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The System of Qualified Legal Assistance in Russia

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Abstract: This research analyzes theoretical and legal problems of realization of constitutional right in Russia for getting qualified legal assistance including free of charge. Articulated is the concept of qualified legal assistance, analyzed is the essential interconnection of subjective rights for judicial protection and to qualified legal assistance. Unavailability of legal assistance is associated with gaps of legal regulation of the right to qualified legal assistance, wiggery, high costs of provided legal services. The researchers substantiate that the mechanisms used for the exercise of the right for qualified legal assistance for everyone cannot act as justification of any violations or restrictions of other constitutionally established ways of legal protection. It is alleged that the subjective right for professional legal assistance can be successfully implemented on a competitive basis, not only by legal practices but also by other subjects including legal clinics. At the same time, emphasized is the need for unconditional following the standards of professional legal activity.

Key words: Judicial protection, qualified legal assistance, free legal assistance, advocacy, legal clinics, mediation

INTRODUCTION

The topic of establishment and development of qualified legal assistance to citizens and legal persons continues to be relevant in modern Russian and foreign literature. On the assumption of the principles enshrined in the Constitution of the State of Law based on respect for the rights of the individual, subordination to legislation and provision of rights and freedoms by means of justice in Russia there are recognized and guaranteed particularly the right of everyone to protect their rights and lawful interests by all the means not prohibited by law. This explains the purpose of lawyers providing professional legal assistance in all procedures to protect the rights which is special and specific for civilized society.

Literature review: Development of qualified legal assistance institute guaranteed by the norms of the Constitution, is inextricably linked with the genesis of Russian constitutionalism. The fundamentals of development of Russian constitutionalism originated in the 17th century, during the reign of Vasiliy Shuisky who was limited in power by krestotselovalnaya record. In 1730, D.M. Golitsyn tried to introduce constitutional monarchy in Russia. The power of the Empress Anna Ioanovna was limited to "Conditions".

Progressive noble aristocracy suggested to make a transition to constitutional monarchy by means of constitutional reforms which was reflected particularly in the "The Plan for State Transformation" by M.M. Speransky (1809) and "The State Charter of the Russian Empire" N.N. Novosiltsev.

The constitutional views of the Decembrists as reflected in the "Manifesto to the Russian people" of Northern Society, Curnow (1989) suggested not only the abolition of serfdom but also the formation of local government, the People's Guard, jury trials.

However, during 6th-7th centuries the development of the idea of constitutionalism largely affected the overall transformation of the Russian State and the system of power. The guaranty of qualified legal assistance at the state level became an important principle of the Russian legal system later.

The history of development of qualified legal assistance institution is inextricably linked with the process of formation of the legal profession institution. The origin of the institute of legal profession in our country is associated by most of the researchers with the reforms of Alexander II in the second half of the 19th century when this institution was established by the judicial statures in 1864. It was largely conditioned by the peasant reform of 1861 when there appeared in Russia the institution of private landholders, owing to farmers there

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extended the circle of private law entities with independent rights for property, to conclude transactions and represent their interests in court (Smolensky, 2004).

However, in the beginning of the 20th century the dismantlement of the previous state system and the formation of the foundations of the new socialist state resulted in the formation of a new legal system. All the four Constitutions of the RSFSR (of 1918, 1925, 1937 and 1978) was ideologically oriented. The constitutional law of the Soviet period proclaimed the idea of political freedom, social and cultural equality. The rights and freedoms of Soviet citizen priori were considered protected by the State on behalf of its political, administrative and judicial authorities. Qualified legal assistance was absolutely positioned as an accessible and effective. However, the propaganda of relevant ideas could not become a barrier against mass lawlessness and extrajudicial killings.

The Constitution of 1993 reflected the profound changes of the state and social system after the collapse of the USSR. It acquired fundamentally new features and set new goals and challenges in front of our country. Proclamation of Russia as legal, democratic and social state provided a new impulse for development of qualified legal assistance institution including the legal profession. Consolidation of institution of private property and free enterprise requires not only the increase of legal literacy of the population but also the creation of an effective and accessible system of qualified legal assistance to individuals and legal entities.

MATERIALS AND METHODS

In this study, the researchers used a systematic method of analysis, formal-legal method, comparative legal, historical and comparative methods. The usage of the system analysis method enabled the authors to study in complex from different angles the problem of qualified legal assistance. Based on the principles of unity, functionality and organization of the main goals and objectives of the study have been resolved, the results of which are set out in article.

