NEW APPROACHES TO DEFORMALIZATION OF EVIDENCE
IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF KAZAKHSTAN

Abstract
At the present stage of criminal proceedings development in the Republic of Kazakhstan, there has clearly been a tendency towards the maximum convergence of the procedures of the criminal process to the Common law system and, as a result, attempts to deformalize evidence. The law enforcement bodies and some representatives of the scientific world see the solution of these tasks in strengthening the effect of the principle of adversarial parties at the pre-trial stages of the process and increasing the scope of powers of defense, including by granting them the right to conduct independent investigative actions. They outlined their vision in the Conceptual Approaches for Improving the Domestic Criminal Procedure, developed by the Institute of Parliamentarism of the Republic of Kazakhstan, and submitted them for discussion at the expanded meeting of the Legal Council.

The purpose of the article is to substantiate the position of the authors in the context of the modernization of criminal justice in the Republic of Kazakhstan.

The scientific novelty is to conduct a legal analysis of the proposed Conceptual Approaches, consider the consequences of their implementation and reveal the reasons for author’s disagreement with the considered position.

Conclusions. We believe that it is precisely the lack of a systematic approach, including in the proposed by the Institute of Parliamentarism Conceptual approach, that determines the instability of the current legislation, the growth of legal nihilism among the population, as well as the voluntarist and unprofessional interpretation imposed by the developers of the Institute of the Concept of the Legal Policy of the Republic of Kazakhstan until 2030 provisions regarding the continuation of the development of the principle of competitiveness and equality of the parties.

Key words: conceptual approaches, criminal process, parties, evidence and proof, prosecution and defense, deformalization, criminal prosecution bodies.
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Нові підходи до деформалізації доказу
в кримінальному процесі Республіки Казахстан

Анотація
На сучасному етані розвитку кримінального судочинства в Республіці Казахстан явно
намітилася тенденція до максимального зближення процедур кримінального процесу
dо англосаксонської системи права та, як наслідок, спроби деформалізації доказування.
Вирішення зазначених завдань правозастосовник і деякі представники наукового світу
вбачають у посиленні дії принципу змалкуності стороні на досудових стадіях процесу та
зближення обсягу повноважень сторони захисту, у тому числі шляхом надання їм права на
проведення самостійних слідчих дій. Своє бачення вони виклали у розроблені інститутом
парламентаризму РК Концептуальних підходах удосконалення вітчизняного кримінального
процесу, виникши їх на обговорення розширеного засідання Правової ради.

Метою статті є обґрунтування позиції авторів у контексті модернізації
кримінального судочинства в Республіці Казахстан.

Наукова новизна полягає у проведенні правового аналізу запропонованих
Концептуальних підходів, розгадлі наслідків їх реалізації, розкритті причин авторської
незгоди з викладеною позицією.

Висновки. Вважаємо, що саме відсутність системного підходу, у тому числі в
запропонованому Концептуальному підході Інституту парламентаризму, обумовлена
нестабільність поточного законодавства, зростання правового негізизму серед населення, а
також та, що нав'язується, волонтерістське і непрофесійне плумання розробниками
названого Інституту положення Концепції правової політики РК до 2030 року в частині
продовження розвитку принципу змагальності та рівноправності сторон.

Ключові слова: концептуальне підходи, кримінальний процес, сторони, докази та
dоведення, звинувачення та захист, деформалізації, органи кримінального переслідування.

Introduction. Active process of modernizing the procedural foundations of legal proceedings, aimed at bringing it into line
with generally recognized world standards for the administration of justice ongoing in
the Republic of Kazakhstan. As part of the implementation of this direction, attempts are
being made to reform the existing mechanism of
legal proceedings by introducing amendments
and additions to the procedural legislation. This
necessitates a scientific analysis of the proposed
approaches, as well as consideration of their
effectiveness and prospects for the entire
criminal process.

The purpose of the article is to
substantiate the position of the authors in the
context of the modernization of criminal justice in the Republic of Kazakhstan.

