxiety for over delegation.

It is difficult to imagine any radical changes to the current system in the United States, but there are interesting examples of regulatory reforms introduced in England, Canada and New Zealand that should be inspiration for the U.S. In particular, "regulatory objectives" should be taken into consideration as a part of regulations. They define the purposes of regulation and its parameters, ensuring the regulation is transparent and the facilitation of public debate (Terry et al. 2012).

4. Admission to Bar: A Control of Producers

The concept of controlling the number of lawyers is very old. There were statutes that introduced the maximum number of lawyers during the time of the Roman Empire. While the United States adopted some parts of English common law, institutions like the Inns of Court, the gatekeepers controlled by lawyers and with public powers to make decisions on admission to the bar never developed. However, in the late 1800s, following the period of Jacksonian democracy, called the era of liberalization or decadency (Pound 1953), ABA and State Bar Associations started a campaign to raise admission criteria.
ABA focused on three issues: (i) centralization of the admission authority by state supreme courts, (ii) introduction of an obligation to study for three years in the ABA-approved law school, (iii) introduction of standardized written exams. In all fields, they reached success. The 'inherent powers doctrine' guaranteed integrated state bar and state bar examiners a decisive influence on admission. ABA Accreditation is recognized as the only law school accreditation program in the United States. Most jurisdictions demand a JD from an ABA-approved law school. Written exams were launched in all jurisdictions and since 1971 they have been based on standardized tests, most prepared by the National Conference of Bar Examiners.
What is the function of regulation on admission to bar? Officially it is a public protection from incompetent practitioners that used information asymmetry. The empirical research shows that the functional impact was quite different. According to Richard Abel (Abel 1989) the main function was producers' control aimed at creating a monopolistic market. The ABA Accreditation excluded law schools offering part-time programs and the admission rules helped to protect the bar against overpopulation, as well as excluding immigrants and minorities from the legal profession. Currently, high tuition at ABA-approved law school's acts as the biggest gatekeeper.

Moral character and fitness exams do not have a practical impact and are often criticized by scholars (Rhode 1981). Median bar exam results have been constant in recent years, however acceptable test score requirements have increased for the last 20 years. The criticism aimed at the bar exam by scholars is that it is not related to practicing law, but rather its results merely show a strong correlation with LSAT (Law School Admission Test) scores and GPAs (grade point average).

State bar examiners, who are in charge of admission procedures, are dependent on the supreme courts; while the supreme courts are composed mostly of lawyers who are members of state bars. There have been a few important decisions made by the Supreme Court of the United States that have forced the ABA and state supreme courts to loosen the criteria, reduce the level of discretion, and launch better guarantees of due process.

Summing up, graduating from an ABA-approved law school is still a leading admission criterion in most jurisdictions. However, an increasing number of jurisdictions are introducing alternative paths of fulfilling legal education criterion: graduation from a law school approved by state authority; a specified number of years of practice; law office study; correspondence studies or on-line study. ABA-approved law schools still have a huge competitive advantage in that their students are eligible to apply for federal loan and scholarships.

5. Professional Conduct: A Control of Production

The first regulation on lawyer's conduct goes back the Roman Republic. It imposed a ban on charging remuneration; obviously not in favor of the lawyers. Until the late 1800s, rules of professional conduct were ethical recommendations and their enforcement was very weak. In 1908 the ABA published the *Canons of Professional Ethics* that were adopted in all jurisdictions soon after. Canons covered different issues, but most of ABA opinions and charges concerned only a few; advertisement, solicitation, and cooperation with unqualified lawyers. They affectively had more of an anti-competition function than the protection of the public from incompetent or unethical lawyers. Critics claimed, that canons regulating lawyer's duties to clients were too general and vague (Wolfram 1986). In 1969 ABA published the *Model Code of Professional Responsibility* including canons, ethical considerations and disciplinary rules.

In the 1970s the Supreme Court of the United States ruled on a few decisions that greatly affected lawyers' professional conduct. In *Goldfarb*, the Court said that a state bar could not publish fee schedules, even if it was just a recommendation (1975). In *Bates*, the Court established that commercial advertisements by lawyers were entitled to First Amendment protection as long as it was not "false, deceptive or misleading" (1977). The decision forced the ABA and other jurisdictions to change the Model Code. ABA research showed that advertising, or generally broader information for consumers, not only leaded to lower prices to consumers, but also had a positive effect on the quality of legal services (Muris et al. 1979).

Supreme Courts' decisions, Watergate, and changes in the legal services market required the ABA to start thinking about deep reforms. Although the Kutak Commission proposed some radical reforms, the resulting Model Rules of Professional Conduct were not a big change. It actually continued the practice of using the language of ethics to mask controls on the availability of legal services that in turn artificially inflate the cost of those services (Gillers 1985). The adoption process was long and last into the early 2000s.

