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Problem of lawyer protection: comparative legal analysis

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Abstract

This article is dedicated to the analysis of a preponderant institution of Civil Society in Russia such as the Bar Association, consequently, its role in the implementation of the state function of providing qualified legal assistance is examined. In addition, it addresses the criminal defense mechanism of the Russian legal profession. To achieve the objective of the study, several general scientific techniques, and methods of scientific knowledge (analysis, synthesis, deduction, induction, systemic-structural, formal-logical approaches) and specific scientific methods were launched: historical-legal, formal-legal, comparative-legal, and interpretative are employed. Based on the results obtained, it can be concluded that the legal profession, being an institution of civil society, remains vulnerable in the legal sense in its interaction with law enforcement agencies. At the same time, by illegally interfering in promotion, public officials go unpunished. There is still no criminal liability for unlawful interference in the activities of a lawyer. It therefore proposes to introduce specific amendments to the criminal legislation governing this matter of general interest.

Keywords: lawyers in Russia; criminal liability; legal activities; comparative analysis; problems of the protection of lawyers.

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Problema de la protección de los abogados: análisis jurídico comparado

Resumen

Este artículo está dedicado al análisis de una institución preponderante de la sociedad civil de Rusia como lo es Colegio de Abogados, en consecuencia, se examina su papel en la implementación de la función estatal de brindar asistencia legal calificada. Además, aborda el mecanismo de defensa penal de la profesión jurídica rusa. Para lograr el objetivo del estudio, se pusieron en marcha varias técnicas científicas generales y métodos de conocimiento científico (análisis, síntesis, deducción, inducción, enfoques sistémicos-estructurales, formal-lógicos) y métodos científicos específicos: histórico-legal, formal-legal, comparativo-legal e interpretativo se emplean. Con base en los resultados obtenidos, se puede concluir que la abogacía, al ser una institución de la sociedad civil, sigue siendo vulnerable en el sentido jurídico en su interacción con los organismos encargados de hacer cumplir la ley. Al mismo tiempo, al interferir ilegalmente en la promoción, los funcionarios públicos quedan impunes. Aún no existe responsabilidad penal por injerencia ilegal en las actividades de un abogado. Por lo tanto, se propone introducir enmiendas específicas a la legislación penal que regula esta materia de interés general.

Palabras clave: abogados en Rusia; responsabilidad criminal; actividades legales; análisis comparado; problemas de la protección de los abogados.

Introduction

The Constitution of the Russian Federation establishes that Russia is a legal state. In this regard, one of the main functions of the Russian state, as a public-law entity, as well as its duty at the same time, is the protection of human and civil rights and freedoms. This provision is enshrined in the article 2 of the Constitution of the Russian Federation. At the same time, in order to implement and fulfill this obligation, the Constitution of the Russian Federation establishes that everyone is guaranteed the right to receive qualified legal assistance (The constitution of the Russian federation, 1993). This legal provision directly means that it is the state that is obliged to realize the specified right of a person and a citizen. The Constitutional Court of the Russian Federation came to a similar conclusion in its Decision of 05.02.2004 No. 25-O "On the complaint of citizen Valentina Onoprievna Ivkina on violation of her constitutional rights by part of the first art. 45 and art.405 of the Criminal Procedure Code of the Russian Federation", which states that "The provision contained in art. 48 (part 1) of the Constitution

of the Russian Federation that everyone is guaranteed to receive qualified legal assistance means the constitutional obligation of the state to provide everyone who wishes with a sufficiently high level of any type of legal assistance provided ...” (Determination of the Constitutional Court of the Russian Federation of 05.02.2004 No. 25-O). In modern Russia this obligation does not belong to any of the state bodies, that is, in fact, none of them, which is in essence a representative of the state, is not empowered to implement this obligation. But this situation does not mean at all that the named duty is in no way fulfilled by our state.

