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The lawyer in pretrial criminal proceedings

Abstract: Study of participation of the lawyer in pre-trial criminal proceedings, consideration of structural elements of the system and their peculiarities.
Suggestions have been made to change the acting legislation.

Key words: pre-trial proceedings, lawyer, counsel for the defense, participants of the process, system, evidence

According to the Criminal Procedure Code, the system of participation of a lawyer in the investigation of crimes consists of subsystem of participation as a counsel for the defense and representative which includes the following elements:

Elucidation of rights and responsibilities; participation in investigative and other procedural acts; collection and consideration of evidences; statement of remarks and objections, recusations and petitions, filing of complaints.

As a rule, the above-mentioned elements are applied as a complex, nevertheless can also be used separately. (6. p. 71)

In their turn, each of the indicated elements present a system interrelated with the systems of participation and other elements. In particular, the participation of a lawyer as a counsel for defense of presumptive criminal or indictee assumes the explanation of general rights and responsibilities provided by the status, subsequently the rights and responsibilities in participation in investigative and procedural acts on collection, presentation and consideration of evidences, familiarization with materials of the criminal case, appeals, statements of objections, remarks, recusations, etc.

The body realizing the criminal procedure, victim, civil plaintiff or his legal representative, legal representative of the suspect as well as civil defendant have to respect the right of use of juridical aid of the representative invited by themselves in the course of the criminal procedure.

In cases provided by Criminal Procedure Code, the body that realizes the criminal procedure is responsible for involving the legal representative of the suspect or the

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accused person. The participation of a defender or legal representative of the suspect or the accused person does not restrict the rights of the suspect or the accused person.

At the same time, the given system does have substantial gaps, from our point of view. That is, side by side with the right to defense, one of the main principles of the criminal procedure is the presumption of innocence according to which every person accused in committing a crime is innocent until proved otherwise in the order provided by the Criminal procedure Code and until verdict of a court comes into legal effect. A person accused of committing a crime does not have to prove his innocence. The duty of proving the accusations, denial of arguments put forward for the defense of the accused person lies on the side of accusation.

Meanwhile, according to the page 141.3 of the Criminal Procedure code, the knowledge of the rights and professional rules by the legal persons as well as absence of preparation and education in case of non-submission of documents which would prove otherwise, or non-presentation of information on enterprise or organization which has given him special preparation or education, are recognized without using the procedure materials on criminal pursuit.

Supposing there is a case of violation of principle of presumption of innocence, as the statement that everyone is supposed to know the laws and ignorance of the law does not exempt one from responsibility is right but it still doesn't mean everyone knows the laws and for those who make decisions do not care whether one knows the laws or not. The ignorance of law does not exempt a person from responsibility but it influences the punishment in connection with which, the current situation is a part of the subject of proving and should not be recognized adjudicated without using the materials on criminal pursuit. (3, p.p. 47-48)

In juridical literature there is no unified opinion about the necessity of acknowledgement of a person as suspected through establishment of special motivated provision. The supporters of this point of view suggest to pronounce a resolution on involving a person as suspected as a main or additional variant of appearing of present procedural figure in the criminal process, which to their opinion will help to save the person from burdening position of a "damning witness" (1, p. 127), and opponents find this act meaningless suggesting to pay attention to resolution on involving as a suspect including the checked and confirmed suspects. (10, p. 115)

It is supposed that pronouncement of resolution on recognizing the person a suspect has to be strictly followed which will guarantee complete protection from suspicions. In the protocol of detention there are a number of occasions as a basis for such a decision,

which are provided by 148.2 article of Criminal Procedure Code of the Republic of Azerbaijan without giving concrete circumstance of either capture or the witnesses, traces, etc which excludes the real protection from abstract suspicions in the current phase of prejudicial proceeding. Meanwhile presentation of the resolution to a person about recognizing him as a suspect with a concrete description of basis of adopting such a decision will guarantee a person the right for defense as it will make it possible to refute certain circumstances.

For realization of his procedural functions the defender not only has a right but also obliged to use all means and methods of defense indicated in law. The term "means and methods" covers multiform activity of defender for the interest of the clients including those which are not linked to the proving. Analysis of the article 92 of the Criminal Procedure Code shows that the client has right to participate in the case:

1. To be present at the time of presentation of accusation, to participate in the interrogation process of the suspect; the accused as well as in other investigative acts made in their presence;
2. To familiarize with the protocol of detention, resolution in application of preventive measure, protocols of investigative acts made in the presence of a suspect, accused or the defender himself along with the documents which have been or should have been presented to the suspect;
3. To familiarize with all the documents of the case by the completion of inquiry;
4. Present evidences
5. To state petitions

The indicated list is not exhaustive as the legislator does not prohibit the use of any other means and methods of defense not contradicting the law.

In particular, according to the law on "lawyers and advocatory activity" the lawyer has right request certificates, reference and other documents from government and public organizations necessary for rendering juridical assistance. The mentioned organizations in their turn have to present the inquired documents or their copies.

