

DISCUSSION ASPECTS RELATED TO THE PROBLEMS OF INTRODUCING THE INSTITUTION OF LEGAL INVESTIGATIONS INTO THE CRIMINAL PROCEDURE LEGISLATION OF THE KYRGYZ REPUBLIC AND THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

Introduction: *The article reflects the most topical discussion aspects related to the possibility of introducing a new procedural institute as a “legal investigation”, which is currently causing wide controversy among the legal community both in the Kyrgyz Republic, Kazakhstan and other CIS countries.*

Methodology: *in the course of the research, the authors used methods of analysis and generalization. The article presents a critical analysis of the provisions on the collection of evidence by the parties in order to implement the principle of adversarial proceedings, in the context of the new criminal procedure legislation in force in Kyrgyzstan and Kazakhstan; to perform the functions of the newly introduced investigator at the pre-trial stage; in connection with the introduction of such new institutions as "special (secret) investigative actions", "procedural agreement on confession of guilt", "procedural agreement on cooperation".*

Results and Discussions: *The researches substantiate the author's position on the introduction of a parallel legal investigation into the criminal procedure legislation. The theoretical provisions for the improvement of procedural rules with statements of vulnerable circumstances are described in the research that may be resolved as a result of the measures proposed by the authors.*

Conclusion: *The submitted legislative proposals will remove the contradictions that arise during such innovation. In addition, they are aimed at protecting the constitutional rights and freedoms of citizens, as well as the principle of adversary in accordance with international standards.*

Keywords: Criminal Procedure Legislation, Constitutional Rights and Freedoms, Legal Investigation, Provisions, Procedural Rules.

INTRODUCTION

The Kyrgyz scientists correctly point out that today, among other circumstances,

"...a number of factors have an important impact on the shortcomings in the implementation of human rights such as: firstly, the lack of proper responsibility for the violation of personal rights and freedoms; secondly, the weak system of the protection mechanism of the rights of individuals by the law enforcement judicial agencies; thirdly, the lack of control over the activities of the officials conducting the proceedings; fourthly, the sectoral legislation of the CIS countries is rather slowly being brought up to the international standards of observance of personal rights and freedoms" (Isayeva et al., 2016).

Therefore, it is reasonable that, despite the adoption of new criminal procedure legislation in the Kyrgyz Republic and the Republic of Kazakhstan, controversy over a number of provisions of the Criminal Procedure Code is still ongoing.

RESEARCH METHODOLOGY

In the course of the study, the authors used methods of analysis and generalization. The method of analysis allowed the authors to analyze the available data to identify controversial points in the disclosure of the concept of *"lawyer's investigation"* in the context of criminal procedure legislation of Kyrgyzstan and Kazakhstan. The method of generalization also allowed us to summarize the data obtained, and make a number of conclusions and suggestions as a result of the study.

RESULTS AND DISCUSSION

Thus, acute discussions among the legal community of the CIS countries in general raise questions related to the implementation of the principle of competitiveness of the parties. And this is logical, because no one doubts that the defense, compared to the prosecution, is significantly limited not only in the use of means and methods of evidence collection in a criminal case, but also in the means and methods of defense provided in the norms of the CPC of the Kyrgyz Republic and the Republic of Kazakhstan. Despite calls from the legal community for more active implementation of the adversarial procedure in the collection of evidentiary material, by reflecting such procedure in the provisions of the KR CPC and the RK CPC. In the authors' opinion, there is no action on the part of lawmakers in this area of activity. It should be noted that the institution of judicial control at the stage of pre-trial proceedings provided for in the newly adopted Criminal Procedure Code of the Kyrgyz Republic, as well as in the Criminal Procedure Code of the Republic of Kazakhstan, does not automatically entail an adversarial process. This is confirmed by the statement of (Smirnov, 2000), that the formal appearance of the court at this stage, where it is assigned other functions, does not mean the implementation of the principle under consideration. Barbash (2005); Efimichev & Efimichev (2005), Kuznetsova, (2004) also write about it and state that it is impossible to apply the adversarial principle at the pre-trial stage. Therefore, it is quite right that in this case there should be pivotal approaches to the revision of the activities of the lawyer as a whole, as well as additional guarantees and legal mechanisms that allow to some extent equalize the rights of the defense and prosecution. It should be noted that a positive aspect is the *"deposition of evidence"* procedure provided for in article 199 of the KR Criminal Procedure Code and article 217 of the RK Criminal Procedure Code, according to which the prosecution and the defense have the right to request that the investigating judge examine the victim or witness, if there are grounds for doing so. As evidenced by the analysis of the provisions of Article 217 of the RK CPC, which entered into

