Evaluation of Attorney's Law in Terms of Administrative Law

Kongze Zhu[1] and Lei Zheng[2,*]
[1]Institute for Advanced Study in the Humanities and Social Sciences, Beihang University, Beijing, 100191, China
[2]School of Electronic Information Engineering, Beihang University, Beijing, 100191, China

Abstract

Advocacy aims at providing legal assistance in fairly resolving legal disputes. It is a fact that there is a public interest in the performance of this activity. A lawyer performs this activity under the supervision and control of the bar association. Public service is the professional activity carried out by the lawyer/ advocate. This paper evaluated public service in terms of accountability to public officials and administrative organizations. In terms of public service, attorneyship has been examined both organically and financially. In terms of the administrative organization, the professional organizations in the form of public institutions - the bar associations which are the professional organizations of the lawyers - and the admission of a lawyer to the legal profession were evaluated in this paper.

KEYWORDS: Advocacy, Public Service, Public Institutions, Administrative Law, Attorneyship

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INTRODUCTION

Problems of public lawyers should be considered, especially in the context of administrative law. Perhaps the most striking problems faced by public lawyers are the disciplinary crimes and penalties they are subject to. In this framework, public lawyers can be subjected to disciplinary proceedings by both their client institutions and the bar associations. In addition, under the relevant legislation, public lawyers can be audited and supervised by non-lawyers also. In terms of the administrative organization, the professional organizations in the form of public institutions, the bar associations which are the professional organizations of the lawyers, and the admission of a lawyer to the profession are evaluated in this study. It is one of the basic concepts of administrative law in public service (Zoller, 2008; p.255). Non-administrative administration refers to the management of social public affairs by social public organizations authorized by laws, regulations, and rules. The non-administrative organ administration broadens the subject scope of public administration. Its essence is the autonomy and decentralization of administration, as well as the socialization of administration (Yang Lin macro, Huang Xiaoqun, and Yang Dezhi, 2012). Public service refers to the activity of government departments, state-owned enterprises and institutions, and related intermediary organizations that perform their statutory duties, provide assistance, and/or handle related affairs

for citizens, legal persons, or other organizations according to their requirements. Public service is the core concept of public administration and governance reforms in the 21st century. Public service is based on cooperation, including strengthening the construction of urban and rural public facilities, emphasizing the service nature of the government and the rights of citizens.

To sum up, public service encompasses the activities that are decided by the political bodies that there is a public interest in their realization and that is carried out by the administration or by private persons under the close supervision and control of the administration (Law Press China, 2017). The concept of public service expresses three elements: organic, material, and formal (Tan, 2018; p. 356). The organic element is about who carries out a certain service as an organ. If the service is carried out by the administration, it refers to the whole of the public goods reserved for the execution of the service, the public officials assigned to this service, and the financial allocation made. The material element of the public service denotes that it is the activity carried out for the public good to meet the general needs of the society.

The common and general needs of the society depend on the preferences of the political will. The formal element of the public service indicates that it is an activity carried out in accordance with public administration procedures, rules, and regulations. It implies that the public activity cannot be carried out freely, is based on a certain legal regime, and is performed by using public power (Akyılmaz, 2011; p.330). If an activity is considered a public service, it is subject to the public law regime. However, the legal regime to which an activity is subject is not a condition but a result of that activity being a public service (Gözler, 2018; p.478). An activity must first be provided to the administration as a duty then only an activity undertaken by a private person can be considered a public service. Thus, the public administration is primarily responsible for the fulfillment of the public service.

The principal obliged administration does not perform this service itself and gets it done by private persons through providing the public service to private persons. However, there should be a clear legal regulation for the administration to ensure how this activity is assigned to private persons. If the administration has not been assigned a task in this regard, it is not legally possible to accept this activity as a public service (Gülan, 1988; pp. 147-159). It is a fact that the power of determination of activity as a public service and the decision about what activity should be assigned to the administration as a task vest in the political authority. Lawyers are self-employed natural persons. Attorneyship is not a duty legally assigned to the administration. Although bar associations have a public legal personality, they are not assigned by law to carry out their legal services.

