

Adversarial Nature of Criminal Proceedings: The Concept and Properties, the Role of the Institute of Advocacy in Court, Legal Aspects of Strengthening the Protection Function

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ABSTRACT: The article reveals the properties of the concept of “competitiveness”, analyzes the views of some scientists existing in the legal literature on the importance of ensuring the principle of competitiveness in court. The article considers the most controversial changes currently being made to the Criminal Procedure and Criminal Codes of the Republic of Uzbekistan, as well as topical issues of the implementation of the principle of adversarial proceedings at the trial stage in modern criminal proceedings. The conclusions are argued that for the consistent implementation of the adversarial nature of criminal proceedings, one of the most important criteria is to strengthen the role and function of protection.

KEYWORD: adversarial proceedings in court, state and public prosecutors, defendant, defense in court, advocacy, case resolution, objectivity and impartiality.

The issue of the conditions for a fair sentence is of significant interest, first of all, from the point of view of the organization of the criminal process. We are talking about the adversarial nature of criminal proceedings, which presupposes such an organization of procedural activities in which the resolution of a criminal case occurs as a result of a dispute between equal parties before an independent court.

In pre - revolutionary theory, the following were necessary signs of competition in criminal proceedings:

- ✓ the presence of parties with opposing substantive interests in the process, standing apart from the court;
- ✓ procedural equality of the parties involved in the case;
- ✓ the release of the court from those procedural functions that are performed in the process by the parties¹.

ADVERSARIAL is a democratic principle of judicial proceedings, according to which the trial takes place in the form of a dispute between the parties in a court session. The participants in the process are endowed with equal rights in it; the court is obliged to take all measures provided for by law for a

¹ Dukhovskoy M. V. Russian criminal trial / M. V. Dukhovskoy. - M. : Publishing house of the warehouse of M. V. Klyukin, 1905. - 472 p.

comprehensive, complete and objective investigation of the circumstances of the case, establishing the truth in order to make a lawful and reasonable decision (sentence).

The principle of competition is one of the fundamental and most important principles of the science of criminal procedure, which is fixed at the legislative level.

According to article 25 of the Criminal Code of the Republic of Uzbekistan "Adversarial proceedings in court", in the court session of the court of first instance, as well as when considering cases by higher courts, proceedings are carried out on the basis of the adversarial nature of the parties.

When considering a case in court, the functions of prosecution, defense and resolution of the case are separated from each other and cannot be assigned to the same body or the same official.

Proceedings in the court of first instance may be initiated only if there is an indictment or an indictment or a resolution on the referral of the case to the court for the application of compulsory medical measures.

The State and public prosecutors, the defendant, the legal representative of the minor defendant, the defender, the public defender, as well as the victim, the civil plaintiff, the civil defendant and their representatives participate in the court session as parties and enjoy equal rights to present evidence, participate in their research, submit petitions, express their opinion on any issue relevant to the proper resolution of the case.

The Court does not take the side of the prosecution or the defense and does not express any of their interests.

The criminal prosecution, defense and resolution of the case by the court are separated from each other and are carried out by various bodies and officials. The court is not a body of criminal prosecution, does not act on the side of the prosecution or defense, and does not express any interests other than the interests of law. The Court, while maintaining objectivity and impartiality, creates the necessary conditions for the parties to fulfill their procedural duties and exercise the rights granted to them.

This provision of national legislation complies with generally accepted international standards and formally postulates their implementation in domestic criminal proceedings.

This principle is also enshrined in the International Covenant on Civil and Political Rights².

In accordance with article 14 of the International Covenant on Civil and Political Rights, everyone has the right, when considering any criminal charge against him, to at least the following guarantees on the basis of full equality:

- a) Be promptly and thoroughly notified, in a language he understands, of the nature and basis of the charge against him;
- b) Have sufficient time and opportunities to prepare his defense and communicate with the defender chosen by him;
- c) Be tried without undue delay;
- d) to be tried in his presence and to defend himself personally or through a lawyer of his own choosing; if he does not have a lawyer, to be notified of this right and to have a lawyer assigned to

² International Covenant on Civil and Political Rights. Adopted by General Assembly resolution 2200 A (XXI) of December 16, 1966

him in any case when the interests of justice require it, free of charge for him in any such case when he does not have sufficient funds to pay for this lawyer;

e) to interrogate witnesses testifying against him or to have the right to have these witnesses questioned, and to have the right to summon and interrogate his witnesses under the same conditions as exist for witnesses testifying against him;

f) To have the free assistance of an interpreter if he does not understand the language used in court or does not speak that language;

(g) Not to be forced to testify against himself or to plead guilty.