force on January 1, 2015, the legislator made certain changes in the current version of this article on April 1, 2019. According to the new version, a person conducting pre-trial proceedings has the right to independently request the investigating judge to interrogate the persons referred to in article 217 of the RK Criminal Procedure Code, without addressing the prosecutor, which is certainly justified. However, the right to apply to the investigating judge, both by the prosecution and the defense, does not guarantee that such request will be granted. Furthermore, if the investigating judge refuses to grant a request, the request may be reviewed only if it is appealed by the prosecutor. The authors believe that a lawyer should have the right to independently appeal against the decision of the investigating judge refusing to satisfy his request for the deposit of evidence. In the conditions of the adversarial nature of criminal proceedings, it is most reasonable to provide for a provision that would oblige the investigating judge to create the necessary conditions for such an interrogation in all cases where a lawyer makes such request. A lot of debates, both in the Republic of Kazakhstan and the Kyrgyz Republic, have led to "*covert (special) investigative activities*". Thus, the Kazakh scientist (Ginzburg, 2013) was one of the opponents of the introduction of covert investigative activities" in the Criminal Procedural Code of Kazakhstan, as their conduct cannot be fully regulated both in form and content. This, in his view, is hindered by the use of means, methods and technologies that constitute State secrets, which could make this procedure a mystery for the investigating authorities as well. The authors wrote about the problems of introducing such institution in the other article on the irregularities that may follow from officials (Isaeva et al., 2015). In turn, without elaborating on the views expressed by other authors on this issue, the authors of this research believe that the position of international organizations is correct,

"... it is indisputable that the Government must bring the guilty persons to justice. However, proceedings must be conducted and decisions should be made in strict compliance with substantive and procedural law that meets the requirements of fair trial standards. And the procedure established by law should ensure protection against groundless accusation and conviction, illegal restriction of human and civil rights and freedoms".

It is correct to exclude from sentencing the testimony of a "*secret witness*" as evidence in court (unless there is other evidence of legal force) if the defense was not given the opportunity to question such witness during the deposit of his or her testimony at the pre-trial stage (which can sometimes be observed at trial). Such approach is possible under the newly adopted Criminal Procedure Code of Kyrgyzstan and Criminal Procedure Code of Kazakhstan within the framework of the deposition of evidence, but at the same time, the procedure for the questioning of the "*secret witness*" itself must be provided for by law. It is necessary to mention the introduction into the provisions of CPC of KR and CPC of RK (section 13, chapter 63) such procedural institutions as: (1) procedural agreement on confession of guilt; (2) procedural agreement on cooperation. There is no point to go into the details on the content of the provisions of these institutions, as it is not part of the task of the article, but it is important to emphasize the need to strengthen the role of the Bar in the conclusion of agreements with participants in criminal proceedings. It is especially relevant because, based on an analysis of the provisions of the KR Criminal Procedure Code and the RK Criminal Procedure Code, the guilt of a person in the crime under investigation, the amount and type of punishment can be determined at the stage of pre-trial proceedings. And the court only carries out statement of the facts which are

represented by the prosecutor possessing absolute power in this question according to articles 33, 487, 498 of the CPC of the KR and articles 58, 612-621 of the CPC of the RK. Therefore, the authors consider it reasonable to believe that the prosecution will take measures to conclude agreements with suspects and accused persons that do not exclude abuse and a subjective approach to the legal procedures provided for by the KR Criminal Procedure Code and the RK Criminal Procedure Code. Therefore, it is logical to revise a number of provisions of the CPC of the KR and the CPC of the RK for more active participation of an attorney in deciding on the conclusion of a procedural agreement by a suspect in order to timely identify, suppress and prevent possible violations of law and to establish the actual circumstances of the case (Isaeva et al., 2015). It seems natural that today all the debates among scientists, lawyers and practitioners about the need to introduce a parallel legal investigation, and its insolvency. Thus, (Mikhailovskaya, 2007) stresses that

