

G.Z. Kozhakhmetov, M.B. Rakhimgulova

*Ye.A. Buketov Karaganda State University, Kazakhstan
(E-mail: bmv877yum@mail.ru)*

Urgent problems of jury trial functioning in the Republic of Kazakhstan

The institute of jurors is one of the important institutes of protective legal proceedings, however it is not given due consideration. The jury trial does not have historical traditions in the Republic of Kazakhstan as it has recently been introduced. Nevertheless, presently the jury trial is directed to its further independence and is an important guarantee against the repressive prosecution. This article investigates the problems of necessity and functioning of the jury trial in the Republic of Kazakhstan and the questions of number of jurors. The article also considers the legal proceedings with participation of jury members under the Criminal Procedure Code of the Republic of Kazakhstan. The legislation and court practice in this sphere has been analyzed, the ways to solve the problems have been proposed in the article.

Keywords: jury, judicial system, jurisdiction of cases, jurors, selection of candidates, the Criminal Procedure Code of the Republic of Kazakhstan, court session, defendant, competitiveness of the parties, legal culture.

Jury trial is one of the most esteemed and respectable institutes of the law. In the Republic of Kazakhstan it has no historical traditions as it has been introduced recently. The tsarism, in due time, did not introduce this institute on the Steppes territory due to the colonial interests. Before its fall the provisional government had introduced the jury trial in the Steppe and Turkestan regions; however in Soviet times it was abolished. Therefore, the introduction of the trial by jury in Kazakhstan in 2007 raises many questions and polemic in the public; in particular, disputes arise about the question of necessity and justice of this institute. Nevertheless, nowadays the jury trial is directed to its further independence and is an important guarantee against repressive prosecution. It means that regular routine feelings of mercy are integrated into the mechanisms of criminal justice that sounds illogical, but nevertheless, the throughout centuries the institute of jury trial gained popularity. Independence of jurors means that it is possible to ignore a strict letter of the law and to render a verdict based on sympathy and humanity, and sometimes on common sense (considering the absurdity of some laws).

With the introduction of the institute of jury in the Republic of Kazakhstan, it is possible to say that this form of democratization and participation of citizens in trial is promising and long-term.

The jury trial positively influences the legal culture of our society, trust to judicial authority, understanding by our citizens the transformations and reforms in our country [1; 4].

Anyway, the jury trial is not only native, but also foreign example of democracy in building the modern state. But nevertheless, it should be noted that the law and regulatory legal acts which work in the Republic of Kazakhstan as the legal framework of jury legal proceedings are not perfect. Therefore, there appeared the need to research the trial with participation of jury members in the Republic of Kazakhstan in order to develop subsequently the necessary offers on its improvement.

For more precise and deeper examination of the reviewed material we have formed in accordance with Section 14 of the Criminal Procedure Code of the Republic of Kazakhstan [2] which regulates the court proceedings on the cases with jury trial.

The article deals with the aspects of origin and the subsequent development of institute of jury trial as a phenomenon newly appeared in Kazakhstan.

It should be noted that the need of revival of jury in Kazakhstan is caused by a number of factors:

- firstly, it is a way of implement the democratic principle of participation of ordinary citizens in a trial;
- secondly, it is a guarantee of transparency of judicial proceedings;
- thirdly, it is a materialization of the principles of criminal trial, that is the principle of equality, justice, competitiveness of the parties, publicity;
- fourthly, it is an exercise of the rights of participants of legal proceedings;
- fifthly, insistence in admission of proofs;
- sixthly, elimination of the incriminating bias of criminal trial;
- seventhly, conducting the legal proceedings consistently and impartially;

- eighthly, public, educational, moral value of the institute of jury;
- ninthly, assessment of criteria of features of the trial organization and conducting.

Article 631 of the Criminal Procedure Code of the Republic of Kazakhstan regulates the jurisdiction of cases with participation of jurors.

At the legislative level it is accepted that the defendant has the right to demand his case to be heard with participation of jury members if he committed grave or particularly grave crime.

Here we may agree with B. Shnarbayev who highlights that from 17 crimes specified in the article, the most commonly committed are murders under the aggravating circumstances and infringement of life of the person who is carrying out justice or preliminary investigation [3; 20]. This circle was outlined in 2001 by the President of the Republic of Kazakhstan N.A. Nazarbayev who, speaking at the III Congress of Judges of the Republic of Kazakhstan, prioritized the implementation of the principle of administration of justice with participation of jurors [4; 1].

