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## **TO A QUESTION OF DEFINITION OF THE BEGINNING OF CRIMINAL PROSECUTION**

Article is devoted to a research of the moment of the beginning of criminal prosecution, determination of its features and the legal nature. On the basis of the conducted research the main theoretical approaches to definition of the moment of the beginning of criminal prosecution in criminal procedure are analysed. The analysis of special legal literature allows to allocate several main positions concerning the beginning of criminal prosecution. A number of scientists considers that the beginning of criminal prosecution is initiation of legal proceedings (in Kazakhstan – registration of a statement (messages, the official report) about criminal offense in the Unified register of pre-judicial investigations or production of the first urgent investigative action); others – from the moment of emergence in criminal case of the particular person (the suspect or the defendant); the third – from the moment of application concerning the person of measures of procedural coercion. The author's position concerning the beginning of criminal prosecution makes a start from the moment of detection of signs of criminal offense which can be found out including during operational search activity, in this regard, production of the investigation and search operations directed to identification and disclosure of crimes testifies to the beginning of production of criminal prosecution. Thus, establishment of illegal act, namely its identification and suppression, can be carried out also during investigation and search operations within the Law of the Republic of Kazakhstan "About Operational Search Activity". Considering the above, the conclusion is drawn that criminal prosecution not always has procedural character. Besides, in article suggestions for improvement of the criminal procedure legislation in this sphere are formulated.

The scientific and methodological basis was made by laws of the Republic of Kazakhstan, the Code of Criminal Procedure of the Republic of Kazakhstan and also works of the known scientific professional of Kazakhstan and foreign countries.

**Key words:** Criminal prosecution, charge, investigation, the suspect, the defendant, the body conducting criminal procedure, measures of procedural coercion, criminal offense, operational-investigative activity, criminal procedure law.

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### **Қылмыстық қудалаудың басталуын анықтау мәселелері**

Мақала қылмыстық қудалаудың басталу сәтін зерттеуге, оның ерекшеліктері мен құқықтық табиғатын анықтауға арналған. Жүргізілген зерттеу негізінде қылмыстық процесте қылмыстық қудалаудың басталу сәтін анықтаудың негізгі теориялық тәсілдері талданды. Арнайы заң әдебиеттерін талдау қылмыстық қудалаудың басталуына қатысты бірнеше негізгі ұстанымдарды

айқындауға мүмкіндік береді. Бірқатар ғалымдар қылмыстық қудалаудың басталуы деп қылмыстық іс қозғауды (Қазақстанда – қылмыстық құқық бұзушылық туралы арызды (хабарламаны, баянатты) сотқа дейінгі тергеудің бірыңғай тізілімінде тіркеу не бірінші кезек күттірмейтін тергеу әрекетін жүргізу); басқалары – қылмыстық істе нақты адам (сезікті немесе айыпталушы) пайда болған сәттен бастап; үшіншілері – адамға қатысты іс жүргізушілік мәжбүрлеу шараларын қолданған сәттен басталады деп санайды. Қылмыстық қудалаудың басталуына қатысты авторлық позиция қылмыстық құқық бұзушылық белгілері анықталған, оның ішінде жедел-іздігі кызметі барысында анықталуы мүмкін, осыған байланысты қылмыстарды анықтауға және ашуға бағытталған жедел-іздігі іс-шараларын жүргізу қылмыстық қудалауды жүргізудің басталғанын куәландырады. Осылайша, құқыққа қарсы әрекетті анықтау, атап айтқанда оны анықтау және жолын кесу «жедел-іздігі кызметі туралы» Қазақстан Республикасы Заңының шеңберінде жедел-іздігі іс-шаралары барысында да жүзеге асырылуы мүмкін. Жоғарыда айтылғандарды ескере отырып, қылмыстық қудалау әруақытта процессуалдық сипатқа ие бола бермейді деген қорытынды жасалды. Сонымен қатар, мақалада осы саладағы қылмыстық іс жүргізу заңнамасын жетілдіру бойынша ұсыныстар тұжырымдалған.

Мақаланың ғылыми-әдістемелік негізін Қазақстан Республикасының заңдары, ҚР ҚПК, сонымен қатар Қазақстанның және шет елдердің атақты ғалым процессуалистерінің еңбектері құрайды.

**Түйін сөздер:** қылмыстық қудалау, айыптау, сезікті, айыпталушы, қылмыстық іс жүргізуші орган, іс жүргізушілік мәжбүрлеу шаралары, қылмыстық құқық бұзушылық, жедел іздігі кызметі, қылмыстық іс жүргізу заңнамасы.

