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RESEARCH ARTICLE

THE ANALYSIS OF HUMANITARIAN APPROACH IN PROVISION OF THE RIGHT TO DEFENSE IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF UZBEKISTAN

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Abstract

In this scientific research given the analysis of humanitarian approach in provision of the right to defense in the criminal procedure of the Republic of Uzbekistan, the analysis of legal norms related to defence counseling in criminal procedure, and the opportunities to increase the effectiveness of defense counselor's participation in criminal procedure. Together with this special ideas are developed on strengthening adversarial proceedings in criminal procedure. Besides that, defense counselor should be given the right to "defense conclusion" and read it aloud in the court.

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INTRODUCTION

Nowadays, it is one of the main duties of the state to provide practical protection of human rights and interests in the society. In the Republic of Uzbekistan constant reforms are applied in the fields of consolidation of rule of law, strong protection of citizens' rights and freedoms, provision of the right to defense by the state through humanizing the laws related to this sphere.

First of all, we need to mention that the 2nd article of the Constitution of the Republic of Uzbekistan says that "The state shall express the will of the people and serve their interests" and article 22 says that "The Republic of Uzbekistan shall guarantee legal defense and protection to all its citizens both on the territory of the Republic and abroad".

The principles considered in the abovementioned articles express that state body is accountable before every citizen. The right to defense is one of the signs reflecting the legal status of a person and it is disposed in the relations between the individual and the state. Any right as well as subjective rights need to have opportunity to be protected by the state and the holder, otherwise, they will lose their significance. Moreover, it is enshrined in the article 26 of the Constitution that all possibilities to protect the person are secured in the court. Which means, according to the criminal procedural legislation, when criminal case is being heard at the court the state takes the responsibility of "protecting its citizens' interests" through courts.

It should be noted that, the provision of the right to defense is one of the main principles of criminal procedure and that's why we can assuredly say that criminal procedural legislation is loyal to humanitarian ideas. Compared to administrative, civil, economic and other fields of law criminal procedure can have more impact on

the rights and interests of people. The humanitarian nature of norms show humanitarian point of view towards a person. During the production of criminal cases the possibility of restriction of personal rights and freedoms of people is higher.

This is the reason why it is enshrined in the article 24 of the Code of Criminal Procedure that suspect, accused, and defendant have the right to defense.

It shall be the obligation of an inquiry officer, investigator, prosecutor, court to secure a suspect, accused, and defendant the right to defense by expounding him this right and taking measures to ensure that he has a real opportunity to use all means and ways provided by law to defend himself of the charge.

The essence of this principle is reflected as following:

firstly, suspect, accused, and defendant as participants of criminal procedure, have set of rights, which help them to protect their own rights and legal interests;

secondly, suspect, accused, and defendant may get defense counselor's assistance, and in some cases the participation of defense counselor is mandatory and is provided as prescribed in the law;

thirdly, enquiry officer, investigator, prosecutor and the court are obliged to explain suspect, accused, and defendant their procedural rights and obligations, provide conditions to enjoy their substantial and procedural rights.

Following the right to defense reflects in the set of rights given to suspect, accused, and defendant as participants of criminal procedure. And in some cases the participation of defense counselor is mandatory and is provided as prescribed in the law. And most importantly, enquiry officer, investigator, prosecutor and the court are obliged to explain suspect, accused, and defendant their procedural rights and obligations, provide conditions to enjoy their substantial and procedural rights.

Thus, in the court trial the defense of a person is carried out in two forms: 1) self-defense; 2) defending the defendant by defense counselor. Defense, no matter what form it has, is provided by the court, that is why court supports all and every conditions for defense. The form of defense to be carried out in the trial is reflected in the decision of the court on appointment of the case to be heard.

From the judicial point of view, legality of self-defense is consolidated in the substantial laws (for example, articles 11 and 13 of Civil Code, and norms of Necessary defense and Extreme necessity in criminal code) and procedural (for example, article 5 of Civil Procedural Code) laws.

