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Problems of Activity of the Lawyer on Preliminary Investigation to the Republic of Kazakhstan

Abstract. Legal and democratic state requires a well-established and effective action of the law enforcement system, aimed at protecting the rights and freedoms of man and citizen. Such systems are designed to operate in accordance with applicable law. However, in practice, including the leading Western European countries, written in the law is one thing, but law enforcement is sometimes quite different. The aim of work is to identify and analyze the problems associated with the activities of defense counsel at the preliminary investigation of the criminal case. And on this basis – to develop and justify recommendations for improving the participation of counsel in criminal proceedings as a whole, increasing its effectiveness.

Key words: state, advocacy, counsel, criminal proceedings, legislation, preliminary investigation.

Introduction

Qualitative criminal procedural activity of the defender during the preliminary investigation has a major impact on the effectiveness of the protection of rights of the suspect (accused), at this stage of the criminal process. In addition, the activities of defense counsel at the preliminary investigation stage determine the future course of criminal proceedings, and, under certain conditions, provides its termination.

The dynamic development of the legislation in this area does not allow researchers to be limited by scientific work already done and requires constant analysis of the changing legal environment. Therefore, now following requires a detailed study:

1) the general questions of legal status of counsel, as a uniform concept of «legal status of defender» has not worked out by the science of criminal process yet;

2) the questions of delimitation of concepts such as «right» and «authority» of defender;

3) the specific character of the criminal procedure of the defender's activity during the preliminary investigation stage;

This article is devoted to the study of these problems and appears important.

Moreover, the depth of the studying theme and the lack of theoretical unity for many of its key issues (admission of participation of defender who is not a counsel during the preliminary investigation; the effectiveness and feasibility of the institute of defender assignment; admission of bringing defender to responsibility for poor quality legal services; the concept of poor and unskilled legal service) are so obvious that the multiplicity of researches in this area is not only not excluded, but is absolutely necessary.

Methods

The methods of the research are a detailed analysis of the legal status of the defender in criminal proceedings, the study of the elements of the legal status of said subject, peculiarities of defender's implementation of his duties and responsibilities during the preliminary investigation stage and the development of theory and practical suggestions to promote the development of regulatory activities of criminal procedure of defender.

The object of the research is the legal status of the defender, including his duties, powers and responsibilities. The object of the study are also those

of criminal procedure and the closely related social relations in which the defender comes in the performance of his duties and exercise of its powers during the preliminary investigation.

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Problems of defense counsel during the preliminary investigation and their concepts, values and procedural provisions

The international community attaches utmost importance to availability of quality legal assistance for human and, consequently, the effectiveness of institutions to provide such assistance. According to paragraph «c» of section 3 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, every defendant has the right «to defend himself in person or through defender selected, or if he has not sufficient means to pay for legal assistance, to be given it free» [1]. Specified international law generally reflected in section 3 of Art. 13 of the Constitution of Kazakhstan: «Everyone has the right to qualified legal assistance. In cases provided for by law, legal aid is free», thus the State has undertaken to provide everyone the relatively high level of any of the types of legal assistance provided [2]. Moreover, it should be noted not only in criminal proceedings, but also in any other sphere of activity where there is a need for such assistance.

Upon the level of ensuring effective implementation of this right now is accepted to judge democracy not only of justice, but also of the political regime of a particular state [3].

«Advocacy is of the same ancient origin, as well as the title of the judgment. (Advocatus, Latin, means «called» that is designed to protect the trial, to conduct case). Like the judicial, advocacy is a public position, whose task is to safeguard the rights of the private individual. However, at the time when the judge protects these rights by his state authority, the counsel can only help in that, he presents his knowledge of the law to the client's litigation and tries to give a favorable direction for the latter «[4].