Further, we will consider Article 632 of the Criminal Procedure Code of the Republic of Kazakhstan which regulates the structure of trial with participation of jurors.

According to the materials of the OSCE, not so often the role of the second judge was accepted and implemented correctly and fully. So, «... in 14 out of 28 processes the second judges were actively involved in hearing the cases ... Sometimes the activity of the second judges extended to the duties and rights of the chairman. For example, in three processes the second judges contrary to provisions of the part 3 of Article 562 of the Criminal Procedure Code of the Republic of Kazakhstan disclosed the questions which arrived from jurors» [5; 47].

In addition, the second judge along with the chairman took part in the solution of a question of rejection of candidates for jury members [6; 36].

The fact of conscientious attitude to the job responsibilities of the second judge also takes place.

Namely: «reading newspapers, personal phone conversations, reading some cases and papers, studying the materials of another criminal case», et al. [7; 47].

Therefore, we consider that so far it is impossible to trust one judge to conduct the proceeding with participation of jury members as it can result in inevitability of defects.

Proceeding from it, we consider necessary at the level of the Supreme Court of the Republic of Kazakhstan with assistance of the ODIHR/OBSE each half a year to organize two-week courses where the judges will be able to expand the knowledge in the field of execution of legal proceedings with participation of jury members. The following questions will be urgent: typical mistakes made by the participants of criminal trial, and also the methods to correct them.

It is possible to perform with the help of the program of the German Society for technical cooperation «Support of legal and judicial reform in the countries of Central Asia» and the USAID program «Assistance to judicial system of Kazakhstan» [6; 24].

There are a lot of disputes about the necessity of jury trial, there is a category of persons who consider that the number of qualified specialists have more chances to reach the «correct» verdict rather than the group of «ordinary» people. Another category of people consider that the jury trial is important as it emphasizes the penal statute in the state and society and establishes the rules of conduct. Some elements of these rules (such as rationality) shall be applied to our society so that it was really a fair demonstration of a will of society or the people, but not the state.

But we deal with people's lives! And if to look objectively, the jurors possess the power, even with limited the rights and duties, resolving the matters of fact — they are not obliged to explain the reasons of their decisions. Would you entrust your life to 12 people who you see for the first time one Monday morning? It seems everyone would think twice. Perhaps, it is enough that the police and prosecutor's office will make decisions concerning the person who will take responsibility? So, some people can tell that when we deal with people's lives, not only the defendant, but also all potential future victims, we should always give a priority to traditional legal proceedings when the professional judge presides. But the question whether the system which leaves fatal decisions for a small number of «ordinary» people is desirable is still disputable.

Talking about the number of jurors, it is necessary to agree with the opinion of professor M.Ch. Kogamov. He very truly considered that the more jurors there are, the more confident the citizens are in the correctness of the decision.

For example, if to reduce the number of jury members, let us assume, to eight people, the degree of confidence in legality and justice of the rendered verdict by jury trial unambiguously would reduce. It can discredit the concept and functions of jury trial [7; 2].

We created our own opinion of Article 633 of the Criminal Procedure Code of the Republic of Kazakhstan, which regulates inadmissibility of impact on the jury member.

We consider that it would be absolutely logical to expand a circle of people participating in consideration of criminal case. It is our belief that the circle of people who cannot contact with the jury members participating in deliberation of this case shall be expanded and widespread on all participants of the process. It is written in para. 2 of the part 2 of Article 17 of the Republic of Kazakhstan Law «About jury members».

Professor M. Ch. Kogamov has reasonably noted: «Citizens must have a choice! And if the defendant has had an opinion against the judges, they have to have a right to entrust the destiny to the representatives of the people — the jurors». Therefore, Article 634 of the Criminal Procedure Code of the Republic of Kazakhstan notes that the appointment of the main judicial proceedings with participation of jurors should depend on defendant's will [8; 1].

It is not fair to grant some people with the right to hear the case with participation of jurors, but to deprive the others of this right.

If the main objective of the court with participation of jury members is providing guarantees of human rights without unreasonable condemnation, then why is this right is granted only to those people who are accused of committing grave or particularly grave crime?

Meanwhile, it is impossible to omit the fact that declaration of the defendant's will about carrying out a judicial session with participation of professional judges, is also his decision and implementation of his right to have his rights and interests defended in court.

Here it is necessary to emphasize several important aspects where we would like to state our own point of view. First, is that the defendant needs to petition personally about consideration of his case in court with participation of jury members. But, Article 32 the Criminal Procedure Code of the Republic of Kazakhstan states that cases cognizable to court with participation of jury members belong to the cases of public accusation and prosecution.

