

QUALIFYING EXAM AS A CONDITION TO OBTAINING THE STATUS OF A LAWYER: COMPARATIVE LEGAL ASPECTS

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1. Introduction

A lawyer is assigned a constitutional duty to provide professional legal assistance to persons. Guaranteeing a person to receive such assistance, the state sets higher qualification requirements for applicants for the status of the lawyer. When considering the nature of the legal status of the lawyer the emphasis is put on the question of the order of acquisition of such status. At the same time, we must note that one of the prerequisites for the person access to the legal profession is passing the qualification examination. The relevance of the study is shown in the fact that the qualification exam is regarded as contender's dropout condition, who are not able to carry out professional activities on the provision of adequate legal assistance to persons appropriate in the future.

The problem of determining the legal nature of the qualification exam as one of the conditions for obtaining the status of lawyer has been the subject of a number of scientists' research. Among the scholars who have examined some aspects of this problem, one should distinguish the works of V. I. Golovanov, M. A. Kosarev, M. S. Kosenko, N. A. Kudryavtseva, R. G. Melnichenko, S. F. Safulko, M. B. Smolensky and others. At the same time, nowadays a sufficient number of controversial issues remain in this area.

The purpose of this article is to analyze the legal nature of the qualifying examination as a condition for obtaining the status of lawyer. The main tasks of the author are as follows: to reveal the essence of the conditions of access to the legal profession as the person's passing of qualification examination; to analyze theoretical approaches and norms in the Ukrainian legislation and foreign legislation regulating this issue; and to formulate one's own attitude to the procedure of passing the qualification test as a condition for obtaining the status of the lawyer on the basis of the analysis.

2. Qualification exam as a condition of obtaining the status of lawyer in Ukraine

A mandatory condition for obtaining the status of Ukrainian lawyer is passing the appropriate qualification examination. It should be noted that in the legal literature scholars have different opinions concerning to the fact of obtaining the status of a lawyer. So, the compilers of the textbook *The legal profession in the Russian Federation* agree with the need for the existence of such exam, they indicate that *the qualifying examination is to determine the applicant's opportunity to qualify to provide legal assistance*¹, while nothing that such an examination also means of establishing whether or not an applicant has knowledge that correspond to his education. They also point out that such a condition complies with the Regulation on the Role of Lawyers, adopted by the VIII Congress of the United Nations in August 1990, in Havana², namely P. 9, where it is noted that the government, professional associations of lawyers and educational institutions shall ensure that lawyers shall receive appropriate education, training and knowledge of the ideals and ethical duties of lawyers as well as and human rights and fundamental freedoms recognized by national and international law.

A different view is held by the scholars who oppose the existence of the necessary conditions for qualification examination by a person who has expressed a desire to get the status of the lawyer. So, I. Golovan, pointing to the state certification of persons graduating from higher education which exists in Ukraine, draws attention to the fact that it is not clear on what grounds the Bar shows distrust of the state certification system, conducting re-examination of lawyers who want to become lawyer?³. He suggests to enter the average score of the diploma instead of passing the qualification exam, setting it at 4.5, while questioning the passing of such a test by numerous members of the qualifying commissions. Exploring the view of Golovan, the position of R. G. Melnichenko should be taken into account, who noted that the qualification committee took over the function of rechecking the results of final state certification (which is the basis for the issuance of a diploma of higher legal education), appropriately indicates that the evaluation commission majority (and as a rule it's everybody) are persons with academic degrees, who are experts in the field of pedagogy, also created various commissions (the experts in the field of the theory of state and law, as well as in special subjects), while the

¹ *Адвокатура в Российской Федерации : учебное пособие* / А. В. ГРИНЕНКО–Ю. А. КОСТАНОВ–С. А. НЕВСКИЙ; Под ред. А. В. Гриненко. – М.: ТК Велби, 2003. – С. 36.

