

**LAWYER INVESTIGATION IN THE CONTEXT OF THE SUBJECTIVE RIGHT  
TO QUALIFIED LEGAL AID**

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**Abstract.** In article the content of criminal procedure norms of the certain states of Anglo-Saxon and Roman-German legal systems approaches to legislative regulation of lawyer investigation institute on the basis of the comparative and legal analysis of the international legal acts is presented. Arguments in favor of the fact that the lawyer investigation institute needs to be considered as a substantial component of the subjective right for the qualified legal aid and criterion of the legal aid efficiency rendered to the principal are given. Need of a detailed legislative regulation of the minimum standards of the qualified legal aid for the international regulations and the national legislation is proved by authors.

**Keywords:** the right for the qualified legal aid, effective legal aid, the lawyer defender, lawyer investigation, criminal legal proceedings.

**1. Introduction**

The right for the qualified legal aid is not only one of fundamental human rights and the citizen, but it is also the necessary legal instrument of ensuring the right of everyone for access to justice.

This right was acquired by the standard fixing in the conventional international legal acts and the criminal procedure legislation of most the states; however its substantial characteristic demands a theoretical research within implementation of the concept of human rights policy of the modern democratic state.

Systematization of foreign and domestic experience of a research of the matter allows to draw a conclusion that one authors consider the right for the qualified legal aid as an element of system of guarantees of ensuring the rights of participants of criminal legal proceedings [1, p. 46; 2, page 6188], others - as vigorous activity of professional lawyers [3, p. 110; 4, page 306], the third - as one of fundamental human rights and key principles in departure of criminal justice [5, p. 16; 6, page 207].

The international practice, defining a substantial component of legal aid, operates with the term "effective legal aid" that demands development of the concrete quality standards of such help.

The concept of efficiency of legal aid, today, is estimated though some aspects were formalized in the international and national acts. It is represented that the appeal to the international experience, practice of various states and theoretical developments will allow defining the substantial characteristic of the right for the qualified legal aid.

**2. Technique.**

In work provisions of dialectics, general scientific, special and private methods were applied. During a research also specific scientific methods were applied: historical and legal, legalistic, formal and logical, system, comparative methods.

**3. Discussion and Results.**

The right for the qualified legal aid for the first time was affirmed in article 11 of the Universal Declaration of Human Rights adopted by the UN in 1948: "Each person accused of commission of crime has the right to be considered as the innocent until his guilt is not established legally by public judicial proceedings at which all opportunities for protection" are provided to it [7].

This situation was concretized in the International Covenant on Economic, Social and Cultural Rights in the following formulation: "Everyone has the right by consideration of any criminal charge brought to him at least to the following guarantees on the basis of full equality: to be an offender at his presence and to protect itself personally or through the defender chosen by him; if it has no defender, to be notified on this right and to have the defender appointed to it in any such case when the interests of justice of that demand, is gratuitous for it in any such case when it has no enough means for payment of this defender" (the item d of the p. 3 of Art. 14) [8].

The set of the principles of protection of all persons subjected to detention or the conclusion in any form, accepted by the resolution 43/173 of the General Assembly of December 9, 1988 contains similar situation: "The detained person has the right to legal aid from the lawyer. Soon after arrest the person is informed by competent authority on the right, and is given reasonable opportunities for implementation of this right" (Principle 17) [9]. The substantial characteristic of the right to the qualified legal aid reveals in Basic provisions in more detail about a role of lawyers where it is specified that "any person who has no lawyer in cases if the interests of justice demand it, has to be provided with the help of the lawyer having the corresponding competence and experience of conducting similar affairs to provide it effective legal aid without payment from its party if he has no necessary means" [10]. At the regional level this right also finds the fixing: in Art. 6 of the Convention on protection of human rights and fundamental freedoms (1950) [11], in Art. 8 of the American Convention on human rights (1969) [12], Art. 6 of the Convention Commonwealths of Independent States on the rights and fundamental freedoms of the person (1995) [13]. In the specified documents of rule of law for receiving the qualified legal aid practically reproduce provisions of the international acts of universal level and provide opportunities: "to protect himself personally or through the defender chosen by him or, at a lack of means to pay the defender, to use services of the defender appointed to him free of charge when that is demanded by the interests of justice" [11].

In the international regulations standards of the qualified legal aid are accurately not defined that creates problems in law-enforcement activity. In various states such criteria are the qualification examination, existence of a certain legal education, length of service in the specialty, a trial period, age qualification. It is necessary to agree with a position of prosectorialist who offer introduction of the minimum standards of the qualified legal aid which include: "legal education of the person rendering legal aid; presentation to the person rendering legal aid, special requirements (a qualification examination, an experience, etc.); active rendering legal aid which includes production of lawyer investigation" [14, with. 399]. Lawyer investigation represents universal remedy of legal protection which provides independent and independent collecting by the lawyer of proofs for justification of a position of the principal in criminal legal proceedings.

Procedural activity of the lawyer as the defender of the persons subjected to criminal prosecution as realization of the international principle of providing to the suspect and the defendant of the right for protection and the qualified legal aid is enshrined in the procedural legislation of the majority of foreign countries. At the same time procedural position of the lawyer, his right and a duty, opportunity for upholding of procedural interests of the principal and collecting of proofs for criminal case considerably differ depending on a form of criminal trial. Let's consider typical models of a standard regulation of lawyer investigation on the example of a research of the procedural legislation of the certain states of Anglo-Saxon and Roman-German legal systems. Criminal legal proceedings in the USA represent a dispute of the equal parties in the face of impartial court. The equality assumes equal procedural opportunities of the parties for upholding of the procedural interest by submission of collected proofs and belief of court in validity of the required facts.

