

THE DEVELOPMENT OF THE RUSSIAN BAR AND CRIMINAL PROCEDURE: PROBLEMS THAT REQUIRE SOLUTIONS.

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Abstract

Purpose – is to analyze the theoretical aspects of the development of the bar and criminal procedure in Russian Federation with regard to historical, anthropological and international aspects.

Design/methodology/approach – in the research theoretical methods (analytic, systemic and historical) are applied. Article consists of three parts. The first presents the nature of the Bar. Second illustrates some of the existing conflicts between the Bar and the law enforcement agencies. In the third part is given an attempt to evaluate the importance of international documents and organizations for the modern Russian bar.

Findings – The term “legal awareness” is polysemantic: an important aspect of legal awareness is views about the ideal law. Legal awareness contains a teleological model of law development: what is the law and what like it should be. Low rate of legal consciousness in Russia is one of the reasons of the poor development of system of legal assistance in Russian Federation.

Research limitations/implications – This paper is part of a growing body of research on local government’s role in the health care system. It will contribute to future research on similar topics.

Originality/Value – The work examines the development of the criminal procedure and the bar from the point of view of the philosophy of Aristotle. The article gives an attempt to explain the constant conflict between the government and the bar. Entelechy of law is found in public’s legal awareness, the latter not only being transmission mechanism from law to behavior. This approach allows to establish the true reasons for limiting the rights of lawyers and in the Russian Federation. Mention should be made that the correspondence between those elements never was involved as the subject of any research.

This paper is part of a growing body of research on the role of the Bar in law system. It will contribute to future research on similar topics.

Keywords: Philosophy of the defense, entelechy, sociocultural paradigm, legal consciousness, qualified legal assistance.

Research type: general review

Features of the Russian Bar and criminal procedure

It should be recognized that the current level of legal consciousness in Russia is not high enough, that is why problem of legal nihilism in Russia is widely discussed.

At the same time there are no mechanisms to ensure the provision of free legal aid for all groups of citizens. Simultaneous there is a rise in the cost of legal services in the country. As a consequence, the protection of the rights and freedoms of citizens in many ways rests on their own shoulders.

At the same time, it should be noted the absence of the trust to the lawyers in the social environment, which is due on the one hand, with on the unavailability of legal services and the lack of legal education of citizens, and on the other, with the poor quality of such services.

The history of development of public defender’s office in Russia cannot boast of such ancient history as her European antitypes.

Russian professional advocacy was the youngest in Europe, it is constituted only by the judicial reform of 1864.

By that time legal profession in Europe has had a long history and glorious tradition: in Italy, it represented the ancient genius of Caesar and Cicero, and a new time- T. Caldogno, D. Mazzini; in France- M.Robesper, J. Danton, the president A. Thiers and Zh.Grevi; in England - Thomas More and Walter Scott; in Germany - I.Gete and F. Lassalle, etc.

The history of almost every state has it’s periods in which counsel carefully tried to turn into an official, making it impossible to practice advocacy in the first place due to violation of guarantees of attorney-client privilege.

In Russia, however, not only the legal profession as such, but even (oral or written) statements about it were considered, according to the government (until the reign of Alexander II), reprehensible. Russian autocrats with more suspicious of the legal profession and lawyers. Catherine the Great in a letter to F. Grimm on June 25, 1790 the sovereign right to explain their lack of success of the lawyers: "The main reason that lawyers and prosecutors I have no legislation ever to legislate not be long as I live," Nicholas I thought that it advocates the end of the eighteenth century ruined France, and has repeatedly said: "While I will reign, Russia does not need to have a lawyer."¹

Mention should be made that the bar is achievement of Greek and Roman antiquities. Nevertheless the institute of representation existed in all states and in all times. It can be explained by the fact that the rights of many categories of citizens for example disabled, insane people, could be violated and they needed someone to defend their rights.

And the roots of nowadays Bar go back to that institution. But it is the Greek and Roman that gave rise to the Bar. And there were some reasons for that:

¹ Troitskii N.A. Coryphaeus of Russia Advocacy. / N.A. Troitsky. - M. : Tsentrpoligraf, 2006.- p. 34.