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#### **К вопросу об определении начала уголовного преследования**

Статья посвящена исследованию момента начала уголовного преследования, определению его особенностей и правовой природы. На основе проведенного исследования проанализированы основные теоретические подходы к определению момента начала уголовного преследования в уголовном процессе. Анализ специальной юридической литературы позволяет выделить несколько основных позиций относительно начала уголовного преследования. Ряд ученых считают, что началом уголовного преследования является возбуждение уголовного дела (в Казахстане – регистрация заявления (сообщения, рапорта) об уголовном правонарушении в Едином реестре досудебных расследований либо производство первого неотложного следственного действия); другие – с момента появления в уголовном деле конкретного лица (подозреваемого или обвиняемого); третьи – с момента применения в отношении лица мер процессуального принуждения. Авторская позиция относительно начала уголовного преследования отталкивается от момента обнаружения признаков уголовного правонарушения, которые могут быть обнаружены, в том числе и в ходе оперативно-розыскной деятельности, в этой связи, производство оперативно-розыскных мероприятий, направленных на выявление и раскрытие преступлений свидетельствует о начале производства уголовного преследования. Таким образом, установление противоправного деяния, а именно его выявление и пресечение, может осуществляться и в ходе оперативно-розыскных мероприятий в рамках Закона Республики Казахстан «Об оперативно-розыскной деятельности». Учитывая вышеизложенное, сделан вывод о том, что уголовное преследование не всегда носит процессуальный характер. Кроме того, в статье сформулированы предложения по совершенствованию уголовно-процессуального законодательства в данной сфере.

Научно-методологическую основу составили законы Республики Казахстан, УПК Республики Казахстан, а также труды известных ученых-процессуалистов Казахстана и зарубежных стран.

**Ключевые слова:** уголовное преследование, обвинение, расследование, подозреваемый, обвиняемый, орган, ведущий уголовный процесс, меры процессуального принуждения, уголовное правонарушение, оперативно-розыскная деятельность, уголовно-процессуальное законодательство

## Introduction

Inclusion in the criminal procedure legislation of such category as “criminal prosecution” created prerequisites for registration in law of criminal procedure of the new legal institute regulating an order of the accusing activity which is carried out by the party of charge of the relation of the suspect, the defendant that provided to prosecutor an occasion to begin to use actively the concept “institute of criminal prosecution” (Enikeev 2000: 131).

Realization of the problems of criminal procedure regulated by Article 8 of the Code of Criminal Procedure of the Republic of Kazakhstan is impossible without ensuring function of criminal prosecution. Criminal prosecution, being one of the main functions of criminal trial, sets all criminal trial in motion, determines contents and the direction of pre-judicial investigation by particular criminal case.

At the same time, the term “criminal prosecution” has ambiguous understanding, both in the theory of criminal procedure, and in the criminal procedure legislation.

According to the Code of penal procedure of the Republic of Kazakhstan of 2014 criminal prosecution is defined as procedural activity, carried out by the party of charge for the establishment of the act prohibited by the criminal law, and which made his faces, guilts of the last in commission of criminal offense and also for ensuring application to such person of punishment or other measures of criminal influence (Paragraph 22 of Article 7 of the Code of Criminal Procedure of RK).

The purpose of this article consists in a research of the moment of the beginning of criminal prosecution, determination of its features and the legal nature. The analysis of the main theoretical approaches to definition of the moment of the beginning of criminal prosecution in criminal procedure.

**Results of researches** demonstrate that the beginning of criminal prosecution is the moment of detection of signs of criminal offense. Besides, implementation of criminal prosecution for appropriate authorities and public officials (the prosecutor, the head of investigative division, the investigator, body of inquiry, the head of body of inquiry and the investigator) is a procedural duty, and for the victim (the private accuser), the civil claimant, their lawful representatives and representatives – a procedural law.

## Main part

In legal literature definition of the moment of the beginning of criminal prosecution remains debatable.

In foreign literature such scientists as were engaged in studying of criminal prosecution: Skórzewska-Amberg M. (Skórzewska-Amberg M. 2017: 67-86); Gordon S., Ford R. (Gordon. 2001: 185); Le Guernic C., Legay A. (Le Guernic 2017: 80); Viano E.C. (Viano 2017: 3-22); Tahir R. (Tahir 2017: 287-310); Gupta B.B., Arachchilage N.A. G., Psannis K.E. (Gupta 2017: 1-21); Jakobsson M. (Jakobsson 2016: 1-3); Kethineni S., Cao Y., Dodge C. (Kethineni 2017: 1-21); Kott A. (Kott 2014: 1-13), etc.

At the same time, the question of the moment characterizing the beginning of criminal prosecution is not only terminological as it can seem at first sight. It has great theoretical and practical value. As in practice such phenomenon as production of the investigative actions directed to collecting of proofs which demonstrate further to commission of socially dangerous act by the particular person before presentation of charge to it that leads actually to deprivation of such persons of a right of defense is rather widespread.

The analysis of references, allows to mark out the following main points of view on the matter.