² Basic Principles on the Role of Lawyers, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990 [Электронный ресурс]. – Режим доступа: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>

³ Головань І. Чи треба змінювати Закон «Про адвокатуру»? [Електронний ресурс] / І. Головань // Дзеркало тижня. – 2004. – № 7 (482). – Режим доступу: http://gazeta.dt.ua/LAW/chi_treba_zminyuvati_zakon_pro_advokaturu.html

members of the qualification commissions *think it possible to evaluate the candidate on all issues of law*⁴.

In our opinion, each of these positions is attention-worthy, and that's why we consider it necessary to review the order of the qualification examination of persons who have expressed a desire to become a lawyer in Ukraine, and the experience of foreign countries, to determine of the form of assessment of knowledge of these persons, which is appropriate for the reaching of the goal.

First of all, we should note that, in accordance with Part 1 and Part 2 Art. 9 of the Law of Ukraine *On Advocacy and Legal Practice*⁵ qualifying exam is a certification of a person which identifies the theoretical knowledge in the fields of law, history of legal profession, legal ethics as well as to identify the level of his skills and abilities in application of the law.

So, the purpose of the qualification examination, along with the definition of the level of theoretical knowledge of the applicant, is the identification of the level of his skills and abilities. This state of affairs is reflected in the Programme of qualification exam⁶, in which the written exam consists of the preparation of civil, economic, administrative, criminal, procedural documents and procedural documents of Administrative Offences (3 of more than 60 options), as well as in drawing conclusions about legal position and protection tactics or providing other legal assistance in the given case.

In this case, one should take into account the fact that, firstly, in accordance with the Ukrainian legislation qualification exam is not preceded by the internship institution (the purpose of which is the acquisition by a person of practical skills), and secondly, the Ukrainian system of legal education is characterized by providing job seekers a fundamental theoretical knowledge. We must not forget that, in accordance with the Order of admission to the qualification exam, the Order of the qualification examination and evaluation techniques qualification exam to be eligible to practice law in Ukraine (new edition)⁷ written examination is passed first (PG 13.1 section 2), and persons who successfully pass the written exam are allowed to pass the oral examination (Sec. 14.1 of section 2). All this combined with the fact that the qualification exam program mentioned above is duplicated with the

⁴ Мельниченко Р. Г. Квалификационный экзамен на получение статуса российского адвоката / Р. Г. Мельниченко // Право и образование. – 2010. – № 11. – С. 28–29.

⁵ Про адвокатуру та адвокатську діяльність : Закон України від 5 липня 2012 р. № 5076-VI // *Офіційний вісник України*. – 2012. – № 62. – Ст. 17.

⁶ Програма складання кваліфікаційного іспиту [Електронний ресурс], затверджена рішенням Ради адвокатів України від 01 червня 2013 року №153. – Режим доступу: <http://unba.org.ua/assets/uploads/legislations/programmy/2013.06.01-programma-153.pdf>

⁷ Порядок допуску до складання кваліфікаційного іспиту, Порядок складання кваліфікаційного іспиту та методики оцінювання результатів складання кваліфікаційного іспиту для набуття права на заняття адвокатською діяльністю в Україні (нова редакція) [Електронний ресурс], які затверджені рішенням Ради адвокатів України від 17 грудня 2013 року № 270. – Режим доступу: <http://unba.org.ua/assets/uploads/legislations/poryadki/2015.09.25-poryadok-104.pdf>

program of the internship⁸ gives us the opportunity to come to a conclusion of essential drawbacks in the procedure of the organization and passing the qualification examination by persons willing to obtain the status of Ukrainian lawyer.

