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CRIMINAL PRIVILEGE OF AN ATTORNEY AND DEFENCE LAWYER

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Abstract: The boundaries of the attorney-client privilege are the main issue of theory and practice that directly touches upon the content of the criminal privilege of an attorney and defense lawyer. In procedural law branches the prohibition of their examination is acknowledged axiomatic. The paper calls attention to the existing moral and legal problem associated with preserving the attorney-client privilege in all the circumstances without exception, including the cases when the disclosure thereof can be justified from the point of view of protecting the interests of a person, society and state. The authors admit the possibility of restriction thereof provided that the law reflects an exhaustive list of crimes, the information on preparation or commission of which will not fall under the content of the attorney-client privilege. As a result it is proposed to eliminate the existing gap in the criminal legislation of RF that can be used in the foreign law.

The conclusions made by the authors are based on analyzing the judicial practice of the European Court of Human Rights (ECHR) for a period of 1980-2017; decisions and ruling of the Constitutional Court of RF made in 2001-2017; published judicial practice of the RF Supreme Court for 2003-2017; and results of the survey of 78 respondents (judges, prosecution office staff, attorneys and teachers of criminal law and proceedings).

Keywords*:* attorney-client privilege; privilege restriction; immunity; attorney responsibility; refusal to testify.

1. Introduction.

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Privileges have a long history. Some historians attribute their appearance to the emergence and development of the diplomatic (ambassadorial) law. In other words, initially the privileges were conditioned by the necessity of fulfilling the representative capacity by certain persons in interstate relations. Later on they were established in the national including criminal legislation. Therefore the privileges were studied to the fullest extent possible in the international law. The criminal law does not give due attention to them. However it is required to elaborate a scientifically grounded and socially acceptable stance on a number of circumstances, and first of all on definition of their notion and social conditioning. Implementation of the attorney and defense lawyer privilege in the criminal law is long overdue; in procedural law branches the prohibition of their examination is actually acknowledged axiomatic, established for centuries, probably from the time of a more or less formed institute of the bar. There was every ground for that both in the past and at present. Moreover, de-facto judicial practice including that of the European Court of Human Rights and RF Constitutional Court recognizes an absolute privilege of the specified persons. Upon enforcement of the privilege, the status of a person and content of the information that attorneys and defense lawyers may not disclose shall be reflected in the law.

The privilege being a complex legal phenomenon is studied within the frameworks of a number of branches of legal sciences. As it was already mentioned, it is elaborated more profoundly and in detail within the frameworks of the international law. The theory on testimonial privilege was elaborated rather thoroughly by the scholars in the criminal proceedings including the papers devoted to the activity of the bar. In the criminal law the privilege was commonly considered either when analyzing the operation of criminal law for a number of persons, or when characterizing the norms on certain crimes containing the exclusion from the parties involved reflected in the notes to the Articles of Particular Conditions of the RF Criminal Code.

The exceptions are PhD thesis of Kibalnik A.G. and Elizarova I.A.: the first one was devoted to the privilege in the criminal law on the whole (Moscow,

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1999); whereas the second one – to the international-legal privileges in the criminal law (Stavropol, 2004).

Certain aspects of the privilege were considered by Chuchaev A.I. and Kruptsov A.A. in joint monograph "Criminal-legal status of a foreign citizen: notion and characteristics" (2010).

In the paper for the first time an attempt was made to consider the problems of correlation of procedural privileges and exemptions provided by the procedural law (administrative, administrative legal proceedings, arbitration, civil and criminal), Federal law as of May 31, 2002 No. 63-FZ "On the advocacy activity and the bar in the Russian Federation" and note to Article 308 of the RF Criminal Code, not containing the exclusion of specified persons from the operation of criminal law because of refusal to provide testimony on the circumstances that became known to them in view of fulfilling professional duties. Proceeding from the requirements of law consistency in general, correlation of the criminal law and other branches of law in particular, on the basis of the RF Constitution, decisions of the Constitutional Court of RF and practice of the European Court of Human Rights, the proposals on elimination of the existing gap in the criminal legislation of RF were elaborated.

