

# COMPARATIVE LEGAL ANALYSIS OF ISSUES OF EXTENDING CRIMINAL PROCEDURAL POWERS OF ATTORNEY IN UZBEKISTAN

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## ABSTRACT

*The article explains the legal difficulties surrounding the use of criminal procedural powers of attorney. It includes a comparative legal analysis of Uzbekistan's and other countries' legislation in this field. This research also offers ideas for expanding the power of the attorney in criminal proceedings.*

**Keywords:** Advocacy, Attorney, Defence Counsel, Representative of the Victim, Witness, Investigative Report.

## INTRODUCTION

Criminal procedure legislation establishes that an attorney (defense counsel, victim representative, civil plaintiff, civil defendant, or witness's lawyer) has the necessary and sufficient powers to perform his/her legal duties and provide legal assistance to the trustee (protected person).

As a result of the reforms carried out in this sphere: the number of registered attorneys in the register of advocacy bureau, board of attorneys, law firms and attorneys, which is administered by the Ministry of Justice of Uzbekistan, is 5260; a procedure for compulsory assessment of evidence presented by an attorney during the pre-trial investigation, preliminary investigation and trial has been introduced; an official of the state bodies carrying out operational-search activities may receive applications, explanations or testimonies from a suspect, an accused or a defendant only in the presence of his/her defense counsel; a suspect has the opportunity to have a defense counsel from the time he or she is actually detained or the operational-search activity related to his or her detention at the scene of the crime is completed in practice; mandatory participation of defense counsel has been established in cases where an agreement to plead guilty is concluded, in cases where a preliminary hearing is held, and in cases involving a person suspected or accused of committing a serious crime.

However, analyzing the views of the director of the law firm "Simay Kom" S. Mayorov (Mayorov, 2022), an attorney of the law firm "My Lawyer" Turdaliyev (2020) and representatives of the legal scientific community, in particular Davlatov (2021), Anvarovich (2021), A. Romanenkov (2010) on this issue showed that criminal procedural powers of attorney established by the current legislation are insufficient to perform his/her duties fully. These issues are discussed below:

According to article 25 of the Criminal Procedure Code of the Republic of Uzbekistan (hereinafter referred to as the Criminal Procedure Code), court proceedings shall be adversarial,

and the parties to the case shall have equal rights to present evidence, participate in their examination, make requests, and express their opinions on any matter relevant to the proper determination of the case.

In practice, the equality of accusation and defense in the collection and presentation of evidence is not ensured.

For instance, the defense does not have access to the services of the state bodies carrying out operational-search activities, which can use special technical means and methods. The prosecutor, investigator and inquirer who provide the accusation have access to the services of such bodies to gather evidence.

It should be noted that the prosecution has a greater advantage in gathering evidence in this circumstance and, accordingly, this makes it more difficult to ensure equality of the parties in proceedings at the court.

Based on the analysis of advanced foreign experience, it becomes clear that an attorney can use the services of a private detective to gather evidence in a criminal case.

In particular, it is stipulated in the Criminal Procedure Codes of Italy (CPD, 2007) and Kyrgyzstan (CPD, 2017) that defense counsel may use the services of a private detective to gather evidence.

However, the legislation of Uzbekistan does not regulate the activities of a private detective. Therefore, attorneys cannot use their services legally.

Private detective activity is regulated by law in the United States (Act, 1953), Japan (Law, 2006), Spain (Law, 2014), Romania (Law, 2003), Latvia (Act, 2001), Russia (Law, 2002), and Kyrgyzstan (Law, 1996).

For example, according to the Latvian Law on Detective Activity, detective activity can be carried out by individuals or legal entities. In order to engage in this activity, it is required to get a license issued by the State Police. Detective activity includes gathering information on civil and criminal cases; searching for a person who has committed a crime or missing person; identifying facts, objects, or persons related to criminal activity; and searching for property lost or illegally alienated by individuals and legal entities.

It is important to note that the use of the services of a private detective by a defense counsel in the collection of evidence causes to ensure the principle of equality of the parties in proceedings at the court and expands the defense's ability to gather evidence legally.

Article 115 of the Criminal Procedure Code defines the range of persons who cannot be questioned as witnesses or victims. This article includes only the defense counsel and the representative of the victim, civil plaintiff, civil defendant in the list of persons who cannot be questioned as witnesses or victims.

Nevertheless, attorneys, attorney's assistants and trainees are not included in the list of persons who cannot be questioned as witnesses in cases known to them as a result of providing legal assistance in a criminal case.

It should be noted that an attorney has an obligation to keep advocacy secret, and in accordance with Article 10 (1) of the Law on Advocacy, direct or indirect interference in the professional activity of an attorney is prohibited.

Furthermore, an attorney's assistant and trainee shall perform orders of attorney in connection with his/her professional activity and disclosure of information related to advocacy secrets is also prohibited for them.

But, the above norms are not fully reflected in the criminal procedure legislation. For instance, an attorney may be questioned as a witness in the preliminary investigation of a criminal case if he or she has provided legal assistance to a suspect or an accused before defense counsel is involved in the criminal case. Because the persons referred to in Article 115 of the Criminal Procedure Code do not cover the concept of an attorney.