Therefore, bar associations as public legal people cannot have these duties undertaken by lawyers. Bar associations are the professional organizations of the lawyers and are responsible for the representation, regulation, and supervision of the attorneyship profession. The difference between bar associations and private professional associations is that the bar associations are established by law, a bar member must perform the professional legal duties, pay dues. Also, the bar associations enjoy some powers over their members that emanate from public law. The function of bar associations is to protect the dignity of the attorneyship profession; to ensure that the profession is performed in accordance with the purpose of natural, free, and fair justice; to take the necessary disciplinary measures to achieve this objective, and to resolve potential

disputes between lawyers and their clients/organizations/institutions which they represent.

An attorney enters the profession by becoming a member of the bar association and performs his/her duty under the supervision of the bar association. The lawyer guides the actions and actions of the client individual with his legal opinions and prevents unnecessary lawsuits by showing that a useless lawsuit will lead to no positive results.

The material element of the public service is that the service is an activity carried out to fulfill the common needs of society. Advocacy is an integral part of judicial activity. According to the attorneyship law, a lawyer freely represents the independent defense which is one of the founding elements of the judiciary. The defense of any individual cannot be restricted within the set legal procedures. This is an extension of the freedom to seek and safeguard rights enshrined in the Constitution. The defense rights of individuals who cannot exercise their rights are fulfilled by the lawyers assigned by the bar associations.

Since the appointment/nomination of a lawyer by the bar association for those who are unable to hire legal aid and defense lawyers is carried out to meet the common needs of society, it corroborates that a lawyer performs public service.

ATTORNEYSHIP IN TERMS OF PUBLIC DUTY

It is stated that in order to be accepted as a public official, he/she must be employed by the administration and be bound by a public law bond to the public legal person. The condition of employment between them requires a certain period of employment by the administration. This is not the case with the lawyers because lawyers (except public lawyers) are normally employed by the administration. Therefore, lawyers are not accepted as public officials. Resultantly, lawyers are self-employed members who qualify as public officials in terms of administrative law and performance of public duties. Lawyers are not public servants. From this perspective, according to the Law of Lawyers (Law Press China, Beijing, China), lawyers can legally defend their clients, which helps to safeguard the legitimate rights and interests of clients and ensure the proper implementation of the law and protect social and public interests. Because of the importance of their professional activity for the public good, a lawyer is subject to certain public obligations as well as privileges.

It is a moot point whether an obligation imposed on lawyers is compatible with the legal nature of their profession. Advocacy may be subject to certain public obligations, but importantly, the lawyer must be legally subject to such obligations. The reason why bar associations have been transformed into professional public institutions and have ceased to be professional associations is expressed as the lawyer helping other elements of the judiciary in the execution of the judicial function, preventing harm to an individual, and helping him safeguard and defend his right in accordance with legal procedures and rules, thereby meeting a collective need. Furthermore, it is stated that a lawyer performs a public service by guiding the individual on the legal value of the transactions and ensuring the legality of the transactions. On the other hand, it is also stated that providing a legal person established by private persons with the assets of private persons and subject to private law in terms of personnel with certain public power privileges will not turn him into a public legal person.

In this framework, professional organizations that are private law legal entities in terms of comparative administrative law may carry out executive transactions based on public power.

These transactions are subject to administrative law, and any dispute arising out of these transactions can be resolved in the administrative judiciary. Different professional organizations are established to protect the benefits arising from the membership of persons belonging to a particular profession. Therefore, administrative law serves private interests, not public interests. Professional organizations should not be public legal entities.

There is a need for an authority to regulate and supervise some professions such as lawyers and doctors in terms of professional ethics, conduct, and discipline. This authority can vest in the central administration or an independent administrative authority.

