
ҚЫЛМЫСТЫҚ ПРОЦЕСС ЖӘНЕ КРИМИНАЛИСТИКА УГОЛОВНЫЙ ПРОЦЕСС И КРИМИНАЛИСТИКА

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Legal bases of barrister's activities

Particular attention is given to this element of the legal basis for the participation of counsel in criminal proceedings as the legal status of counsel in the Article. It is noted that he comes from a combination of general and special one in the legal status of a counsel as a personality and a representative of the profession. The legal basis of the lawyer's activity in criminal proceedings includes not only the rules of criminal procedure, but also the norms of international law and common law. Using the analog port of a classification of legal status, legal position, legal capacity in the theory of law (general, branch, special) the classification of defense counsel's powers is divided into general, branch and special. The lines for determining of the defense counsel's legal limits are divided into: scientific, law-regulatory, and corporate.

Key words: lawyer's activity, the barrister, training of lawyers, municipal legal profession, the criminal trial, the qualified legal aid, competitive essence of process, legal profession, legal status of the lawyer, legal limits of the lawyer's activity, defender's powers, signs of defense counsel.

Progressive changes to the legislation on practice of law have materially altered the status and role of a lawyer. Nevertheless, there are still a lot of unresolved issues influencing the efficiency of granting legal aid to the population.

For example, the issues of incentives for providing legal aid in remote regions and rural districts, on-the-job training and providing gratuitous legal aid are not resolved. The status of paralegal assistants is not clear to the full extent.

It should to be noted that nowadays there are many lawyers within Kazakhstan, which have a license to be engaged in practice of law, but do not want perform it in rural districts. Regional colleges of lawyers themselves seek the way out at least at corporate level, through the reduction of amounts of entrance and current fee, or even the exemption from payment of entrance fee. However, with enormous number of lawyers in cities, there are not enough of them in rural districts. It appears that this issue can not be resolved at the level of departmental or corporate adjustment. Legal groundwork must be laid to create benefits in interning and examination for a license, in case if a person plans to work in rural districts. All this, in order to be guaranteed, must be reflected in a certain agreement. In case of giving up such work, in accordance with this agreement, the revocation of a license, the termination of a license, and the exclusion from a college of lawyers take place.

By historically developed reasons not only in economic, cultural, educational and other spheres of activity, but also in providing legal services, rural districts lack government support. It is known that some benefits are provided for the enrollees from rural districts by certain quotas. Let us remember the institution of land doctors and teachers existed in times past, for it was there where skills of future professionals have been honed. And we think that this measure will not discord with the principle of equality before the law, but contribute to balance the positions of urban and rural population. It is not harking back to the Soviet past, but a measure for humanization and democratization of relationships between two social groups. Therefore, we consider that there is the necessity for legislative machine aimed to resolve this issue.

The institution of assistance is by far advantageous than internship, and it was correctly noticed by Yu.I. Stetsovskiy: «The period of internship may be prolonged by the college, but one cannot forget about the insufficiency of its means for remunerating interns. In this regard, the issue of implementing the institution of paralegal assistants is worth noticing. Being, during a few years after finishing the internship, under the supervision of experienced lawyers and carrying simple and paid cases, assistants gain experience and knowledge, which will improve training of lawyers» [1; 95].

For example, the internship of future lawyers in Kazakhstan is fee-paid today (the amount is large), and its period is up to a year. An intern is not remunerated and has no time to gain experience within such short period. And given that the requirement of relevant professional experience for lawyers was omitted in Kazakhstani legislation, it is possible to imagine legal aid that former student will provide.

And with implementation of assistance many things would seem different. A student, after the graduation from the institution of higher learning, can undertake an internship, which is included into professional experience in Kazakhstan. Then the student takes an examination to an assessment college, in order to obtain a license to be engaged in practice of law, and enters the college as paralegal assistant for the period defined by the college, but for no less than two years. Once this period expired, the college will resolve the issue on prolongation of being at this position for the period up to five years, or on admitting to the membership of the college. We believe that within this particular multistage system of training only skilled people, who understand their own calling, will stay in practice of law. There will also be a possibility for young and entry-level lawyers to earn money, gaining invaluable personal experience. As K.K. Arsenyev previously noticed, «We are convinced that the hope to quickly find paid, though poorly, occupations is the only incentive reason for quite many people to become an assistant of an attorney at law» [2; 41].

Undoubtedly, this rule must be applied somewhat differently to persons with professional experience. It is possible to shorten the period of being an assistant or internship period. It is possible to implement appraising instead of the examination for obtaining a license, as it has been relevantly recently implemented in the RoK: persons, who have been working as an investigator, an interrogating officer, a judge, or procurator for more than ten years, are excused from the examination, and are appraised.

