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Who demands collective action in an imperfect institutional environment? A case study of the profession of advocates in Russia

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ABSTRACT

We analyse the profession of criminal defence lawyers (“advocates”) in Russia to understand their potential for collective action in an imperfect institutional environment. In 2013, we conducted a survey of 372 advocates in 9 regions of Russia. The following two main hypotheses are tested: (1) lawyers with strong ethical values have a higher demand for collective action; and (2) the negative experience of clients’ rights violations by law enforcement officers can motivate advocates to support the foundation of a strong professional association. We suggest that an advocate’s profession with bona fide members at the core could be an instrument to evaluate and to improve the quality of law enforcement in Russia.

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1. Introduction

After perestroika and the collapse of the Soviet Union, two opposing processes could be observed in Russia. On the one hand, the market transition implied the development of legal regulation and the formation of legal institutions to accompany growing demand for legal services. On signal of this demand was manifested in the dramatic increase in the number of law students. On the other hand, because of the weak state and the general degradation of the law enforcement system, which was unprepared to address the new realities, most economic entities either ignored legal requirements – engaging in large-scale tax evasion, barter and non-payments, etc. – or tried to manipulate legal norms, such as the legislation concerning bankruptcy and joint-

stock companies, in unintended ways. The consequence of these two processes was an increase in the size of the profession of advocates (licensed private criminal defence lawyers) and a simultaneous obvious decline in professional standards. After Vladimir Putin came to power in the 2000s, the restoration of the state led to the strengthening of the law enforcement system and increased risk for those engaging in legal noncompliance. However, the combination of non-homogeneous staff and a distorted pattern of incentives stemming from the closed nature of the law enforcement system and a lack of public control over it resulted in a systematic tendency towards accusatory bias in court decisions (the probability of not-guilty verdict is less than 1%), violent pressure on businesses, corruption, large-scale violations of human rights, and a lack of progress in the fight against crime.

Attempts to reform the existing system through ongoing general legal reform, reforms of the Interior Ministry, the separation of the Investigation Committee and the Pros-

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education Office, etc. have thus far produced no tangible results. The key problems linking law enforcement and judicial system reforms are their objective evaluation in an absence of independent courts and genuine political competition, as well as the extremely limited influence of free mass media. Public opinion polls concerning the performance of law enforcement do not provide a reliable picture of the situation, because the majority of the population is rarely involved with the courts and the prosecution authorities. Any real encounters often have dramatic implications, however. In the absence of reliable information this situation entails, advocates can step in to fill the information gap: providing both the state and society with an external evaluation of the quality of law enforcement and an examination of potential reforms. In this study we try to answer two key questions: what factors increase the demand of advocates for collective action in the context of an imperfect institutional environment and what groups of advocates can become the drivers for social changes in Russia?

In this study we try to show that a corporation of advocates could be subjected to changes in the legal profession under current conditions. Advocate (“advokat”) is a formal status that allows Russian lawyers to work on criminal cases. Since 2002 lawyers must have higher legal education and at least two years of legal practice to take the special exam to become an advocate. Every advocate in Russia is a member of a regional chamber of advocates and must pay an annual fee and conform to a formal code of legal ethics. Because of this, advocates are the most organised part of the legal community in contemporary Russia. This professional group has clear membership and strict rules of professional control that private lawyers (so called “chastnopraktikuyushchie yuristy”, attorneys who did not pass the bar exam) lack. Therefore, in our study we will focus on advocates as the most organised part of the legal profession in Russia. Advocates as a special professional group are by law part of civil society. Although they regularly interact with various representatives of law enforcement bodies they are formally independent from them. The question is to what extent this professional group is ready to become a platform for creating an external evaluation of the law enforcement system and its practices. We argue that now there are no other professional or social groups in Russia with the relevant skills and knowledge of the law enforcement system and organisational capacity for to provide systemic information. An important advantage of advocates compared to other sources is that their evaluations of the quality of law enforcement have a higher probability of being politically neutral. Therefore under the current political regime, they can be accepted by ruling elites in ways that assessments by human rights activists or the political opposition cannot and can help to improve the law enforcement system. However this important task can only be realised by a large, inclusive professional corporation of advocates.

In our survey of 372 advocates conducted from November to December 2013 in nine regions of Russia, we proposed a mechanism for a type of “external evaluation”. The possibility to create such external evaluation is not yet widely understood by the majority in the profession, but the idea receives support from advocates with whom we have dis-

cussed it. The survey also allows us to assess the main incentives for collective action in the community of lawyers, because this mechanism can only be launched in a professional group through the efforts of its members.

To evaluate the potential incentives of advocates for collective action, we formed and tested several hypotheses. First,

Hypothesis 1. The demand for collective action (exercised through professional associations) will primarily be expressed by advocates with high ethical standards.

By ethical standards, we mean an orientation of advocates on the interests of their clients and the reputation of the legal profession, rather than a focus on personal benefit or the interests of state. Generally, this means that advocates will follow the formal rules in Russia’s Code of Ethics. We note that the risk of a decline in the reputation of the profession is quite tangible to advocates, as it may manifest in an overall drop in prices for legal services because of a lack of quality signals (cf. Akerlof, 1970 for a similar situation in “lemon” car markets).

Hypothesis 2. A personal encounter in which the rights of defendants are violated by law enforcement will create an incentive for advocates’ collective action.

This circumstance may be indirectly registered through advocate assessments of existing law enforcement practices and the reasons for the “accusatory bias” in legal decisions.

By suggesting these hypotheses, we try to determine both the internal motivation (professional ethics) and external stimuli (violations of the rights of defendants) for collective action among advocates. Thus we can take into account the most important factors of collective action discussed in the literature within our study.

This paper is divided into 8 sections. In Section 2 we discuss several theoretical approaches to research on the profession of advocates and the factors that can stimulate collective action among professionals. In Section 3 we provide a short history of Russian advocacy and describe the characteristics of this corporation in modern Russia. After the description of sample and methodology (Section 4) we present a brief portrait of an advocate in Russia (Section 5) and then discuss both internal and external incentives for collective action (Section 6). Finally, we test our hypotheses using the regression analysis (Section 7) and then conclude.

2. Theoretical approaches to the research of the profession of attorneys

Research on the legal profession traditionally proceeds in the framework of professionalism (Evetts, 2003). Professionalism emphasises the privileged status of lawyers equipped with special formal knowledge, ethical standards, and a developed professional community (Brante, 1988). Some researchers note that professional groups follow a “third logic” (Freidson, 2001) distinctive from the logic of the market and the logic of bureaucracy. Interestingly, business associations occupy a similar marginal place between the state and the market (Schneider, 2004); their mission

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