Formal legal method was used to clarify the nature of the regulatory legal acts containing norms on procedures and conditions for the provision of legal assistance, allowed to define the legal concept of "qualified legal assistance", classified the subjects of legal assistance, gave a proper legal assessment of the conditions of their work.

The researchers also used a comparative legal method which during the study of issues of providing qualified legal assistance enabled to analyze the state of the problem in the context of the relationship between the concepts of lawyer and lawyers in private practice. Thus there was carried out the analysis of the relevant legal material, formulated the conclusions that have some practical significance.

The reliability and justification of the conclusions formulated in the framework of the scientific study is provided by a comprehensive approach to the process of collection and analysis of empirical data and the use of modern regulatory framework for the issue investigated in this work.

RESULTS AND DISCUSSION

As can be seen from the content of Article 48 of the RF Constitution, mainly Russian law contains both concepts and "legal assistance" and "qualified legal assistance". Legal assistance is a broader concept in relation to qualified legal assistance. However, until now the Russian legislation does not contain a definition of the concept of "legal assistance", nor regulatory fixed, in what the case the provided legal assistance will be qualified.

However, the lack of a unified understanding of what is meant by the qualified legal assistance leads to uncertainty in the issue of providing the rights by the state to citizens enshrined in the said article of the Constitution. Inadequate level of study of the right for qualified legal assistance not only leads to uncertainty of legal terminology in the field of professional activity but also to the fact that in the scientific and academic literature in the field of constitutional law and the law the concept of such right has not even worked out (Goshulyak, 2005). Therefore, conceptually-theoretical analysis of the concept of "qualified legal assistance" urgently needs a uniform understanding and application by its specific constitutional and legal purpose.

Constitutional and legal and social importance of reforms in the sphere of provision of the qualified legal assistance to citizens and legal persons determines the need for researches and discussions both in the professional community of lawyers and the whole in the civil society which follows from the Presidential Decree of May 7, 2012 No. 601 "On the main directions of improving the system of public administration". With a view to implementation of the above-mentioned legal act there was developed a state program of the Russian Federation called "Justice", in accordance with which and as per the RF Government Decree of April 15, 2014 No. 312 the Ministry of Justice provided the approval of the Concept of regulation of professional legal assistance market in the Russian Federation and further development of the draft laws on such assistance.

Of course, the planned changes in the market of professional legal assistance will affect not just the legal profession but also the so-called lawyers in private practice, working both individually and in organized communities. The program sets in front of the lawyers the tasks to ensure and improve the level of protection of public interests and the rights of citizens and organizations. The following is provided for these purposes: reformation of the legal profession and insurance of provision of qualified legal assistance by lawyers; improving the status of advocates in the legal community including by systematic improvement of their vocational training as well as the mechanism of exclusion from the profession; the development of "market of professional legal services" and increasing their accessibility for all the population stratum and economic entities including the provision of legal assistance free of charge (Lyubashits *et al*., 2015a, b).

At the same time, the said program leaves the interested representatives of legal community including lawyers, notaries, lawyers in private practice, in the dark of the methods and techniques that will particularly provide the creation of the "qualified legal assistance" system and in which direction the market reform of legal services will move.

The program "Justice" has undergone a series of changes. Particularly, the previous versions contained detailed measures on the improvement of the legal services market by creating competition in the system of legal assistance.

The previous editions of the program contained more detailed account of measures of improvement of "Legal services market" and particularly formulated the task of the development of competition in the system of legal assistance which in fact due to the market-based approaches to its organization as well as improving the competitiveness of the legal profession. There is a natural competition between lawyers and their associations formed under the law for the organization of their professional groups; in this competitive environment, the priorities are based on the recognition of qualifications and authority of a lawyer and presumably, on the well-known reliability of specific organizational form of the professional activities chosen by lawyers (Lyubashits *et al*., 2015a, b).

At that, it is assumed that by 2020 the number of lawyers will be increased (about 70,00 currently up to 140,000). If to be more specific it is planned to increase by almost two times relatively to the number of lawyers per population.

The main tasks announced in the mentioned state program "legal profession reformation" do not quite adequately meet the actual needs of the legal assistance system transformations. In fact, the reasons for the reforms are largely associated with external factors in relation to legal profession. In fact, it is not about the social purposes of transformation of qualified legal assistance in accordance with its constitutional model which should be the subject of State responsibility but above all the interests of its different subjects working in the field of legal support of individuals and organizations including those involved in commercial law activities. Of course, if with their involvement the right for qualified legal assistance is realized then their certain high status should be provided (including corporate and legal and procedural) as well as professional interest and qualification.

