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Who's going to protect the lawyer?

Abstract: Some problems of ensuring the rights and interests of the defence counsel (lawyer) in the course of criminal proceedings are considered.

Suggestions for their resolution are given.

Keywords: lawyer; defence counsel; criminal proceedings; defence; protection; security; security system.

In idea - the Law, unless both concepts do not contain the prefix "fix", invented by Pierre Janet [7]. However, all in order.

The necessity of any protection of a person is caused by the violation or attempted violation of his rights and interests. A number of scientists identify protection with defence [3; 4], some consider protection to be broader in content than protection, according to others, protection and defence are interrelated, there is no protection without defence, protection can develop into defence, and identified violations will lead to the restoration of violated rights. The absence of violations of individual rights excludes their protection and restoration, but protection is a permanent condition [13; 32].

Nevertheless, almost all authors consider the above concepts as elements of the system of ensuring individual rights - favourable treatment in the exercise of rights and interests, which includes: a) informing about the possession of rights and their clarification; b) protection of rights and c) protection and restoration of violated rights [1; 30; 31].

Similarly, the problem is considered in criminal proceedings, the concept of which, unlike the CPC of the Azerbaijan Republic, we and most legal scholars consider identical to the concept of "criminal proceedings" [16; 28].

In the science of criminal procedure, the concept of ensuring the rights of the individual is usually associated with the concept of criminal procedural guarantee, which is explained by the etymology of the word "guarantee" - vouching, surety, security [161, p.110]. This was rightly emphasised by V.S. Shadrin, M.O. Motovilovker, E.A. Lukasheva and other authors [30, p.37; 19, p.4; 18, p.20].

At the same time, different points of view have been expressed at different times regarding the definition of the concept of criminal procedural guarantee, its properties and content, which is due to the historical background of the development of society.

Thus, M.S. Strogovich pointed out that procedural guarantees are those means established by law, by means of which citizens participating in criminal proceedings can protect their rights and interests [26, p. 83].

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Later, M.S. Strogovich corrected his position and began to consider procedural guarantees as means established by law that ensure the correct implementation of the tasks of justice in each criminal case, among which the guarantees of the rights of persons participating in criminal proceedings, which are an integral part of the guarantees of justice and therefore do not enter into any contradictions with them [27, p. 56-58], are singled out as a special type.

According to V.I. Kaminskaya, the state and citizens always have a common interest in criminal proceedings, and we can only talk about criminal procedural guarantees of justice [10, p. 48].

Later, V.A. Zdrikovsky put forward a rather interesting position, according to which the guarantees of justice and guarantees of individual rights are simultaneously guarantees of establishing the truth. Thus, an attempt was made to improve the well-known thesis about the unity of guarantees of personality and guarantees of justice [8, p.187].

On the issue of the content of criminal procedural guarantees as means of ensuring the rights of the individual there are also different points of view, which, as it seems, do not refute, but complement each other. Thus, E.F. Kutsova refers specifically to the rights and obligations of participants in the process [15, p. 127], A.L. Tsypkin - legal norms [33, pp. 21-22], N.N. Polyansky - principles of criminal procedure [24, p. 203], R.D. Rakhunov - procedural form [25, p. 3], and P.E. Kondratov - the criminal process itself [11, p. 65].

T.N. Dobrovolskaya rightly notes in this regard, stating that criminal procedural guarantees of the rights of participants in criminal proceedings are means established by the norms of criminal procedural law, different in their specific content, which together provide the persons involved in the case with the opportunity to realise the rights granted to them [6, p.133].

Thus, summarising the above, we can conclude that the notions of security and guarantee are identical, therefore, their operation should not cause doubts.

According to Article 7.0.18 of the CPC of the Republic of Azerbaijan, the lawyer as a defence counsel and representative is referred to the participants of criminal proceedings, therefore the issue of ensuring his rights and interests in the course of criminal proceedings is no less relevant and important, especially since it has not been fully researched, contains a number of contradictions and is a problem.

In general, the rights of a lawyer in criminal proceedings as a defence counsel are specified in the Constitution and Article 92 of the Code of Criminal Procedure of the Republic of Azerbaijan, are touched upon to a greater or lesser extent in almost all sections of the Code of Criminal Procedure of the Republic of Azerbaijan, are contained in the Law "On lawyers and advocacy" and other normative acts, but, in our view, they are mainly declarative and are not really ensured.

According to the Code of Criminal Procedure of the Republic of Azerbaijan, the system of participation of a lawyer in criminal proceedings consists of interrelated subsystems, including the following elements: clarification of rights, obligations and legal issues; collection and examination of evidence; participation in investigative and other procedural actions; submission of comments, objections, challenges and petitions; and filing of complaints.

