

# CLASSIFICATION OF LEGAL ASSISTANCE IN CRIMINAL PROCEEDINGS

## CLASSIFICAÇÃO DA ASSISTÊNCIA JURÍDICA EM PROCESSOS PENAIS

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**Abstract:** The study of the features of legal assistance in the criminal process of the Russian Federation and some foreign countries made it possible to determine the grounds and substantiate its four main types: qualified legal assistance provided by lawyers (defenders, representatives), as well as legal advisers and notaries; qualified legal assistance provided by public defenders or other persons whose activities are paid from the state budget; legal assistance provided by other persons involved in criminal proceedings (close relatives, legal representatives, other persons); legal assistance provided by persons who are not participants in criminal proceedings (Commissioner for Human Rights in the Russian Federation, private detective, etc.). The article shows the features and problems of providing legal assistance for each of its types, suggests ways to improve legislation and law enforcement practice.

**Keywords:** Criminal proceedings. Legal assistance. Lawyer. Legal adviser. Defender. Close relatives. Other persons. Detective.

**Resumo:** O estudo das características da assistência jurídica no processo penal da Federação Russa e de alguns países estrangeiros permitiu determinar os fundamentos e fundamentar seus quatro principais tipos: assistência jurídica qualificada prestada por advogados (defensores, representantes), bem como por consultores jurídicos e notários; assistência jurídica qualificada prestada por defensores públicos ou outras pessoas cujas atividades são pagas pelo orçamento do Estado; assistência jurídica prestada por outras pessoas envolvidas em processos penais (parentes próximos, representantes jurídicos, outras pessoas); assistência jurídica prestada por pessoas que não participam de processos penais (Comissário para os Direitos Humanos na Federação Russa, detetive privado, etc.). O artigo mostra as características e problemas da prestação de assistência jurídica para cada um de seus tipos, sugere formas de melhorar a legislação e a prática da aplicação da lei.

**Palavras-chave:** Procedimentos criminais. Assistência jurídica. Advogado. Consultor jurídico. Defensor. Parentes próximos. Outras pessoas. Detetive.

## INTRODUCTION

First and foremost, it must be emphasized that the provision of legal assistance in the Russian Federation and other countries is one of the important legal institutions and a guarantee of the rights and freedoms of citizens. Legal regulation of legal assistance activities is widely used in the Constitutions of the Russian Federation and other countries, as well as in numerous legal acts of the international and national levels. However, the issues of development and typology of legal assistance in the field of criminal proceedings are highly debatable and have not yet been finally resolved.

## MATERIALS AND METHODS

As the main method in the process of conducting the study, we used the general scientific systemic method of cognition, which made it possible to comprehensively consider and fully analyze the features of the provision of legal assistance in the Russian Federation and other countries, determine the grounds for classification and highlight its main types.

The method of a systematic approach made it possible to consider legal assistance in criminal proceedings in the Russian Federation and other countries as an independent institution of criminal procedural relations, which allows achieving the goals of criminal proceedings.

The use of the comparative legal method made it possible to study in detail Russian and foreign legislation relating to the provision of legal assistance to participants in criminal proceedings by various entities, including those who do not have the professional competence of a lawyer and are not participants in the criminal process.

Through the application of methods of analysis and synthesis, real information was obtained regarding the effectiveness of various types of legal assistance to participants in criminal proceedings, gaps in the legal regulation of relations in the activities of lawyers, legal advisers, and other authorized persons were identified.

The application of the formal legal method made it possible to identify the specifics of providing legal assistance to participants in criminal proceedings, designed to guarantee the rights and legitimate interests of the individual, society and the state, to generalize the existing problems, classify them and propose solutions.

As a result of the application of this methodology, we have obtained new knowledge about the subjects of provision and the typology of legal assistance both in the Russian Federation and in other countries.

## **RESULTS AND DISCUSSION**

In the modern period, one of the important means of protecting the rights and legitimate interests of the individual is legal assistance (Ozhegov, 1988), the social purpose of which is associated with legal assistance to individuals and legal entities. The prevalence of the term “legal assistance” in legal acts of the international and national levels, in the Constitution of the Russian Federation and other countries shows that the phenomenon reflected by it is a real phenomenon of the state-legal life of society, is multifunctional and intersectoral in nature.