1. Firstly. The attitude to law as the highest social value. Very early in the history of Greece and Rome the court became one of the most widely used instruments of settling conflicts.

2. Secondly. Early labor specialization.

3. Thirdly. Political regimes in Greece and Rome. Even in those days people took an active part in ruling the country.

As was said above in the second part relationships between the state and the Bar has some problems. While speaking about the relationship between the Bar and the state mention should be made of continuous conflicts that existed between them. We all remember words of Nicolas the First who said “There will be no barristers in Russia as long as I live” or the words of Elisabeth the second “My state is strong because lawmakers have no rights here” etc. But we must admit that the more independent the Bar will become, the sooner the state will become into a civil society. Strange as it may seem but the problems that the nowadays bar faces do not differ much from those of the past. Main of them are:

1. Government pressure on the Bar

2. Ignorance of the population in the sphere of law

The Law on Advocacy allows you to define the legal profession as an independent self-governing institution of civil society, public corporation of professional lawyers, called to participate in the administration of justice and provide legal assistance. It is this public law function is the main function of the legal profession. Just as the protection of individual natural element intended to pursue the survival of the species, the protection of private interests lawyer pursues the interests of the public.

Some of the most important problems often discussed in jurisprudence are the causes of change in the forms of the criminal procedure and the causes of conflict between the state and the independent institution of the Bar. We believe that the solution to these problems, which, on the face of it, do not seem much connected with each other, lies in one and the same background.¹

First, we would like to specify the important role that the two institutions play for social environment.

Criminal procedure undoubtedly occupies a special niche in any legal system. A crime, if compared to other offences, poses the highest risk to the public because it threatens the underlying principles of the society. It is criminal procedure as a special activity aimed at solving crimes and finding the guilty person that may show the extent of the legal development of the society.

The Bar, on the other hand, depends more heavily than other institutions on cultural, political and economic situation in the country. One can hardly expect the Bar to play an important role in the country ruled by tyranny but not by law and order. It is impossible simply because where there is no law there is no advocacy.²

1. Batsunov, A.N. Legal awareness as the basis of the society’s sovereignty :abstract of PhD in Law thesis. – Voronezh (2011).-p. 17

2. TsukovYe.A. Loyalty to profession/ URL:<http://www.tsukov.ru/index.php/intervue> [accessed 07.10.2013]

That is why there is an interdependence of the person’s status and the Bar, on the one part, and the state, on the other part. For example, in totalitarian states, where collective interests dominate over personal ones, the Bar often becomes a state body, thus losing its unique public character. By contrast, democratic states, where the Bar is guaranteed independence, always promote a person’s legal interests.

There are certainly many other public associations whose development shows the extent to which a person’s interests are promoted in the state and the position that a person has in the society, for example, political parties, trade unions, etc. The Bar is different from any of them in two aspects:

1. The Bar (unlike trade unions and political parties) represents the interests of the whole public (not only separate groups).
2. The Bar is the only social institution whose aim is to guarantee citizens’ rights in administration of justice.

With this in mind, one can’t but agree to the opinion who compares the Bar to a barometer which shows the legal climate in the society.¹ However, we must not forget that criminal procedure as well as law on the whole are strongly influenced by social and cultural situation in the country. At different periods of time and in different countries there were different ways of organizing criminal investigations and criminal trials.

The crime, the criminal behavior, the guilty person, and the procedure, aimed at stating the connections between them and the interests of the victim and also criminal persecution that leads to crime criminal punishment can be studied only within the limits of criminal procedure relations based on the criminalistics knowledge.

This statement can be explained by the fact that the relations proper, which are being investigated have particularly personal roots while civil procedure carried out apropos of things, objects of the material world.

Wholly sharing this opinion we would like to point out a specific connection of the Bar and criminal procedure.

Since it is the Bar that protects private rights and legal interests of individuals the relations that arise between the advocate and the client are of fiduciary nature cannot bear any interference of third persons.