Currently, there are about 4 million lawyers. This includes about 850 thousand lawyers in the U.S.A., 450 thousand – in the EU, 400 thousand – from India, 300 thousand – from Brazil and around

1 500 thousand – from the rest of the world. Overall, excluding Japan, we can say that the more developed the country, the greater the number of counsels working there. Recently, in the western hemisphere number of representative of this profession has increased significantly. While in 1970 only a few law firms have a staff of 100 counsels, now there are about one thousand mega firms. The amount of the sum for which legal services were provided also significantly increased [5].

In Russia, according to the Russia Ministry of Justice, the registers of counsels of the Russian Federation subjects were included 58 872 counsels, organized to boards, bureaus and law offices [6].

According to the Committee of registration service and legal assistance of the Ministry of Justice of the Republic of Kazakhstan now (2009) 9 thousand 179 citizens of Kazakhstan have license for the advocacy profession. In fact, the only 3 thousand 795 persons, or 41% are counsels. [7].

Unfortunately, in Kazakhstan, advocacy and advocacy activity does not enjoy the respect, as in the developed countries of Western Europe and the U.S. In these countries the advocacy – is highly prestigious institution, which enjoys great trust and influence. Suffice it to say that the judges of English House of Lords – barristers with 15 years of stay in the bar. Advocacy – a way to master (referee). Each judge is a former counsel. Even clothes of lawyers in court (mantle and wigs) is the same as the judges and the counsels, which highlighting them as belonging to a single profession, equality and mutual respect. The U.S. has about 60% of the total number of lawyers around the world. The following data shows the social and political role of law degree holders in the U.S. 25 of 42 U.S. presidents were lawyers; particularly Thomas Jefferson, Abraham Lincoln, FD Roosevelt, H. Truman, Richard Nixon, Bill Clinton, Barack Obama were advocates by profession. Over 65% of senators and almost half of the members of the House of Representatives of USA Congress are lawyers. Half of state governors and 40% of diplomats are law degree holders. About 45% of those who have held senior positions in the government since the 1960's., were lawyers, 25% of the state apparatus were former counsels [8].

One of the most complex and demanding types of legal assistance provided is to work as a defense counsel in criminal proceedings because of the possibility of a significant restriction and violation of the rights, freedoms and legitimate interests of the individual.

Under Part 1, Art. 70 of the Code of Criminal

Procedure, the defender – the person performing the procedure established by law in the protection of rights and interests of suspects and accused persons and rendering legal aid. It is appropriate to note the following: the defender – a person performing the «defense.» Giving such a definition of the concept of the defender, the legislature is on the verge of violation of logical rules, called the «vicious circle». Meanwhile, we have what we have.

As the defender, a counsel is involved. Counsel – a citizen of the Republic of Kazakhstan, which has a law degree, obtained a license to engage in the legal profession, always a member of the Bar, and who provides legal assistance on a professional basis within the profession, regulated by the Law on Legal Practice (Section 1, Art. 7 of the Law of the RK «On Advocacy»). Along with the counsel defending the rights and interests of suspects, defendants, defendants can be performed by a spouse (wife), close relatives or legal representatives of the suspect, the accused, the representatives of labor unions and other associations for the case of the members of these associations (Part 2 of Art. 70 of CCP of the RK). In criminal proceedings, regardless of whether such alternative defenders have legal education and practical experience in the legal profession, participate in case only along with the counsel.

The Part 3 of 70 of the Code of Criminal Procedure of the RK states that the defender is allowed to participate in case after filling accusation (when the person subject to an order to prosecute an accused or the court started a criminal case of private prosecution, as well as when process of prosecution is established and approved by the head of the inquiry body) or recognition of a person as a suspect in accordance with Part 1 of Art. 68 of CCP (i.e., when the person prosecuted on suspicion of having committed a crime, of which he declared by investigator, inquirer or the detention or restraint applied before filling accusation). In these parts is a wide variety of criminal procedure of the situations, the moment at which the defender participates in. Human Rights Watch says about the moments when the defense counsel enters the case: «Their common sense is that in these moments the accused or the suspect appears in case. One can be protected, who is «attacked», i.e. people accused or suspected and officially announce it. Since then, the inquirer, investigator, prosecutor begin to function as a criminal prosecution and pre-trial gets adversarial» [9]. We cannot agree with the opinion of this person. In our opinion, the meaning of the above regulations

(Part 3 of Art. 70, Part 1 of Art. 68 of CCP of the RK), is that the right to legal aid of defense counsel is guaranteed to every person regardless of his formal procedural status, including the recognition of detainees or suspects, if authorized body in respect of the person taking steps that are actually limited to the rights and security of the person, including freedom of movement.