Another prospect, in which line it would be possible to improve practice in law, is the ways for creation of municipal advocacy. Especially as this issue is closely connected with providing the institution of mandatory defense and is included into criminal proceeding of any type.

As opposed to optional criminal defense, when there is the necessity to provide mandatory defense, it is no secret that the difficulties associated with staffing lawyer support and complicated relationships with the court always occur. At the same time, there is an issue of some dependence of lawyers on the authorities carrying out criminal proceeding, which is known for quite a long time.

Two variants of modifying foreign experience are possible. It is known that there is conventional division of persons providing legal aid into barristers and solicitors in the countries of Anglo-Saxon legal system. For today, as the result of legislative development, dissolution of existent differences takes place, for example, in England [3; 80]. Considering present trends of globalization and integration, the experience of foreign countries is of certain interest. Maybe, specific structural subdivision should be created within advocacy (perhaps, even with use of the institution of assistants). Besides, persons providing such aid must not get fee for the participation in criminal case as intended, but only salary. It would provide the independence of young lawyer from the representatives of authorities carrying out criminal case and other outside influences, fair remuneration, good practical training of the assistant, and skilled defense of the accused.

The second variant could be taken from legal practice in the USA, where this method has more recently proved its value as more or less efficient. It is the creation of so-called public defenders agencies for providing legal aid to the poor. Their financing is performed mainly using local budget funds, special contributions and charitable donations [3; 193, 194].

This model is quite acceptable within our countries, despite of its questionable character at home. In the USA, as in all countries with such type of judicial proceeding, with absolute competitiveness, there is always particularly critical issue of financial support for not only provision of legal aid for the accused, but present heavy expenses on conducting parallel investigation: expert appraisals, search for witnesses and evidence for the defense, private investigator, conveying of witnesses, etc.

In continental type of criminal proceedings, it is not necessary to conduct such investigation; the burden of proof lies on the parties in judicial proceeding only, and the burden of proof lies on the authority carrying out criminal proceeding. Therefore, the expenses for salaried lawyer will be far less than costs of a lawyer for each criminal case paid from federal budget. There also will not be so-called «pocket lawyers»; there will

be the guarantee of independent defense. It is more preferred than the situation when members of the college of lawyers take their work on mandatory defense as a mere formality, focusing their efforts on paid criminal cases. In this case a young lawyer will have no other (criminal or civil) cases, but «gratuitous». It is possible to develop the standard of load per a lawyer and decide on necessary staff.

Positions on the legal status of counsel take the central place in the legal bases of advocacy in the criminal process. The legal status of counsel is the condition of his legal status as individuality, in the first place. The legal status of the lawyer comes from a combination of general and special one in the legal status of a lawyer as a personality and a representative of the profession. This combination looks like a general legal status of an individuality, a special legal status of the individuality and the individual status of the personality.

In the theory of law alongside with other kinds of status there are professional and official status [4; 235, 236]. That is, there is a single legal personal status, from which according to the form of fixing the rights and responsibilities, common and different kinds of special legal status can be identified [5; 75].

The main content of the legal status of defense counsel is his rights and duties, that is the authority. But at the same time, it is obviously that it includes in addition to the above: the reasons for his appearance, personality of the legitimate interests and liabilities. «Being able to implement some of the law gives only the possession of certain legal status» [6; 401]. Therefore, we cannot accept the position of the V.L. Kudryavtseva, who considers only the procedural status of defense counsel [7; 29]. This is not quite right, the rights and obligations of a lawyer are not only enshrined in the sector-specific legislation, but in general, legal status.

The legal status and procedural powers of attorney in certain stages are the condition of his legal position not only in criminal proceedings, but also in the police machinery in general. It is no accident E.V. Vaskovskiy noted that «the legal profession in its own sense is law protection, that is, in other words, it is legal assistance to those in need specialist-lawyers» [8; 6].

Advocacy in its basis has a few basic provisions. The Constitution of the Republic of Kazakhstan in 1995 consolidated the most important provisions on the right of counsel. The Constitution of the Republic of Kazakhstan are reflected in two positions: «2. Everyone has the right to judicial protection. 3. Everyone has the right to qualified legal assistance. In the cases provided by law, legal assistance shall be free» (p. 2, 3 tbsp. 13). Enshrined in Section 3, Article. 13 of the Constitution of RK everyone's right to qualified legal assistance is fundamental. Consolidation of the law at the constitutional level underscores its place a mechanism to ensure the rights and freedoms in society and the state.