Legal assistance is especially in demand in criminal proceedings, where the rights and freedoms of its participants can be significantly violated as a result of a crime or illegal criminal prosecution, or other significant restriction of their rights and freedoms. In the norms of the Code of Criminal Procedure of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation), the expressions “assistance of a defense lawyer” (Clause 8, Part 4, Article 47 of the Criminal Procedure Code of the Russian Federation), “assistance of a lawyer” (Part 4, Article 399 of the Criminal Procedure Code of the Russian Federation) are used on an equal footing. , “assistance to a foreign state” (Part 2 of Article 353 of the Code of Criminal Procedure of the Russian Federation), “assistance to the investigation” (Part 2 of Article 317<sup>1</sup> of the Code of Criminal Procedure of the Russian Federation).

However, the issue of the types of legal assistance has not yet been resolved, since the theory of law of the Russian Federation and foreign countries is dominated by a point of view that presumes the diversity of subjects of legal assistance. Thus, in the legal literature and legislation of Russia there is no consensus on the list of entities providing legal assistance, and signs that distinguish them from other law enforcement agencies and human rights organizations (Fadeev, 2014). Among the subjects of legal assistance, along with lawyers, notaries, patent attorneys, legal advisers, include the prosecutor, local authorities, state legal bureaus, legal clinics (State Duma of the Federal Assembly of the Russian Federation, 2011), military administration authorities, military justice authorities,

preliminary investigation authorities, the court (State Duma of the Federal Assembly of the Russian Federation, 1998) as well as close relatives and other persons.

The most informative model that allows you to see both the entire set of persons providing legal assistance and various types of legal assistance is the classification given by I. G. Chernyakov. In his opinion, the subjects of legal assistance, depending on the specifics, form and procedure for its implementation, are not only state authorities and local governments (including the prosecutor's office, courts, the Commissioner for Human Rights of the Russian Federation and the constituent entities of the Russian Federation), but also educational institutions of the legal profile (Chernyakov, 2007, p. 8).

In our opinion, the proposed classification needs substantial refinement and argumentation. Especially in relation to criminal proceedings. *Firstly*, the proposed typology is based only on the specifics of the activity under consideration and does not take into account the professional competence of its subjects providing various types of legal assistance. As a result, this approach gives rise to judgments that legal assistance in the form of legal advice (consultation) can be obtained not only from a lawyer, but also in the process of learning a legal specialty and even when reading periodicals (Melnichenko, 2001, pp. 19-21; Voplenko, 1978, p. 50).

*Secondly*, when classifying legal assistance, the issue of the place and role of state bodies in the system of protecting the rights and freedoms of citizens was not taken into account. It should be noted that there is still no consensus in the legal literature about the role of state bodies and their officials in the provision of legal assistance. As the analysis shows, some lawyers believe that state bodies and their officials provide only legal assistance (Panchenko, 2014, pp. 10-67). Others believe that such activities of these bodies are a subsidiary task carried out in the process of protecting the rights and freedoms of citizens (Tarlo, 2004, pp. 21-22).

Noteworthy is the point of view that state bodies and their officials do not provide legal assistance, but legal assistance, which is a generic concept for legal activity, is similar in essence, but differs in subjects, as well as their goals, nature and content of activities (Fadeev, 2020, pp. 18-21). An important difference between legal assistance and legal assistance is the nature and content of the activities of the subjects of the provision of this assistance, including the public law nature of their activities and the use of measures of an authoritative and administrative nature. Accordingly, differences also arise in the right to

legal assistance from state bodies or legal assistance from a lawyer (defender or representative).

It should be noted that in the legislation of the Russian Federation and most foreign countries, to a greater extent, the term “legal assistance” is used to refer to legal relations related to international cooperation of various states in civil, family and criminal cases. At the same time, the concept of “legal assistance” is associated with the professional activities of lawyers (lawyers, notaries, legal advisers), as well as other persons.

For instance, in Germany, the above right to legal assistance is analyzed only within the framework of the right of the accused to the assistance of a defense lawyer (Fastie, 2017). The accused may avail himself of such assistance at any time during the trial, and the number of defense counsel chosen may not exceed three (Federal Ministry of Justice, 1987a). At the same time, the assistance of a defense lawyer is understood as the assistance of both lawyers and law professors who are members of the staff of German universities if, in accordance with their position and level of education, they are qualified to hold the position of a judge. Other persons may be appointed as counsel only with the consent of the court.

A similar attitude to the provision of international legal assistance. As an example, we can cite the legislation of Germany (Federal Ministry of Justice, 1982) and Switzerland (The Federal Assembly of the Swiss Confederation, 1981), where this concept is denoted by the term “die Rechtshilfe” (the term is given on the basis of Swiss regulatory legal acts published in German), which is used in the law to refer to international legal assistance and cooperation in criminal matters. In particular, it is this term that is used in the treaties of these states on accession to the European Convention on Mutual Legal Assistance in Criminal Matters of 1959 (Federal Law Consolidated, 1977).