**Analysis of studies and publications.** The issues of improving the criminal process at one time were devoted the works of such well-known proceduralists as I. Ya. Foinitsky, L. E. Vladimirov, A. F. Koni, V. T. Tomin, L. M. Karneeva. Among Kazakh scientists should be noted A. N. Akhpanov, M. Ch. Kogamov, N. V. Mazur, G. S. Suleimenova, T. A. Khanov, A. L. Han and others.

**Main part.** On November 25, 2021, the Committee on Legislation and Judicial and Legal Reform of the Mazhilis of the Parliament of the Republic of Kazakhstan held an expanded meeting of the Legal Council as part of the implementation of the Address of the Head of State to the people of Kazakhstan dated September 1, 2021 «The unity of the people and systemic reforms are a solid foundation for the country’s prosperity».

At the meeting with the participation of the Mazhilis deputies, representatives of state bodies, including judicial, law enforcement and special, as well as advocacy, scientists and the legal community, the Conceptual Approaches to Increasing Competitiveness and Equality of Parties in Criminal Proceedings presented by the Institute of Parliamentarism were discussed, as well as the conditions for strengthening protection guarantees of the rights of participants in criminal proceedings (hereinafter referred to as Conceptual Approaches).

An analysis of the position of the authors of the text of the Conceptual Approaches and the speakers of the extended meeting of the Legal Council showed that further improvement of criminal justice, in their opinion, should be carried out in the following areas:

- transferring the prosecution function to the judicial stages from the moment the main trial began and abandoning the institute of prosecution at the stage of bringing the accused to trial by the prosecutor;
- placing the burden of proof solely on the court and reviewing the evaluation criteria for the evidence obtained and their sources;
- changing the structure of the subjects of proof through the introduction of a lawyer’s investigation and the establishment of their equality by strengthening the competitiveness of the process at all stages of criminal proceedings.

As seen, the developers from this institution based the Conceptual Approaches on the Common law doctrine of formalization of evidence at the stage of pre-trial investigation, which is rather dubious and unacceptable for the continental, including Kazakhstan criminal process. Its essence boils down to the recognition of the evidence collected by the parties to the prosecution and the defense of factual data not by the investigator, but exclusively by the judge when he evaluates the evidence in the judicial investigation at the stage of the main trial.

As follows from the presentation of Musralinov A. S., the Deputy Head of the Department for Supporting the Activities of Courts at the Supreme Court of the Republic of Kazakhstan, it is necessary to deformatize the criminal process by bringing the current continental model of legal proceedings in Kazakhstan closer to the Common law adversarial model. At the same time, he relied on the problem of eliminating the accusatory paradigm in the courts (as a vestige of the Soviet system) by placing the burden of proof directly on the judge in whose proceedings the criminal case was received, by examining and evaluating the evidence presented by the parties and its sources within the framework of the main trial, since before the main trial, the judge will get acquainted only with the acts – the conclusions of the prosecution and defense.

The position of the director of the Institute of Parliamentarism was even more categorical. He emphasized the need to create a balance between the parties and give them equal rights, including the right of a lawyer not only to collect, but also to legally evaluate the factual data, transferred directly to the court with the act of defense, in parallel with the factual materials collected by the prosecution. Thus, the criminal prosecution of a person (accusation) will be identified with the beginning of the trial, which, in his opinion, will make it possible to equalize the side of the defense and the criminal prosecution authorities.

Any qualified lawyer will have big doubts about the theoretical consistency, practical relevance and scientific validity of the Conceptual approaches of the «short stories» proposed by the authors.

At the same time, cannot be denied the relevance of the conclusion that the procedural
figure of the accused is formal, declarative and short-term in the domestic criminal process [1]. On the other hand, the opinion on the transfer of the charge to the judicial stages indicates a confusion of concepts, the danger of which was pointed out by Professor L. M. Karneeva: «... it is completely unacceptable and erroneous, both in theoretical and practical terms, to identify the accused with the guilty, to treat the accused as if he had already been exposed as a criminal...» [2].