2. Materials and Methods.

In order to determine the privilege of an attorney and defense lawyer in the criminal law it is required to consider the evolution of legislation on attorney-client privilege, study the content of the specified notion, analyze discussions on these issues for the last two centuries, determine a complex of circumstances to which a regime of the attorney-client privilege is applied and the boundaries of it.

The legal framework of the paper covers the international law acts, RF Constitution, RF Criminal Code, the Criminal Procedure Code of RF, a number of federal legislative acts, and historic monuments of law. The criminal legislation of some foreign countries was used in the paper.

The empiric basis of the paper consists of the judicial practice of the European Court of Human Rights for certain categories of affairs for a period from 1980 till 2017; published materials

on crimes and violations of law committed by diplomatic agents in Russia and in other countries; RF Constitutional Court rulings and determinations on certain types of privileges made in 2001-2017; published judicial practice of the Supreme Court of RF for 2003-2017 on admission of proof unacceptable due to violation of norms on testimonial privilege; and results of the survey of 78 respondents (judges, prosecution office staff, lawyers and teachers of criminal law and proceedings).

3. Discussion and Results.

In accordance with Part 3, Article 56 of the Criminal Procedure Code of RF (CPC of RF) the following persons are not subject to examination as witness:

1) defense lawyer of the alleged criminal and defendant – on circumstances of the criminal case that became known to him or her due to his or her taking part in the proceedings on the given case;

2) attorney – on circumstances that became known to him or her due to his or her rendering legal assistance.

An attorney is a person that received a status of an attorney and the right to fulfill the advocacy activity in the procedure prescribed by law; and is acknowledged an independent professional legal adviser (par. 1 to the Article 2 of the Federal Law as of May 31, 2002 No. 63-FZ "On advocacy activity and the bar in Russian Federation"). Legal assistance with regard to which the attorney cannot be examined in the criminal procedure and the types of it are determined by law.

The notion of a defense lawyer is given in Article 49 of CPC of RF. It is a person fulfilling protection of the rights and interests of alleged criminals and defendants in the procedure prescribed by criminal-procedure legislation and rendering legal assistance to them in criminal proceedings. Attorneys act as defense lawyers. However, it should be kept in mind that along with the latter, a defender can be one of close relatives, or another person about the admission of whom the defendant applies for. In justice of peace proceedings the specified person is admitted instead of an attorney as well. Under Part 2, Article 49 of the CPC of RF, in pre-trial proceedings on the criminal case only attorneys can be defense lawyers.

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According to par. 4 to the Article 5 of CPC of RF close relatives involve husband, wife, parents, children, adoptive parents, adopted children, whole blood brothers and sisters, grandfather, grandmother, and grandchildren.

At the core of the privilege considered is the attorney-client privilege that has its roots deep in the past - the Roman Empire times. At that it should be noted that since then the attention to it does not drop at all: people disputed and still dispute, wrote and still write about it. Both distinguished foreign and Russian lawyers stated opinion about this privilege. In a word it is acknowledged to be one of the perennial problems of the bar and advocacy activity, a peculiar "quadrature of the circle" – the task of building a quadrate equal to the circle of a given radius. Vatman D.P. for instance specified that for advocacy activity being public-law by the content and unilateral in direction, vitally important is the attorney-client privilege established by law for the benefit of decent course of justice, protection of fiduciary relations between an attorney and client, strengthening the authority and social image of the bar.

The majority of specialists acknowledge the attorney-client privilege as a necessary condition of rendering real assistance to the client in terms of protection of rights and legal interests. For this category of lawyers by the way justifying its existence differently, the issue is only in the boundaries of the attorney-client privilege. At that some of them did not even admit this thought. Other well-known lawyers of the last centuries on the contrary spoke against the attorney-client privilege.

In the pre-revolutionary law of Russia, an attorney was called attorney at law. According to Article 403 of the Organization of Judicial Institutions, "the attorney at law shall not make public the secrets of the client not only during the proceedings of the case, but also in case of exclusion from it and even after the completion thereof".