"... The function of prosecution is not properly performed by the relevant participants of the process by ignoring the information indicating innocence or the lesser degree of responsibility of the accused, inadequate assessment of the evidence collected, etc."

Galitskikh, (2006) writes about the bias in the course of the investigation against the proposals made by the defense, which is mainly supported by the prosecution. Smanaliev, (2013) believes that this approach is explained by the fact that the legislator has placed the functions of an investigator on the side of the prosecution, so his activities have an accusatory bias. At the same time, opponents of the introduction of provisions regulating the conduct of legal investigations in the Criminal Procedure Code focus on the following main vulnerable circumstances, which prove the invalidity of the "innovation" proposed by other scientists, namely: Carrying out of "private investigative actions" will come into conflict with the established norms of the CPC proving grounds (Sheifer, 2014; Tretyakov, 2012; Lotysh, 2003).

This approach may lead to unhealthy competition due to the different financial possibilities of the defendants; a defense counsel cannot use coercive measures of enforcement during the legal investigation and cannot be authorized with such powers;

In the opinion of Dyusebaev (2018), the difficulty arises in the following:

1. Provision of guarantees that the evidence received by the defense counsel is reliable;
2. Providing the defense counsel with the powers necessary during the collection of evidence (through measures of enforcement);
3. Impossibility, once the defense counsel has received the necessary evidence, to reproduce the conditions under which such procedural actions were conducted;
4. The activity on collection of factual material leads to the assignment of the properties, both relativity and inadmissibility of evidence, since such activity of a defense counsel is carried out in a peculiar way".

Content analysis of supporters of the legal investigations, allows the authors of this article to state that for the implementation of the above innovation, the following is necessary: *firstly*, to provide the chapter in the CPC "Conducting a private investigation" as well as criminal liability in case of falsification of evidence (Yaselskaya, 1999). *Secondly*, when conducting a private investigation, do not impose on the lawyers representing the interests of the accused to establish objective truth (Martynchik, 2004); *thirdly*, to oblige a lawyer to prepare an exculpatory evidence with appropriate conclusions for this purpose; *fourthly*, the CPC regulations should

stipulate by law that the objects and documents provided by a lawyer should be evaluated from the point of view of their relevance, reliability and admissibility as evidence only in court, in this regard, all materials provided at the pre-trial stage should be admitted to the case (Madmarova, 2019); fifthly, in order to ensure the legality in the collection of evidence, the investigative agency should participate as an official observer (Bardin et al., 2003). The analysis of various sources and practical experience of work does not allow the authors to agree with the opinion of opponents of the introduction of legal investigations. The main problem lies not in the provisions of the law, but in the problems and mistakes made by the enforcer (Kudryavtsev, 2008). It is emphasized in the legal literature, that the principle of completeness, fullness and objectivity of the research applies to officials of the investigation and inquiry agencies (Kruglikov, 2012). It has often been suggested that the extending rights of defenders would encourage abuse on their part. But this approach is essentially incorrect, because bad faith and abuse also occur among the subjects of investigation such as law enforcement agencies. It should be noted that the court with the evidentiary basis mainly formed by the criminal prosecution authorities, without information on the actual progress of their receipt, is forced to assess compliance with the procedure of evidence collection. Therefore, the prosecutorial bias from the pre-trial stage unwittingly "*shifts*" to the trial stage, where the court assesses the evidence actually collected by the prosecution but not by the defense. This only confirms that a lawyer must have his own set of evidence gathered independently from the prosecution. The introduction of a parallel legal investigation is justified from the following points of view:

Firstly, modern realities require a conceptual review of lawyer's activity taking into account the renewal of the state and legal policy, which has led to the reform of the legislation, in which the priority should be the implementation of constitutional provisions relating to the protection of human rights and freedoms. It is necessary to create such legal regime and mechanism, where the participants of the process have the maximum opportunity to defend the interests of the individual before the court.