Therefore, we consider that the victim's opinion should be taken into considered in case of appointment of the court with participation of jury members. Secondly, we consider reasonable, without releasing the investigator at any stage of preliminary investigation, to interpret to the defendant his right for consideration of his case in court with participation of jurors, to order the judge to record a consent or ban of the defendant in this case. Needless to say that all those actions, together with the organization and conducting of criminal trial with participation of jurors, are carried out by the secretary and the judge.

Article 638 of the Criminal Procedure Code of the Republic of Kazakhstan determines the order of preliminary random selection of candidates for jury members to participate in legal proceeding. According to this article, random selection is carried out by the court clerk from the single and reserve (annual) lists which are in court. However, the Law of the Republic of Kazakhstan «About jury members» gives clear interpretation of the term «random selection» according to which special technologies which could provide random choice should be used [9; 3].

Here it would be desirable to note the necessity to establish the uniform parameters of the technology of random selection, for example computerized. We consider that random choice of such procedure can fully provide objectivity and legality of conducting court session with participation of jurors. By the principle of computer random selection, we suggest to use the function of random numbers in Microsoft Excel, this program is installed in each computer as it is a standard set of requirements to the modern personal computer.

Article 647 of the Code of Criminal Procedure of the Republic of Kazakhstan regulates the rights and duties of the juror and restriction in the actions connected with deliberation of the case.

There are several key moments which seem very important to us: the first — the juror is equal in the procedural duties with other participants of criminal trial such as the specialist, the expert, the translator. As all other participants of trial, the juror has to follow all the rules and duties established in court.

The second is that the jurors are especially limited in their rights because they cannot leave the courtroom during hearing; they also cannot contact with other participants of the trial who are not jury members; it is forbidden to collect initiatively any data on the case, to reveal the facts they know about the case during the closed court session. These limits work not to constrain the rights of the juror somehow; on the contrary, they work to ensure such principles as a presumption of innocence, respect of honor and dignity, etc. Moreover, they define the procedural importance of the juror in comparison with other participants of the criminal trial.

However, the punishment for non-execution by the jurors of their functions is not enshrined in the Criminal Procedure Code of the Republic of Kazakhstan; the non-compliance with the restrictions provided by this article and by the Law «About Jury Members», is not specified too.

We consider that it is a significant fault as the admissibility to dismiss the jury member by the chairman from the subsequent participation in judicial session in case of failure to carry out by the juror of the procedural obligations can be used by «unfair jurors» as a method not to bear procedural functions.

We consider it necessary to make changes to article 514-1 of the Code of Administrative Offences of the Republic of Kazakhstan, namely to establish a penalty to the jury member, in the amount of thirty units of the monthly calculation index not only for absence from court, but also for inadequate accomplishment of the procedural obligations.

Article 650 of the Criminal Procedure Code of the Republic of Kazakhstan regulates the features of court investigation in the court with participation of jury members. However, the following items are excluded from the article of criminal procedure: presentation for an identification, certification, check and specification of evidence on site, organization of an experiment, receipt of samples (Art. 379 the Criminal Procedure Code of the Republic of Kazakhstan) and restriction of the research of proofs (Art. 380 of the Criminal Procedure Code of the Republic of Kazakhstan).

In our opinion, the legislator, concerning restriction of a circle of proofs provided by the state prosecutor and the defense, does not correspond with Article 379 of the Criminal Procedure Code of the Republic of Kazakhstan. The legislator simultaneously permits jurors: «1) To take part in deliberation of proofs by the court in order to, being guided by their internal beliefs, give an assessment to the facts of the case and to answer questions which will be raised further before the jury members»; 2) to ask questions to the participants judicial session via the chairman; 3) to participate in court investigation; 4) to ask questions to the chairman concerning the provisions of the law, and also other questions about the case». On the other hand, the legislator limits the jurors' right to be present during the delivery for an identification, survey, check and specification of evidence on site, organization of an experiment, receipt of samples during the court investigation.

Part 2 of Article 650 of the Criminal Procedure Code of the Republic of Kazakhstan prohibits the state prosecutor to mention the circumstances which are not subject to consideration by jurors. But here we consider that the legislator should extend this prohibition not only on the state prosecutor, but also on all other participants of legal proceeding. Also, we consider that other factors should not be admissible to publicity, such as the defendant's criminal record, the fact that the defendant was recognized as the alcohol or drug addict, or other circumstances which can negatively affect opinion of jurors, and it will possibly give the grounds to show disinclination to the defendant.