It is enshrined in the article 46 of the Code of Criminal Procedure that the defendant enjoys the right to defend himself independently, in order to practice this right court takes the responsibility of providing defendant with right to give or not to give evidence; to file motions and challenges; to introduce evidences, to raise objections over court decisions, to get familiarized with the official records of the court session and to submit comments on them.

In accordance with the demand from suspect, accused, and defendant enquiry officer, investigator, prosecutor or the court provides participation of defense counselor in the trial. Also in the article 116 of the Constitution it is stated that the right to legal assistance shall be guaranteed at any stage of the investigation and judicial proceedings.

Defense counselor acts in relation to the competence taken from suspect, accused, and defendant, protects their interests, and has independence as a participant of the proceedings. From the general analysis of the norms, if we can conclude from the humanistic point of view, we could develop it in the following way:

First of all, if we enlarge the sphere of mandatory participation of defense counsel it would strengthen the humanistic approach during the defense in the trial.

Participation of a defense counsel in criminal proceedings shall be mandatory, if the cases engage, as follows: 1) juveniles; 2) dumb, deaf, blind, or persons having other mental or physical defects and therefore incapable to exercise his right to defense on his own; 3) persons having no command of the language in which the proceedings are conducted; 4) persons suspected or accused in the capital crime; 5) persons, who have contradicting interests, if one of them is being assisted by a defense counsel; 6) participation of a state or public accuser; 7) participation of a lawyer as a representative of a victim; 8) compulsory medical measures.

It should be noted that, participation of defense counsel is mandatory in interrogation. The reason for that is that interrogation is most commonly practiced investigation action not only in the process of preliminary investigation and enquiry but also in the court trial. Furthermore, another vital point here is that, the evidence taken

by interrogation is considered as genuine and direct evidence, which play essential role in definition or qualification of committed crime (during incrimination) and final court decision¹.

If we look over legislation of CIS countries, this condition is giving a positive effect and it has no any bad impact on solving the criminal cases. In most CIS countries it is strictly prohibited to conduct interrogation without defense counsel's participation².

With this in mind, it would be appropriate to add norms which restrict the conduct of investigation actions without the presence of defense counsel in Criminal Procedure.

An inquiry officer, investigator, prosecutor, or court may recognize engagement of defense counsel as mandatory in the cases not specified above, if complexity of the case or other circumstances may impede the right of the suspect, accused or defendant to defense. Providing the defendant has a mental defect, the court or investigation bodies will be obliged to conduct expertise to define the level of defendant's mental defect. If the defendant is minor, psychologist or other specialist must participate in the process of expertise. If the participation of defense counsel found mandatory, the court is responsible to take measures to provide conditions for that.

Secondly, it would be appreciable to re-consider the subjects competent to gather and submit evidence so that we could develop a mechanism to apply humanistic approach in the very procedure of collection and submission of evidence.

Although articles 43, 44, 46, 53, 55, 57, 59, 63 of the Code of Criminal Procedure state that suspect, accused, defendant, defense counselor, public accuser, public defender, as well as, victim, civil claimant, civil defendant and their representatives have the right to submit evidence, article 86 of the same code does not include the above mentioned participants in the list of competent subjects of PROOF. They are only listed as participants who can collect, prepare and assess the evidence. They do not have right to find any evidence as proof. Only the investigator, enquiry officer, prosecutor and the court is given this right. If it is stated in the law that "...suspect, accused, defendant, defense counselor, public accuser, public defender, as well as, victim, civil claimant, civil defendant and their representatives have the right to submit evidence", then it should be understood as, firstly, those mentioned participants should be competent to conduct 14 investigation actions shown in the article 87 of the Code and secondly, defense counselor can parallelly run "defense investigation"³. Article 82 writes that collected evidence can be taken into account as evidence only when it is collected by investigation bodies or the court (both are state bodies), which shows the one-sidedness of the procedure.