«Legal aid — is a» war for the rights of «using all legitimate means and ways to protect the rights and interests of citizens by raising awareness, drafting of complaints, the filing of motions, discovery of documents, active carrying out other actions in court proceedings, and beyond it» [1; 7]. And the urgency of the implementation of the constitutional right is acquired in criminal proceedings. Advocacy according to all the rules of «war for the rights», thus becoming not only the subjective-legal, but also the public and legal interest. The main subject of the provision of qualified legal assistance is a lawyer. And the public and legal nature of his work is reflected, for example, in mandatory participation of defense counsel in many criminal cases on grounds provided in Art. 72 Code of Criminal Procedure of RK.

The legal status of a lawyer is firstly the condition of the right to qualified legal assistance and the defendant's right to protection.

Under the right to legal assistance in criminal proceedings are implied to understand the provision by the state of the right to receive skilled care to be provided by a specially authorized agents (attorneys) realizing in a professional manner protecting the rights and lawful interests of citizens, as well as their representation in the production of materials and Criminal case.

O.D. Savich considers the legal assistance as a variety of social assistance and rightly includes this right in terms of the procedural safeguards of individual rights and freedoms of citizens [9]. At the same time we can not agree with the opinion of the author, that legal assistance in criminal proceedings should be provided only by lawyers. We do not agree with the author's opinion, because this statement does not reflect the legal nature of bar associations, that are non-public associations in nature. The basic guarantee in our view will be the principle of giving to the suspect, accused the right to protection.

Undoubtedly, this law is corresponding obligation of bar associations and their members to provide legal assistance. The bodies of the officers of the bar associations may not impose any restrictions on the rights of lawyers and persons needed in legal assistance [1; 9].

In this regard, notably the point of Section 4 of Art. 4 of the Law of RK «About Advocacy», and logically it develops the rules proposed in the draft Law of Kazakhstan «On making changes and additions

to some legislative acts of the Republic of Kazakhstan on the questions of the Bar» (hereinafter — the Law) [10]. This project has caused a lot of questions not only from the side of the public but also from the government, which is exercising its right to appeal to the Constitutional Council on the constitutionality of certain provisions of the draft, in particular on the legal status of the Union of Advocates of the Republic of Kazakhstan.

It should be noted that the lawyer — is a professional participant of criminal proceedings. As if we did not argue about the unconstitutionality of this point, but for today at the legislative level, at the level of public opinion — this fact is undeniable. The question arises, what is expressed by the professional nature of the lawyer.

In the literature there is an attempt to formulate specific features. Thus, through the prism of advocacy A.G. Kucherenina formulated more precisely the basic features of professional work in providing legal assistance. There are eleven founded [11, 40–46]. We will try to distinguish the specific features of the lawyer as the subject of protection in criminal proceedings in the broad sense of the word.

Firstly, the lawyer is a citizen of Kazakhstan. Foreign lawyers are permitted only in special cases. Secondly, he has a law degree, obtained a higher education institution that has a license to provide educational services in this specialty. Thirdly, he received a license to practice law. Procedure of obtaining the license is provided for by legislative acts. Fourth, he should be definitely a member of the Bar. As to the impropriety of this situation, we've already covered above, the question still remains opened. Fifthly, he provides legal assistance on a professional basis. Sixth, he operates within the legal profession. For the lawyer the defense in a criminal case is a professional activity, primary occupation, employment, protection for him — is a profession, the main source of income. Advocate — is a person who possesses not only education and license, but also some professional skills in providing legal aid. It is no accident from the meaning of the law of Kazakhstan «About advocacy it implies that the person is allowed to the qualification exams only for an internship period from 3 months to a year. Seventh, he operates on the basis of a special law of Kazakhstan «On Advocacy». In the eighth, he is guided by not only the law but also corporate and ethical standards of conduct; ninth, a lawyer himself, his organization (Bar) have a special legal status.

For example, in the Code of Criminal Procedure of RK it is provided that a lawyer acts as an obligatory counsel, about it the orders are issued binding for a professional organization of lawyers that do not apply to non-professional counsel. Only a lawyer may not refuse to take over the defense of a suspect or accused person.

On the legal status of counsel, subjects to the safeguards of advocacy, of secret law, the rules of professional conduct, disciplinary action are spread.

Many other regulations emphasize the professional nature of the lawyers. Considered earlier provisions that reinforce isolation of this profession, point to its isolated nature.