In the first decade of the Soviet power, the problems of the attorney-client privilege were actively discussed in the legal community. Discussions proved a rather stable division of positions: some scholars and practitioners insisted on its firmness; the other on the contrary acknowledged a

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privilege a survival of times past incompatible with the socialist morale, professional ethics, regarded it as an obstacle to establishment of truth in criminal proceedings, a way of evading responsibility etc. All this inclined to search for an acceptable decision under conditions of an absolute domination of CPSU in all spheres of life of society.

In Article 65 of the CPC of RSFSR as of 1922 the resolution was confirmed that the following persons "cannot be called and examined as witnesses:

1) defense lawyer of defendant on the case on which he or she fulfills such duties..."

On May 26, 1922 there was adopted a Statute on the Bar that determined general features of the corporation and duties of the bars. There is nothing about the attorney-client privilege in the specified Statute; however it seems to us that it was assumed on the basis of the Article 65 of CPC of RSFSR prohibiting the examination of the defense lawyer. The Stature concerning the bar approved by the People's Commissariat of Justice of RSFSR as of July 5, 1922 also says nothing about the attorney-client privilege.

Probably that is why the discussions on the problem under study continued in the academic circles. In this respect the discussion of the attorney-client privilege among the Ukrainian legal community that took place in 1924 is of interest. The very name of the report by V. Skerst leaves no doubt that there is no unity in the point of view of the specialists – "Boundaries of Professional Privilege of Defense Lawyer in the Spirit of the Soviet Legislation". The viewpoint of the reporter was not consistent. On the one hand he asserted that under conditions of the Soviet reality and its ideology there is no question of the "holiness" of the professional attorney-client privilege. Therefore the problem should not be fetishized, when resolving it one should proceed from the practical expediency solely. On the other hand he came to the following conclusion: "An attorney ... is not entitled to disclose a secret entrusted to him or her, consequently nobody is entitled to insist on such disclosure".

Mamutov V., having supported the reporter noted: "One should not confuse two ideas and say that the defense lawyer is obliged to lodge information when all citizens are

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relieved of these duties... Elimination of the attorney-client privilege will result in situation where the institute of the bar will be needless. The lawyer is inconceivable without trust from defendant. The defense lawyer cannot denunciate to the court that the defendant confessed to the committed crime if the defendant pleads not guilty in court".

Disagreeing with it, Cherlyunchakevich K.S. got very tough on it: "One must not make secrets from the Soviet state;" Karashevich M.I. asserted: "Defendant or a client should know that everything told to the attorney should be known to the court as well, since the attorney cannot tell a lie together with a client as he or she is an office holder". Fishman L., Sanchov V., Rubinshtein L., Obukhovskiy V. and other declared against the attorney-client privilege.

Later Elkind P.S. spoke against the attorney-client privilege. She considered that the increased consciousness of the soviet attorneys in modern times contradicts the requirements of professional confidentiality in present volumes thereof. The author proceeded from the fact that the bar is meant to protect only legal interests of citizens, consequently, it should not conceal and silently protect the illegal interests without entering into a conflict with its governmental and socialist nature. According to the author, there are no such cases in practice when for protection of legal interests of the client the attorney would need the attorney-client privilege in the sense specified.

In legislation of that time (for instance in the Statute of the People's Commissariat of Justice of USSR as of August 16, 1939 "On the Bar of USSR") there was nothing about the attorney-client privilege. It was first mentioned in the Soviet history in the Statute on the Bar of RSFSR as of July 25, 1962 In accordance with the Article 33 of the Statute "the attorney shall not disclose the information told to him or her by the client in connection with his or her rendering legal assistance on the given case.

The attorney cannot be allowed as a witness on the circumstances of the case that became known to him or her due to his or her fulfilling defender duties on the given case". The specified prohibition was in line with par. 2 of Part 2 to the Article 72 of CPC of RSFSR as

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of 1960 in which it is said: "The following persons cannot be examined as a witness:

1) defense lawyer of the defendant – on circumstances of the case that became known to him or her due to his or her fulfilling defender duties..." However it should be noted that despite the circumstances specified, the attorney privilege was not reflected in the Criminal Code of RSFSR of 1960.