The forms of participation of a lawyer-defender in prejudicial proceeding like inquiry of evidences and presentation of evidences and statement of petitions are practiced actively. The participation in investigatory acts is practiced actively which is why we will give more detailed information on this.

The inquiry of objects and documents is a way of independent collection of evidences which compared to investigatory acts has more universal character as it can be applied in any phase of the criminal process.

In science there is unified opinion neither in understanding the essence of inquiry of evidences nor definition of a place of this method of receiving factual information compared to investigatory acts.

There is a justified point of view of S.A.Sheyfer who suggested that inquiry of evidences means the summary of the following acts: a) direction of requirement to a person or organization, b) presentation of inquired object; c) attachment of evidences to the case (11, p. 72)

While using the indicated method of collection of evidences the lawyer has to be sure that there is no danger of destroying or distortion of any information important from the criminalistics point of view otherwise it is advisable to state a petition on seizure. The essence of inquiry of evidences means voluntarily withdrawal of objects and documents by their owner on requirement of authorized person or lawyer-defender and presentation of them to the indicated persons. This issue has been worked out well in literature.

There are cases when some documents inquired by the defender have not direct importance form the criminalistics point of view but their content gives necessity of statement of a petition on procedure of certain investigatory acts. It is suggested in such cases, to attach these materials to the petition with a purpose of confirmation of its justification.

In practice the defender realizes this right mainly through directing inquiries through juridical consultation with a purpose of receiving references, certificates and other documents necessary for rendering juridicalassistance in connection with a certain case.

According to the article 143.2 of the Criminal Procedure Code, the defender is given right to inquire certificates, references and other documents from various enterprises, which in their turn have to present these documents or their copies in reply.

Along with that, there is a recommendation of some others (which are not quite justified) about such cases taking away the subscription from the lawyer saying that these evidences can only be presented to investigator, prosecutor or the court (5, p. 72)

Our point of view is like, there is no necessity to make the defender keep the received information in secret as it obviously contradicts the position of the article 92 of the Criminal Procedure Code and procedural function of the defense. Also, in realization of such a proposal, the confidential relations (on the basis of which stands sincerity and principle of conformation of positions) between the lawyer and the suspect will be broken.

It is supposed that more detailed normative regulation of the rules of inquiring the documents will let the lawyers and defenders use the suggested form of the participation in prejudicial investigatory proceeding more effectively.

The right of the presentation of the evidences of the lawyer also includes the duty of a person conducting the inquiry, investigator and prosecutor to check the written and material evidences thoroughly.

Nevertheless, giving the defender the right to present the evidences the legislator does not; early regulate the order of their collection. According to article 143.1 of the Criminal Procedure Coded, the collection of evidences is realized by presentation of interrogations, confrontations, seizure, search, examination, expertise, presentation for identification another procedural acts. But the defender has no right to do the above mentionedacts which is why collection of evidences is restricted for him and he can only get clarification from private person and inquire certificates.

The most important problem in the prejudicial proceeding is the question whether he as has the right to collect the evidences as the collection also means being able to present them.

The current investigatory and procedural legislation does not clearly define which exactly evidences the defender can present to the investigation. The fact that defender has no power to make citizens do certain acts compared to prosecutor, investigator also influences the solution of this issue.

Nevertheless, the defender cannot fully refuse doing certain acts which would direct to finding out circumstances which may be in favour of the suspect. There are suggestions by I.L.Petrukhin and Y.I.Stetsovsky which defines that the defender independently examine the scene of action, taking photos, making plans, etc. But the point of view of T.B.Varfolomeyev creates objection saying that the evidences received by such methods cannot be presented. (2, p. 16)

Y.I Stetsovsky rightly states that one has to do the following for the interest of the client: 1) To properly fix who the object or document has been presented by 2) take into consideration the arguments about the importance of the object for the case 3) take into consideration the fare sins of the object or document on which the arguments of the defense are based 4) to ensure that object does not get lost after acceptance (8, p. 60)

But in such cases, both investigator and client find themselves in a difficult situation as the legislator does not regulate the registration of the presented evidences. In literature there is no unified opinion about the entitlement of the protocol of presentation of evidences. A number of authors suggest that protocol has to be titled as “protocol of acceptance of object or document” taking into consideration the fact that is being accepted by investigator. (4, p. 67)

But such approach does take into consideration the fact that not every petition of the defender about attaching it to the case is being satisfied by the investigator. In case of refusal by the investigator of the suggested title of the protocol would not justify its content. It would be more precise to entitle the document as "protocol of presentation of evidences". In such entitlement it does not matter much whether the evidences are accepted by the investigator or not. (12 p. 87)

To summarize the above mentioned issues it has to be state that the defender has right to present evidences if that is required for the interest of the client and they can be used for justifying the client. It has to be underlined that presentation of evidences is the right of defender and not his duty which he may and may not use. At the same time the defender does not have to present the evidences which he has, if they may prove the client guilty. Such behavior contradicts the procedural function of the defender as well as professional and moral start of defending activity.

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