Therefore, there is no legal basis for an attorney (including a witness's lawyer) to refuse to testify as a witness.

An attorney, attorney's assistant and trainee shall not be questioned as witnesses in the Criminal Procedure Code of Ukraine (CPD, 2012), Russia (Law, 2002), Georgia (CPD, 2009), Kyrgyzstan and Belarus (CPD, 1999), among foreign countries.

To prevent inconsistencies in the legislation and indirect interference in the activities of attorneys in criminal procedure, it is advisable to include an attorney, his assistant and trainee in the list of persons, who cannot be questioned as witnesses or victims.

Article 53 of the Criminal Procedure Code provides that defense counsel shall have the right to participate in the questioning of a suspect, to be present during the announcement of charges against him and to participate in the interrogations of a defendant, as well as in other investigative actions involving an accused or a defendant, and to question a suspect, a defendant, witnesses, experts, specialists.

At the same time, it is not mandatory to satisfy defense counsel's questions related to the investigative action or to include them in the record of the conducted investigative action. The investigator may not include defense counsel's questions in the records so as not to jeopardize the relevance or reliability of the evidence obtained as a result of the investigative action. This negatively affects the process of evaluating evidence.

According to Article 87(2) of the Criminal Procedure Code, the evidence presented by a defense counsel in accordance with the criminal procedure legislation is required to be attached to the materials of the criminal case and subject to mandatory assessment.

Consequently, it is advisable to include in the record of investigative action the questions asked by defense counsel about the conducted investigative action.

The criminal procedure legislations of Kazakhstan, Kyrgyzstan, and Ukraine provide for the mandatory inclusion of defense counsel's questions about investigative action in the record of the investigation.

A defense counsel must use all legal means and methods to establish the circumstances rejecting suspicion or charges, mitigating liability, and providing necessary legal assistance to a suspect, accused, or defendant. This norm limits the scope of the means and methods necessary for defense counsel to perform his or her duties under criminal procedure law.

In particular, the means and methods provided by law may not be sufficient for defense counsel to identify circumstances that reject suspicion (or accusation) or mitigate liability. Although the means or methods to be used are not provided by law, they may not contravene the requirements of criminal procedure law.

In this case, a defense counsel may not apply the means or methods necessary to carry out his or her duty in accordance with the requirements of this norm.

As a result, it is recommended that defense counsel be permitted to use all means and methods permissible under criminal procedure law to identify circumstances that reject suspicion (or accusation) or mitigate liability.

The Criminal Procedure Codes of Kazakhstan, Kyrgyzstan and Estonia (CPD, 2003), among other foreign countries, provide that a defense counsel may use all means and methods not prohibited by criminal procedure law to identify circumstances that reject suspicion (or accusation) or mitigate liability.

Article 53 of the Criminal Procedure Code provides for defense counsel's right to inspect documents relating to procedural actions taken in the presence of a suspect or an accused.

However, the Criminal Procedure Code does not specify the mechanism for exercising this right. A defense counsel or other participant in criminal procedure may request an inquirer, an investigator, or a prosecutor to inspect the relevant documents in the criminal case at the pre-trial stage. A request shall be considered independently by an inquirer, an investigator, or a prosecutor.

It should be pointed out that an inquirer, an investigator, or a prosecutor has no obligation to satisfy the request.

For that reason, it is essential to specify in the criminal procedure legislation the enforcement mechanism of the right of defense counsel and other participants in the criminal proceedings to inspect the documents related to the procedural actions taken.

This mechanism is determined in some foreign countries' legislation. For instance, the legislation of the Netherlands stipulates that a defense counsel's request for access to documents relating to criminal proceedings must be granted by an investigator during the preliminary investigation.

Furthermore, according to the Criminal Procedure Code of Ukraine, on a motion of the defense, victim or representative of the legal person in whose behalf proceedings are being taken, the investigator and public prosecutor are required to release all records of the pre-trial investigation for review, except for the records of security measures initiated in respect of persons participating in criminal justice, as well as the records for review which at such stage of criminal proceedings may be to the prejudice of the pre-trial investigation.

Taking into account the above, it is proposed to implement the following measures:

1. Developing the draft law of the Republic of Uzbekistan "*On private detective activity*";
2. Allowing a defense counsel to use all means and methods not prohibited by criminal procedure law to identify circumstances that reject suspicion (or accusation) or mitigate liability;
3. Introducing a procedure for the mandatory inclusion of defence counsel's questions, comments and objections on the investigative action in which he or she participates in the record of the investigative action;
4. Including an attorney, his assistant and trainee in the list of persons who will not be questioned as witnesses;
5. Introducing an enforcement mechanism in criminal procedure legislation to allow defense counsel and other participants in criminal proceedings to inspect documents relating to procedural actions.

## CONCLUSION

The implementation of these proposals will serve to ensure in practice the equality of accusation and defense in the collection and presentation of evidence in criminal proceedings and to take into account the standpoints of defense counsel about the criminal case.

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