This drawback mentioned above is grounded on the fact that great attention (and in some cases decisive) is given to practical knowledge and skills of the applicant to obtain the status of lawyer while passing the qualification exam. Considering the fact that the system of legal education in Ukraine is characterized by providing mainly fundamental theoretical knowledge, the position of M. S. Kosenko deserves attention. He writes that *a law degree can serve as a basis (the original knowledge base) and the requirement necessary for the professional specialized training of such a person, as a result of which it is necessary to take a qualifying examination*⁹. In addition, in our opinion, the Ukrainian legislator's binding requirement of a two-year qualifying period of a person who has expressed a desire to become a lawyer, does not always justify the stated objective for the acquisition by the person of practical knowledge and skills necessary for further independent exercise of advocacy. The mentioned above facts gives us the opportunity to question the usefulness of the qualification examination in accordance with the procedure that exists nowadays, including the passing of such exam before passing the internship.

3. The experience of foreign countries in obtaining the status of a lawyer

Foreign lawmakers also use the qualifying examination as a condition for acquiring the status of lawyer. So, for example the French legislator provides the necessity to first passing the entrance exam by the applicant for the status of the lawyer at the regional training centre (where a person passes the theoretical and practical training for at least eighteen months). After graduating and obtaining a certificate of compliance with the legal profession (which still does not give the right to self-employment), such person should go through the internship (at least two years), and only after the appropriate validation (verification of skills in the specialty) National Council advocates a certificate, and the person is included in the register of lawyers (Art. 12 and 12-1 of the Law *Concerning the reform of certain judicial and legal professions* from 21 December 1971 № 71–1130)¹⁰ All of this indicates that the candidate for the status of a French lawyer has to actually pass two exami-

⁸ Програма проходження стажування для отримання особою свідоцтва про право на заняття адвокатською діяльністю [Електронний ресурс], затверджена рішенням Ради адвокатів України 01 червня 2013 року №125. – Режим доступу: <http://unba.org.ua/assets/uploads/legislations/programmy/2013.06.01-programma-125.pdf>

⁹ КОСЕНКО М. С. Місце кваліфікаційно-дисциплінарної комісії адвокатури у системі формування професійної адвокатури України / М. С. Косенко // *Вісник Академії адвокатури України*. – 2013. – Число 2. – С. 100.

¹⁰ Portant réforme de certaines professions judiciaires et juridiques [Електронний ресурс] : Loi du 31 décembre 1971 № 71–1130. – Режим доступу: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte= EGITEXT000006068396>

nations: the first, which is called “entrance” (as the access to the regional centre of professional training); and the second – “graduation” (after probation).

German legislature has a slightly different approach, which also points to the need for passing by the applicant two exams, but unlike the French, the first of such examinations is passed *in the school where the future judge or a lawyer has studied*¹¹ and that’s why it is called «graduating» in the legal literature. In the future, a person who wants to become a lawyer or a judge (in accordance with Art. 4 of the Federal Law *On Advocacy*¹² the person who obtained the right to hold the office of judge also can be a lawyer)¹³, in accordance with Art. 5 “b” of the Federal Law *On the Status of Judges* passes a two-year probation, and only then he passes the second exam, but *under the auspices of the Ministry of (management) Justice respective administrative territory (land)*¹⁴.

Despite the fact that the French and German legislators actually use different ways for the legal profession, but they are united by a common objective of the abovementioned first examination, namely a test of knowledge (of the main professional disciplines) of applicants for the status of the lawyer to determine their ability to be engaged in advocacy.

It should be noted that there are interesting conditions that must be met to practice law in Hungary, and it is provided in paragraph 13 of the Hungarian Republic *On Lawyers*. Lawyer can be a person who is a member of the Bar Association, he took the oath and received a photo ID. The lawyer must comply with the following conditions:

- a) is a citizen of any country in accordance with the Agreement on the European Economic Area citizens of the State party;
- b) have a higher legal education;
- c) passed the state exam in Hungarian law;
- d) worked as a lawyer, assistant lawyer to practice law at least for 1 year;
- e) is a member of the Hungarian Lawyers Insurance Association;
- f) has available office within the territory of the Chamber of Advocates;
- g) does not fall within the grounds for refusal¹⁵.

