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LEGAL ASSISTANCE OF A LAWYER IN CHECKING A CRIME REPORT

Natalya Rafikovna Krysina (a)*, Vladimir Nikolaevich Naryadchikov (b), Lyubov Danilovna Kalinkina (c), Elena Ivanovna Shigurova (d)

*Corresponding author

(a) National Research Ogarev Mordovia State University, 68, Bolshevistskaya str., Saransk, Russia
natalya.mukhudinova@yandex.ru,

(b) National Research Ogarev Mordovia State University, 68, Bolshevistskaya str., Saransk, Russia
olodimer@mail.ru,

(c) National Research Ogarev Mordovia State University, 68, Bolshevistskaya str., Saransk, Russia
dep-general@adm.mrsu.ru,

(d) National Research Ogarev Mordovia State University, 68, Bolshevistskaya str., Saransk, Russia
dep-general@adm.mrsu.ru

Abstract

The development of the legal regulation of ensuring the right to qualified legal assistance in the criminal procedure legislation of the Russia and other members of the Commonwealth of Independent States has contributed to the expansion of guarantees for qualified legal assistance at the first stages of a criminal case – the stage of criminal proceedings. The authors note that further improvement of the mechanism for ensuring this constitutional right at the stage of criminal prosecution is necessary in terms of clarifying the scope and content of the procedural rights of a lawyer who provides qualified legal assistance to participants in criminal proceedings in checking reports of a crime. Legislation on advocacy and the emerging law enforcement practice allow offering the necessary amount of procedural rights of a lawyer in providing qualified legal assistance to the principal at this stage of the criminal case. An analysis of law enforcement practice indicates numerous violations of the right of participants in criminal proceedings to legal assistance of a lawyer: non-clarification or inadequate explanation of this right to participants in criminal proceedings by an official who checks the report of a crime; refusal to a lawyer to exercise his procedural rights in providing legal assistance, etc. The consolidation in the Code of Criminal Procedure of the procedural status of a lawyer as an independent participant in a criminal process will help ensure constitutional right to receive qualified legal assistance in criminal proceedings, in particular, when checking a report of a crime.

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1. Introduction

In accordance with Art. 48 of the Constitution of the Russian Federation, everyone is guaranteed the right to receive qualified legal assistance. Ensuring this constitutional right is important in criminal proceedings, where the restriction of the rights, freedoms and legitimate interests of the individual is most pronounced. The right to qualified legal assistance is, by its legal nature, a guarantee right, as it ensures the realization and protection of other personal rights.

The right to legal aid was formed and received normative consolidation in international and national legislation in the second half of the 20th century, and at present its development, clarification of the essence and content, and improvement of the support mechanism are ongoing. The right to legal assistance, along with the Russian Federation, is enshrined in the constitutions of other member states of the Commonwealth of Independent States (hereinafter referred to as the CIS): the Constitutions of the Azerbaijan Republic (Article 61), the Republic of Kazakhstan (Part 3 of Article 13), the Republic of Armenia (Article 64) and others. The norms of the constitution have a direct and immediate effect, but their basic, general nature presupposes further specification in sectoral legislation, taking into account the specifics of regulated social relations. Therefore, most of the most important constitutional provisions are mediated in the criminal procedure legislation as principles of criminal proceedings. In the criminal procedural legislation of some CIS member states, the transition of constitutional norms that enshrines the right to legal aid to sectoral criminal procedural legislation is carried out in stages: constitutional norm–norm-principle (sectoral criminal procedure principle)–industry criminal procedural norms. Such a transition of constitutional norms to industry principles, as noted in the scientific literature, is most typical (Bezrukov, 2015). And in a similar way, the principle of ensuring the right to qualified legal assistance is enshrined in the Code of Criminal Procedure of the Republic of Kazakhstan (Article 27), the Republic of Azerbaijan (Article 19), as well as the Model Criminal Procedure Code for the CIS member states (Article 15). However, most CIS member states, including the Russian Federation, do not provide in the criminal procedure legislation an independent principle of ensuring the right to qualified legal assistance, mentioning the right of individual participants in criminal proceedings to legal assistance, for example, the right of a suspect, accused to use the assistance of a defense lawyer. We believe that the inclusion in the Code of Criminal Procedure of the Russian Federation (hereinafter the Code of Criminal Procedure) of the principle of ensuring the right to receive qualified legal assistance will positively affect the effectiveness of ensuring this right in criminal proceedings (Mukhudinova, 2008).

In the Russian Federation, with the adoption of the Constitution of 1993, the Code of Criminal Procedure of the Russian Federation of 2001 and the development and improvement of criminal procedure legislation, new approaches have been formed in understanding the right to qualified legal assistance, its content, significance and guarantees of security in criminal proceedings. Thus, the activities of the defender of the suspect, the accused, the representative of the victim have significantly expanded and substantively changed, new ways of securing the right to legal assistance have been enshrined, for example, the participation of a witness attorney in criminal proceedings. Currently, the improvement of the mechanism for ensuring the constitutional right to receive qualified legal assistance at all stages of the criminal process continues.