But the approaches and principles used to achieve this cannot but be agreed with the principles of human rights legal profession as a professional association built on the basis of recognition of its independence, self-government, corporate and compulsory membership of lawyers in the Bar Association which ensures an effective mechanism for admission to the profession-after confirming an adequate level of qualification-and corporate and professional monitoring of implementation of public-law function of providing legal assistance and ethical requirements to the subjects and methods of its implementation (Ovchinnikov *et al*., 2015).

These requirements are applied to legal activities of a lawyer including the provision of free legal assistance. In accordance with the essence of public legal authority delegated to the Bar by the State, the activity of legal profession is not a commercial (business). However, the provision of legal assistance (except for criminal defense) is widespread as a business activity of commercial law firms as well as individual entrepreneurs. The activity of such individuals and entities providing paid legal services is unregulated in practice and, in contrast to advocacy, no qualifications and professional ethical demands are made to it; legal commercial entities (firms) not tasked to provide a professional level and accessibility of legal assistance for citizens and organizations. They focus on business and profit exactly by providing legal services (Sharov, 2015).

These tasks make lawyers comparatively less "competitive", the more so in the process of advocacy, he lawyers (as opposed to commercial lawyers who ae not members of the legal profession) are presented fairly stringent requirements, both in the choice of forms of lawyer associations as well as in the formation of prohibitions in relation to functions not compatible with law and the forms of legal mediation of corporate, tax, contractual relations of lawyers in the course of their activities.

It is clear that this area, rather than advocacy detects a lack of regulation that provides adequate professional level of legal assistance. The State cannot consider it as its task, although there are different options for the extent and forms of such regulation-from licensing to transfer of public functions of control over this type of business, legal service of business by various self-regulatory organizations of professionals or recognition of exclusively lawyer monopoly for legal representation (Sharov, 2006).

But the right to confirm the admission of legal advisers to render assistance to economic entities is in the least related to the field of State and corporate law responsibility rather than to criminal defense. Freedom of the legal commercial activities cannot but provoke the question of how "attractive" for the legal business itself the incorporation of lawyer mechanism of admission to the profession and if so by what exactly? With no less ground there arises the doubt as to the consequences which will take place in the process of incorporation of business lawyers as entrepreneurs in the profession during the plan of development of legal profession.

The mere fact that the state program "Justice" sets the "protection of the public interests" in the forefront of all the other tasks of the Bar, cannot fail to raise objections, if reason from the human rights nature of advocacy, the value of which one of the documents of the Council of the President of the RF for civil society development and human rights (his Recommendations based on the results of the special meeting held on the 31th of March, 2015 on the topic: "The role of advocacy in human rights activities") is particularly dedicated to. It states the "organic connection of legal profession with the movement for human rights" and underlines that "the advocacy without human rights component would be deprived of a significant part of the meaning of its activities as a public service".

This task of advocacy during implementation of public law function of providing qualified legal assistance which is delegated by the State cannot yield to the tasks of creating "a unified market of legal services".

In fact, the declared desire to ensure "uniformity" of the market and its development does not agree with another task, the improving of the competitiveness of legal profession, especially if at the same time the introduction of a law monopoly in legal representation is being discussed. Such decision, in fact, increases the status of legal profession in relation to other subjects providing the legal advice and more likely provides it in terms of market, a dominant position (if not its recognition as a "natural monopoly", if other subjects of such activity are excluded). But this does not provide a guarantee of the qualified legal assistance. The quality of activity is largely determined by the specialization of the subjects exercising it. Establishment of reasonable requirements for admission to the profession as a problem in the process of legal assistance system reformation does not exclude the differentiation of the functions of legal assistants.

The concept of "uniform market" is not informative, it is not synonymous to uniform requirements for admission and the activities of different business entities providing legal assistance, groundlessly transfers the algorithms of market business activities to the sphere of human rights protection with its priority to getting profit (Mordovcev *et al*., 2015).

Providing legal assistance to population stratum requires not so much its "uniform market" but different possibilities of access to it including free of charge, since both the lawyers, nor the commercial lawyers organized in self-regulating structures can manage to provide the need in such assistance. This is proven by widespread practice of applying for legal assistance to human rights organizations dealing with legal advice and representation in the courts, where a lot of graduates in law including lawyers are employed (Kipnis, 2013).