It should be noted that internship in Hungary before the exam should be at least 3 years with 8 hour working day, if it’s less than 8 hour than internship increases¹⁶.

¹¹ СОЛОВЬЕВА Ю. И. Актуальные проблемы приобретения статуса адвоката и подготовки к адвокатуре / Ю. И. СОЛОВЬЕВА, О. В. ПОСПЕЛОВ // Наука и Мир. – 2014. – № 10. – Т. 2. – С. 47.

¹² Bundesrechtsanwaltsordnung (BRAO) [Электронный ресурс], ausfertigungsdatum 01.08.1959. – Режим доступа: <http://www.gesetze-im-internet.de/bundesrecht/brao/gesamt.pdf>

¹³ Deutsches Richtergesetz (DRiG) [Электронный ресурс], ausfertigungsdatum 08.09.1961. – Режим доступа: <http://www.gesetze-im-internet.de/bundesrecht/drig/gesamt.pdf>

¹⁴ СМОЛЕНСКИЙ М. Б. Адвокатская деятельность и адвокатура Российской Федерации / М. Б. Смоленский. – Ростов-на-Дону: «Феникс», 2004. – С. 199.

¹⁵ 1998. évi XI. Törvény az ügyvédekről // [online source].: http://njt.hu/cgi_bin/njt_doc.cgi?docid=34117.242980

¹⁶ 5/1991. (IV. 4.) IM rendelet a jogi szakvizsgáról // [online resource]. – www.njt.hu/cgi_bin/njt_doc.cgi?docid=14954.228085

We consider it necessary to change the procedure of passing the “entrance” exam qualification by the applicants for the status of Ukrainian lawyer, which has to be passed before the internship. In this case, the view of Melnichenko is attention-worthy: *candidates should be given the most basic questions, and secondly, with the limited scope of legal knowledge – issues of advocacy and law*¹⁷. According to his opinion, in this case the most unsuitable candidates for the status of the lawyer will be discarded. In addition, in our opinion, making a decision on the admission of persons to advocacy one should take into account not only the formal knowledge, but also moral and ethical level of individuals. Such a level should be determined by testing to establish the professional level of the applicant and psychological testing. At the same time, we must proceed from the fact that *it is impossible to require the presence of psychological competence of the lawyer, a predisposition to acquire this competence can be checked*¹⁸. A. F. Coney proceeded from the fact that the lawyer should be an educated person whose general education is ahead of special and care about the man is above all¹⁹.

4. Conclusion

So, we shared the position of the Ukrainian legislator, who uses the qualification examination as the person’s access to the legal profession, but we believe that the approach to its use should be changed. In our opinion, the applicant for the status of lawyer should pass two qualifying exams, namely one (“entry”) prior to the internship and the second (“graduating”) – after its passing. The purpose of “entrance” exam is only to check a person’s ability to proceed his further theoretical and practical training in order to properly implement advocacy in the future, “graduating” – readiness of a person to carry out such activities on his own. In addition, in our opinion, “graduation” qualifying examination should be passed by all persons who wish to acquire the status of a lawyer, even those who use alternative methods of obtaining such status (without internship).

¹⁷ Мельниченко Р.Г. Квалификационный экзамен на получение статуса российского адвоката / Р. Г. Мельниченко // Право и образование. – 2010. – № 11. – С. 36.

¹⁸ Мельниченко Р. Г. Почистить фильтры (Положение о порядке сдачи квалификационного экзамена на присвоение статуса адвоката нуждается в доработке) / Р.Г. Мельниченко // Новая адвокатская газета. – 2010. – № 23. – С. 7.

¹⁹ Кони А.Ф. Собрание сочинений в восьми томах / А. Ф. Кони; под общ. ред. В.Г.Базанова, Л. Н. Смирнова, К. И. Чуковского. – М.: Юридическое издательство, 1967. – Том 3: Судебные речи. – С. 7.