In the Law of USSR as of November 30, 1979 "On the Bar in USSR" (Article 7) there was actually fixed the same formula of the attorney-client privilege that in the Statute on the Bar of RSFSR as of July 25, 1962. However, the content thereof became much broader in our opinion which can be seen from the comparison of notions "rendering legal assistance" (in the Law "On the Bar in USSR") and "rendering legal assistance on the given case" (in the Statute on the Bar of RSFSR). However, it should be kept in mind that the criminal procedure characteristics of the prohibition to examine the defense lawyer remained unchanged.

Special legal regime was attached to the attorney-client privilege in the Statute on the Bar in RSFSR as of November 20, 1980 In particular it specified the following (Article 16): "The attorney is not entitled to disclose the information reported to him or her by the client due to his or her rendering legal assistance." In the Article 15 of Statute the prohibition of the attorney examination was broader than in the CPC of RSFSR: it covered the information obtained not only in connection with protection of the defendant, but also in connection with fulfilling the duties of a bailsman.

Zalogina O.G. considers that "from the moment of adopting the Law on the Bar in 1979 and the Statute on the Bar in 1980, the right and liability to keep the attorney-client privilege are associated not with the type of legal assistance rendered by the attorney, but with a special status of a person rendering legal assistance, i.e. the defense lawyer status". One can hardly agree with this assertion. System analysis shows that the attorney-client privilege rests on the dual basis: functional – performance of the duties of a defense lawyer; criminal procedure status (status indicator) – intervention in the criminal procedure in the property specified.

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The name of the secret as an attorney-client privilege is rather conventional, at least in criminal proceedings. In the criminal law taking into account the specific nature of refusal to testify as a crime stipulated in Article 308 of the Criminal Code of RF (CC RF) actually the question should be firstly about the defense lawyer in the broad sense of the word, not only about the attorney; secondly about the attorney when he or she renders legal assistance not associated with fulfilling the defendant duties.

For settling the issues of the defender privilege in criminal law, the content of the secret being considered is of prime importance. Tsypkin A.L. identified two groups of information making the secret: 1) information betraying the alleged offender or defendant in commission of an incriminated crime; 2) information that can directly or indirectly have an unfavorable impact on selection of the defendant liability.

Another opinion was reflected in the Federal Law "On advocacy activity and the bar in the Russian Federation." In Article 8 of the Law it is said: "1. The attorney-client privilege covers any information associated with the attorney's rendering legal assistance to the client...".

Even more broadly the notion is interpreted for instance by Barshchevskiy M.Yu. "From the moment the client crossed the threshold of the legal consultation office or a firm of attorneys, everything thereafter is a subject of the attorney-client privilege. The very fact of addressing an attorney is already a professional privilege... Moreover, even if it was not the future client himself who applied to the attorney but somebody of his relatives with whom no agreement for conducting of case was ever made, the general rule remains unchanged - all the information received from this relative and even the very fact of his or her applying to attorney is an attorney-client privilege."

The fact of applying to attorney, including the names of clients, is included in the content of the privilege being considered by the Code of Legal Ethics adopted on January 31, 2003 at the First All-Russian Congress of Attorneys of Russia (Article 6). However it should be kept in mind that in CPC of RF as it was already specified the questions are the circumstances that

became known to him or her in connection with his or her taking part in the proceedings on the case or in connection with his or her rendering legal assistance (the same is specified in the Article 6 to the Code). In this case the examination on the very fact of a person's application for legal assistance does not fall under the content of the criminal-legal prohibition in our opinion, and consequently, under the criminal-legal privilege of an attorney and defense lawyer.

In accordance with the specified Code, the attorney-client privilege regime also applies to

– all evidence and documents collected by the attorney when preparing for the case;

– information received by the attorney from clients;

– information about the client that became known to the attorney in the course of his or her rendering legal assistance;

– content of legal advise provided directly to the client or intended for him or her;

– all attorney's proceedings on the case;

– terms and conditions of the legal assistance agreement including monetary settlements between an attorney and client;

– any other information associated with the attorney's rendering legal assistance.