The provisions listed above are the basic, basic standards of a fair criminal process, the obligation to comply with which falls on each State that has ratified the Covenant. It is obvious that the implementation of these standards is possible only in court, where the parties are equal in their procedural capabilities, the process is adversarial, and the functions of prosecution, defense and resolution of the case are essentially completely separated from each other and are carried out by different subjects of the process.

Understanding the concept of "the basis of competition" will allow you to see the realities of the very competitiveness of the parties in the investigation of crimes. In reference literature (dictionaries and encyclopedias) different approaches to the concept of competition are revealed. Thus, when describing the concept of "adversarial", it is proposed to consider it together with the concept of "judicial proceedings". But in part 1 of Article 25 of the Criminal Procedure Code of the Republic of Uzbekistan, the phrase "the basis of competition" is used.

As explained by the "Explanatory Dictionary" by V.A. Dahl– "the foundation, the foundation is everything based on something, set, strengthened, serves as a support, a beginning." It seems that the most interesting interpretation is the original verb "to base" - to affirm, strengthen, establish, arrange firmly, lay a foundation for something, a solid beginning; that on which the created should stand, hold on³".

Also noteworthy is the verb "to compete" – to argue, to oppose, to compete, to enter into a debate, into a struggle, into an argument." Thus, the adversarial activity of the parties should be carried out and, it seems, quite actively, using all possible procedural forms to formulate their legal position.

According to the adversarial principle (Part 1 of Article 25 of the Criminal Procedure Code of the Republic of Uzbekistan), a court designed to resolve a dispute between the parties cannot act either on the side of the prosecution or on the side of the defense.

The court, remaining objective and impartial, controls the legality of the behavior of the participants in the process, checks and evaluates the evidence presented by the parties, creates objective conditions for making a fair decision. Equality of the parties means that the position of the parties in the judicial process should be fairly balanced, each party should be guaranteed an equal procedural opportunity to state and justify its position on the case before an independent court, one of the tasks of which is to provide the parties with conditions for free competition.

The parties enjoy equal rights and opportunities to defend their position on the basis of adversarial proceedings in court.

³ Dal V.I. Explanatory dictionary of the Russian language. Modern version. - Moscow: CJSC Publishing House EKSMOPress, 2002– - 5

The independence of the court is one of the main conditions for ensuring the impartiality and fairness of justice.

Compliance with the principle of independence of judges is also facilitated by the exercise of discretionary powers by the court, including on its own initiative to collect evidence, participate in their research and evaluate them freely.

Obviously, equality of the parties and competitiveness in criminal proceedings are possible only if there is a reasonable balance between the powers of the prosecution and the defense. This balance should take place not only in the judicial stages of the process, but also during the preliminary investigation. In this regard, the legal status of a defender in criminal proceedings, guarantees of his independence and inviolability are of very important and fundamental importance for fair justice.

There is no doubt that a full-fledged defense can be carried out only by lawyers - qualified and free from the authorities of criminal prosecution, lawyers united in corporations organized in order to preserve their independence from the state and protect the ethical standards that form the basis of the profession.

We believe that the idea of state advocacy contradicts the basic principles of fair justice in a democratic state and the legal nature of professional protection. Lawyers should not have any official relation to the state apparatus, because they are called to protect private interests and guard human rights and freedoms⁴.

The legal profession is a part of civil society and is clearly separated from the State in the specialized literature⁵.

The idea of creating a "state" bar contradicts the basic principles of providing legal assistance, especially in criminal cases, where the executive power, represented by its law enforcement agencies, persecutes a citizen. It is obvious that protection in this case can only be carried out by a subject completely free from the influence of the state and having the appropriate guarantees of independence in the exercise of law enforcement activities⁶. At the same time, such a subject must be bound by the rules of professional ethics that protect a citizen who has applied for legal assistance from betrayal, incompetence or dishonesty of a lawyer. It is obvious that a full-fledged defense is possible only by members of the professional community of lawyers.