Secondly, at the stage of pre-trial proceedings, the prosecution and the defense cannot, by virtue of the regulatory provisions of the criminal procedure legislation, have equal rights, which results in different degrees of their participation in proving the criminal case under investigation. This approach by the legislator requires:

1. A defense lawyer is an independent participant, he or she should be legally empowered to collect evidence independently, thus allowing for its admissibility from a procedural standpoint;
2. To add norms in the Criminal Procedure Code for the involvement of private detectives, legal investigations in the framework of pre-trial criminal proceedings;
3. To develop criteria for declaring the collected evidence admissible as a result of the lawyer's procedural work, which should be clearly reflected in the norms of the Criminal Procedure Code (the procedure for obtaining, recording and evaluating evidence, which should be evaluated from the point of view of its relevance, reliability and admissibility, as well as the procedure for the legal regulation of the admission of obtained evidence into the case).

Thirdly, a legal and organizational mechanism should create conditions not only for the implementation of the principle of adversarial proceedings, but also for the guarantee of the independence of the lawyer, as his or her procedural activity consists, among other things, in the prevention of abuse and bias against defendants from the prosecution (For example: operative search activity, using mental pressure and giving information about the defendant, etc.). This

also applies to the collection of confidential information protected by law due to the professional duties of lawyers and private detective agencies.

Fourthly, the authors of this article believe that since the lawyer also has the function of preventing the crimes from the subjects of the investigation of the case against the defendants, if there are grounds, including those to be obtained as a result of the legal investigation, to provide for the possibility at the legislative level to request the investigating judge to conduct the necessary procedural actions by the authorized agencies in order to collect evidentiary information about the violation.

Fifthly, in the course of a legal investigation, factual data may be collected in order to request the court to recognize the evidence collected at the pre-trial stage by the prosecution as inadmissible, which formed the basis for the prosecution of the defendant, including evidence obtained by the investigating and interrogating authorities with the violation of the requirements of the Criminal Procedure Code (For example: this may be the result of improper proceedings, including investigative actions, due to the low professional level of the subjects of the investigation). Besides, such direction of lawyer's activity may be of preventive nature, as it not only creates legal obstacles to prevent the violation by the investigation agencies, but also does not allow for an arbitrary interpretation of the rules of legislation, where the subjective component is not excluded, including the bad faith of law enforcement agencies.

Sixthly, the expediency of the legal investigation is also based on the negative circumstances that have developed in connection with the adoption of the new Criminal Procedure Code of the KR and the Criminal Procedure Code of the RK, which exacerbated the unequal position of the parties (Abdukarimova et al., 2018). This is the operative search activity incorporated into criminal proceedings, which resulted in the introduction of such an institution as "*covert investigative activities*" in the KR Criminal Procedure Code "*special investigative actions*", which leads not only to a greater imbalance of the parties, but also to legal conflicts that require the resolution, including abuses on the part of the subjects of investigation, covering the scope of protection of the rights and interests of the defendant. It is connected to the fact that the majority of the materials collected in this process are state secrets, which does not allow the side of the defense to get acquainted with it and build its line of defense at the stage of the trial, as well as to take measures to prevent violations of the constitutional rights and freedoms of the defendant. Accordingly, the authors' position to develop the idea of a legal investigation in criminal procedure legislation is right, taking into account the principle of adversarial proceedings and equality of the parties in criminal proceedings (Abdukarimova et al., 2018). The Law "*On lawyer activity and legal assistance*", as well as the KR CPC and the RK CPC, should be amended to include the notion of "*legal investigation*", which would allow lawyers to independently present the necessary evidence in a criminal case. In addition, it is necessary to develop and adopt the Law "*On Private Detective Activity*", which provides legal conditions for the conclusion of a contract between a lawyer and a private detective of such institution. As for the Kyrgyz Republic, despite the existence of such normative act, it is of no significance for the work of a lawyer, since in the KR CPC the provision is only formal, since the issues of collecting factual material and recognizing it as evidence are not regulated.