These elements are usually used in combination, but can also be used separately. In turn, each of these elements is a system interconnected with systems of participation and other elements. In particular, the participation of a lawyer as a defence counsel of a suspect or accused implies the explanation of their general rights and obligations provided by his and their status, and subsequently - the rights and obligations when participating in investigative and other procedural actions, on col-

lection, provision and examination of evidence, familiarisation with the materials of the criminal case, appealing actions, making objections, comments, challenges, etc. [21, p.71].

Now for the realities. Clarification of rights, obligations and legal issues. It seems clear and there is nothing to explain, pardon the involuntary pun. Meanwhile, the law does not describe the procedures for these procedural actions, and therefore, often representatives of the other side of the process (Art. 7.0.21 of the CPC) and judges "silence" lawyers, considering the explanation as an illegal instigation.

It is possible to form an epic about the forms of such obstruction of a lawyer in the exercise of professional duties established by law, in which the phrases "stop talking", "don't pretend to be smart", "I forbid it", "don't be a bully", etc., as a rule, with the familiar pronoun "you", will be relatively "decent". Attempts to explain the legality of actions end with threats to be taken out of the room and to report unethical hooliganism, illegal behaviour, etc. to the Bar Association or the Prosecutor's Office. Often the threats are carried out and the lawyers have to prove who is a camel.

It has become a common practice for lawyers to sit for hours beyond the appointed time in waiting rooms, or more often defile in corridors, waiting for the prosecutor, investigator, inquirer or judge to finish a tea party or briefing from the trembling half [21, p. 56-64].

We are not anti-feminists and, God forbid, do not suffer from misogyny. However, as noted in one of their interviews on TV, the vast majority of young female judges, except for their appearance and clothes, do not pay special attention to the process, do not make decisions without repeated meetings with the management and repeated consultations, the announced oral decisions in some cases do not correspond to the procedural documents, the motions of lawyers are not understood and therefore rejected without justification, objections and statements are perceived inadequately.

Under-educated? However, the practice knows not so long ago cases when a newly minted servant of Themis concealed material evidence in a case out of personal interest, another one for the same reasons fabricated the minutes of a court hearing, a third one issued two different judgements on the same issue, a fourth one went shopping in Italy and postponed for two months the trials on cases with several arrested persons, a fifth told the victim that she could not take her problems into account, since she did not consult with her when transferring the money to the fraudster (?!), sixth one told the lawyer that he would not have looked at her (???), seventh.... Unfortunately, there are dozens of such examples and even more blatant ones. When and where did they learn it?

Collection and examination of evidence by a defence lawyer. According to Article 143 of the Code of Criminal Procedure, evidence is collected during the preliminary investigation and court proceedings through interrogation, confrontation, search, seizure, inspection, examination, identification and other procedural actions.

An inquirer, investigator, procurator or court shall have the right, at the request of the parties to criminal proceedings or on their own initiative, in the course of gathering evidence, to demand from individuals, legal entities and officials, as well as bodies carrying out operational and investigative activities, the production of documents and things relevant to criminal prosecution, and from competent bodies and officials to conduct inspections and audits.

A defence attorney admitted to participate in criminal proceedings in the cases and in accordance with the procedure provided for in the present Code shall have the right to present evidence and gather information for the purpose of providing legal assistance, including obtaining explanations from individuals, as well as requesting certificates, characteristics and other documents from various organisations and associations.

Suspect, accused, defence attorney, prosecutor, victim, civil plaintiff, civil defendant and their representatives, natural and legal persons have the right to present things and documents, as well as oral or written information that may be recognised as evidence [29].

Consider whether everything is as smooth as it is written.

Thus, according to Article 124 of the Code of Criminal Procedure, evidence in criminal prosecution is recognised as credible evidence (information, documents, stuff) obtained by the court or the parties to the criminal proceedings in compliance with the requirements of criminal procedural legislation.

It turns out that the defence attorney cannot collect evidence, as he is not entitled to conduct interrogations, confrontations, searches, seizures, inspections and other procedural actions specified in Article 143.1 of the CPC, and, therefore, according to Article 125.2.5 of the CPC, inform

The statement in Article 143.3 of the CPC that the defence counsel has the right to receive explanations from private persons is also inaccurate, since Article 92.9.9 of the CPC contains a reservation that the defence counsel may receive explanations from individuals and legal entities only in cases of private prosecution. And these are only four elements: Article 147 (libel), Article 148 (insult), Article 165.1 (violation of copyright without aggravating circumstances) and Article 166.1 (violation of inventive and patent rights without aggravating circumstances) of the Criminal Code of the Republic of Azerbaijan [8]. As a subject of evaluation of evidence, the defence counsel is not listed in Article 145.2 of the CPC at all. So, defend your rights.

The problems of participation in investigative and other actions, consideration of statements, comments, objections, petitions and complaints are described in detail in the procedural and forensic literature, therefore we will try to consider them only from the position of ensuring the rights of the defence counsel.