According to D. A. Rovenskaya, the Institute of Advocacy is a practical embodiment of the basic principles of legal protection, as it applies all legal means to protect the legitimate interests and rights of citizens. Advocacy is a guarantee of professionalism and accessibility of legal protection, plays the role of a professional human rights institution of the domestic civil society, and is also considered the primary form within which the implementation of human rights activities takes place. Accordingly,

⁴ "If, for the purposes of justice, it is impossible to leave the bar in the form of a simple assembly of persons dedicated to the defense of defendants, as a craft, without any organization and judicial control, then on the other hand, it is impossible to turn lawyers into officials, because with their subordination to the government, independence and the energy, independence with which a defense lawyer must defend the interests of his client, the defendant, since they do not diverge from the interests of justice, not the government, is not compatible... the bar in its internal management should be free, that is, autonomous, and does not tolerate interference in its internal life by the government, as well as the court." S.I. Viktorovskiy Russian Criminal Trial. Moscow, 1912 Reprinted: Moscow: Gorodets Law Bureau, 1997. p. 209

⁵ "Advocacy is not on paper, but in fact should not be included in the system of state bodies and local self-government bodies. Lawyers cannot be turned into officials, they are people of a "free profession". It is with this status that an effective polemic with representatives of state bodies is possible, and not only in criminal, but also in civil proceedings." Yu.I. Stetsovskiy. Advocacy and the state. - M.: Jurist, 2007. - p. 83.

⁶ Rovenskaya D. A. Advocacy as a human rights institution in the Russian state: directions of optimization // Young Scientist. 2019. No. 47 (285). pp. 372-373.

the basis of advocacy is to provide citizens with direct access to justice guaranteed by the state. The peculiarity of such an institution is accessibility on the part of ordinary people who are in a difficult legal situation⁷.

The legal profession, unfortunately, is not free from problems that have long-standing historical roots, and in a sense, are "birthmarks" of the totalitarian past.

Since Uzbekistan gained independence, the legal status of lawyers and the organization of the legal community have gradually been concretized and developed in legislation. In 1996, the current Law "On the Bar" was adopted, which allows the bar to maintain independence to some extent, and lawyers to carry out their activities in relatively acceptable conditions.

In accordance with article 1 of this Law, the bar is a legal institution that includes independent, voluntary, professional associations of persons engaged in advocacy and individuals engaged in private law practice. In accordance with the Constitution of the Republic of Uzbekistan, the bar provides legal assistance to citizens of the Republic of Uzbekistan, foreign citizens, stateless persons, enterprises, institutions, organizations⁸.

The legal status of bar associations, the powers of the members of the professional estate themselves, the procedure for acquiring and losing the status of a lawyer, the basics of relations with persons seeking legal assistance, guarantees of advocacy and many other fundamental issues were specified. With the latest amendments to this law, the bar associations were united within a single structure authorized to represent the estate at the republican level.

In addition, the Law of the Republic of Uzbekistan "On guarantees of advocacy and social protection of lawyers" dated 25.12.1998 under No. 721-i was also adopted⁹.

But it should also be noted that the existing order of things needs some improvement, and the place of a lawyer in society and, accordingly, the role of a defender in criminal proceedings should be elevated to a suitable height. This postulate is not just an expression of corporate interest. In fact, the entire criminal justice system must be radically restructured. The main direction of such restructuring should be the further implementation of generally recognized international standards of fair criminal procedure into the law and the practice of its application.

For an objective researcher, it is obvious that the prosperity of the bar is impossible without establishing the true independence of the judiciary. It is clear that the latter issue, in relation to the countries of the transit period, mostly lies in the political sphere, rather than the legal one. Until society, the people and the state reach a certain level along the path of social evolution, the judiciary will not take its proper place in the state system. Until then, serious problems in the activities of lawyers and the existence of this professional community itself will take place¹⁰.

Confirmation that the need for reforms is long overdue is the draft of the new CPC of the Republic of Uzbekistan currently being discussed.