In the 1990s the legal profession faced new challenges related to technological and economic changes. The ABA's Ethics 2000 Committee, as well as Ethics 20/20 (2010) proposed solutions that were rejected by ABA or were accepted too late. After the Enron scandal the government would not allow ABA to react. In 2002 Sarbanes-Oxley Act gave regulatory powers to the Security and Exchange Commission (SEC), including enacting rules of professional conduct for lawyers involved in litigations involving the SEC. An analysis of the last amendments in state's laws indicates the ABA's leadership is not as omnipotent. States are not as willing to adopt new ABA proposals, such as screening rule 1.10 which was fully adopted by 12 states and partially by 12 (2011). Some jurisdictions have changed their regulation prior to ABA's amendments of the Model Rules.

Summing up, the ABA had a huge impact on the development of professional ethics and conduct. It was successful because supreme courts were willing to accept ABA's proposals. Until the 1970s, the protection of the profession from open competition was the essential function of ABA's "soft law". During the last 30 years we can observe that the ABA's influence on professional conduct regulations has declined. One reason is that lawyers are no longer a homogeneous group and their interests are contradictory. The ABA is still the most powerful lawyers' organization in the U.S., but they need to re-shape their policies. The example of the United Kingdom, where regulation of legal professions has been radically changed since 2007, shows that self-regulatory privileges are not given unconditionally and may be limited or taken back.

6. Professional Discipline: A Lawyer's Brotherhood

The concept of professional discipline including disbarment has been around for over two millennia. It was re-instituted in the Middle ages in England by the Inns of Courts. It also existed in the United States but did not play an important role until the late nineteenth century. In the 1880s, state bar associations who aimed at keeping profession honor and dignity, created grievance committees. They did not have a practical impact on lawyers' discipline, but they were an important part of a 'professional project', helpful as a justification for self-regulation claim.

When Canons of Professional Ethics were adopted by most jurisdictions, the majority of discipline charges were filed by state bar associations against lawyers who broke canons related to advertisement or solicitation. The empirical research showed that the discipline did not work till late 1960s (Abel 1989). Conclusions of Clark's Report (1970) were shocking for lawyers and the public, but did not lead to deep changes. MacKay Report (1992) showed that while most of recommendations had been introduced, the disciplinary boards were still totally dependent on state bar associations.

The statistical research covering 1998-2010 shows that lawyers' discipline has not worked. The percentage of complaints dismissed without investigation has increased and is around 55%. The percentage of complaints dismissed after investigation has declined but is

still around 30%. Only 4.5% of complaints are formally charged. The number of disciplinary proceedings has also declined. In 2010, only 7.7% of proceedings closed with any sanction to the lawyer, but only 1.6% closed with disbarment and 2.9% closed with suspension.

Why does the discipline not work? The supreme courts and state bar associations do not have particular interest in investigating and sanctioning lawyers. A good example is provided by California where lawyer's discipline became a public issue only when several shocking investigative articles were published in Los Angeles Daily and San Francisco Examiner. As a result, the self-regulation discipline in the state was collapsed. A new institution, the State Bar Court of California uses full-time judges appointed by the California Supreme Court, legislature and governor. It is completely independent of State Bar of California; however, it is financed by lawyer's dues.

As a solution, a system of independent administrative law judges should be established to conduct hearings, find facts, and propose conclusions of law with respect to charges of ethical misconduct (Frisch 2005). Questions still exist on the jurisdiction of disciplinary boards and their regulatory objectives. The beliefs of this author are that they should be more consumer oriented, meaning that their jurisdiction should include also rulings on negligence and fees. It is crucial, that adequate investigation and remedial responses should be provided (Rhode 2013).

7. Conclusions

It is not surprising that professional law organizations try to affect their own regulation. The American lawyers' professional project that started in 1870s was very successful. Due to the inherent powers doctrine, the ABA and state bar associations captured regulatory powers that let them control the whole profession. High entry criteria, ABA Accreditation, and delegation of regulatory powers to bar examiners guaranteed control on admission to the bar. Model codes and rules standardized the profession and limited competition among lawyers, which was beneficial for lawyers, but not for the public. Self-regulation and discipline guaranteed the enforcement in all cases where the group interest was threatened. It seems obvious, that the public interest was not being protected.

The "self-regulatory heaven" was shaken by a several Supreme Court decisions, new conditions on legal services market and political response to Watergate and Enron. The ABA reaction was belated and unsuitable, so the Congress, supreme courts, and legislators a few states stepped in and began to change the lawyers' regulation. Some scholars have even written about the "fall of professionalism", or "myth of self-regulation". In all analyzed fields (entry, conduct, discipline) it is obvious professional lawyers' organizations are still powerful, but their policies are under increasing critique. If ABA and state bar associations want to participate in the re-shaping of lawyers' regulation, they must accept that some parts of their policies are unacceptable in the modern world. Lawyers will need to demonstrate that their professional expertise is still useful and propose policies that will be related to public protection. Otherwise, one can assume a slow continuing process of excluding them from regulatory functions.

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