Thus, according to Article 92 of the Code of Criminal Procedure of the Republic of Azerbaijan, when exercising his powers, the defence attorney (lawyer):

- acquainted with the decision of the body conducting the criminal proceedings to order an expert examination and with the expert's report and the materials submitted by that body to the court to confirm the lawfulness and validity of remand in custody or remand in custody;

- from the moment of the end of the preliminary investigation or termination of criminal proceedings, familiarise himself with the case file and make copies of the necessary documents relating to the defendant;

- shall be informed by the body conducting the criminal proceedings of the decisions adopted by it concerning the rights and legitimate interests of the defence counsel, and shall, at his or her request, receive copies of those decisions, including decisions on the imposition of a preventive measure, the imposition of investigative or other measures of procedural coercion, the bringing in of an accused person, the filing of charges, as well as copies of the indictment, statement of claim, judgement, other final court ruling, appeal or cassation appeals or protests.

Meanwhile, according to Article 268 of the Code of Criminal Procedure of the Republic of Azerbaijan, the suspect or the accused have the right to get acquainted with the decision on assignment of expert examination before the examination, to get acquainted with the expert's report not later than 10 days from the moment the investigator receives the expert's report and to apply for additional or repeated examination; to challenge the expert, to apply for appointment of an expert from among the persons specified by him; to put additional questions before the expert; to demand

from the expert to explain the essence of the applied metres However, these rights are not granted to the defence counsel.

Petitions for alternative examinations criminal prosecution bodies and courts reject unequivocally and categorically, referring to the reservation in Article 92.9.9 and Article 264 of the CPC, which provides for such a possibility only in cases of private prosecution.

Meanwhile, Article 10 of the Constitutional Law of the Republic of Azerbaijan "On Normative Legal Acts" confirms the right to organise alternative expertise, but it is not easy for a lawyer to bring the truth to people who do not know and understand the law.

The right of defence attorney to make copies of documents relating to the defendant seems to be artificially limited, which often causes disputes with representatives of the criminal prosecution authority, and even with judges. It is difficult to explain the elementary truth that all documents in a criminal case to a greater or lesser extent relate to the person accused thereof, and the lawyer is not obliged to explain the interrelationships, as these are elements of defence tactics. Also, with the rulings relating to the rights and legitimate interests of the defense attorney, even if the logical connections are not clear to someone.

To a certain extent, the rights of defence attorney are also infringed by the provisions of Articles 284-288 of the Criminal Procedure Code of the Republic of Azerbaijan. 284-288 of the CPC of the Republic of Azerbaijan regulating the procedure for familiarisation with the case file.

Thus, according to Article 284.1 of the CPC, an investigator who recognises the collected evidence as sufficient for drawing up an indictment and forwarding the criminal case to the prosecutor who is in charge of the procedural management of the preliminary investigation shall perform the following actions:

- Notifies the accused, his defence counsel, the victim, the civil plaintiff, the civil defendant or their representatives of the end of the preliminary investigation;

- determines the place and time of familiarisation of participants of criminal proceedings with the materials of the criminal case [29].

However, the law does not say in what order the notification of the end of the preliminary investigation is carried out, and in this connection in some cases postal or telephone communication is used, notification by e-mail or SMS messages etc.

Meanwhile, if the accused is in custody, the question of whether he will familiarise himself with the case file together with the defence attorney or separately can be decided only after their meeting. In this case, it will be possible to determine the specific date from which the five-day period of possible postponement of the defence attorney's (representative's) acquaintance with the case file will start to run, and, most importantly, the deadline for acquaintance.

In terms of notification, it seems necessary to provide for such an order in which the participants of the process will have the opportunity to appear in a timely, but not hasty manner. The summoned person should be given time (at least 2-3 days) to have time to organise his work and other cases, if necessary, to reschedule planned activities, etc., rather than to schedule a meeting for the next day, which the defence attorney or representative may have fully scheduled a week before.

At the same time, the issue of the time of familiarisation with the case materials should be decided. According to Art. 290.1 and 290.3 of the CPC, if the accused is arrested or house arrest is chosen as a preventive measure, the criminal case together with the indictment must be sent to the prosecutor at least 20 days before the expiry of the term of these preventive measures, and the prosecutor must consider the case with the indictment within 5 days [29].

According to Article 292.1-1 of the CPC, if the defendant is arrested or house arrest is chosen as a preventive measure, the criminal case with an approved indictment must be sent from the prosecutor's office to the court at least 15 days before the expiry of the preventive measure [29].

Thus, according to conservative estimates, familiarisation with the case file should be completed at least 20-25 days before the end of the arrest or house arrest. By adding to these 20-25 days the time required to familiarise oneself with the case file, it is possible to determine, in retrospect, a fairly precise date for the announcement of the end of the preliminary investigation.