2. Problem Statement

The stage of initiating a criminal case is the initial stage of the Russian criminal process, in the framework of which the acceptance and verification of a report of a crime is carried out, a decision is made to initiate a criminal case, or to refuse to initiate a criminal case. Ensuring the constitutional right to receive qualified legal assistance at this stage of the criminal process is important, as it allows participants in the criminal process at the earliest stages of criminal proceedings to use legal assistance to protect their rights, freedoms and legitimate interests.

For a long time, the Code of Criminal Procedure did not directly regulate the procedure for securing the right to legal assistance at the stage of criminal proceedings. At the same time, the right of persons involved in checking a report of a crime to qualified legal assistance of a lawyer was in practice exercised on the basis of the provisions of the Federal Law “On Advocate's Activity and the Bar in the Russian Federation” and Art. 48 of the Constitution of the Russian Federation. The lawyer participated with the principal in obtaining explanations, filed motions in the interests of the principal, appealed against unlawful actions (inaction) and decisions of officials checking the report of the crime.

3. Research Questions

As a result of changes made to the Code of Criminal Procedure of the Russian Federation by the Federal Law of March 4, 2013 No. 23-FZ, in Art. 144 of the Code of Criminal Procedure of the Russian Federation, specific aspects of ensuring the constitutional right to receive qualified legal assistance at the stage of initiating a criminal case were directly enshrined and thereby specified. So, in accordance with Part 1.1 of Art. 144 of the Code of Criminal Procedure of the Russian Federation, the persons involved in the production of procedural actions when checking a report of a crime are explained their rights, including the right to use the services of a lawyer, and the possibility of exercising these rights is ensured.

According to the meaning of the law, it is the lawyer who provides legal assistance to individuals in checking the report of a crime. The lawyer, in accordance with the Federal Law “On Advocate's Activity and the Bar in the Russian Federation”, provides qualified legal assistance on a professional basis to individuals and legal entities in order to protect their rights, freedoms and legitimate interests, as well as providing access to justice. However, the procedural status of a lawyer involved in checking a report of a crime, his rights and obligations, liability in the Code of Criminal Procedure of the Russian Federation remains unsettled and in practice is revealed through the application of the norms of the Federal Law “On Advocate's Activity and the Bar in the Russian Federation”, as well as corporate acts of the advocacy community, in particular, the Code of Professional Ethics of the Lawyer. The scientific literature points out the problem of the absence in the Code of Criminal Procedure of the Russian Federation of regulation of the procedural order of a series of verification actions at the stage of initiating a criminal case and the procedural status of their participants (Andreeva et al., 2018; Kalyuzhny & Chaplygina, 2015; Sviridov, 2016; Sushkova & Chistyakov, 2012).

4. Purpose of the Study

The purpose of this study is to determine the scope and content of the procedural rights of a lawyer who provides qualified legal assistance to participants in criminal proceedings in checking a report of a crime under conditions of non-specification of its procedural status in the criminal procedure legislation.

5. Research Methods

The research methodology consists of the dialectical method of scientific knowledge, logical, historical, system-structural, formal-legal methods, comparative legal method in the analysis of the criminal procedural legislation of the CIS member states.

6. Findings

A lawyer, providing qualified legal assistance to participants in criminal proceedings when checking a report of a crime, firstly, exercises the rights stipulated by the Federal Law “On Advocate's Activity and the Bar in the Russian Federation” (Paragraph 3 of Art. 6):

- the right to collect information necessary for the provision of legal assistance, including requesting certificates, characteristics and other documents from state authorities, local authorities, public associations and other organizations in the manner provided for in Art. 6.1 of this Federal Law;
- the right to interrogate, with their consent, persons allegedly owning information relevant to the case in which the lawyer provides legal assistance;
- the right to collect and present objects and documents that can be recognized as material and other evidence in the manner prescribed by the legislation of the Russian Federation;
- attract specialists on a contractual basis to clarify issues related to the provision of legal assistance;
- to freely meet with their principal in private, in conditions that ensure confidentiality (including during his detention), without limiting the number of visits and their duration;
- record (including using technical means) the information contained in the materials of the case in which the lawyer provides legal assistance, while respecting state and other secrets protected by law.

A lawyer is entitled to perform other actions that do not contradict the legislation of the Russian Federation.

Secondly, a lawyer exercises the basic procedural rights provided for by the criminal procedure law:

- the right to participate in the production of investigative, procedural actions that are carried out with the participation of a principal in the verification of a report of a crime;
- the right to get acquainted with the protocols of investigative, procedural actions carried out with the participation of the principal during the verification of the report of a crime;
- the right to file motions;
- the right to challenge;

- the right to bring complaints about actions (inaction) and decisions of officials who verify the report of a crime.