The importance of the attorneyship profession in terms of the freedom to seek rights and to exercise the right to defense, and its participation in the delivery of justice service highlights an inherent public interest in the performance of the legal profession. Therefore, it must be admitted that advocacy meets the financial criteria for public service. In addition, lawyers fulfill their professional obligations under the supervision and control of bar associations that have the characteristics of public institutions, meeting the organic requirement. However, advocacy is an activity carried out by private individuals and is not assigned to the administration as a duty.

It can also be said that the main responsibility of the advocacy is not the administration. Although the bar associations - the professional organizations of the lawyers - have the public legal personality, the supervision of the bar associations over the attorneys requires a disciplinary audit to determine whether the profession is carried out in accordance with the ethical rules. Therefore, practicing law is technically not a public service. Advocacy law does not consider advocacy as a public service. Although it is accepted that the determination of the legislator has a founding role in qualifying activity as a public service, it is stated that other qualifications should also be sought. Although advocacy is defined as a public service in law, activities established and carried out by private persons are, in principle, private activities. The proof of this presumption to the contrary can be demonstrated using organic criteria.

Though the will of the legislation has a founding role in accepting an activity as a public service, other conditions, especially the organic condition, must be met. Accordingly, an activity defined by the legislation as a public service will not be considered as a public service if it fails to meet other conditions.

Advocacy should also be considered in this context. Although it is qualified as a public service by the legislator, attorneyship cannot be accepted as a public service since it does not satisfy other conditions related to public service. A lawyer is subject to certain obligations to carry out the profession in accordance with ethical principles, such as the obligation to care, prohibition of advertising, and prohibition of accepting work with an intermediary. At the same time, lawyers enjoy certain privileges that other professions do not have, it helps them properly fulfill the duty of defense and legal aid.

The public law regime, being a regime based on public power, refers not only to rights and privileges but also to certain obligations. Undoubtedly, advocacy is subject to a certain degree of the public regime.

However, the obligations and privileges for attorneyship, which is technically not a public service and is a self-employed profession, are aimed at ensuring that attorneyship is done properly. Therefore, it will be in accordance with the law to the extent that it serves this purpose. Obligations that transgress this purpose will be deemed unlawful.

DISCIPLINARY REGIME OF PUBLIC LAWYERS

Several controversial points need to be considered regarding the disciplinary regime to which public lawyers are subject. Public lawyers can be subject to disciplinary investigations by the disciplinary committees of both the institution they work for and the bar associations they are registered with. This issue brings with it some questions that are examined below.

Assumably, the disciplinary regime to which public officials are subject aims at the continuous and regular performance of public services. Accordingly, the rules to protect the aforementioned purpose, disciplinary rules, and the consequences envisaged in the event of their violation are considered within the scope of the criminal law in a broad sense. In line with the same opinion, it is necessary to accept that the general principles of criminal law can also be applied in disciplinary law (Kaya, 2005; p. 71), which is particularly used to restrain the conduct of public officials (Law Press, China, 2007). The acceptance of the applicability of the general principles of criminal law in disciplinary law may lead us to the point we find controversial in terms of public lawyers. According to the principle of "*ne bis in idem*", which is one of the general principles of criminal law, a person cannot be punished more than once for the same crime. This principle implies that "if the act of the perpetrator has been judged and the verdict given at the end of the trial has become final judgment, it cannot be re-judged about the same elephant and the same perpetrator" (Orman, 2011; p.75). However, an examination of the legislation on public lawyers shows that the principle of "*ne bis in idem*" is violable.

However, due to the same elephant, public lawyers can be subjected to a disciplinary investigation by the disciplinary committees of both the institution they are assigned to and the bar associations they are members of, sometimes for the same act. Regarding the aforementioned issues, there is a need to underline the uncertainty of the status of a public lawyer who is given a dismissal penalty under the Law on Attorneyship in the public institution where he/she is employed.