⁷ Lebedev D. V. The role of advocacy and public organizations in human rights activities // Actual research. 2020. No.17 (20). pp. 53-56. URL: <https://apni.ru/article/1163-rol-advokaturi-i-obschestvennih-organizatsiy>

⁸ The law "on the lawyer" g Taushkent, December 27, 1996, No. 349-I.

⁹ Bulletin of the Oliy Majlis of the Republic of Uzbekistan, 1999, No. 1, Article 12, Collection of Legislation of the Republic of Uzbekistan, 2008, No. 52, Article 514; 2016, No. 39, Article 457; 2017, No. 37, Article 978; National Database of legislation, 01.12.2020, No. 03/20/651/1577

¹⁰ KANAFIN D.K., Associate Professor "Compliance with the principle of competition, equality of the parties and the right to defense in criminal proceedings"

And these reforms are not limited only to changes in the field of advocacy, but include a much more extensive list concerning several institutes of the science of criminal procedure.

In November 2020, a regular meeting of the Legislative Chamber of the Oliy Majlis was held.

The draft law "On amendments and additions to the Criminal Procedure Code of the Republic of Uzbekistan" was considered in the first reading at the meeting¹¹.

To further improve the institution of criminal investigation, the draft law provides for amendments and additions to certain articles of the CPC. In particular, it provides for the preliminary investigation by the prosecutor's office for crimes that infringe on the lives of citizens, the interests of society and the state, as well as other corruption and official crimes, by the internal affairs bodies – for crimes that infringe on the health, property of citizens, against public order and security, by the state security service bodies - for crimes against the constitutional order, sovereignty, territorial integrity and other interests of the country.

During the discussions, special attention was paid to the proposal to transfer the powers of investigation of certain corruption and official crimes provided for by the Criminal Code to the prosecutor's office.

On the basis of the draft law, amendments to the fifth part of Article 345 of the Code of Criminal Procedure, establishing the transfer of powers to investigate crimes provided for in Articles 1251, 2161, 2162 of the Criminal Code, to internal affairs bodies, the potential of operational investigative activities of internal affairs bodies in solving crimes, sufficient resources and ample opportunities are taken into account. The bill was adopted by deputies in the first reading.

The deputies considered the draft law "On amendments and additions to the Criminal and Criminal Procedure Codes of the Republic of Uzbekistan".

Criminal procedure legislation is supplemented by a new institution of preliminary confirmation of testimony. Introduced into the criminal process, this institution will have a significant impact on the effectiveness of the inquiry, preliminary investigation and trial and will serve to simplify the proceedings.

The bill also introduces the institution of a plea agreement in the CPC. A plea agreement is a transaction concluded with the prosecutor overseeing the criminal case proceedings for less serious and serious crimes that do not pose a great public danger on the basis of a petition filed by the suspect, the accused in cases of their consent to the suspicion and accusation brought against them, active participation in the disclosure of the crime, as well as compensation for the damage caused.

The Criminal Code is supplemented by article 581, which provides for a norm according to which the term or amount of punishment in criminal cases for which a plea agreement has been concluded should not exceed half of the highest punishment by the corresponding article (part) of the Special Part of the Criminal Code.

Article 51 of the Code of Criminal Procedure establishes the obligation for the participation of a defender when a person is suspected or accused of committing a particularly serious crime, considering the application of a preventive measure in the form of detention or house arrest,

¹¹ Resolution of the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan "On the draft Law of the Republic of Uzbekistan No. pz-686 "On amendments and Additions to the Criminal Procedure Code of the Republic of Uzbekistan". Tashkent, November 24, 2020, No. 588-iv

concluding a plea agreement. After discussions, the bill was conceptually adopted in the first reading¹².

It is obvious that ensuring international standards and making appropriate changes to the regulatory legal acts in force in this area is not an easy process and requires comprehensive and in-depth research, but Uzbekistan is already making great strides towards achieving a fair criminal process and building it in accordance with all international standards, principles and rules, based on the experience of advanced states.

¹² Learn more: https://www.norma.uz/nashi_obzori/v_nk_upk_i_uk_vnesut_izmeneniya

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