The particular importance in the legal status of the defense counsel is the definition of the moment of the acceptance of his authority, from which the lawyer subsequently will not be able to refuse. The value of the entry in the criminal case of lawyer as defense counsel is very large. With the accession to the defender many significant things are changing in the criminal procedure, it acquires new features. In criminal and procedural law the mechanism of tolerance lawyer as defense counsel to participate in criminal proceedings is given in detail. But the latter is due to a tolerance of-counsel attorney in the criminal process in general, because from that point defense lawyer begins to have a legal personality as a participant in the criminal process [12; 105]. In accordance with Part 3 of Art. 70 Code of Criminal Procedure defender is allowed to participate in the filing of charges or the recognition of a person in accordance with the first part of Article 68 of the suspected. In Part 1 of Art. 68 Code of Criminal Procedure the person is a suspected in three cases: if in respect of him the criminal case is brought an action on suspicion of having committed the crime for which he is announced by the investigator, if his detention is implemented or if a measure of restraint before bringing charges is applied to him.

The suggestion was made to optimize the list of grounds of compulsory participation of defense counsel in the production of materials and the criminal case [9]. Not agree with this position, because it contravenes the purpose of legal aid. At the same time, we agree with the author's suggestion to expand this list in the second instance — when the accused is in custody, the case is considered on his complaint.

Legal basis of lawyer's participation as defense counsel in criminal proceedings organically include rules for determining the defendant's right to protection. The right of counsel is one of the most valuable achievements of modern criminal process. The need to protect the rights of the individuality pursued in criminal proceedings, gives an indication of that society and the state have recognized this fundamental beginning of one of the fundamental principles governing the relationship between society, the individual and the state.

The legal basis of the lawyer in criminal proceedings include not only the rules of criminal procedure, but also norms of international law and common law. The mere presence of defense counsel is a way to protect the accused from prosecution, a form of exercise of the constitutional human and civil rights to qualified legal assistance in implementing their own personality, guarantees of individual rights in criminal proceedings, a compulsory element of the adversarial principle.

An essential element of the counsel's legal status is rights and duties of defense counsel, which are embodied in the form of authority in the Criminal Procedure Act. These include the rights and duties of defense counsel as a party to judicial action and the right of counsel in accordance with the Law of RK «On Advocacy». We want to pay attention to the fact that the Code of Criminal Procedure Art. 74, fixing the list of remedies is called «Powers of counsel». Regulations, Part 1 of this article, and in general the nature of authority means that the law granted the right of counsel is also his / her duties: defender must use all legitimate means and ways to protect in order to identify the circumstances to refute the charges or mitigate the responsibility of the suspected, accused, and to provide them with the necessary legal assistance.

Protection, therefore, the powers of defense counsel are legislated in two regulations: Code of Criminal Procedure and the Law of RK «On Advocacy». Basing on the existing legal structure, we can say, using the analog port of classification of legal status, legal point, the legal theory of law (general, branch, special), [6; 188.402]. The existence of general, branch and special powers of defense counsel. General powers are enshrined at the constitutional level, in the law on the Bar, in other legal acts. Special status of a lawyer is part of the branch status of counsel in criminal proceedings, but it is referred to the defense lawyers. Despite some correspondence between the two categories of lawyer's rights, a defense lawyer has the opportunities for maneuver, and if it is necessary he can use powers not foreseen in the Criminal Procedure Act, but also conducive to the objectives of participation in court proceedings. Powers of defense counsel are enshrined in article 74 of the Code of Criminal Procedure of RK.

Determination of legal limits coming from the meaning of Part 1 of Art. 15 of the Law of RK «On advocacy» and the logic of development should go in several directions: academic, regulatory, corporate.

The law defines the boundaries of protection, indicates the means and methods that can be applied by subjects of protection [13; 73]. This means that the lawyer is not entitled to defend the material actions and the proceedings of the defendant, or to commit such acts on behalf of the accused, if they violate the law.

Statutory limits are fixed on special (the Law of RK «On Advocacy») and branch (Code of Criminal Procedure of RK) level.

In the Law of RK «On advocacy» in the provisions of Articles 15, 16 we can synthesize the following limits: the requirement of compliance with legal requirements, principles of organization and activities of the legal profession, professional standards and advocacy secrets; terms self-removal of legal aid, a ban on differences in the legal position with a client, becoming worse the situation, a ban on the denial of legal aid on a criminal case, the obligation to appeal against illegal decisions, the prohibition of combining advocacy with the public service, business and other paid position, ethical and professional standards.

At the branch level as well as in the Code of Criminal Procedure of RK limits are imposed on implementation of the lawyer's powers as defense counsel. Defender can not commit any acts against the interests of his client and hinder the implementation of his rights, contrary to the position of the defendant admit his involvement in the crime and his perpetrators, make reconciliation of the injured with the defendant, recognize a civil suit, filed by his client to withdraw the complaints and petitions; disclose information that he has learned in connection with an appeal for legal aid and its implementation, to refuse to accept for himself protection of the suspected or accused person. Responsibility for the failure of authority rests solely with the professional advocates for the Law of RK «On Advocacy».

