

A historical panorama of the legal professions in France and abroad

Jean-Louis Halpérin,
professor of the history of law, École Normale Supérieure

Abstract:

This historical approach inquires into the origins and evolution of the legal professions. Legal procedures were invented before legal experts appeared in ancient societies such as Rome (*prudents*). The figure of the court lawyer appeared later, before prosecutors, attorneys and notaries emerged out of learned sources of law during the Middle Ages. In France, royal authorities required a *licence* in law for lawyers and then judges. By the end of the 17th century, they tolerated the formation of the equivalent of bar associations. After the French Revolution, Napoleon reorganized the professions of notary and attorney. A comparison with foreign countries lets us glimpse various configurations of these legal professions, a rapprochement between them during the 19th and 20th centuries and the march toward professionalization.

How far back can we go to talk about the legal professions? For legal positivists, law is a technique, like the wheel or money, that was invented separately in different ancient societies: the principalities and then empire of China, the Judaic world, the city of Rome.... Nothing attests the existence of experts whose religious or political functions “predetermined” them to make this invention. What is more likely is that jurists gradually appeared long before the invention of the law. Judges were in charge of settling disputes before the emergence of legal techniques; and for a long time, these judges were not “learned” in the law.¹

The emergence of experts in the law

Ancient Rome was probably the first civilization where jurists appeared: the *prudents* were neither judges nor lawyers, but men of experience, often former magistrates, who devoted part of their time to consultations and to writing about the law. Pleadings, which mainly occurred during political trials, were left to orators like Cicero (CROOK 1995). Roman judges were, at first, private persons to whom the praetor referred cases for the examination of their merits before becoming polyvalent imperial officials. This pattern also holds for judges in China. Not before Late Antiquity (the Justinian and Theodosian codes) were rules formulated for lawyers (registry, oath, colleges) and the notaries who, in the imperial chancellery or cities, kept registers of writs but without certifying their authenticity.

During the Lombard and Carolingian periods, only the profession of notary survived in Italy, in the courts of bishops or counts. Along with the rediscovery of Roman law and the rise of canon law, the figure of the lawyer reappeared during the 12th-13th centuries, when, too, the profession of notary spread from Italy as it obtained from the pope, emperor or princes the privilege of certifying writs as authentic.

¹ This article has been translated from French by Noal Mellott (Omaha Beach, France).

Before ecclesiastical (and then secular) courts, the duty of prosecutors was to use written documents on behalf of the parties they represented, while that of lawyers was to use the law to plead difficult cases orally. In Italy, these first professional jurists formed “colleges”, sometimes separate colleges for judges and lawyers, who had a university education, and for notaries and prosecutors, who learned the trade through practice (BRUNDAGE 2008). In England, where the judges of Westminster were often *clerks*, proceedings were initiated by attorneys or solicitors, whereas pleadings were the prerogative of “serjeants-at-law”, who were, as of the 14th century, the youngest barristers in the Inns of Court. In much of Europe, despite the merger of the two professions in Saxony and Prussia during the 18th century, the duality between prosecutor and lawyer persisted.

Regulated professions

In France, the monarchy intervened at an early date in organizing the legal professions. A law diploma, the *licence*, was required of lawyers in 1517 and of judges (selected from among the lawyers with at least two years of experience) as of 1679. Prosecutors and notaries held royal offices, which were limited in number. At the end of his reign, Louis XIV allowed for the formation of an “order” of lawyers in the Paris *parlement*; and Chancellor Daguesseau praised the independence of lawyers (BELL 1994). The model of the Parisian “order of lawyers” (bar association), though imitated by some provincial cities, was not widespread (LEUWERS 2006). The Constituent Assembly forbid lawyers from forming an “order” and left the exercise of defense before a court of law open. Furthermore solicitors (*avoués*) replaced prosecutors till 1793, but the profession of notary was preserved.