If we proceed from scientific data that normal familiarisation (perception and analysis) with one printed page is possible for 5 minutes, then a standard 250-300 page criminal case in one volume can be familiarised for 1250-1500 minutes, i.e. for 20-25 hours, i.e. for 2.5-3 eight-hour working days, provided by the rules of investigative isolators. [5; 9; 14; 17; 23]. In addition, it is necessary to take into account the time for familiarisation with physical evidence, annexes (discs, etc.) to protocols, etc.

In this regard, from our point of view, having as a product of a six-month investigation, e.g. 3 volumes of the criminal case without exhibits and annexes, the investigator should announce the end of the investigation 27.5-34 days before the end of the term of arrest or house arrest. If the criminal case consists of 10 volumes, then, accordingly, the beginning of familiarisation with them should be announced 45-55 days before the termination of the preventive measure (arrest or house arrest), etc., again without taking into account material evidence.

According to Article 285.1 of the Code of Criminal Procedure, the investigator must provide for familiarisation the materials of the criminal case in one or more bound volumes with numbered sheets, provided that each volume contains an inventory of documents. Physical evidence and annexes to the records of investigative actions kept in the case file must also be provided. If a criminal case consists of several volumes, all volumes shall be provided at the same time. Unfortunately, as a rule, this legal requirement is violated, and new documents appear in the file after familiarisation.

In addition, if there are several defendants, it will not be possible to bring the entire criminal case against them at the same time, especially if some of them are in custody and some are at large.

The way out of this situation is seen in the practice applied in a number of countries, when at the announcement of the end of pre-trial proceedings the defence is presented with copies of all case materials without exception. It is a bit expensive, but it is thought that law enforcement bodies with their unlimited possibilities will bear this load, but human rights in this part and conditions of fair trial will be observed.

With regard to motions, objections, comments and complaints, the artificial obstacles to the normal work of the defence lawyer are not less, and not an order of magnitude more, than in other contacts with representatives of the criminal prosecution authorities and judges.

Petitions, complaints and applications are not considered within the time limits established by law, again contrary to the requirements of the law, they are rejected without any justification by one or two illogical proposals of a rescriptive nature, and in some cases, they are postponed until the Second Coming.

The discussion of petitions and complaints turns into the lawyer throwing pearls (arguments, explanations of evidence, etc.), which the opposing party does not understand or pretends not to understand, turns into sand.

The law provides for the filing of an appeal within 20 days of the pronouncement of the judgement, while the full text of the judgement is usually sent to the accused at large after 5-10

days. Nevertheless, the courts calculate the appeal period from the moment of proclamation (announcement) of the operative part of the verdict, which has become the rule.

The CPC contains hundreds of such absurdities, but we are particularly concerned about the ethics of the relationship between the defence lawyer and the representatives of the prosecution and the judges, who generally determine the essence of the process.

Among the international instruments, the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century, adopted by the International Bar Association, govern lawyers' relations with judges. Under Principles 2 and 5, lawyers have the right to have judges recognise their important role in litigation, as their participation in the proceedings ensures the fairness of the proceedings. Lawyers are also obliged to act with integrity and dignity in their dealings with judges and to fight to ensure judicial independence [34].

The "Bangalore Principles of Judicial Conduct", adopted by the UN Commission on Crime Prevention and Criminal Justice in 2006, oblige a judge to exhibit and promote high standards of behaviour with a view to fostering public confidence in the judiciary, which is paramount to maintaining the independence of the judiciary (para. 1.6). A judge's conduct in and out of court should contribute to maintaining and enhancing public confidence, the legal profession and litigants in the objectivity of the judge and the judiciary (para. 2.2). A judge should observe ethical standards and avoid improper behaviour in all actions related to his or her office (paragraph 4.1). In his or her personal relations with lawyers, a judge must avoid situations that might give rise to reasonable suspicion or the appearance of favouritism or prejudice (paragraph 4.3). In the performance of judicial duties, a judge must not, by words or behaviour, show bias or prejudice against any person or group of persons for irrelevant reasons (para. 5.2) [2].

However, unfortunately, most of the prosecution and newly-minted judges, and even the old-timers, know nothing about the "Turin Principles" and the "Bangalore Principles".

So, who's going to protect the lawyer?

Law. In the first place, the CPC, if perfected, contradictions and other defects of it are removed.

In the meantime, the defence of the lawyer is in the hands of the lawyer himself. Some people practice complaining to the SPS, management, etc. on every case of violation of their rights. Very often it helps.

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Кто защитит адвоката?

Аннотация: Рассматриваются отдельные проблемы обеспечения прав и интересов защитника (адвоката) в ходе уголовного судопроизводства.

Даны предложения по их разрешению.

Ключевые слова: адвокат; защитник; уголовное судопроизводство; защита; охрана; система обеспечения.

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