Therefore, we suggest to edit Part 2 of Article 650 of the Criminal Procedure Code of the Republic of Kazakhstan as follows: «The state prosecutor, the defendant, the victim, the defending party, witnesses, experts, specialists and other participants of court investigation have no right to mention the criminal record facts, circumstances connected with a former criminal record of the defendant about recognition of his chronic alcohol or drug addiction, and also other circumstances capable to cause jury's prejudice against the defendant», and, respectively, to exclude Part 6.

The implementation of Articles 653 and 654 the Criminal Procedure Code of the Republic of Kazakhstan seems difficult. The lack of this practice among the judiciary establishment is an important circumstance why difficulties emerge in the process of drawing up the questionnaire. The main mistakes were:

1. Use of special legal language made it difficult for the jurors to understand the question itself, and therefore, did not allow to give a correct answer. In Russia, the chairman should make an explanation before raising a question in the questionnaire, especially if there are several episodes or several defendants participating in the case. The wrong understanding of questions leads to contradictory answers from jury members. Therefore, the presence of the judge is obligatory when the jury members answer the questions [10; 22].

2. Use of materials of accusation in formulation of the question that often leads to distortion of questions in the text.

3. Violations of a procedural form (order) of creation and discussion of the questionnaire.

4. Use of questions prepared beforehand.

5. Leaving the parties' opinions without attention when creating the questionnaire.

6. Leaving the materials of debates without attention when creating the questionnaire [7; 53, 54].

Thus, the problem of implementation of Articles 653 and 654 of the Criminal Procedure Code of the Republic of Kazakhstan requires the scientific and theoretical study taking into account the practice acquired by the courts. Here we suggest to carry out a discussion in scientific periodicals about preparation of a single sample (form) of the questionnaire with the terms unified, standardized, clear to any citizen into where only specific data would be written (defendant's full name, victim's full name, etc.).

Proceeding from the above, we are sure that the questions raised in article appeal to the Legislator and other participants of legal proceedings as the improvement of the institute of jury trial is an important component of democratization of society and the legal reforms undertaken in our Republic.

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Г.З. Қожахметов, М.Б. Рахымқұлова

Қазақстан Республикасы алқабі соты қалыптасуының заманауи мәселелері

Алқабі институты — қорғаушылық сот ісін жүргізудің маңызды институттарының бірі, алайда оған лайықты көңіл бөлінбей келеді. Қазақстан Республикасында тарихи дәстүрге ие емес, себебі енгізілгеніне көп болған жоқ. Соған қарамастан, бүгінгі күні алқабілер соты келешекте өз тәуелсіздігіне бағытталған және жазалау шараларына қарсы маңызды кепілдік бола алады. Мақалада Қазақстан Республикасындағы алқабілер сотының қызмет етуі мен қажеттілігіне байланысты және алқабілер алқасының саны туралы мәселелер қарастырылған. Сондай-ақ Қазақстан Республикасының Қылмыстық-процессуалдық кодексі бойынша алқабілердің қатысуымен сотта іс қараудың ерекшеліктері талданып, осы мәселелердің шешілу жолдары ұсынылған.

Кілт сөздер: алқабілер, сот жүйесі, іс жүргізу, алқабілер соты, кандидаттарды іріктеу, Қазақстан Республикасы Қылмыстық-процессуалдық кодексі, сот отырысы, айыпталушы, жақтар тартысы, құқықтық мәдениет.

Г.З. Кожухметов, М.Б. Рахимгулова

Актуальные проблемы функционирования суда присяжных в Республике Казахстан

Институт присяжных является одним из важных институтов охранительного судопроизводства, однако ему не уделяется должного внимания, поскольку в Республике Казахстан он был введен совсем недавно и не имеет исторических традиций. Тем не менее в наше время суд присяжных направлен на дальнейшую свою независимость и является важной гарантией против репрессивного преследования. В работе рассмотрены проблемы, связанные с необходимостью и функционированием суда присяжных в Республике Казахстан, а также вопросы численности коллегии присяжных заседателей. Выделены особенности судебного разбирательства с участием присяжных заседателей по УПК Республики Казахстан. Проанализированы законодательство и судебная практика по данному вопросу, предложены варианты решения поставленных проблем.

Ключевые слова: жюри, судебная система, подсудность дел, присяжные заседатели, отбор кандидатов, Уголовно-процессуальный кодекс Республики Казахстан, судебное заседание, подсудимый, состязательности сторон, правовая культура.

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