Agreeing with this opinion, we see a slightly different solution to the problem.

A distinctive feature of the current Code of Criminal Procedure of the Republic of Kazakhstan is a two-level order of suspicion, which differs both in terms of grounds and in terms of procedures:

- initial (probabilistic) suspicion arising in the early stages of the pre-trial investigation, the legal basis of which is either the issuance of an appropriate decision (clause 1, part 1, article 64 of the Criminal Procedure Code of the Republic of Kazakhstan), or the first investigative action of a security nature (clauses 2, 4, part 1 article 64 of the Code of Criminal Procedure of the Republic of Kazakhstan);

- final (reasonable) suspicion, which, in addition to providing procedural guarantees to the suspect, also contains a legal assessment of his act, based on the evidence collected by that time (clause 3, part 1, article 64 of the Code of Criminal Procedure of the Republic of Kazakhstan).

In addition, in accordance with the policy of introducing a three-tier model of legal proceedings with delimitation of powers and areas of responsibility between law enforcement agencies, the prosecutor’s office and the court, the dispositions of Art.202 and 203 of the Code of Criminal Procedure of the Republic of Kazakhstan were amended and supplemented, suggesting that procedural acts, issued by the investigator establishing the status of a suspect, acquire legal force only after agreement with the prosecutor. Thus, it is stated that the prosecutor’s agreement with the qualification of the suspect's act actually means the beginning of an official (state) charge against a particular person on behalf of the state, who during mandatory interrogation should have the status of an accused, not a suspect.

It is with this moment that the beginning of the competitiveness of the parties to the criminal process is associated, covering the activities of all participants in the functional trial: prosecution, defense and resolution of the case on the merits. Moreover, the establishment of the status of the accused is the basis for applying preventive measures to the latter, which, unlike punishment, only state the increased danger to society of the specified participant, but not the degree of his guilt in the alleged act.

In this regard, it is necessary to distinguish between the discretionary powers of the pre-trial investigation bodies (investigator; interrogating officer) to assess the evidence collected within the framework of the initial suspicion, which does not require agreement with the prosecutor, and the powers of the prosecutor to agree on a decision on the qualification of the suspect’s actions, entailing the establishment of the status of the accused. From this moment, the prosecutor, as a representative of the prosecution, has the right to give written, binding instructions and assess the sufficiency of the collected evidence to bring the accused to trial. With this approach (with the mandatory adjustment of the relevant norms of the Code of Criminal Procedure of the Republic of Kazakhstan), the prosecutor, as a representative of the prosecution, fully implements the functions assigned to him, starting the criminal prosecution of the accused at the pre-trial stage, subsequently putting forward the charge formulated by him in court as a public prosecutor.

We believe that what we have stated testifies to the erroneous opinion of the authors and supporters of the proposed Conceptual Approaches, who propose to exclude the institute of prosecution from the pre-trial stages. Otherwise, the whole essence of criminal prosecution is emasculated as a special type of state activity in the pre-trial stages of the process, creating a platform for subsequent trial by preliminary research and evaluation of the information obtained, its transformation into evidence and protection of law-abiding citizens from possible illegal influence by the accused persons.

At the same time, the question of the degree of guilt of a person has not yet been finally resolved, which necessitates a preliminary, thorough and unbiased study of all the circumstances of the case, both incriminating the accused and justifying him.
For these very purposes a well-founded public prosecution must be opposed by a qualified defense, since «... the process where the accused is brought face to face against the prosecution, armed with the all-powerful help of the state, is not worthy of the name of the trial, it turns into persecution ... The task of criminal justice is not to punish in any way no matter, but only in the punishment of the guilty »— noted the well-known Russian lawyer I. Ya. Foinitsky.