The system of provision of free legal assistance is typical also for other countries, while today there are many different models of legal assistance: judicare, model of public defenders and mixed model. Judicare model implies the involvement of private lawyers with whom a special agreement is concluded every time for handling each individual case. Such a system is typical for the United States, England, Scotland, Norway. Public defenders work in the system of state offices and the quality of their services may be even higher than that of lawyers.

The concept of the mixed model of legal assistance is not limited to legal representation. Often the employees of legal offices who are not lawyers can provide such services as mediation in the settlement of a dispute, education in the law or rendering the assistance not requiring deep legal knowledge. Consultants can help clients, clarifying the contents of legal norms and explaining the essence of legal process while the lawyer provides the required legal advice. In some countries of Eastern Europe established are the centers of free legal assistance (pro bono) where the lawyers work on a rotating basis, for a few hours a week.

However, it is difficult to imagine that the rendering of legal "services in different price segments" as the planned positive effect of reformation of the of activity of rendering the legal assistance will adequately provide the necessary standards of professional legal activity. The

task of the unified regulatory functions of legal advisers and representatives is also artificially justified by incorrect grounds that such regulation would eliminate or reduce the violations of rules of proceeding and abuse of rights of private attorneys.

In court proceedings this is first ensured by the procedural rules of participation of legal representatives and judicial control. In addition, in various professional societies of lawyers their members can be imposed the same qualification and professional ethical requirements, even when they carry out various functions related to legal support. Conversely, membership in one community of professionals which are imposed different eligibility requirements has no explanations if they are allotted the same professional tasks.

The planned reform of the Bar Association suggests the association of lawyers and commercial lawyers by incorporating the business lawyers into the legislature namely by incorporation but not the entering under the current rules of the Bar. This will inevitably lead to a decrease in standards of professional selection in legal profession as it is not based on the submission of requirements to business lawyers entering legislature at least comparable to those established by the current legislation for the acquisition of the lawyer status.

It is expected that the terms of its acquisition for the persons now involved into commercial legal activities within the time specified for such less stringent order will be the presence of the field-specific higher education, practical experience in legal consultation and representation in law firms as well as the knowledge of the Federal Law "On advocacy and the Legal Profession in the Russian Federation" and the Code of professional ethics of lawyer. On the background of total absence of current eligibility requirements to business lawyer and this approach sets so much advanced standard for the access to rendering of legal assistance but it is clear that it significantly differs from the professional requirements to lawyers.

But naturally the original persisting specialization of commercial lawyers for legal support of business (other than defense in criminal cases) in transition period when the simplified rules for inclusion in the professional advocacy will be in force (this period, according to representatives of the Ministry of Justice and the Federal Chamber of Lawyers should be completed within 2 years), cannot be regarded either as a restriction of their equality or as a lack of respect for their professional activity which according to the proposed draft reforms, on the contrary, adopted at once at incorporating them into the legislature as sufficient proof of practical experience required for judicial offices in the field business disputes.

While it is always both during the association with legislature and later, of course there remains the possibility of acquiring the status of attorney based on general acceptance of the bar which provides access to all functions of the lawyer.

In any case, the planned reforms in the sphere of rendering legal assistance should not create risks of anti-constitutional development by distorting the original concepts of the Constitution. Even if the legislator had agreed to the change of semantic load of the applied constitutional concept of "defense attorney", he would have gone beyond the limits of its constitutional powers. Those who defend the stated position, explicitly allow the possibility of lowering the qualification of defense attorneys in criminal cases, although the declared reform of the legal profession is motivated by the inadmissibility namely of such processes and the state program of the Russian Federation "Justice", to be submitted by the Ministry of Justice for approval to the Russian Government until 2020 the year is oriented on systematic improvement of professional advocacy standards.

Today, it is necessary to pay attention to the essential requirements to normative regulation related to contemporary transformations in the sphere of rendering the qualified legal assistance, without which the positive effect in the development of access to justice and judicial protection cannot be predicted. These requirements are imposed by the task of implementation of the main constitutional ideas of protection of rights and freedoms including those of corresponding to international standards of independent lawyers, who contribute to judicial protection and the "promotion of the idea of independence of the legal profession as one of the elements of an independent system of justice" (Tayler, 2015).

These ideas and principles can play an important role in assisting the legal communities and legislative authorities, should be a guide for the national legislator and the starting point for lawyers and other legal professionals in the discussion of professional standards and ethic norms.