DISCUSSION

If advocacy is accepted as a public service, its performance will be subject to different legal regimes than private activities. In the performance of the activity meant by this legal regime, some public power privileges and obligations are not available for private activities. No matter who performs the activity that has public interest in its realization, it may be subject to some public rules. Although the administration does not operate directly in the relevant field, entrepreneurs may be given obligations such as an obligation to provide services, continuity, reasonable price, non-discrimination, and privileges such as protection against competition and monopoly, due to the public interest in the performance of the activity. As a rule, public services are subject to the public regime. This does not mean that public law is fully applied to public services. The legal regime of the public service is not only public law. There are also private law subjects in the performance of public service. Private law is applied to its relations with the market. The fact that the public service is subject to the public regime is that several privileges and obligations are operating in the market cannot have, unlike private activities in the performance of public services.

Advocacy cannot technically be considered a public service but is subject to a certain degree of the public regime. Under this regime, a lawyer enjoys few public privileges and is subject to some public obligations. The purpose of subjecting

advocacy to the public regime to a certain extent is to have a public interest in advocacy.

In this framework, the public obligations to which the attorney is subject and the privileges he enjoys are listed in the Attorneyship Law. An activity that has a public interest in its realization can be subjected to public rules separated from private law, regardless of who performs the same.

The activity of the private enterprise can be subject to a public regime to a certain extent if there is a public interest in the performance of the activity. Regardless of who performs the activity or the technical nature of the activity, the performance of the activity in the name of the public benefit is subject to public obligations.

Here, allowing the administration to impose public obligations on private persons is inconvenient and inconsistent in terms of legal security, based on a concept such as public interest whose content cannot be determined precisely. As in the USA, the importance of the procedural principles (the principles regarding the protection of the individual against public power) emerges. The activity that has a public interest in its realization is accepted as a public service in the administrative regime (if other conditions are also fulfilled) and is bound to certain principles.

Therefore, the rights of those who benefit from the service are protected. In the judicial regime, it can be accepted that the rights of the beneficiaries of the activity are protected by the establishment of procedural guarantees (the administration's activity in this direction is subject to a certain procedure) since it cannot be subject to subjecting the activity with public benefit to the public service regime (Şahin, 2010; p.108).

In most of the Continental European countries, recognizing a certain organization to be of "public benefit" indicates that the organization has obtained a "status" and not that it has been registered as a separate legal form (David Moore, Katerina Hadzi-Miceva, and Nilda Bullain, 2008). When the purpose of the activity is the public benefit, the activity is defined as a public service in the Continental European system, and the individuals are protected against obligations and privileges brought for the public benefit by binding to certain principles (public service principles) in terms of technical nature.

However, the protection of the individual against the obligations and privileges created for the purpose of public benefit in the Anglo-American system, which does not bind the activity to certain rules due to its technical nature, by giving importance to the result rather than the nature of the activity, is provided through procedural principles and guarantees. Therefore, administrative procedural law was adopted in the USA before several Continental European countries. Consequently, the main issue is whether the activity that has public interest in its realization is assigned to the administration as a duty.

In this context, although there is an abundant number of cases in which private law is applied to this activity, public law will primarily be applied. The implementation of public law refers to a separate legal regime expressed as "public law procedure" or "public law regime", subject to certain privileges, obligations, and principles (such as equality and continuity) with a public interest inherent in its realization. However, accepting the activities that are not assigned as a duty to the administration as a public service means keeping the concept of public service very broad.

CONCLUSION

Since public lawyers are considered civil servants, they can be inspected and supervised by non-legal disciplinary supervisors or boards. In our opinion, if the jurisdictions accept that public lawyers are

professional officers and take into account the attorneyship legislation as a priority in their supervision and activities, it would be a judicious and healthy practice empowering attorneyship. However, the change of attitude by the judiciary will not suffice in solving the problems. There is no doubt that changing the legislation and trying to solve the problems is at the discretion and authority of the legislator.

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