The civil procedure being a less “personalized” legal formation allows far less interaction between the representative and represented.

Partially due to the this the Law contains directions about the guarantees of the support of the confidential relations between the advocate and the client, summoned to exclude any influence of the representatives of the charge upon rendering qualified legal help of the advocate.

Wholly sharing this opinion we would like to point out a specific connection of the Bar and criminal procedure.

Undoubtedly, one of the main guarantees of the advocate’s independence in the criminal procedure of rendering qualified legal assistance is the duty of all third persons to respect privacy of the advocate’s activity.

1. StetsovskyYu. I. Bar becoming a government structure is incompatible with law. // Advokat. – (2007).-7 July, p. 9.

The actuality of the topic in question is conditioned by the necessity of scientific and practical study of the independence of the advocate’s activity.

Being one of the most important conditions for administering justice, independent Bar is an indivisible element of the lawful state and the only in our society nowadays.

In its turn the criminal procedure, undoubtedly, occupies a specific niche in the legal society. You know, any crime (in comparison with other kinds of offence) has a very high degree of danger for the society.

In spite of the given conclusion, it’s necessary to admit that the scientific investigation of the independence of the advocate’s activity within the criminal procedure is characterized by the existence of a good number of lacuns.

Entelechy of the criminal procedure and advocacy

The theory of criminal procedure distinguishes between several forms of development of criminal procedure: accusatory, inquisitional, mixed and adversarial criminal procedure. It is necessary to emphasize that the change in the form of criminal procedure took place together with change in the legal system and the views on law as such. The vector of the development of criminal procedure is connected directly with the existing vector of the development of law and its interpretation.

Historically several theories of law interpretation were developed. They aimed to give a comprehensive description of the essence of law from the point of view of its characteristics (psychological, materialistic, natural rights theory, normative theory, etc.) However it is also important to understand what a vector of the development of law is, whether it is a part of the essence of law, what influences a vector and what it can be like. It is the concept of the “vector” of law that causes the change of the legal system or leaves the system as it is.

We believe that despite the close connection between the two definitions it would be reasonable to draw the line between the concept of the essence of law and the vector of its development. The latter should be considered as the entelechy of law.

The concept of entelechy has the central place in Aristotle’s philosophy. However, he gave different definitions, which were not always similar and that is why not quite clear.¹ It is possible to give a comprehensive and precise definition of Aristotle’s entelechy after comparing all the relevant statements of the philosopher. Entelechy (from Greek entelecheia, "completion")² is a term used in Aristotle’s philosophy to mean 1) transition from potentiality to organized energy which contains 2) matter, 3) its own cause and 4) the purpose of its motion, or development. In other words, entelechy can be defined as some inner potential which contains the purpose and the final result.

¹ Losev A.F. Aristotle and classics’ works/ URL:<http://psylib.org.ua/books/losev004/txt09.htm> [accessed 07.10.2013]

² Losev A.F. idem, [accessed 07.10.2013]

Tabel 1. Concept of Entelechy¹.

| | |
|-----------------------------------|---------------------------|
| Aristotele’s concept of Entelechy | |
| Purpose of motion | Vector of the development |

It is also clear that Aristotle connected the concept of entelechy with obligatory transition from potentiality to energy. While matter is only a possibility different things can have and form points at the principle of total organization, entelechy can be neither only matter nor only form but the combination of both, i.e. really organized matter and its completion. Entelechy, however, is not merely energy as opposed to potentiality (though Aristotle himself used the term “entelechy” to mean only energy).

Aristotle applied the concept of entelechy only to the objects of material world though it might well be applied to such ideal phenomena as law. When using the concept of entelechy in relation to law, we should first say that entelechy of any object of the material world is contained in the object itself. However, can we claim the same in relation to immaterial objects?

To answer the question we should admit that law appears and exists only in society and is influenced by many factors of social environment (economic, religious, ethnic, etc.). However, the most significant factor influencing law is public opinion in relation to law.