The indicated basic procedural rights are necessary for a lawyer to carry out the function of providing qualified legal assistance to participants in criminal proceedings in checking a report of a crime. For example, a lawyer, exercising the powers provided for in paragraph 3(1) of 3 Art. 6 of the Federal Law “On Advocate's Activity and the Bar in the Russian Federation”, collects information (certificates, other documents) that it can provide to the official who checks the report of the crime by submitting a corresponding petition.

Although the Code of Criminal Procedure of the Russian Federation does not directly fix the procedural rights of a lawyer providing qualified legal assistance to persons when checking a report of a crime, the presence of these basic procedural rights is objectively necessary for the lawyer to exercise his function of providing qualified legal assistance. An analysis of law enforcement practice shows that lawyers exercise the following procedural rights: participate in the production of procedural actions with the participation of the principal (in most cases, explanations), file petitions in order to ensure the rights and legitimate interests of the principal, get acquainted with the materials for checking the report of a crime, appeal against illegal actions (inaction) and decisions of officials who verify the report of a crime to the court, the prosecutor, the head of the investigative body (Krygina, 2018; Naryadchikov, 2018).

The lack of legislative consolidation of the procedural rights of a lawyer providing legal assistance in checking reports of a crime leads to their limitation. For example, lawyer K. filed a request for familiarization with the contents of the explanations of principal V. received during the verification of the report of the crime. The investigator refused the request, indicating that receiving an explanation was not an investigative action, and V. did not have the procedural right to familiarize himself with the materials of the criminal case, respectively, his lawyer K. was also not endowed with that right.

An important guarantee of ensuring the right of participants to verify reports of a crime is the right to know about the procedural rights that they have, and the corresponding obligation of officials carrying out the criminal proceedings to clarify the rights and ensure the possibility of their implementation. In accordance with Part 1.1 of Art. 144 of the Code of Criminal Procedure of the Russian Federation, persons involved in the production of procedural actions when checking a report of a crime are explained their rights and the possibility of exercising these rights, including the right to use the services of a lawyer, is provided. An analysis of law enforcement practice shows that the right to use the services of a lawyer is clarified to persons upon receipt of explanations from them when checking a report of a crime, but since the Code of Criminal Procedure does not provide for a procedural form for the majority of verification actions, including the requirements for a procedural document drawn up when their production, the right to use the services of a lawyer is explained to the participants of the verification actions in different ways. For example, upon receipt of an explanation, the right to use the services of a lawyer is explained as follows (based on an analysis of the explanations, i.e. written documents drawn up when checking the report of a crime): “P. 1.1 of Art. 144 of the Code of Criminal Procedure of the Russian Federation is clarified: (and the full content of this rule is provided.” Moreover, it is often incorrectly indicated in the norms of the law, for example, it indicates the clarification “Art. 144, P. 1 para. 1 of the Code of Criminal Procedure of the Russian Federation”, or “subpara. 1, para. 1 of Art. of

the Code of Criminal Procedure of the Russian Federation”, “subpara. 1 of Art. 144 of the Code of Criminal Procedure of the Russian Federation”, etc., whereas in article 144 there is part 1.1, but there are no paragraphs and subparagraphs. Some explanations note, “Art. 48 of the Constitution of the Russian Federation is clarified and understandable.” In some of the explanations there is no indication of an explanation of the right to use the services of a lawyer to the person from whom the explanations are received. The clarification in many cases, or the lack of clarification to the persons participating in the procedural actions when checking the report of a crime, the right to use the services of a lawyer, negatively affects the enforcement of this right.

At the same time, clarification to the participants of the verification of the message about the crime of their procedural rights, enshrined in part 1.1. Art. 144 of the Code of Criminal Procedure of the Russian Federation, including the right to use the services of a lawyer, is considered in law enforcement practice as a prerequisite for the legality of information obtained during verification actions. For example, the court recognized the report of P.'s confession as unacceptable evidence, since when it was received by the police officer, P. was not clarified, taking into account the requirements of part 1.1 of Art. 144 of the Code of Criminal Procedure of the Russian Federation, the right not to testify against oneself, to use the services of a lawyer, etc. and, accordingly, the possibility of exercising these rights was not provided. Subsequently, at the hearing P. refused to confess, did not plead guilty to a crime, which allowed the court to recognize the confession unacceptable evidence on the basis of part 2 of art. 75 of the Code of Criminal Procedure of the Russian Federation (RM Presidium, 2019).

7. Conclusion

In the conclusion, let us note that the lack of direct legislative consolidation of the procedural rights of a lawyer in the Code of Criminal Procedure of the Russian Federation, which provides qualified legal assistance to participants in criminal proceedings in checking a report of a crime, can lead to unreasonable restriction of its procedural capabilities, complicate the function of providing qualified legal assistance to participants in criminal proceedings, therefore criminal procedure legislation in this part needs further improvement and development, in particular, by securing the procedural status of a lawyer as a participant in criminal proceedings, with specification of his rights and obligations. Such a participant in criminal proceedings should be attributed to the group of “other participants in criminal proceedings”, his function in the criminal process is to provide qualified legal assistance to persons participating in criminal proceedings.

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