In our opinion, the most promising approach to the classification of legal assistance is related to the nature and content of the activities of its subjects. Such a classification is especially relevant in the field of criminal proceedings, as it allows us to identify the main types of legal assistance to participants in criminal proceedings, provided not only by various subjects of the criminal process (Nguyen et al., 2021, p. 214), but also by other persons providing legal assistance to participants in criminal proceedings.

In our opinion, the first type of legal assistance is qualified legal assistance provided by lawyers (defenders, representatives), as well as legal advisers and notaries. It is advisable to include only lawyers (defenders, representatives), as well as legal advisers and notaries

who carry out their activities on a professional basis and are involved in the criminal process on the basis of the provisions of the criminal procedure law, as entities providing legal assistance to participants in the criminal process.

It is noted in the legal literature that in 94.4% of cases qualified legal assistance to participants in criminal proceedings is provided by persons who have received the status of a lawyer (Sementsov & Burger, 2010, p. 34). This subject of legal assistance, engaged in advocacy, is a member of the bar association and takes an oath in which he swears to conscientiously fulfill his duties, guided by the Constitution of the Russian Federation, relevant laws and the Code of Professional Ethics of a lawyer.

Qualified legal assistance in criminal proceedings is also provided by legal advisers who represent the interests of the civil plaintiff and civil defendant, which are legal entities (Part 1 of Article 45, Part 1 of Article 55 of the Code of Criminal Procedure of the Russian Federation). As noted in the legal literature, the interests of the victim in criminal proceedings are represented by 5.8% of legal advisers (Ivanov, 2017, p. 460).

It should be noted that some legal advisers do not have the appropriate professional competence in the field of criminal proceedings and cannot provide qualified legal assistance (Botnev, 2011). In our opinion, it is advisable to streamline their activities in the criminal process, for example, by obliging them to obtain licenses (Nevskaya, 2004). Foreign experience indirectly speaks in favor of the introduction of licensing in the sphere of legal services. For example, access to courts for lawyers without a proper license is closed in the United States. In Germany, such specialists can only represent in court in cases with a claim value of up to 5,000 euros. A few years ago, lawyers who did not have a license were not allowed to take part in the trial in France and Switzerland (Semenyako, 2011).

Notaries also play an important role in providing qualified legal assistance to participants in criminal proceedings (Begichev, 2013, pp. 77-106). In our opinion, despite the fact that their powers in accordance with Paragraph 31 of Part 4 of Article 46 and Paragraph 91, Part 4 of Article 47 of the Code of Criminal Procedure of the Russian Federation are reduced only to the certification of a power of attorney for the right to represent the interests of the suspect and the accused in the field of entrepreneurial activity, the activities of notaries, based on its nature and content, should also be attributed to qualified legal assistance carried out on a professional basis.

As the analysis shows, in the field of criminal proceedings it is allowed to use as evidence various documents certified by a notary (Mayboroda, 2018), including when filing a civil claim in a criminal case (Begichev, 2013, p. 59), involving him by a defense lawyer when interviewing persons who have information about the innocence or lesser guilt of the client (Koryakin, 2003; Rudnev & Benyaguev, 2002).

The following independent type of legal assistance should include qualified legal assistance provided by public defenders or other persons whose activities are paid from the state budget. This type of assistance is widely practiced in Russia and some foreign countries.

Part 2 of Article 20 of the Federal Law “On free legal aid in the Russian Federation” (State Duma of the Federal Assembly of the Russian Federation, 2011) establishes that free legal aid is provided by state legal bureaus and lawyers included in the state system of free legal aid. However, this Law did not provide for the provision of free legal assistance in criminal proceedings.

It should be noted that a similar approach to this type of legal assistance is available in Germany (Federal Ministry of Justice, 2005). Free legal assistance is provided only in the framework of civil, administrative proceedings, legal proceedings in social courts and legal proceedings in labor disputes (Plischuk, 2003, p. 2). However, within the framework of criminal proceedings, the provision of such legal assistance to the accused is provided in some cases.

Among them, cases of filing claims for damages and compensation for non-pecuniary damage, which may be presented in the course of criminal proceedings by the defender of the accused (Pushkarev et al., 2021, p. 404). However, this restriction is subject to serious criticism in the German doctrine (Kühne, 2010, pp. 140-141), since in the framework of criminal proceedings the accused has the right to a public defender only in cases established by law. Firstly, if the accused is not able to hire a defense lawyer on his own (the so-called “mandatory legal defense”, “die Pflichtverteidigung”) (Federal Ministry of Justice, 1987b); secondly, if the accused belongs to poor citizens and has a “low” income (Federal Ministry of Justice, 1980); thirdly, if the committed crime meets the requirements specified by law (degree of severity, severity of punishment, etc.).