The Consulate and Empire reestablished a legal framework for these officers of court. The position of solicitor and the quota system were reinstated for first hearings and appeals (1800). An act of 16 March 1803 declared notaries to be “public functionaries” who certify documents. An act of 14 March 1804 required, once again, that lawyers have a *licence* in law; and a decree of 14 December 1810 required them to register at the bar of a court of law. The freedom of the bar to choose its president and the members of its disciplinary council was so restricted that French lawyers fought to have the decree of 1810 changed. They obtained a broader monopoly (1822) and the institution of elections for their “order” (1830).

Borne by the strong implication of lawyers (especially from Paris) in the political battles led by liberals (KARPIK 1995), the emancipation of bar associations from government oversight was achieved later in Italy and Germany, following unification (1861 and 1871 respectively) under laws dating from 1874 and 1878. Whereas the *rechtsanwalt* in Germany brought together the activities of representation and pleading, legal professionals in France were still scattered among *avocats*, *avoués*, *notaires*, *agrés* and *défenseurs* at the bars of courts with separate spheres of competence. In England, solicitors had, as of 1823, a powerful, voluntary professional association, the Law Society. Barristers, fewer in number, could join the Bar Council after 1894, but they still have no obligatory professional organization apart from being members of the Inns of Court. In the United States, lawyers could join the American Bar Association as of 1878 (ABEL 1989), which played a leading role in instituting a single profession recognized in all states in the union.

The march toward professionalization

In all countries, the title of lawyer was long coveted by persons in quest of a social status but who took little or no part in pleadings. The genuine professionalization of this occupation and the end of dilettante lawyers took place in several stages from the mid-19th till the mid-20th century.

In France, when lawyers were made to pay a licensing tax in 1850, the members of the bar fell from six to four thousand. The latter figure, which remained relatively stable till the start of the 20th century, corresponded to lawyers with a minimum of professional practice (HALPÉRIN 1996). Inflation at the time of WW I wiped out “rentier lawyers”, and a 1920 decree required a practice of the profession for maintaining the title. Tighter training requirements — the conferences organized in several bars for learning oratory and the spreading practice of working (unpaid for a long period) as an older lawyer’s secretary — led belatedly to the creation of an examination for admission to the profession. Demanded by the National Association of Lawyers, founded in 1920, the *certificat d’aptitude à la profession d’avocat* was adopted under the Vichy regime by an act of 26 June 1941. This law diploma would remain in place following Liberation. The idea of disinterestedness and the freedom to set fees still place lawyers apart from solicitors and notaries, which have fixed rate schedules and have to undergo a training period as clerk.

In England, solicitors were the first to establish, through the Law Society, a professional education with courses and examinations for completing their training as clerks. Barristers followed a university curriculum in the humanities rather than in the law. Since membership in the Inns of Court amounted to a series of dinners with older lawyers and judges, the professionalization of the reputable profession of barrister proceeded much more slowly. Judges were chosen exclusively from among barristers.

Till the end of the 19th century in the United States, given a strong free-enterprise tradition in several states, lawmakers opted for training through practice rather than a university education. Little by little, with the support of the American Bar Association, law schools grew; and more importance was placed on diplomas. In several states, graduates from these schools were dispensed from sitting for examinations for admission to the bar. During the interwar period, the standard for becoming a lawyer was a college education followed by three years in law school, and then the passing (rather easily) of state bar examinations.

Professionalization and the reconfiguration of the legal professions

Professionalization of the legal professions advanced during the decades following WW II.

Although, in Nazi Germany, Jews had been massively excluded from the legal professions (where they made up 22% of bar members), the Federal Republic reestablished the Prussian system that required, following a first state examination, a three-year period of training in courts, lawyers’ offices or public administrations for future members of the bench and bar. At the end of this training and following a second state examination, postulants made a choice between these two professions — the judiciary attracting those with the best grades.

In England, the majority of barristers started receiving a law school education during the 1960s. In 1964, one year of training was instituted in cooperation with the Inns of Court.

In Italy, the professions of *procuratore* and *avvocato* came closer together as of 1933. The first, whose members were allowed to represent clients and plead in appellate courts, became a preliminary for registration as a lawyer, a profession whose members could plead anywhere in the country. In 1997, the *procuratore* was abolished. Future lawyers had to spend time in a specialized school before passing a state examination in order to enjoy all the prerogatives of their status.