CONCLUSION

On the basis of the above, the authors of this article consider making the following legislative proposals:

Provide in Section 14 of the KR Criminal Procedure Code "*Special Procedure of Criminal Proceedings*" and in Section 11 of the RK Criminal Procedure Code "*Special Proceedings*", respectively, a new chapter "1 (its content should be considered from the standpoint of a separate legal institution that provides an effective procedural mechanism for the protection of individual rights and interests at the stage of court proceedings and prevention of abuse or violation of law by the prosecution party at the pre-trial stage).

Art. 5 of the KR Criminal Procedure Code and Art. 7 of the RK Criminal Procedure Code should contain the following definition:

"Legal investigation is a set of procedural actions carried out by a lawyer at the stage of pre-trial proceedings, including the involvement of a private detective for the purpose of protecting the rights and interests of a person in accordance with the procedure provided for in this Code and aimed at revealing factual data justifying the guilt or mitigating the criminal liability of the defendant, as well as the rehabilitation of persons unlawfully subjected to criminal prosecution."

It is necessary to legalize private detective activity and regulate the legal forms of cooperation between them to establish a balance between the parties and the effective exercise of a lawyer's powers to collect evidence within the framework of the proposed "*legal investigation*". For this purpose, it is necessary to develop and adopt the Law of the Republic of Kazakhstan "*On Private Detective Activity*", which should describe in detail the conditions of conclusion of a contract with a private detective, specify his duties and requirements for the formation of the evidentiary base according to the lawyer's assignment. At the same time, it is justified: (a) to provide a new article 342 (Isayeva et al., 2016). Of the Criminal Code of the Kyrgyz Republic and 416 (Isayeva et al., 2016). of the Criminal Code of the Republic of Kazakhstan on "*Counterfeiting of evidence by a private detective*" and to present it in the following wording: "*Falsification of evidence by a private detective taking part in a lawyer's investigation at the stage of pre-trial proceedings in procedural actions, resulting in an unjustified decision (sentence)*"; b) to make changes and additions to Art. 33 of the KR Criminal Code and Part 1 of Art. 435 of the RK Criminal Code, respectively, and present it in the following wording

"Impeding in any form to legal activity of lawyers and private detectives within the framework of a legal investigation, as well as other individuals... and with no further amendments to the text; c) to make the additions to the Law of the KR "On the bar and legal activity" and the Law of the RK "On the bar and legal assistance" with the following wording: "Lawyers are entitled to conduct a legal investigation with the involvement of private detectives, to draw up a file on each criminal case, which shall include written evidence obtained in the course of all procedural actions in the case".

Amend Art. 50 of the KR Criminal Procedure Code part 5 and 6 and Art. 66 of the RK Criminal Procedure Code part 6 and 7 with the following content: 6. If a lawyer participates in the proceedings of a criminal case, the materials of which contain information with state secrets, then the investigator or judge make a lawyer to sign a non-disclosure agreement.

Focusing on the analysis of existing discussions among the legal community, it can be said that the following circumstances prevent the full exercise of powers by a lawyer to provide

qualified legal assistance to the defendant: firstly, given the fact that the prosecution has a powerful arsenal of means to collect evidence, the defense does not have a legal and organizational mechanism to obtain alternative evidence in order to form a "lawyer's file"; secondly, the continuing prosecutorial bias of the investigator's activities and the priority of collecting evidence from the prosecution authorities, which enables them to put direct and indirect pressure on a suspect and a lawyer; thirdly, despite the introduction of new procedural institutions, which require changes in certain areas of the work of lawyers, the legislator has not reflected the adoption of measures to resolve the conflicts that have arisen and the legal settlement of problems in this area.

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