Rights and obligations of defense counsel are given in the article 53 of the Code. Besides that, the law of Uzbekistan "On Advocacy" enlarges the defense counselor's opportunities in the court trial. For instance, defense counselor has the following rights 1) to collect information about the facts which could be considered as evidence in the trial; 2) to inquire from the state agencies, self-governing bodies, enterprises, institutions, organizations and public associations the references, character evidences, and other documents required for defense; 3) with the consent of the person under defense, defense counselor can take expert conclusions, information from specialists; 4) to submit the court collected materials related to the case.

The following people can get defense counselor's assistance during investigation actions:

- the people who were called as witnesses, is they feel a possibility of imposing guilt over them. This is important when the criminal case has no exact accused such as crimes in economic sphere, crimes related to traffic;
- investigation action called expert witness;
- people taken under custody⁴.

The actions of defense counselor could be divided into groups:

The first and most important action needed to be done by the defense counselor is to get closely acquainted with the accused and gain his/her trust. As E.Y.Lvov says, defense counselor should inform the accused about his experience, specialty, as well as rights and obligations given to the accused⁵.

¹ Hidoyatov B. Criminal Procedural activity of defense counsel in preliminary investigation. // Bulletin of Tashkent State University of Law, 2008, № 1. – Tashkent, 2008. – p. 73.

² Saidov B.A. The Problems of provision of defense counsel for participants of criminal proceedings. // The problems of protection of human rights in and out of the court. – Tashkent: TSUL, 2005. – p. 254.

³ Narbutaev E.H., Hujakulov S.B. On the mechanism of conducting procedural actions prescribed in law by the defense counselor. // Bulletin of the Academy of Internal Affairs of the Republic of Uzbekistan, 2010, № 2. – Tashkent, 2010. – p. 41.

⁴ Dobrovolskaya S.B. Green way for defense counselor! // Domestic advocate. № 15. 2000. – p.p. 14–15.

After that defense counselor checks the accused's health, conditions he is being kept, defines the conditions of the case, explains the persons rights and obligations and then familiarizes him with the defense plan.

As mentioned above, defense counselor has the right to file motions, and file formal motions on performing certain procedural actions, or on any other issues related to the case. These motions, depending on the time they are submitted, can be divided into two categories: 1) motions during the preliminary investigation; 2) motions submitted during the familiarization with the criminal case materials, after finishing the preliminary investigation. Moreover, procedural motions have different characteristics (for instance, motions on getting all protocols of investigations actions in which the accused participated, motions on getting the materials on apprehension to learn their grounds and legality; motions on informing the date of the planned investigation actions and so on). Bottomline is that, defense counselor practices his right to submit evidence with the help of motions.

Another main problem we need to focus on is equality of defense counselor and the accuser, including adversarial proceedings. The experience from developed countries show that supporting adversarial proceedings is the key factor to define the justice. Following the principle of adversarial proceedings help the parties to enjoy their freedoms, wills to win the case by finding the justice⁵. Particularly, it is the court who is accountable to provide equal basis for the accuser and the defender.

According to the article 4 of the law of Uzbekistan "On the guarantees of defense counselor's activity and their social protection", defense counselor, as a party, in all stages of court proceedings has the equal rights with all other participants of the production. Here defense counselor is given following rights:

- as prescribed in law, get familiarized with all materials of the case and copy the needed information from them;
- can meet the person under defense, from the time he was taken under custody, as prescribed in law, as often as he wishes;
- take written confirmation from investigation body, enquiry officer, or from court about the permission to participate in the very case;
- use recorders or other type of technical apparatus during familiarization with case materials, in court or during investigation actions as prescribed in law;
- to get familiarized, under the legally established procedure, with the state, commercial and other secrets, if it is required for defense.

In accordance with the article 87, part 2 of the Code of Criminal Procedure, the defense counselor has the right to collect evidence, which can be used as proof. This includes: undertaking the questioning of the persons, having information referring to the case, and receptions of the written explanations with their consent; directing request and receiving the references, features, explanations and the other documents from state bodies and other organs, as well as enterprises, institutions and organization.