As an exception the Code of Professional Ethics stipulates the right of attorney to use without client's consent the information provided to him or her in the volume that the attorney considers reasonably necessary to justify his or her position upon investigation of a civil dispute between the attorney and client, or for protection of himself or herself on the disciplinary proceedings or criminal case initiated against him or her (par. 4, Article 6). Other exceptions can involve the situations with respect to which the international acts and federal legislation established special legal regime with due account for requirements of the attorney-client privilege.

The boundaries of the attorney-client privilege presently, just as before, are the main issue of theory and practice which in its turn directly touches upon the content of the criminal-legal privilege of an attorney and defense lawyer. Thus, Tsypkin A.L. thought that

the attorney-client privilege cannot be absolute, "..crimes differ, and we can encounter the most dangerous criminal to whom the attorney-client privilege may not be applied." The author proposed to specify such situations directly in the law. In fact, Podolnyi N.A. speaks about it as well: "The logic of public safety makes me look at the attorney-client privilege and conditions of preserving thereof in a slightly different way. It should not and cannot be absolute, that is be observed under any circumstances. There should certainly be specified the cases and situations where the attorney must distribute the information that became known to him or her to the bodies that conduct investigation and criminal intelligence operations."

Some authors when characterizing the situation described by Podolnyi N.A. refer to par. 2 to the Article 7.1 of the Federal Law as of August 7, 2001 No. 115-FZ "On countermeasures against legitimization (laundering) of proceeds of crime and terrorism financing", in accordance with which if the attorney has any reasons to think that transactions or financial operations (real estate transactions; management of cash, securities or other property of the client; bank account management, securities account management; attraction of money for establishing organizations, ensuring the activity thereof or management thereof; establishment of organizations and purchase and sale of organizations) are fulfilled with the purpose of legitimization (laundering) of proceeds of crime and terrorism financing, shall notify the authorized body about that. It as a false statement since in par. 5 to the Article 7.1 of the specified Law it is directly said that the statements of par. 2 of the same Article do not refer to the information covered by the requirements of RF legislation on attorney-client privilege.

Petrukhin I.L. made one exception from the content of the attorney-client privilege, and consequently from the criminal-legal privilege – the necessity of reporting the circumstances associated with crime prevention. Earlier a well-known Russian attorney Aria S.L. discoursing about it wrote: "One can positively think that the attorney must keep silent about the crime committed by his or her client. Upon the action committed, the reporting

of it can pursue one objective – punishment...

It is more difficult to answer the question regarding the correct behavior of an attorney when the client came to take counsel on the crime being prepared. It is obvious that the only piece of advice the attorney is entitled to give to such client is to earnestly convince to refuse from fulfillment of intention and specify the malignity of consequences. What shall he do next: is the attorney obliged to take other measures to prevent probably dire threat hanging over or follow the professional duty of preserving secret taking a risk to retain a sense of guilt for the whole life? In this case the question is already not in assisting in vindictive actions, but in helping other people and preventing a real disaster threatening them. Here the voice of moral duty sounds unbearably loudly. And it is hard to resist it...”

According to some specialists in the situations described there is neither right, nor legal interest of a client subject to protection. The information about the wish to commit some crime does not have any relation to protection, or rendering legal assistance to the client by the attorney.

The possibility (or obligation) to inform about the prepared crime with the purpose of prevention thereof shall be fixed regulatory. At that the law should clearly specify the crimes in question. Otherwise, “if the attorneys will start lodging information for instance about particularly serious economic crimes being prepared, the independent and publicly esteemed bar can be forgotten about.”

The paradox that formed between the ethic requirements to the attorney activity and interests of society shall be eliminated by means of recognizing the priority of the pivotal norms of human morale presuming an absolute value of the human life.

A number of criminalists suggest that making confidential information known to public should be considered in extreme emergency. The latter has nothing to do with the attorney-client privilege.

According to the Core principles with respect to the role of lawyers (Havana, 1990), “the governments acknowledge and secure the confidential nature of any relations and consultations between lawyers and their clients within their professional relations.” In

accordance with the Standards of Independence of Legal Profession of the International Bar Association (New-York, 1990) the attorneys shall be provided confidentiality of relations with a client.