Thus, in the legal framework of a lawyer there are his legal status and legal limits of exercise of the powers that require the attention of scientists and practitioners.

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Адвокаттық қызметтің құқықтық негіздері

Мақалада адвокаттың қылмыстық сот өндірісіне қатысуының құқықтық негіздерінің элементі болып табылатын адвокаттың мәртебесіне ерекше назар аударылды. Ол кәсіптің өкілі және жеке тұлға ретіндегі адвокаттың құқықтық мәртебесіндегі жалпы және ерекшенің үйлесімінен бастау алатыны атап айтылды. Қылмыстық сот өндірісіндегі адвокат қызметінің құқықтық негіздеріне қылмыстық іс жүргізушілік нормалармен қатар, халықаралық құқық және жалпы құқық нормалары кіреді. Құқық теориясындағы құқықтық мәртебенің, құқықтық жағдайдың, құқық субъектіліктің жіктелімінің (жалпы, салалық, арнайы) ұқсастығын пайдалану нәтижесінде, адвокат-қорғаушының өкілеттілігін жалпы, салалық, арнайы деп жіктеу ұсынылды. Сондай-ақ адвокат-қорғаушының қызметінің құқықтық шектерін анықтаудың ғылыми, нормативтік-құқықтық, корпоративтік бағыттары берілген.

Р.М.Жамиева, Б.А.Жакупов

Правовые основы адвокатской деятельности

В статье особое внимание обращается на такой элемент правовых основ участия адвоката в уголовном процессе, как правовой статус адвоката. Отмечается, что он исходит из сочетания общего и особенно в правовом статусе адвоката как личности и как представителя профессии. Авторами подчеркнута, что к правовым основам деятельности адвоката в уголовном судопроизводстве относятся не только уголовно-процессуальные нормы, но также нормы международного и общего права, с использованием аналогового переноса классификации правового статуса, правового положения, правосубъектности в теории права. Приведена классификация полномочий адвоката-защитника на общие, отраслевые и специальные. Предложены направления определения правовых пределов деятельности адвоката-защитника — научное, нормативно-правовое, корпоративное.

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Криминалистическая характеристика преступлений террористической направленности

В статье рассматриваются вопросы раскрытия, расследования и предупреждения преступлений террористической направленности. Выделены признаки преступлений террористической направленности с позиции решения криминалистических задач для установления объективной истины в уголовном судопроизводстве. Раскрыты закономерные процессы формирования и развития причинно-следственной обусловленности события преступления, определяющие эффективные методы, способы поисково-познавательной деятельности субъектов доказывания при установлении факта совершения терроризма.

Ключевые слова: методика расследования, криминалистическая характеристика, расследование терроризма, обстоятельства, подлежащие доказыванию, установление причинно-следственных отношений, следственные ситуации.

Раскрытие, расследование и предупреждение преступлений террористической направленности обусловлены исследованием криминалистически значимых признаков, определяющих механизм преступной деятельности условиями и обстоятельствами события преступления. Установление события преступления определяется закономерными процессами проявлений взаимодействующих объектов, предметов, явлений, субъектов, раскрывающими причинно-следственные отношения в механизме преступной деятельности.

Причинно-следственная обусловленность события преступления определяется объективно-субъективными факторами формирования и развития пространственно-временных, субъектно-объектных, субъектно-субъектных отношений, выявляющих условия и обстоятельства криминогенного, конфликтного характера при установлении характера преступной деятельности.

Итак, установление характера преступной деятельности требует от субъектов доказывания познания характерных проявлений определяющих признаков причинно-следственных отношений формирования и развития условий и обстоятельств совершения, сокрытия преступления, оказания противодействия, которые в системе составляют информационную основу для раскрытия, расследования и предупреждения преступлений.

Информационная база раскрытия, расследования и предупреждения террористического акта определяется причинно-следственной обусловленностью формирования и развития детерминирующих факторов направленности на совершение преступления, выбором места и времени, орудий и приспособлений для совершения преступления, объектом и предметом преступного посягательства, раскрывающих типичные проявления условий и обстоятельств совершения террористического акта.

Детерминирующим фактором типичных проявлений условий и обстоятельств совершения террористического акта является социально-психологическая природа терроризма как общественно опасного явления, имеющего международный уровень, посягающего на национальную безопасность государства, на безопасность прав и свобод граждан, на неприкосновенность личности, общества. Социально-психологические факторы как источники формирования и развития причинно-