CONCLUSION

Constitutional and legal guarantees enshrined in article 48 of the RF Constitution provide the right for getting the qualified legal assistance, both on the paid basis and free of charge in the cases directly provided by the law. The legislator refers to the qualified legal assistance, lawyer and notary activity but does not define the notion of the constitutional term "qualified legal assistance" itself. From a literal interpretation of this norm

it follows that any legal assistance, irrespective of the subject status, to which it is provided, must be "qualified", otherwise the meaning of this right is lost because it is difficult to imagine that the person concerned shall exercise the right to apply for unqualified legal assistance. After all, the right for professional assistance in dealing with legal matters has the quality of particular common weal in the sphere of protecting the rights of citizens. However, it seems reasonable to suggest a legislative consolidation of the term "qualified legal assistance".

In the current context, the system of legal services in Russia includes such members as the legal profession, notaries, private legal consulting. The main problems of development of professional legal assistance system are not sufficiently high level of professionalism of persons providing ongoing legal services to individuals and organizations. Persons providing legal services, except for lawyers and notaries are not required to prove their qualification in the field of law which leads to a participation as representatives in the courts of persons often do not have the necessary knowledge in law and a professional experience for conducting this kind of activity.

Another important problem is the activity of entities in the market of legal services having the reputation for unscrupulous lawyers excluded from professional associations of lawyers or notaries for the wrongful acts or unworthy but retained the ability to continue legal practice as lawyers in private practice. At the legislative level there is no mechanism to eliminate such unscrupulous persons from the legal community.

Also there remains the problem of the lack of uniform professional standards for all members of the legal profession. Qualification requirements are established only for a small part of total number of members of the legal profession including lawyers and notaries. Providing professional legal services and the standardization of their quality remains beyond the legal regulation. The situation is complicated by the fact that there is no uniform quality control mechanism of providing the legal assistance in Russia.

Conceptual provisions of legal profession reformation should be independent and self-government of legal associations. As the most important institution of civil society, the legal profession in its activities should not be limited by legislative regulation or departmental control over the results of its activity. However, the activities of lawyers are not possible without the creation of self-governing professional associations that represent their member's interests, promote their continuous education, protect the professional rights of lawyers. That is this refers namely to self-regulation with minimal involvement of the State and then only in cases when it is required to provide legal guarantees of advocacy.

Activity in the market of professional legal services of lawyers and other professional associations shall be carried out under conditions of establishing and maintaining the professional standards of qualification and lawyer competency as well as regulatory established uniform requirements to the subjects rendering qualified legal assistance as court representatives (Muranov and Samkov, 2010). Even in the absence of statutory requirements to the lawyer status in the presence of other professional associations of lawyers, the conditions of compulsory specialized education and adherence to established ethical standards while rendering legal services to any legal subjects must be applied to the persons who work in the field of legal assistance.

The availability of qualified legal assistance for certain categories of citizens is ensured by its provision free of charge. Legal regulation of the mechanism of realization of citizens' constitutional right for free legal assistance is implemented at the federal, regional and local levels. The Federal Law "On free legal assistance in the Russian Federation" defines the range of subjects of state and non-state system of rendering free legal assistance. The effectiveness of implementation of the state policy in the sphere of provision of free legal assistance to citizens depends on the timely and comprehensive adoption of necessary organizational and legal solutions by public authorities. There should be sufficient funding of free legal assistance subsidized by the State and other necessary forms of resource support of advocacy by the State. This particularly requires changes in the regulation and payment amounts for lawyers' work in purpose as well as subsidizing the free legal assistance, the provision of which is entrusted to the legal profession and in other cases prescribed by law.

The non-state system of free legal assistance involves legal clinics, established by educational institutions of higher education and the centers of free legal assistance, created by non-profit organizations including professional associations of lawyers. Legal clinics of universities are in addition to but not in lieu of the existing systems of providing free legal assistance which, first of all, meet dual interests of the State: the provision of high-quality legal education and the growing need of citizens of free legal assistance.

Thus, to date the system of legal services in Russia is represented by two equivalent groups of lawyers providing legal assistance-lawyers and those without such status. Analysis of Russian legislation shows that the State gives preference to legal associations. However,

in our opinion there are no socially significant conditions for the establishment of a law monopoly in the field oflegal services. Instead, the activities of various professional associations of lawyers in conditions of competition, self-regulation and professional standards common to legal profession seem advisable.

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