The Russian Federation has delegated the implementation of this responsibility to such an institution of civil society as the Bar. At the same time, based on a systematic analysis of the provisions of art. 48 of the Constitution of the Russian Federation and art. 1 of the Federal Law of 31.05.2002 No. 63-FZ “On advocacy and the legal profession in the Russian Federation”, it can be unambiguously concluded that the state actually equates such concepts as “qualified legal assistance” and “advocacy”. At the same time, this assistance is in no way legal assistance provided by employees of legal services of legal entities, employees of state authorities and local governments, participants and employees of organizations providing legal services, as well as individual entrepreneurs, notaries, patent attorneys, etc. (Federal Law of May 31, 2002, No. 63-FZ “On advocacy and the legal profession in the Russian Federation”).

Thus, the Russian state, having delegated to the Bar Association its responsibility to provide qualified legal assistance, has established a kind of monopoly, which is connected with the fact that it is the Bar Association that is capable of competently providing this assistance. This monopoly is more clearly manifested in criminal proceedings, since under the current criminal procedural legislation, only a lawyer has the right to act as a defender of a suspect (accused) (The Criminal Procedure Code of the Russian Federation of 12/18/2001 No. 174-FZ, 2001). In addition, the state imperatively established that the legal profession is an institution of civil society and is not part of the system of state authorities and local self-government (Federal Law of May 31, 2002, No. 63-FZ “On advocacy and the legal profession in the Russian Federation”). A similar perception and attitude towards the legal profession can be traced in a number of foreign countries including the United States (Parsons, 1966).

In connection with the issues mentioned above, it can be concluded that the Russian Federation has assigned its duty to provide citizens with qualified legal assistance to the Bar, thereby endowing it with a public law function. At the same time, it is assumed that having done this, the state should create a working mechanism to protect the institution of the legal profession and ensure the real observance of the professional rights of lawyers, and not just establish declarative norms. After all, a lawyer

carries out his activities by exercising his professional rights, which must be protected by the state. A similar situation is observed in the United States of America where the institution of the Bar is endowed with serious social guarantees and protection from the state (Hall, 2004).

1. Methodology

The methodological basis of the research is based on the use of various general scientific techniques and methods of scientific knowledge (analysis, synthesis, deduction, induction, system-structural, formal-logical approaches), as well as specific scientific methods - historical-legal, formal-legal, comparative-legal, and interpretive.

2. Results and Discussion

Let us consider the security of a lawyer and his professional powers on the example of criminal procedural legal relations when he acts as a defender in the framework of criminal proceedings.

The current constitution stipulates those legal proceedings are carried out on the basis of competitiveness and equality of the parties. This provision is supplemented and developed in the criminal procedural legislation, according to which criminal proceedings are carried out on the basis of the adversarial nature of the parties; the prosecution and defense parties are equal before the court. The above provisions have repeatedly been the subject of consideration by the Constitutional Court of the Russian Federation. So, according to the Decision of the Constitutional Court of the Russian Federation of 04.11.2004 No. 430-O “On the complaint of citizen Olga Vasilievna Starovoitova about violation of her constitutional rights by paragraph 1 of part two of art. 42, part 8 of art. 162 and part two of art. 198 of the Criminal Procedure Code of the Russian Federation” it follows that the parties to the prosecution and defense are provided with equal procedural opportunities to defend their rights and legitimate interests (Determination of the Constitutional Court of the Russian Federation of 04.11.2004 No. 430-O).

First, let us analyze how the state protects its direct “representatives” from the prosecution side which include the prosecutor, the investigator and the person conducting the inquiry. Thus, the current legislation establishes criminal liability for interference in any form in the activities of a prosecutor, investigator, or interrogator, in order to obstruct a comprehensive, complete and objective investigation of the case (art. 294 of the Criminal Code of the Russian Federation) (The Criminal Code of the

Russian Federation of 13.06.1996 No. 63-FZ). These provisions mean only one thing, that no one has the right to interfere, as well as in any other way to influence the legitimate activities of these subjects of the charge. A similar opinion is expressed in foreign literature (Adler *et al.*, 1994).

A reasonable question arises: how does the state protect the legal, professional activities of lawyers? Unfortunately, at present, there is no administrative or criminal liability in this regard, that is, a lawyer, namely his professional activity, in fact remains unprotected against illegal actions of anyone including law enforcement officers. The lack of real protection of the professional activities of lawyers, as equal participants in the trial, can be traced in a number of CIS countries. This statement is supported by statistics compiled by the Federal Chamber of Lawyers. So, for the period from April 2017 to April 2019, 1,281 violations of the professional rights of lawyers were registered in the chambers of law: in 2017 692 violations were taken into account, in 2018 - 589. The number of lawyers' chambers in which the professional rights of lawyers were not violated, increased from 26 in 2017 to 40 in 2018. 2 lawyers died from criminal encroachments in 2017. In the same year, 21 lawyers were injured as a result of violence. In two years, health was inflicted on 3 family members of lawyers, 8 cases of damage to the property of lawyers and their family members were committed.

The number of encroachments on attorney secrecy has increased. Illegal summons of lawyers for interrogation in 2017 amounted to 168 cases, in 2018 - 223 cases, the number of illegal searches in the living (office) premises of lawyers increased from 34 in 2017 to 40 in 2018. To higher law enforcement agencies and the courts, lawyers sent 2231 complaints about violations of their professional rights in 2017, of which 568 complaints (25.5%) were found justified. In 2018, lawyers filed 3,212 complaints, of which 97 (3%) were deemed substantiated (Report on the activities of the Council of the Federal Chamber of Lawyers of the Russian Federation for the period from April 2017 to April 2019, 2019). At the same time, the fact of recognizing the actions of law enforcement officials as illegal, in fact, does not in any way affect the latter, and therefore there is no restoration of the violated professional rights of lawyers.

The statistics reasonably confirm the position that the professional activity of a lawyer in criminal proceedings does not have adequate protection from the state. Although in this legal proceeding, as it mentioned above, they are equal participants on an equal basis with the prosecutor, the investigator and the person conducting the inquiry. In this regard, these persons should have equal guarantees of inviolability and personal safety in the exercise of their rights and performance of their professional duties. By itself, obstruction of the professional activity of a lawyer infringes not only on the rights of a particular lawyer and indirectly on the rights of his client, but also directly on the interests of justice, on the constitutional right

to qualified legal assistance (Official site for posting information on the preparation of draft regulatory legal acts by federal executive authorities and the results of their public discussion). A similar position is reflected in the American Bar Association's Model Code of Professional Responsibility for Lawyers.

The discussion about the need to introduce a criminal law mechanism for protecting the professional activities of a lawyer has been going on for a long time. This is due to the really existing problem of violation of attorney secrecy, the inviolability of the private and professional life of lawyers, and criminal attempts on their life and health.

For example, in neighboring Ukraine, its Criminal Code contains art. 397, according to which it is prohibited to impede in any form the implementation of the lawful activities of a defense lawyer or representative of a person to provide legal assistance or to violate the guarantees of their activities and professional secrecy established by law (The Crimean Code of Ukraine, 2001). The above-mentioned corpus delicti by its legal structure is formal, that is, when committing illegal actions, there should not necessarily be any socially dangerous consequences (Bronze, 2016).

In Russia, various options were proposed for the implementation of the above mechanism, one of which is currently reflected in the draft federal law "On Amendments to the Criminal Code of the Russian Federation and the Criminal Procedure Code of the Russian Federation (in terms of establishing additional guarantees for the implementation of the adversarial principle)", information about which is posted on the official Internet portal - the Federal portal of draft regulatory legal acts (Official site for posting information on the preparation of draft regulatory legal acts by federal executive authorities and the results of their public discussion).

The specified draft federal law is posted on the Internet portal 09/01/2020. At present, public discussions have already taken place regarding the text of the draft normative legal act, an independent anti-corruption expert examination, and now the formation of the final version of the text is being completed with the aim of its subsequent submission to the State Duma of the Federal Assembly of the Russian Federation.