Justice can be served only when heard all the arguments «for» and «against» the accused, the suspect, when the latter is guaranteed the opportunity to present their evidence, their explanations, etc. because the suspect, the accused does not have knowledge of the law, is not able to fully confront the representatives of the government, with an ongoing investigation, prosecution, so far he needs a professional defender. Equality between the prosecution and defense parties is provided first by counsels. Only defender – a professional lawyer (counsel) can confront the accuser – a professional lawyer. Without the counsel it is impossible not only equality of the parties in criminal proceedings, but also realization the most important constitutional principle of equality of all before the law, for this principle can be achieved only when the prosecution and defense have equal forces: good knowledge of the law, justice, professionalism, i.e. exactly what only professional lawyers – prosecutor and counsel equally should and may have.

Professional knowledge of lawyer is not the only criterion of defense counsel's high skill. Another indicator of the competence is his professional ethics.

For the profession of counsel the moral basis of his activities are of particular importance. Counsel faces with human grief, resentment, moral injury, suffering, that requires him not only compassion, but also great emotional efforts. In addition, most lawyers want to make a career, a name that gives not only the material, but also a deep moral satisfaction. However, to win a good name, a good reputation is not possible without respect for moral and legal foundations of professional protection.

The well-known French counsel of the nineteenth century Francois Etienne Mollo once wrote: «The profession of counsel is not about how to write papers or say speeches, because everyone should write correctly and clearly express thoughts, but the essence of it in the spirit of moral principles, the idea of legal protection. Real counsel should bring himself, all his abilities as a sacrifice for the sake of other people; to become speaker in the name of oppressed innocence; be happy about the fact that

salvation can reach out to the poor, and experience with the moral satisfaction, which is preferred over large fees» [10].

It has long been firmly established the concept of «advocacy ethics» («ethics of counsel»), which is an integral part of legal ethics [11].

A.F.Kony, criticizing once vices of the advocacy, said: «Criminal defender should be *vir bonus, dicendi peritus* (in Russian: a good man, experienced in speech), armed with knowledge and a deep honesty, moderate in receptions, disinterested in the material sense, independent in suggestions, persistent in its solidarity with the comrades. « [12]

Unfortunately, counsels often do not really care about appearing in the eyes of society perfect in moral and legal terms. Thus, according to a survey conducted by Z.V. Makarova, the main competencies of counsel are general and legal culture – 54.4%, professional activity – 38.8% and honesty – 24%. Empathy, respect for the individual, respect for his dignity indicated by only 14.2% of counsels. Students put at the top three among the professional skills of the counsel general and legal culture – 81%, professional activity – 56% and eloquence – 31%. Thus, neither the counsels nor the students who will work as counsels do not consider moral characteristics as the leading professional qualifications for counsel [13].

Unfortunately, we have to conclude that morality is not in favor of counsels and lawyers in other fields too. Hence, there is a low quality of law enforcement.

The counsel is allowed to participate in the case as defender upon presentation of proof, i.e., document attesting to his membership in the Bar, and order, i.e. document proving that the protection of the accused or a suspect in the criminal case assigned to him by the legal advice bureau. It is important to note that the law does not require that the advocacy structure, in which the counsels is, geographically should fall into the area where the investigation was conducted.