The most spectacular reforms — given the splintering of the legal professions — were carried out in France. An act of 31 December 1971 abolished the *avoué de première instance* and *agrégé*. Lawyers (*avocats*) were then allowed to represent clients before courts of first instance (on the model of the German *rechtsanwalt*, which had been preserved in Alsace-Moselle); and the profession of “legal advisor” (*conseiller juridique*) was recognized for French or foreign attorneys, who could eventually form associations. Professional training centers for lawyers were set up in 1972; and an admissions examination was introduced (1980-1981). Meanwhile, the Centre National d’Études Judiciaires, created in 1958 with an admissions examination under a quota system, had been renamed École Nationale de la Magistrature in 1970. Since 1973, notaries have to have a master’s degree in law. An act of 31 December 1990 merged “legal advisors” and members of the bar into a single, “big” profession: lawyer (*avocat*). The position of *avoués d’appel* was abolished in 2011. The Macron Act of 2015 reformed access to the profession of notary. Given the prospects of a rapprochement between the professions of *huissier* (bailiff) and *commissaire-priseur* (auctioneer/assessor), France has considerably reduced the number of legal professions.

New professions with old names?

Traditionally, the legal professions corresponded to two different types of work and practices. Notaries, *avoués*, solicitors and *huissiers* drew up writs. What was important was the drafting of written documents and keeping them in registries. These professions needed the help of clerks and tended, therefore, to form *chambres* (offices with a sizeable staff) or even professional associations (as solicitors did in the 18th century). Lawyers, educated at a university and reputedly learned in the law, mainly pleaded in court; they intervened orally before a tribunal and did not keep any records. The exercise of this profession was resolutely individual, even though consultations, signed by one or more lawyers, existed under the monarchy in France and even though the busiest “tenors of the bar”, as they are called, were backed by secretaries.

These professional cultures started converging in the 19th century. Lawyers formed law firms, at first in the United States (thanks to the Cravath System) by recruiting young graduates from the best law schools and, after a few years, making them partners. This trend spread to Germany, England and, much later, France and Italy. In France, lawyers could form associations in 1954, partnerships (*SCP*) in 1971, or corporations (*SA*) and limited liability companies (*SARL*) in 1990. In parallel, they were also becoming employees on salary in big firms: the *syndikusanwälte* in Germany or in-house counsels in the United States. The role of counsel/advisor, which included drawing up contracts, grew.

The trend toward concentration in big law firms started in the United States in the 1950s as foreign offices were opened, for example by Baker & McKenzie. It swelled in the United Kingdom, where it affected both solicitors and barristers, and then flooded over onto the continent, in particular France (“legal counsel companies” from 1971 to 1990). Despite its lesser force in Germany, Italy and South America, this trend is worldwide. Furthermore, it is sustained by the free circulation of legal professionals in the European Union. Recent legislation has recognized the formation of companies or networks that recruit various legal professionals and even expert accountants.

Different legal professions have many more points of contact than in the past; but everywhere, the number of lawyers has increased, as well as social stratification within this profession. This situation does not put an end to competition between the legal professions, this competition being a legacy of history.

References

ABEL R.L. (1989), *American Lawyers* (Oxford: Oxford University Press).

BELL D. (1994), *Lawyers and Citizens* (Oxford: Oxford University Press).

BRUNDAGE J. (2008), *The Medieval Origins of the Legal Profession* (Chicago, IL: University Press).

CROOK J.A. (1995) *Legal Advocacy in the Roman World* (Ithaca, NY: Cornell University Press).

HALPÉRIN J.L. (1996) Editor of *Avocats et notaires en Europe* (Paris: LGDJ).

KARPIK L. (1995) *Les Avocats. Entre l'État, le public et le marché XIII^e-XX^e siècle* (Paris: Gallimard).

LEUWERS H. (2006) *L'Invention du barreau français, 1660-1830* (Paris: Éditions de l'ÉHÉSS).