Let us analyze the proposed changes. Thus, it is proposed to supplement the Criminal Code of the Russian Federation with art. 294.1, which bears the following title "Obstruction of the legal activities of a lawyer." According to this provision, it is prohibited to interfere in any form in the legal activities of a lawyer in order to impede the exercise of his professional powers, provided for by the legislation on advocacy and the legal profession, if this act entailed causing significant harm to the rights and legitimate interests of citizens or organizations or interests of society or the state protected by law (Turanin *et al.*, 2020).

Thus, it clearly follows from the disposition of the article that this *corpus delicti* is material, that is, for an act to become criminal, the onset of socially dangerous consequences is necessary in the form of “causing substantial harm to the rights and legitimate interests of citizens or organizations or the interests of society or the state protected by law. “. This provision is seen as not entirely fair and contrary to the principle of competition and equality of the parties. For example, the same *corpus delicti* provided for by part 1, 2 art. 294 of the Criminal Code of the Russian Federation, are inherently formal and do not require any consequences (Burnham, 2000). This means that the state a priori protects the professional activities of the court, prosecutor, investigator, and interrogator, regardless of whether there have been any consequences from unlawful interference in it or not.

A similar path was once followed by the legislator of the Republic of Kazakhstan, introducing in the Criminal Code a ban on:

Obstruction of the legal activities of lawyers and other persons to protect the rights, freedoms and legitimate interests of a person and citizen in criminal proceedings, as well as the provision of legal assistance to individuals and legal entities, or other violation of the independence and independence of such activities, if these acts have caused significant harm to the rights, freedoms or legitimate interests of a person and citizen, the rights or legitimate interests of legal entities, the interests of society or the state protected by law” (The Criminal Code of the Republic of Kazakhstan, 2014: art. 83).

It is clear from the above norm that obstruction of the lawyers’ legal activities will become a criminal offense if it has caused significant harm.

Based on the proposed norm of the above-mentioned law, it follows that, although the institution of the Bar was brought closer to the fact that in fact a lawyer will become a more equal participant in the process, there is still a certain “but” that cannot be agreed with, and it is since the proposed *corpus delicti* are going to be made material. At the same time, it should be agreed that it is necessary to introduce an independent article in the Criminal Code of the Russian Federation for illegal interference in advocacy, as proposed by the bill (Burnham, 2000). However, the sanction for committing this crime, based on the principle of equality and adversarial nature of the parties, should still be equivalent to the sanction for unlawful interference in the professional activities of the prosecutor, investigator, or interrogator.

Conclusions

As a result of the theoretical and legal analysis of the institution of the legal profession and the state’s criminal protection of the professional activities of lawyers, the following conclusions can be drawn. Firstly, at present, the legal profession, being an institution of civil society, still

remains vulnerable in the legal sense in interaction with law enforcement agencies. At the same time, by unlawfully interfering with advocacy, civil servants actually remain unpunished. There is still no criminal liability for illegal interference in the activities of a lawyer.

Secondly, before submitting the final bill to the State Duma of the Federal Assembly of the Russian Federation, it is necessary to correct the disposition of the proposed art. 2941 of the Criminal Code of the Russian Federation, making it a formal *corpus delicti* and excluding the following wording from it: “if this act entailed causing significant harm to the rights and legitimate interests of citizens or organizations, or the interests of society or the state protected by law”. In addition, the sanctions proposed by art. 2941 of the Criminal Code of the Russian Federation, in accordance with the principle of equality and adversarial nature of the parties, should be similar to the sanctions contained in part 2 of art. 294 of the Criminal Code of the Russian Federation (Burnham, 2000). Thus, the right status of the prosecution and the defense will really equalize.

It is also necessary to develop and supplement the specified article with additional parts, in which acts committed by a group of persons by prior conspiracy, by a person using his official position, as well as with the use of violence, should be provided as independent offenses. Provide for a more severe punishment for the indicated compositions, until and including real imprisonment.

Conflict of Interest

The authors confirm that the information provided in the article does not contain a conflict of interest.

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