Code of Conduct for lawyers in the European Community (Strasbourg, 1998) considers a necessary element of the advocacy activity the creation of such conditions for the client under which the latter can freely provide information to the attorney that he would not tell other people, and preservation of confidentiality of the information by the attorney as a recipient thereof. Confidentiality of relations between the lawyer (attorney) and the client is established in this Code as a primary and fundamental right and liability of the lawyer that shall be protected by the state.

In judicial practice of the European Court of Human Rights (ECHR) there are a number of cases on applications of attorneys from different countries in connection with violations of their attorney-client privilege (Germany, United Kingdom, Luxembourg, Moldova, Finland etc). On May 15, 2007 the ECHR considered a complaint from the attorney, Smirnov M.V. against Russia. The applicant contested the legitimacy of the search of his flat and seizure of 20 documents and computer system unit which caused the violation of the right for protection of his clients.

The Court came to a conclusion about the violation by the Russian authorities of the requirements of articles 1, 8, 13 (together with the article 1 of the Protocol No. 1 to the Convention) of the Convention for the Protection of the Human Rights and Fundamental Freedom (Rome, 1950). However, the ECHR did not reveal the violation of the attorney-client privilege at that.

4. Conclusion.

The attorney-client privilege is the information obtained by attorney or defense lawyer in connection with rendering legal assistance to the client or fulfilling protection on the stage of preliminary investigation of the criminal case or consideration thereof in court, having special legal regime that prohibits the disclosure thereof. It is not a privilege of attorney or defense lawyer, but the immunity of the client. This privilege is absolute which results as it was

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mentioned in moral and legal collision between the ethical and legal norms regulating the activity of the attorney and interests of a man and society in securing their safety. In this regard the restriction of the attorney-client privilege – exclusion from the content of it of the information about the prepared crime against human life or health (Articles 105, 106, 1101, 1102, 111–112, 120 of the Criminal Code of RF) and public safety (Articles 205, 205^{1}–205^{5}, 206, 208, 209, 210, 212 of the Criminal Code of RF) is expedient and morally and socially justified. Such exclusion does not contradict the RF Constitution and international legal acts. The specified exclusion is reasonable to formalize in Article 56 of CPC RF.

The notion of "confidentiality of data" is not identic to the notion "attorney-client privilege," they correlate as a part and a whole. The criminal-procedure prohibition underlying the criminal-legal privilege of an attorney and defense lawyer also has a narrower content than that of the attorney-client privilege. The criminal-legal privilege of specified persons should be defined proceeding from its procedural value.

Thus, the following persons have a criminal-legal privilege:

1) attorneys;

2) defense lawyers;

3) close relatives;

4) other persons. The latter can involve any persons that took part in protection of the defendant and permitted as such by the judge's ruling.

The functional foundation of such privilege is:

a) with respect to the first person – rendering legal assistance on criminal case; the latter as it was specified above covers the participation of a defense lawyer as well in criminal proceedings;

b) with respect to the second one – participating in criminal proceedings at both pre-trial and on-trial stages;

c) with respect to the last two persons – participating in criminal proceedings at the stage of judicial examination of the criminal case.

The place of norm on the privilege – is a note to the Article 308 of the Criminal Code of RF stipulating the liability for refusal to testify. The privilege considered and the crime are genetically connected with each other: since the attorney and defense lawyer cannot be examined provided that there

are circumstances specified in the criminal-procedure or other federal legislation, the refusal to testify does not constitute a crime. The available note reflecting the privilege of witness speaks in favor of such step.

The note to the Article 308 of the Criminal Code of RF can be stated as follows:

"Article 308. Refusal to testify

.....

Note. The following persons are not subject to criminal liability for refusal to testify:

2) attorney and defense lawyer – on circumstances of the criminal case that became known to him or her due to his or her taking part in the proceedings on the given case; or on circumstances that became known to him or her in connection with his or her rendering legal assistance, except for cases stipulated by the legislation of the Russian Federation."

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