Criminal Procedure Law uses the term «invitation of defender», «participation of defender» and «assignment of defense counsel». The suspected or the accused or his representative at their discretion realizes the invitation. Others may only invite counsel on behalf of or with the consent of the suspect or accused person. The suspect or the accused is a minor, his request or consent to the transaction at the invitation of counsel requires the consent of their legal representative according to the requirements of Part 1 of Art. 22 of the CCP of the RK. If it turns

out that the person, who committed the wrongful act of a criminal, was found incompetent, the invitation of counsel or giving instruction or consent of his invitation is the exclusive right of the trustee (Part 2 of Art. 26 of the Civil Code of the RK). Invitation of counsel must be made by written or oral request of the suspect or accused person to be entered of this petition in the record or relevant investigative proceedings.

In the theory of law, it is recognized that the law under which his rights and obligations are established [14] determines the industry status (position) of the subject. Thus, the procedural position of defense counsel should be regulated by criminal procedural law (Articles 21, 23, 70, 74, etc. of the CCP of the RK). Failure to include the responsibility in the concept of a procedural position of defender and non-determining him through his relationships with other participants in the criminal procedure, based on the rights granted to him, is explained as follows. Since liability is only one of the three main forms of legal obligation, there is no reason to select it as a self-element of procedural provisions.

In addition, as an analysis of ethical codes U.S.A., the European Society, Finland, Sweden and other countries show, all of these codes contain the rules governing such main groups of relations, in particular, as: 1) the relationship between counsel and client and 2) the relationship between the counsel and the court, other state bodies. The Code of counsel's ethics, passed by the first All-Russian Congress of counsels on January 31, 2003 and acting as amended and restated by the second All-Russian Congress of counsels on 08.04.2005 is not an exception to this rule [15].

Thus, his rights and obligations under Criminal Procedure Law should determine the procedural position of defense counsel.

Thus, because of the representative and the defender can and should be spoken of as different names for the concept – the counsel, therefore, the legislator puts into each of them a different meaning and significance.

Based on the above it can be concluded that neither the CCP of the RK nor the Law of the RK «On Advocacy» do not identify and distinguish between the concept of the defense counsel and the representative, putting in each different meaning and value, just as in the institutions for the protection and representation.

In the criminal procedure literature look at the procedural position of the defense counsel as the representative of accused had been defended by

D.PP.Vatman and many others [16]. It should be noted that they determined the procedural status of the defense counsel as the representative through the nature of his relationship with the accused. This means that the defender involved in case to the benefit of accused, by his order or with his consent, and can be removed at any time, if the defendant refused him, but if he did not refuse the defender, neither the court nor the investigator has no right to remove him from the process, as well as defender himself cannot refuse the defense. However, the relationship between the defense counsel and the defendant is substantially different from that of the representative and represented in the civil law and process. More completely these differences showed by S.A.Schafer. They are concluded are as follows. First, in the civil law and process the representative can replace represented, and in the criminal trial defender is not a substitute of the accused, he acts along with him. Second, in civil proceedings, the counsel is not a party; his is only the representative of the party and does not act on its own behalf, but on behalf of the presented. In criminal proceedings, the defender acts on its own behalf. He is not only the representative of the accused, but also the party exercising his rights in order to provide legal assistance to the accused. Third, in the civil law the representative has a right to refuse at any time the authorization issued to him. In criminal proceedings, the counsel cannot refuse from the assumed protection of the accused [17]

So, there are several key points on which look on defense counsel as representative of the accused is based: 1) the procedural position of the counsel as the representative defined by the nature of its relationship with the accused and the state bodies and their officials authorities, leading the process, and 2) despite the fact that character of relations of counsel and the accused allow to characterize counsel as the representative and, therefore, to give this name to this view, it is not a basis to his identification with the representative of the civil law and process, since they carry a different meaning and significance.

The basis of the procedural position of defense counsel should be only the rights and obligations established by the criminal procedural law. As A.L. Rivlin correctly notes, there are no good reasons to seek other sides, which would determine his position in the process [18]. Second, the definition of defense counsel as the representative differs from the representative of the civil law and process. Moreover, it should not only be from the above differences. Usually supporters of look at defense counsel as the

representative define him in that way, because he personally reflects and protects the rights and interests of his defendant. Such an interpretation of the term «representative» consistent with his definition in the ordinary, common usage, understanding as a person who presents someone's interests, expresses someone's views.