The lawyer defender in the USA has the right to make full lawyer investigation at pre-judicial stages of criminal legal proceedings. Lawyer investigation is made for the purpose of collecting detailed information on an event of crime, establishment of potential witnesses of crime, search of material evidences, involvement of experts and experts (expert witnesses) for production of expert researches and preparation of the conclusions. The volume of procedural laws of the lawyer defender at a pre-judicial stage of criminal trial is accurately not regulated and the specification of an order of activity of the lawyer defender is defined by decisions of the courts of the USA that allows the lawyer defender to use all opportunities for collecting of proofs. The procedural legislation of the USA, besides conducting lawyer investigation, legislatively fixes a possibility of collecting proofs by private detectives or investigators of protection who have powers on collecting all necessary information: production of dredging, search, interrogations of witnesses, victims, observation implementation. Results of their investigation can be attached to the criminal case file as proofs of the party of protection.

Procedural fixing collected by the party of protection and charge of proofs on criminal case is carried out directly at trial on the merits during judicial proceedings [15]. Such independence of the lawyer when collecting proofs at pre-judicial stages is characteristic also of Great Britain, Australia, Norway, Sweden and Canada [16, page 536].

The norms determining competences of the lawyer defender by collecting of proofs legislatively are not enshrined in the Code of Criminal Procedure of Germany. At pre-judicial stages of criminal legal proceedings the lawyer has the right to get acquainted only with the protocol of interrogation of the defendant and protocols of investigative actions in which the lawyer took or had to take part and also with expert opinions (the p. 3 of Art. 147 of the Code of Criminal Procedure of Germany). Acquaintance of the lawyer with other proofs of the party of charge is carried out on the basis of permission of the investigative judge who has the right to refuse to them acquaintance with proofs, "if it can threaten the investigation purpose" (h the p. 2, 7 of Art. 147 of the Code of Criminal Procedure of Germany). Participation of the party of protection in formation of proofs is allowed by officials, leaders investigation

only in case such evidence "is produced important for business" (the p. 2 of Art. 163 and, p.1 by Art. 166 of the Code of Criminal Procedure of Germany) [17]. Thus, full lawyer investigation by the German criminal procedure legislation is not provided, and formation of proofs at pre-judicial stages at the initiative of the party of protection depends on discretion of the officials conducting investigation, and in judicial stages - on court.

The criminal procedure legislation of France also practically deprives of the lawyer defender of the right for independent collecting of proofs as investigation of criminal case is conducted by officials of investigating authorities which have all powers on withdrawal and fixing of proofs. The lawyer defender has the right to participate in investigative actions, to file petitions and to bring complaints. At this Code of Criminal Procedure of France provides an opportunity to get acquainted with results of the procedural actions which are carried out by the party of charge in five days before the first interrogation of the defendant or after it, also the lawyer has the right to study all case papers and to receive necessary copies of procedural documents [18]. Similar approach to regulation of lawyer investigation is common in Greece, Denmark, Netherlands [19, page 42-48; 20].

In the Russian Federation possibilities of the lawyer defender on conducting lawyer investigation and formation of proofs according to the Code of Criminal Procedure by the Russian Federation are also extremely limited: the defender has the right "to collect and produce the evidence necessary for rendering legal aid by receiving objects, documents and other data; poll of persons from their consent; reclamations of references, characteristics, other documents; and also has the right to involve the expert according to Art. 58 of the Code of Criminal Procedure of the Russian Federation" [21]. However, the lawyer's powers on collecting and fixing of proofs, a procedural order of attaching of proofs of protection to the criminal case file and also criteria of admissibility to which proofs of protection have to answer in the Russian criminal procedure legislation are accurately not defined.

Thus, the procedural regulation of lawyer investigation institute in the Russian Federation has more similarity to the legislation of continental legal system, than to the Anglo-Saxon legislation providing full lawyer investigation as the Russian and European legal system have the general historical prerequisites of formation.

#### **4. Conclusions.**

As showed the analysis of standards of the international acts and also the criminal procedure legislation of some states, the legal nature of lawyer investigation institute follows from contents and sense of the right for the qualified legal aid and provides use of all possible and expedient means and ways of protection on criminal case. Effective legal aid, from the substantial point of view, assumes not only formal participation of the professional defender in business, but also its active work of collecting, fixing and assessment of proofs that demands legislative regulation of lawyer investigation.

According to us, realization of the right to the qualified help at the international and national levels will be promoted by development and legislative fixing of the minimum standards of the qualified legal aid which, besides formal requirements to education, experience and professional skills of the defender have to contain:

- 1) the lawyer's powers on collecting of proofs;
- 2) procedural order of obtaining proofs by the lawyer;
- 3) establishment of a procedural form of fixing the evidence obtained by the defender;
- 4) criteria of admissibility of the proofs collected by the lawyer.

We believe that the qualified and effective legal aid has to define the nature of procedural activity, penetrate all stages and institutes of criminal justice and to be the effective mechanism of protection of human rights against possible violations from the power.

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