The concept of legal awareness is one of the key concepts of social philosophy connected with understanding law.²The more problems of law are analyzed, the more papers are published on the issue of different aspects of legal awareness.³There are different definitions of the term “legal awareness”. Some researchers associate legal awareness with ethical and humane principles and reject the idea that legal awareness is merely knowledge of law. They define legal awareness as fundamental, immaterial structure determining the development of legal reality⁴. Others emphasize its multiple meaning and pay special attention to elements and levels of legal awareness. The term “legal awareness” is polysemantic: some jurists associate legal awareness with natural right, others – with law in general, still others believe that legal awareness is knowledge, evaluation of law, and criticism of existing law⁵. There is an approach when legal awareness is regarded as a class category. There is another one when the notion of legal ideal is used to characterize legal awareness.⁶All in all, we would agree with the

¹ Losev A.F. idem, [accessed 07.10.2013]

² Pervushina V.N., Smorodina Ye. P. Legal awareness and its sociocultural paradigms. – Voronezh, 2010. - p.9.

³ Pervushina V.N., Smorodina Ye. P. idem, - p. 13-14.

⁴ Bainiyazov R.S. idem, p. 7.

⁵ Uvarkina Ye.V. Legal awareness as the object of social and philosophical analysis: abstract of PhD thesis. – Moscow, 2004. - p. 5.

⁶ Batsunov, A.N. idem, p. 9.

following definition, which we will use in our paper, whereby “legal awareness is a complex of ideas and feelings expressing the attitude of the public and social communities to the existing or desired law.”

Indeed, an important aspect of legal awareness is views about the ideal law. In other words, legal awareness contains a teleological model of law development. Thus, we can distinguish not only such functions of legal awareness as reflecting and cognitive, informative, evaluative, prognostic, regulatory, and educational but also “vector” (teleological) function.

The role of this function is difficult to underestimate because it is this function that determines the values of the development of the legal system, the public relations to be regulated and finally what the law should be like.

Legal awareness of the public may be regarded as consciousness of the law, which in its turn is its entelechy. So we can conclude that the entelechy of law is found in public’s legal awareness, the latter not only being transmission mechanism from law to behavior but allowing the transition from passive legal matter to active legal “energy”. We would like to specify that we do not side with the psychological theory of understanding law and we believe that the understanding of the essence of law should be connected not only with psychological regularities of the society functioning.

It is also necessary to note another aspect in connection with law entelechy – its polymorphism. Initially law combines two vectors of its development: the “law – instrument” vector and the “law – value” vector. Each of these vectors is chosen unconsciously by the public and is a combination of the ideas each citizen has about the role of the legal system. At any time the public can choose only one vector of law development, thus determining its entelechy. There can only be a dichotomy of law entelechy with no “semitones”, i.e. these directions are incompatible because they include different principles of legal activity, different limits of “legal non-interference” and different powers of relevant authorities.

Law entelechy changes under the influence of developing sociocultural paradigms which are reflected in legal awareness (since legal awareness is undoubtedly a part of world outlook). A sociocultural paradigm means an underlying principle that characterizes the dominant idea of the world outlook. Thus, the ancient culture was cosmocentric, the culture of the Middle Ages was theocentric, the culture of the New Age is anthropocentric. Today legal awareness reflects the globalization processes in modern sociocultural area.

These dominant ideas had a significant influence on the development of the criminal procedure. For example, the principles of theocentric culture (soteriologism, providencialism, eschatologism, etc.) were implemented in the criminal procedure of those times, whose character was religious, symbolic and aimed at saving the criminal’s soul.

Conclusions

It is necessary to admit that the Bar experiences transition to a new interterritory stage of its development which finds its reflection in the formation of the corresponding international institutions and the creation of more and more international documents upon the status of the advocate, appear nowadays.

The world's integration processes inevitably actualize the value and importance of international legal acts for the activity of all state and social institutions. Being involved into relations with the interterritory element, many legal mechanisms become more complicated. And this requires somewhat different regulation instrument.

Criminal procedure as well as the Bar is not an exception. Nevertheless, it is necessary to print out that the international legal regulation of the advocate's activity in the criminal procedure has a complex nature.

However, despite multiple dominant ideas of the world outlook, law entelechy is ambivalent and can only acquire the forms described above. At the same time law entelechy is not predetermined by the dominant idea though strongly influenced by it. Law can develop in any direction stated above within each dominant idea. The entelechy of criminal procedure as well as law entelechy can have multiple variants.

It is the teleological model of law chosen that determines which laws will be accepted by the public and which of them will never be enforced. Entelechy plays an even more important role in relation to the Bar.

The Bar appeared to protect private interests of individuals, which shows a fiduciary connection between the public and the Bar. At the same time we must remember that the Bar and the law are also interconnected. Law is a system of obligatory norms and rules which should be enforced with the help of special mechanisms, including legal representation.¹ For a lawyer to perform his duties professionally it is necessary to have special means provided by the law which guarantee and protect his rights and legal interests. Such means include legal guarantees of lawyer's work in criminal procedure.

We would like to note that the Bar entelechy is not polymorphic and is static to a certain extent. We believe it is connected with the fact that the Bar is deeply rooted in older social phenomena than law (such as relationship, social mutual help, etc.) and biological prerequisites of human community. In other words, the need for the Bar is determined not that much by law but rather by the human nature because a human being is a social being living in society of the alike rather than alone. From this stems the entelechy of the Bar as an independent, highly ethical and qualified institution. If anyone of the principles mentioned above is broken the Bar ceases to exist. Because the entelechy of law and the criminal procedure can change, there arise conflicts between the Bar and the state authorities. An independent lawyer cannot participate in an inquisitional trial

¹ Kucherena. A. Yu. The Bar. – Moscow, 2005.- p.220.

because the presence of a representative of the public asserting legal provisions contradicts the law vector which has absolutely different purposes.

Since it is the Bar that protects private rights and legal interests of individuals the relations that arise between the advocate and the client are of fiduciary nature cannot bear any interference of third persons.

Partially due to this the Law contains directions about the guarantees of the support of the confidential relations between the advocate and the client, summoned to exclude any influence of the representatives of the charge upon rendering qualified legal help of the advocate.

In its turn the criminal procedure, undoubtedly, occupies a specific niche in the legal society. You know, any crime (in comparison with other kinds of offence) has a very high degree of danger for the society.

In spite of the given conclusion, it's necessary to admit that the scientific investigation of the independence of the advocate's activity within the criminal procedure is characterized by the existence of a good number of lacuns.

In particular, there haven't been done any complex studies of the category of independence of the advocate in the criminal procedure. In spite of the fact that there is no legally supported concept of the independence of the advocate no attempt has been made to specify it. The existing definition of the criminal procedure defense reflect only its outer features, thus ignoring the essential points of the phenomenon.¹

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But despite this the independence of the advocate its essence and limits has been an object of scientific study for many years already. Edmund Picard considered the independence as “his duty to himself”.²

We think it possible to offer our own definition of this phenomenon. The independence of the advocate in the criminal procedure, supported by the norms of the current legal system and based upon the advocate's inner convictions of their effectiveness is the ability of the advocate to form in the process of rendering qualified legal assistance his own model of conduct which excludes direct or indirect as well as concealed or open/ evident influence of any third persons.

We believed we can speak about inner and outer independence. Inner independence means that the lawyer is sure that he is able determining the model of his behavior on the bases of his own views, opinions and preferences; that he is well aware of the sphere of his rights and freedoms in conformity with the law. Outer independence is the system of guarantees, provided by the positive law which insures the absence of any kind of influence of third persons on the subject's activity.

¹ Bainiyazov R.S. idem, p. 45.

² E. Picard about lawyers. / A.M. : Pikar. Gorodets; Dobrosvet, 2000 – p. 23.

It is important to understand that if citizen's and special subjects lack conviction of their own independence, the system of its even the most perfect guarantees will have no sense. This statement seems to be true to the advocate's activity too.

Thus, if the Bar, being the institution that guarantees professional legal aid, is included in an inquisitional criminal procedure it cannot perform its functions properly and finally loses its real value.

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