Associate Professor of University of Saskatchewan, Saskatoon city, Canada, an expert of the OSCE Centre in Astana P.P.Jordan generally directly admitted that the defender is determined as representative only based on commonly understood, the common understanding of the terms, and not from its use in civil legal sense.

Based on the above, the procedural position of defense counsel can be defined as an independent participant in the process, endowed with the criminal procedure law for certain rights and responsibilities for implementation of protection of the rights and legitimate interests of all the accused, by the means and methods of protection not prohibited by the CCP of the RK [19].

In the German legal literature, there is no consensus on the procedural provision of defender [20]. He is defined as representative of the accused, the assistant of the accused, as right protector and as body of criminal proceedings. Conception of the legal status of the defender as a body of criminal proceedings enjoys most recognition and, in essence, is the dominant. In the guiding clarifications of former German imperial court, the Supreme Court and the Constitutional Court of Germany defender had been directly called as criminal proceedings agency. Moreover, the definition of defender through the criminal justice agency enshrined in the laws and regulations, particularly in Art. 1 of the Federal provision on the bar: «Advocacy – a body of criminal proceedings.» The origin of this concept is also connected with the so-called legal professional governmental organization (institution) – the courts of honor for lawyers.

Position of the defender as a body of criminal proceedings had to be resolved, as the position of the prosecutor and the court in the criminal law. But in it no way is said of him as some kind of body of criminal proceedings. Body of criminal proceedings is governmental body. The defender never held that position of body and did not perform state problems. Despite such a thorough critique, legal position of the counsel, as the Courtney Rose Brooks notes, will be interpreted and will be interpreted as a body of criminal proceedings in the German procedural literature and law practice [21].

Conclusion

Above have been examined the most important issues of legal status of the defender in criminal proceedings, his role in the tasks performance of criminal proceedings, reflected the characteristic of the procedural provisions of the defender during the preliminary investigation stage and particular characteristics of the execution by defender of his responsibilities at the present stage of the criminal procedure.

Conducted research enabled us to formulate the following conclusions, which are essential, both for science of criminal procedure, and for law enforcement practice.

1. Participation of the defender in criminal proceedings is in the execution of his duties of criminal procedure and implementing powers conferred upon him by law. Besides, the said duties and powers are worded in such a way as to be contributed to the defender to solve assigned tasks. The content of the duties and powers of counsel is due to the institution of protection in criminal proceedings, which in the broadest sense is the realization of the fundamental principles of criminal procedure, such as the presumption of innocence, the adversarial principle, the principle of the suspect and the accused the right to a defense.

The above means that the criminal-procedural activity of the defender is directly linked to the achievement of the criminal process of his appoint-

ment. Fulfilling his responsibilities and implementing authority assigned to him by law, the defender promotes the challenges of criminal proceedings.

2. One of the most important manifestations of the specific procedural positions of the defender during the preliminary investigation stage is to encumber defender by duties entrusted by the legislator on the professional counsel. Only the counsel may participate as a defense counsel at the preliminary investigation stage, who not only entitled but also obliged to protect assumed not prohibited by law. Therefore, the rights of the defender established in Art. 74 of the Code of Criminal Procedure of the RK, the preliminary investigation stage for the defender takes the form of power, that is, means of his duties.

3. The necessary and sufficient components of high-quality legal assistance are characteristic of qualifications and honesty. Inconsistency of legal assistance to at least one of these requirements suggests non-fulfillment or improper fulfillment of defense counsel of his responsibilities.

The significance of this development can hardly be overestimated, as the criminal procedural activity of the defender makes a significant contribution to achieving the objectives of the criminal proceedings in general, and the maintenance of the rights and legitimate interests of persons in respect of which, in particular, the prosecution is realizing.

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