However, one of the main problems arising in practice is that defense counselor cannot take the needed information in time. Similarly, he cannot interview the people who have related information about the case in time and with their consent cannot take written explanations in time.

In our opinion, the request sent to state bodies to receive references, explanations and the other documents should be replied in determined time. Thus, it would be reasonable to add fixed time to return the respond in the article 87 of the Code.

Adding the Code this amendment, firstly, plays a significant role in protection of human rights and freedoms, encourage equality of parties, encourage the effectiveness of adversarial proceedings. Secondly, article 25 of the Code states that defense counselor shall participate in proceedings as parties and enjoy equal rights to produce evidences, participate in their examination, file motions, express their opinion on any matter being significant for the correct resolution. Thirdly, several foreign countries have this norm in their legislature and it is giving a positive effect. For instance, article 100 of the Code of Criminal Procedure of Kazakhstan states that defender receives the respond for his request for references, explanations and so on in 10 days time.

Thirdly, in production of criminal cases organizing adversarial proceedings for the parties, developing its effective application in practice together with defense conclusion include humanistic ideas in themselves.

In the Code of Criminal Procedure of Uzbekistan and in other laws there is not norms relating to conducting "parallel investigation" by defense counselor.

⁵ Defense in criminal case // Under Lvov E.Y. edition. – M., 2000. – p. 10.

⁶ Hudoyberdiev H. Principle of adversarial proceedings: main factor to have fair trial. // Bulletin of the Supreme Court of the Republic of Uzbekistan, 2014, № 2. – Tashkent, 2014. – p. 25.

If we look through scientific ideas about defense counselor's independently collecting of evidence, V.Yaselskaya suggests to add Code of Criminal Procedure a new Chapter, namely "Private investigation". In this chapter will be enshrined defense counselor's right to independent evidence collection, and the method of his taking documents will be stated separately in full detail in other articles⁷. D.Bozorova says that before implementation of "private investigation", we need to prepare the relationship among people, society and state to this level. For now, she says that we need to fix a rule that "all evidence collected by defense counselor shall be added to the evidence collected by the investigator"⁸. Besides, some scientists develop the idea of making written collection of evidence and add it to the case as "defense conclusion". We also totally agree with this idea.

In the article 53 of the Code of Criminal Procedure the rights of defense counselor are enlisted. It would be appreciable to fill this article with the right of **"making defense conclusion and submit to add to the criminal case"**. Also, the code must be filled with a norm grounding "defense conclusion" and the questions which should be included in this norm. In order to provide reading aloud the defense conclusion, it would be appropriate write article 439 of the code as following:

"The presiding judge shall announce the commencement of judicial investigation. Judicial investigation shall begin with reading out the indictment. **After that, defense counselor reads aloud the defense conclusion** and the presiding judge shall ask the defendants whether they admit their guilt".

In conclusion, if aforementioned ideas enter into criminal procedural legislature, it increases the level of humanistic approach towards conducting criminal case. In reality, provision of the right to defense reflects in itself humanitarian point of view from the side of state bodies and defense counselor. And it helps to open the case fast and completely, to render fair decision, and the quality will become better by providing thorough, comprehensive, full, and impartial examination.

Respecting the rights and obligations of the participants of criminal procedure by promoting humanistic approach helps us to obey, apply, and follow those rules. And this consolidates legal basis for conditions and opportunities provided by the state to practice them in practice by protecting the interests of society, state and the individuals. In this way, the people will have more trust in the state bodies. Besides that, by humanistic approach we look at the person as the supreme virtue to be respected, protected and appreciated by law.

⁷ Yaselskaya V.V. Defense counselor's activity on collection of evidence in preliminary investigation. Ph.D. dissertation, – Tomsk, 1999. – p.p. 20-23.

⁸ Bozorova D. Participation of defense counselor in proving: some ideas on improvement of it. // Bulletin of the Supreme Court of the Republic of Uzbekistan, 2010, № 2. – Tashkent, 2010. – p. 45.