In Russia, other persons can also provide legal assistance. According to Part 2 of Article 45 of the Constitution of the Russian Federation, any participant in the criminal process, whose rights and legitimate interests have been violated in the course of pre-trial

or judicial proceedings, has the right to defend them both in the manner prescribed by the criminal procedure law, involving close relatives, other persons as a defender, and in all other ways not expressly prohibited by law. This constitutional right provides an opportunity to seek help from persons who are not participants in criminal proceedings (for example, the Commissioner for Human Rights in the Russian Federation, a private detective, etc.).

The content of legal assistance to participants in criminal proceedings from other persons is determined by the features of their subject composition, as well as the legal relations arising from this. This circumstance indicates the expediency of classifying such activities as two independent types of legal assistance in criminal proceedings. In our opinion, the activity of such persons does not guarantee the provision of qualified legal assistance and is not of a legal, but of a legal nature (i.e., based on the law), since it is mainly carried out by persons who do not have the appropriate professional competence.

This circumstance entails a restriction on the admission of such persons, if such a person, by his “personal qualities and legal status”, does not meet the criteria of a defense counsel in criminal proceedings and cannot provide qualified legal assistance (Constitutional Court of the Russian Federation, 2016). This is evidenced by the judicial practice in Russia. The analysis shows that only in 14% of cases, petitions for the admission of a “other” person to the preliminary investigation, declared during the preliminary investigation, were satisfied by the court (Vodyanik, 2012, p. 60).

In some cases, persons who have a legal education, but not the status of a lawyer or legal adviser (for example, teachers of law schools) may be involved in the provision of legal assistance. However, in Russia the issue of their participation in criminal proceedings is resolved in a general manner. It seems appropriate for such lawyers to issue appropriate licenses to exercise protective functions in criminal proceedings.

It should be noted that in some foreign countries the practice of issuing licenses to such lawyers is widely used. In particular, in the United States a license to practice law (an attorney/counselor at law) is issued in each state. However, such a license is valid only within that state, and not throughout the country. To obtain a license, it is only necessary to pass a qualifying examination prepared by the Supreme Court of each state (Sheppard, 2014).

As the analysis shows, the provision of legal assistance by persons who are not subjects of the criminal process and criminal procedural relations, it is advisable to attribute



it to an independent type of legal assistance, since there are significant features. Firstly, such persons carry out their activities on the basis of the provisions of not the criminal procedure law, but also other regulatory legal acts (State Duma of the Federal Assembly of the Russian Federation, 1997; Supreme Soviet of the Russian Federation, 1992). Secondly, as a rule, these persons are involved only in certain cases specified by law, when it is difficult to solve the problem with the help of state bodies and lawyers (lawyers, legal advisers), as well as defenders from among close relatives.

In accordance with Article 3 of the Law of the Russian Federation “On Private Detective and Security Activities in the Russian Federation”, any participant in the criminal process may conclude an agreement with a private detective or a private security organization, the subject of which is the collection of information necessary for him in criminal cases, the protection of his life and health, the protection of property and etc. (Supreme Soviet of the Russian Federation, 1992).

At the same time, the information collected by a private detective is not admissible evidence, since it was not obtained through procedural means (Article 75 of the Code of Criminal Procedure of the Russian Federation). The criminal justice authorities have the right to use the information obtained by a private detective in proving in criminal cases, but only after their appropriate verification and evaluation through the production of investigative and other procedural actions.

## CONCLUSION

In conclusion, the authors see it as a logical and reasonable conclusion that the list of other entities providing assistance to participants in criminal proceedings on the basis of regulatory legal acts is open, since their participation is not related to criminal procedure, but to law enforcement or human rights activities. Such activities, as a rule, entail episodic participation in certain issues, often not related to criminal procedure, although they ensure the protection, protection and realization of the rights and legitimate interests of participants in the criminal process.

It seems logical that legal assistance in criminal proceedings, based on the nature and content of the activities of the subjects of provision, who have the professional competence of a lawyer or provide legal assistance by virtue of the law, can be classified into the following types:

1) qualified legal assistance provided by lawyers (defenders, representatives), as well as legal advisers and notaries;

2) qualified legal assistance provided by public defenders or other persons whose activities are paid from the state budget;

3) legal assistance provided by other persons involved in criminal proceedings (close relatives, legal representatives, other persons);

4) legal assistance provided by persons who are not participants in criminal proceedings (the Commissioner for Human Rights in the Russian Federation, a private detective, etc.).

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