However, unlike the authors of the Conceptual Approaches, he advocated the establishment of protective power as a public service capable, along with the accusatory power, to ensure the independence of the court from the overwhelming influence of one of them to the detriment of justice [3]. A similar opinion was expressed by other prominent scientists, implying not the actual equality of the parties (as follows from the provisions of the Conceptual Approaches), but the equal opportunity for the participation of the prosecution and the defense in establishing the truth in the case [4; 5], appealing to the fact that the basic norm of the defense counsel's behavior in process — is the duty to protect against the accusation (suspicion) [6], including by involving other independent participants (for example, private detectives) [7].

In this regard, it is puzzling the statement on the establishment of the actual equality of the prosecutor and the lawyer, while the first is an official representative of the state (the prosecutor), endowed with full power, and the second is a representative of the public (a free union of lawyers), whose main purpose is to guard the private interests of person subjected criminal prosecution and opposed to the public interest [8].

As for the idea of granting a lawyer the right to collect protective evidence and their independent legal assessment, the idea of a «parallel investigations» [9] should also entail dressing the lawyer's work in the framework of a strict procedural form of evidentiary law on admissibility, which is impossible in relation to a participant who does not being an official. With a different approach, there will be a need to adopt the Lawyer's Code of Criminal Procedure, which will actually lead to the creation of a new state power structure and the emergence of an investigator for the defense.

We believe that such an approach is at least inappropriate. Another thing is a protective act [10]. We believe that this idea does not contradict the current legislation (part 4 of Article 296 of the Code of Criminal Procedure of the Republic of Kazakhstan), and its admissibility, along with the indictment, should be resolved by the investigating judge at the stage of completing the pre-trial investigation [11].

Attention should also be paid to the provision of the Conceptual Approaches on «... fixing the right to recognize the guilt of a person in committing a crime on the basis of collected and studied evidence only in court. At the same time, the bodies of the pre-trial investigation and the side of the defense within the framework of the pre-trial investigation collect not evidence, but factual data submitted to the court ».

We believe that such an approach will entail the need to recognize the precedent as a source of criminal procedural law, since in the current continental model, only proof of the prosecution under the conditions of the inevitability of punishment can be used as the basis for the sentence [12; 13].

In addition, the process of implementing the standards for the admissibility of evidence examined by the court from the standpoint of Common law and the introduction of such evaluation criteria as «convincing», «useful», «with a high degree of probability», «reasonable doubt», etc. will be required [14].

In our opinion, this is a rather costly financial and economic process, the implementation of which will require significant personnel, time and other resources. Therefore, we propose to simply enshrine in the law the provision that «the court creates the necessary and fair conditions for the parties to fulfill their procedural duties and exercise the rights granted to them by law» [15].

In conclusion, we would like to recall the statement of V. T. Tomin that «... numerous additions and changes to the criminal procedural legislation initiated by the legislative branch make criminal proceedings more and more helpless. Under the banner of protecting the rights and freedoms of citizens, such changes are being made to the criminal procedure legislation that deprive criminal proceedings of the opportunity to protect the bulk of their citizens from encroachments on
them by persons who achieve their goals by violating the criminal law...» [16].

Agreeing with the above opinion, we believe that the need for a more balanced and cautious approach to the proposed «novelties» is obvious. Otherwise, this will entail an incorrect understanding of some legal concepts related to the differences in the operation of various legal models in criminal proceedings, arbitrary (superficial) handling of such terms as equality and competitiveness of the parties, identification of suspicion and accusation with the guilt of a person; confusion of such concepts as stages, proceeding and investigation stages [17].

We believe that it is precisely the lack of a systematic approach, including in the proposed by the Institute of Parliamentarism Conceptual approach, that determines the instability of the current legislation, the growth of legal nihilism among the population, as well as the voluntarist and unprofessional interpretation imposed by the developers of the Institute of the Concept of the Legal Policy of the Republic of Kazakhstan until 2030 provisions regarding the continuation of the development of the principle of competitiveness and equality of the parties.

At the same time, we do not pretend to the indisputability of our conclusions and proposals, but we hope that they can be perceived both in theoretical and applied aspects, including in determining the conceptual approaches to improve the Kazakh criminal process.

References: