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Issues of Protection of the Rights and Legal Interests of Legal Consultants in the Context of Sustainable Development of Kazakhstan

Summary of the legal market and legal profession

What does legal market mean at the current stage of development of the state and civil society? Many people assume that legal market is a sphere where attorneys and legal consultants are practicing, i.e. a so-called “free zone” with potential clients who need legal assistance. All other types of legal activity seem not to be related to “legal market”, e.g. the activity of judges, prosecutors, investigators, lawyers of state and quasi-state structures, corporate lawyers, notaries, officers of court.

Is such approach to the interpretation of the term “legal market” correct? I dare say it is not quite correct, because currently the country’s judicial system, prosecution and investigation authorities, legal functions of state and quasi-state structures need skilled lawyers to carry out legal activity in these authorities and structures. There exists the whole system of selection of lawyers to vacant positions. Thus in the specified areas of lawyers’ activity there exist own “market” where skilled specialists are required to perform legal work. And lawyers practicing in these areas unambiguously perform legal activity: judges who administer justice treating civil and criminal cases; prosecutors perform functions of supervision over due course of law, including law enforcement practice; notaries certify and attest jural facts and acts; corporate lawyers ensure legal support to business of his/her employer etc.

Such approach to the interpretation of the legal market in a broad sense allows saying that legal activity has many directions, therefore to give a single ground for classification of all legal professions is impossible. Nevertheless I would like to provide two types of classification identified by different criteria.

The first classification is accessibility of profession subject to compliance with the requirements stipulated by law, and by other internal acts of professional organizations and employers. The first classification is based on accessibility of specific type of legal profession. Moreover accessibility is deemed to be not only legal requirements to the practicing of this profession (e.g. service record, availability of license, membership in the professional organization etc.), but quantitative demand for its representatives and existing practice. Attorneys, legal consultants, private lawyers, corporate lawyers, lawyers of law firms and consulting companies, private enforcement officers should be referred to this category.

The second classification is based on affiliation of this profession to the civil service. Specialties, conditions for access thereto are only established by the state. It also pays for the services rendered by these lawyers. Main requirements are availability of higher legal education of a candidate for vacancy. Judges of all levels, prosecutor, investigator, lawyer of state or quasi-state authority can also be referred this group of legal professions.

It appears that the classification of legal professions will subsequently help solving the following objectives:

- 1) Establishing a list of competencies for different legal professions (depending on a type of activity they should be established by the state, professional organizations, employers);
- 2) Conducting a more accurate division of the area of legal services among the representatives of different areas of legal activity;
- 3) Conducting by scientists and experts of a comparative analysis of legal professions, as well as identifying needs in developing their new types.

In this connection it is impossible to pass by an issue of identification of the needs of the state and the society ... It is a very important issue directly affecting the rights of the lawyers and their security.

Thus, currently the legal community is facing many challenges and hardships, among which inter alia is absence of systematic fundamental and practically oriented education, a low level of legal awareness of the society, not in every instance unambiguous and consistent law-making and law enforcement, absence of a mechanism of influencing curricula on the part of the representatives of the professional legal community and the relevant Ministry etc. We face a great number of issues of the legal community and law enforcement in the context of a precipitous deterioration of the quality of legal education.

At one of the event convened by the RoK Ministry of Education with the participation of the representatives of the universities and practicing lawyers, there was voiced the number of about 400 thousand lawyers in Kazakhstan trained during three decades of independence and almost 70 institutions of higher education graduated about 10 thousand lawyers annually. Almost all institutions of higher education have legal departments and specialties. The graduates of non-major educational institutes of pedagogical, economic, technical, agricultural and other orientation constitute the majority. Moreover, both defense attorneys and the representatives of law firms keep telling about critical labor shortages and lack of highly qualified specialists among the graduates.

The low quality of legal education resulted in the appearance of a great number of “lawyers” incapable to maintain high standards of the profession, ensure proper self-regulation of the legal community. It should be noted that each of the certified lawyer is a dedicated lawyer. Unfortunately, except for several great law schools and several tens of excellent teachers, in general the level of legal education in the country is low. Therefore it is time to resolve at the state level an issue of significant reduction of the universities training lawyers. For the country populated with eighteen million people two-three legal universities are enough to accumulate the whole lot of the academic teaching staff, who in their turn will improve the quality of legal education.

On the Lawyers’ Rights and Legal Interests

Only lazy people do not talk about the lack of independence and excessive restrictions to attorneyship and of self-regulation restrictions and independence of legal consultants. However,

independent attorneys and self-regulating and independent Chambers of Legal Consultants are a guarantee of the rights of citizens to qualified legal assistance, and through it a guarantee of observance of all remaining rights and legal interests.

Thus, the state takes part in the attorneys' activity at the stage of accession into legal profession by state licensing and participation of the state in the attesting of future attorneys. At the same time, in all developed countries, in the ranks of which Kazakhstan is trying to get, the Bar independently makes decisions regarding its members. Recently the legal community often becomes a witness to judicial disputes initiated by the governmental authorities with respect to cancellation of the attorney's license with the right to practice law. At the same time, consideration of the issue of conformance of any attorney's behavior and activity with the Bar's standards should be a competence of the Bar itself. The legislation on advocacy establishes ungrounded restrictions to the employment of attorneys and their business activity, the result of it is the violation of their constitutional rights. All the above has a negative impact on the development of the efficient and independent Bar.

As per legal consultants, within more than two years of adoption of the specialized law this category of lawyers demonstrated that the Kazakhstan legal community is capable to effectively consolidate and conduct its activity on the basis of self-regulation. Regardless the existence of legislative qualification requirements to the status of a legal consultant, which include apart from higher legal education mandatory a two-year experience and testing, the new instituted named the chamber of legal consultants developed all necessary mechanisms for control of the quality and compliance by its members with professional standards.

It is further necessary to develop this legal institute, for protection of the rights and powers of legal consultants, including the introduction of the institute of request for legal consultants, professional secret of a legal consultant similar to attorneys. Given social importance of independence of the legal community, principles and provisions of the RoK Entrepreneurial Code and the RoK Law "On Self-regulation", there is no way to speak about any interference of the state with the self-regulation of legal consultants. It is necessary to understand that independent legal consultants acting in accordance with the principles of self-regulation is an opportunity for individuals and legal entities to protect their rights and legal interests and resort to legal mechanisms on different categories of issues.

It should be noted that the power and the legal community made the first step to the self-regulation of the legal market and legal profession, and it should be evaluated as a positive factor of development of the legal system of Kazakhstan. However, further development of the legal market and legal profession is to be carried out on the basis of the generally accepted international principles and standards. We do not need to invent own Kazakhstani way in this sphere, we need to be guided by the international practice supported by, for instance, the UNO, where the Special Commission the Issues of Maintaining of the Rule of Law, Independent Judicial System and Legal Profession¹.

Subject to the recommendations of this Commission, institutes, bars and legal consultants should at least the following requirements:

- 1) independence;
- 2) self-regulation;

¹ Report of the UN General Assembly Special Rapporteur on the Independence of Judges and Lawyers prepared by way of implementation of Resolution 35/11 of the Human Rights Council. See <https://undocs.org/pdf?symbol=ru/A/73/365>

- 3) availability of legal right to protect independence of legal profession and interests of profession members.

As a rule, the activity of attorneys and legal consultants is deemed to be independent if in its entirety it is free from outside influence. The best guarantee of such independence is availability of a self-regulating entity which is understood to an organization independent of the state or other state institutions, capable to establish own rules and provisions, independently make decisions without outside influence, to represent the interests of its members and independently finance its activity.

Respectively, when assessing the degree of independence of such structure there should be analyzed the existing legal and administrative provisions and the real impact they make on the capability of lawyers to perform their functions based on independence and integrity.

The regulating bodies of attorneys (the Bar) and legal consultants (the Chamber of Legal Consultants, as well as the associations of the chambers of legal consultants established by them based on the principles of voluntariness) should assume important functions to ensure self-regulation in this area of professional activity, specifically:

- 1) development of the requirements and procedures with respect to the access to legal profession;
- 2) development of the code of professional ethics;
- 3) development of standard acts of the Bar and the Chambers of Legal Consultants;
- 4) development of the rules and procedures for disciplinary proceedings with respect to attorneys and lawyers violating the requirements of the legislation and the rules of professional; ethics;
- 5) development of the rules and standards for qualification improvement.

Availability and validity of these functions, established or recognized by the law, protect the legal professional community from the outside interference with the legitimate activity – from different forms of control and pressure on the part of the governmental authorities and other external parties to the legal relations in the area of the activity of attorneys and legal consultants.

Moreover the bars and the chambers of legal consultants should possess sufficient human and financial resources to perform their functions individually and independently. Thus, the important means of maintaining effectiveness and independence of these entities is membership fee. In the cases where it is necessary to attract funds of external sources, the bars and the chambers should always monitor that such external financing would not threaten their independence.

In order to guarantee independence of the legal profession, most of the members of the executive body in the lawyer organizations should be the lawyers elected by the same lawyers. The members of the executive body should have an opportunity to perform their functions without outside interference. The situations where the state, particularly the executive power, fully or partially control the executive bodies of the lawyers or their management team, incompatible with the principle of independence of the legal profession.

In the interests of protection of independence of the legal profession, the issues of regulation of access to the legal profession, development and implementation of the standards of professional behavior, ensuring improvement of lawyer qualification and treatment of disciplinary cases with their respect should be in the jurisdiction of the bar and the chambers of legal consultants. The governmental authorities should not interfere with the process.

The institute of the rights of the bar and the chamber of legal consultants should be the protection of individual members, specifically in the cases where they are not able to duly protect themselves. The obligation of all governmental authorities is to respect the functions of the lawyers' professional organizations to protect their members, in order that they would not have an opportunity to practice their profession without any threats, obstacles, prosecutions and unjustifiable interference.

Most important is the establishment of requirements and procedures for access to the legal profession. Access to the legal profession should be based both on higher legal education confirmed by a respective diploma and the charters of the bar and the chamber of legal consultants preliminary established by law. Access to the profession should be based on the merits given qualification, skills and capabilities of the candidates and their independence and integrity. The important instrument in the process of selection of candidates can be examinations/tests for the knowledge of the legislation of the Republic of Kazakhstan. Moreover the participation of the governmental authorities in the assessment of candidates can have a negative impact on the independence of the legal profession.

Access to legal education and entry into legal profession should be open to everybody who meets the established requirements, and discrimination with respect to access to the legal profession by whatsoever feature is inadmissible. At the same time, given that independence of a lawyer is a fundamental prerequisite for its activity, the regulation of the profession by the state is reduced to the establishment of only most significant principles of lawyer activity and vesting lawyer professional organizations with self-regulation rights on other issues.

Sustainable Development of Kazakhstan and the Legal Community

Our thoughts of sustainable development of Kazakhstan, including the legal community, require our thoughtful approach to the development of the legal of the state and legal profession.

In the background of improvement of the system of legal education there must be improved regulation of the legal market subject to positive international standards for legal activity, they should be implemented in our practice that lawyers become real specialists in this area capable to influence the law and order in the country.

Thereby we should come to such order when it is not sufficient to have a diploma of higher legal education to carry out professional activity, also it is necessary to take a mandatory training and become a member of a self-regulating lawyer organization, e.g. a member of the National Bar Association or a member of the Chamber of Legal Consultants. The membership in the professional lawyer organizations should be a ground for "access to practice". Such systems exist in all civilized countries of the world, and Kazakhstan does not need to invent own "bicycle" in this area; it is necessary to use best experience of the foreign countries in the issues of legal market regulation. Then we will provide for such situation where legal services to economic entities and representation in the courts and other governmental authorities will be carried out by the best lawyers of the country. Those who do not meet this level should improve their qualification and take special training to get "access to practice".

The modern stage of development of the society and the state demonstrates that lack of proper regulation of the activity of professional lawyers, especially, commercial lawyers, does not allow using a potential of this large group of most active members of the society to achieve the goals of the country's development. In addition, a necessity of joint work to maintain the level of people's trust to the power and the judicial system in the development of new approaches to the

interaction of the governmental authorities, state administration and courts with the society through professional lawyers becomes evident. It is time to reform the regulation of the activity of practicing lawyers for solution of the following objectives:

- 1) to establish legislatively high uniform professional standards and basic principles of activity for all practicing lawyers, including attorneys and professional lawyers rendering legal services. High standards and requirements to practicing lawyers shall include, inter alia, obligations to the society and the status of “justice assistants”; it does not imply the status of “court assistants”. An attorney and a legal assistant in their profession should assist in maintaining the principles *должен способствовать утверждению* legitimacy, justice and law and order in the country and the society, this is the essence of the status of “justice assistant”, whereas attorneys and legal consultants assist in the exercise of the constitutional right of each to qualified judicial protection. Therefore access to practice of law, including access to professional representation in courts, should be carried out only through membership in the organizations of practicing lawyers;
- 2) to enhance professional liability of actors of such activity and improve the system of compulsory insurance of professional activity;
- 3) to carry out a complex of measures to strengthen the status of an attorney and a professional lawyer, including the granting to all professional lawyers of the rights and privileges of lawyers (professional secret, right to inquiry, independence and immunity), as well as additional rights and privileges in courts and governmental authorities;
- 4) to establish conditions and requirements to the provision of legal services and legal assistance free of charge to underprivileged people, and legal support to social projects, participation in law-drafting activities, monitoring of the legislation for the purpose of its improvement;
- 5) to establish uniform requirements to the retraining of professional lawyers and requirements to legal education.

Provision of legal assistance and legal services without “access to practice” should be considered as illegal activity with all resulting consequences. Somebody can object and say how the notion “legal assistance” differs from the notion “legal services”. There is an answer to it, obtained as the result of review and analysis of international practice which is based on a certain theoretical assumption. Thus, the terms “legal assistance” and “legal services” are not identical notions by their content, Therefore there must be their statutory definition. Moreover, “legal assistance” should be understood as professional activity of attorneys providing free legal assistance guaranteed by the state in accordance with the RoK legislation, and free complex social legal assistance provided by legal consultants based on the principle “pro bono”. Moreover, the minimum scope of such legal assistance should be established by a decision of the lawyers’ professional association.

The term “legal services” should be understood as professional activity of legal consultants and attorneys carried out on the basis of legal services agreements with legal entities, organizations, individual entrepreneurs and individuals. Thus, the types of “legal services” should include all types of paid legal services, provided by legal consultants and attorneys: legal advice, legal support to business projects, representation in courts, governmental authorities, representation in commercial arbitrations courts, drafting documents etc.

The following fundamental principles of provision of “legal assistance” and “legal services” should be stipulated at the legislative level: right to legal assistance and legal services; equality in the access to legal assistance and legal services; independence of a lawyer; right to receive information; social equity and social profile in the provision of legal assistance and legal services; accessibility of free legal assistance to the unprivileged people; right to free choice of a

type of legal assistance or legal services; objectivity, integrity in the provision of legal assistance and legal services; maintaining confidentiality and other important principles.

In conclusion, I would like to note that legal profession is extremely important for normal functioning of the society. At all times lawyers enjoyed moral privileges, but at the same time they bore an enhanced scope of obligations to the society. Given a specific scope of lawyers' rights and obligations to the society, legal profession is to be subject to state regulation.

At the same time given that the independence of a lawyer is a fundamental prerequisite for his activity, regulation of the profession by the state is reduced to the establishment of only most significant principles of lawyers' activity and endowment of professional organizations with the rights of self-regulation in other matters. Self-regulation of the legal profession on the basis of certain principles established by the state, should stipulate mechanisms which would guarantee to the society lawyers' compliance with their mission as a link between the government machine, including courts and individuals as well as legal entities.