

**European standards and principles in
defence of rights of accused**

Abstract: Right to defence and professional legal aid in sphere of procedural coercion should be appeared in any stage of criminal proceedings including in a stage of institution of criminal case from beginning of criminal procedure relationships. Significant term is that lawyers should be very responsible to the task. Just they have an opportunity to keep balance of the parties in court process and therefore to provide competition a whole process.

Keywords: standards and principles; human rights; a lawyer; implementation; procedural coercion.

Process of implementation of the norms of international law reflects the trends of integration of the states in international community. Kazakhstan should not be aside of these processes. International principles and standards allow critically looking at not only legislation, but also in practical activity, to suggest measures on their reforming with considering of international experience. For a lawyer representing independent institution observance all international standards and principles, which realization depends on him and his colleagues, is a professional duty.

So, Articles 10 and 11 of the Universal Declaration of Human Rights of 10 December 1948 stipulates that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his

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rights and obligations and of any criminal charge against him. [2, p. 5]. International Convention on Civil and Political Rights of 16 December 1966 among guarantees of man at consideration of brought accusation formulates guarantees of realization of the right of accused person to defence with counsel of his own choosing (in Article 14) [2, p. 24].

Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 says: “Everyone charged with a criminal offence has the following minimum rights: ...

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require” [4, p. 36-37].

We believe that a fact non-aligned non-ratification those or other international legal document should not be ignored by scientists and practitioners because this level, to achievement of which each state should be sought, if it desire to be in a club of civilized communities.

We cannot accept fully the classification of international standards that suggested by S.M. Yagofarov. Particular, in addition to universally recognized norms he offers to distinguish the standards for persons in respect of which have applied or might be chosen the measures of criminal procedural coercion; standards in an area of juvenile justice; standards of development of criminal proceedings including the measures of all complex of standards; standards in area of ethics and humanization of criminal proceedings [5]. In this case an author could not cover all standards of protective activity and many others. There is nothing clear in classification: what reason is chosen for division; indicated kinds of suggested classification dot not exclude each other on content.

From the meaning of Article 5 of the Universal Declaration of Human Rights follows that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. That is, it is inadmissible application of illegal methods of conducting procedural actions in respect of accused person. Right to an effective

remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law stipulated in Article 8 of the Declaration means an extension of opportunities for judicial control, appealing of illegal actions of the bodies of criminal prosecution.

Article 9 says that no one shall be subjected to arbitrary arrest, detention or exile. It indicates in necessity of observance of proper control with counsel-defender for lawfulness and reasonableness of application the measures of coercion associated with restriction of movement freedom.

The Principle 11 of “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment” of 1988 says following: 1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law. 2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons there for. Article 68 of the Code of Criminal Procedure of Republic of Kazakhstan (hereinafter, the CCP of the RK) concerning the rights of suspected says about right to use aid of counsel-defender, and part 5 of Article 150 stipulates an opportunity of questioning of suspected or accused if sanction on arrest given by prosecutor. There is no in law other forms of meetings with judicial and other bodies.

Par. 2 of Principle 12 says on necessity to provide to counsel a record “such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law” where shall be recorded the reasons for the arrest; the time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; the identity of the law enforcement officials concerned; precise information concerning the place of custody. At this Principle 15 contains an opportunity of refusal in communication of the detained or imprisoned person with the outside world and in particular his family or counsel, shall not be denied for more than a matter of days. The same

provisions mentioned among the powers of lawyer in Article 74 of CCP of the RK and in part 3 of Article 138 of the CCP of the RK regulating notification of the relatives of detained person.

But, anyhow in compliance with Principle 17, detained person “shall be entitled to have the assistance of a legal counsel”. He/she shall be informed of his right by competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it (par. 1 of Principle 17). Par. 2 of Principle 17 says that “if a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay”. These provisions are reflected in Article 71 of the CCP of the RK concerning a mandatory participation of a counsel, and based on the meaning of Article 68 determining a status of suspected who appeared after his arrest. Provisions of Principle 18 should fully be cited as they are concern a lawyer:

“1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a

continuing or contemplated crime”. Article 68 of the CCP of the RK says only about an opportunity of confidential meeting, an essence of which is understood rather wider.

Principle 23 provides an opportunity a counsel, when provided by law, shall have access to the information concerning the duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law. These provisions in none of the forms stipulated in the CCP of the RK that does not facilitate integration in world community.

Principle 25 provides right “only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion”.

Principle 27 says that “non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person”. This provision should be supplemented in Article 116 of the CCP of the RK, which determines the terms if evidences’ inadmissibility.

Principle 32 provides “a detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful”. Principle 33 provides right “a detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers” (par. 1 of Principle 33). The term “cruel, inhuman or degrading treatment” should be interpreted such way that to ensure maximum wide protection from abuses of

physical or mental nature including detention of detained or imprisoned person in the conditions, which deprive his/her, temporarily or permanently, any of his natural senses such as sight, hearing, spatial or temporal orientation. These provisions in national legislation are acting only concerning an arrest, but not to a detention (an opportunity of appeal an arrest's sanction of prosecutor provided with Article 110 of the CCP of the RK).

Every request or complaint shall be promptly dealt with and replied to without undue delay. If request or complaint is rejected or in case of inordinate delayed, the complainant may submit it in judicial or other authority. Under par. 1, neither detained or imprisoned person nor any complainant shall suffer prejudice for making a request or complaint (par. 4 of Principle 33).

In compliance with par. 1 of Principle 36 “a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.

We are joining to an opinion that “right to defence and professional legal aid in area of procedural coercion should be appeared at any stage of criminal proceedings including the stages of institution of criminal case from beginning of criminal procedural relationships” [1, p. 157]. An important condition is the fact that lawyers should related seriously to their duties. Just they are provided an opportunity keep a balance of the parties in court process, consequently, to ensure competitiveness whole process [3, p. 33]. This circumstance confirms one more necessity of detailed studying of existed international standards and principles in lawyer's activity, which is playing a role of peculiar landmark, on which one may check not only lawfulness or non-lawfulness of activity, but also compliance to some universally recognized human norms confirming a state of progress in area of democracy and humanization.

References

1. Akhpanov A.N. Problemy ugolovno-protsessual'nogo prinuzhdenia v stadia predvaritel'nogo rassledovania [Problems of criminal procedural coercion in stage of preliminary investigation]. Almaty, 1997, 176 p.
2. Mezhdunarodni bill' o pravakh cheloveka. Prava rebenka [International bill on human rights. Child's rights]. Almaty, 1998, 36 p.
3. Rekomendatsii po primeneniyu stat'i 6 Evropeiskoi konventsii o zaschite prav cheloveka – pravo na bespristrastnoe razbiratel'stvo [Recommendations on application of Article 6 of the European Convention on protection of human rights – right to impartial proceedings]. Sankt Petersburg, 2002, 44 p.
4. Sbornik dokumentov Soveta Evropy v oblasti zaschiti prav cheloveka i bor'by s prestupnost'yu [Body of the documents of Council of Europe in area of human rights defence and combat to crime]. Sost. T.N. Moskal'kova i dr [Comp. by T.N. Moskalkova and others]. Moscow, 1998, 388 p.
5. Yagofarov S.M. Mezhdunarodnye standarty po pravam cheloveka v sfere rossiiskogo ugolovnogo sudoproizvodstva [International standards on human rights in area of Russian criminal proceedings]. Avtoref. dis... kand. jurid. nauk. [PhD in Law Diss. Abstract] Chelyabinsk, 2005, 24 p.