The first: the beginning of criminal prosecution is initiation of legal proceedings (in Kazakhstan – registration of a statement (messages) about criminal offense in the Unified register of pre-judicial investigations or production of the first urgent investigative action); the second is the moment of emergence in criminal case of the particular person (the suspect or the defendant); the third – the application moment concerning the person of measures of procedural coercion.

Supporters of the first direction are:

– M.A. Cheltsov who applies the term “initiation of criminal prosecution” and treats it as “... prosecution not only individual and defined already accused, but also the unknown even at the time of excitement in the presence of a possibility of its definition in the future” (Cheltsov 1937: 28.). M.A. Cheltsov writes about the initial moment of criminal procedure: “This initial moment of process also is initiation of criminal prosecution. We understand as it the procedural act of the appropriate public authority in which the last establishes existence in a certain event of signs of a criminal offense and therefore decides to begin criminal prosecution”;

– Z.Z. Zinatullin and T.Z. Zinatullin according to whom, “criminal prosecution begins with the moment of initiation of legal proceedings and takes place throughout criminal proceeding, in all stages of criminal procedure that is until the weight of evidence suggests a certain person guilty of crime execution and deserving application to it this or that measure of criminal sanction which is subject to departure” (Zinatullin 1997: 79);

– V.I. Rokhlin who reflected in the works that “criminal prosecution begins with initiation of legal proceedings” (Rokhlin 1971: 167).

Among the supporters of the second approach considering by the initial moment of criminal prosecution – emergence in criminal case of the suspect or defendant, it is possible to call:

– A.B. Solovyova and N.A. Yakubovich who specified that function of criminal prosecution is implemented at initiation of legal proceedings against the particular person, his detention, application of a measure of restraint, criminal prosecution and also by production according to the judgment of the investigative actions limiting constitutional rights of suspects and defendants. At initiation of legal proceedings upon crime, the initial moment of criminal prosecution is conducting the first legal proceeding connected with application of the specified measures of procedural coercion (Solovyov 1996: 78);

– A.G. Haliulin according to whom, “criminal prosecution can begin also before bringing a charge when the person is put in position of the suspect. And this moment, – according to his point of view, – demands specification as the moment of the beginning of criminal prosecution in the form of suspicion” about what it is necessary to issue the separate decree on involvement of the person offered them as the suspect. If criminal case is brought concerning the particular person, then in this case criminal prosecution will coincide with crime investigation as already from the moment of initiation of legal proceedings investigation has the purposeful character connected with proof of fault of the person who is the suspect (Haliulin 1997: 223);

– P.I. Tarasov-Radionov, S.A. Golunsky and M.S. Strogovich according to whom, criminal prosecution begins and conducted only concerning the certain person accused of crime execution. Initiation of criminal case can take place concerning the fact, crime events when the person which is subject to criminal prosecution for its commission can still not be known (Tarasov-Rodionov 1948: 129; Golunsky 1946: 82; Strogovich 1946: 511). In particu-

lar, M.S. Strogovich defined criminal prosecution as «activity of the investigator (or body of inquiry) and the prosecutor concerning the certain person brought to trial as the defendant directed to exposing this person in crime execution, to prove his guilt, to provide application to it just deserts... Therefore, the act of initiation of criminal prosecution is the act of involvement of a certain person to matter in quality of the defendant» (Strogovich 1946: 511).

– F.N. Bagautdinov according to whom, criminal prosecution is directed against the persons having legal status of the defendant or suspect. “Respectively there is no criminal prosecution literally this word when the person who committed a crime, or suspected of its commission is not identified. At the same time investigation is anyway made, the investigation collects proofs which, perhaps, in the future can initiate criminal prosecution concerning any person. Therefore it is possible to speak only about its preparation, about creation of necessary conditions for the subsequent criminal prosecution” (Bagautdinov 2002: 156).

The called “preparatory” activity in legal literature is offered to be called at the legislative level “taking measures to ensuring criminal prosecution”. “Taking measures to ensuring criminal prosecution – the procedural activity which is carried out by public authorities and public officials, from the moment of obtaining the message about crime for establishment of an event of crime and the person, it made” (Alexandrov 2002: 57).

Among supporters of the third direction, it is possible to mark out L.I. Malakhova who claims that criminal prosecution begins with the moment of acceptance by the body conducting criminal procedure, decisions on restriction of the rights of the citizen for ensuring its exposure in crime execution or from the moment of their actual restriction in the same purposes (Malakhova 2003: 25).

Certain authors consider that criminal prosecution is procedural activity and as procedural activity begins with the moment of initiation of legal proceedings, and by the legislation of Kazakhstan from the moment of registration of a statement (message) about criminal offense (Article 179 of the Code of Criminal Procedure of the Republic of Kazakhstan), and the beginning of realization of function of criminal prosecution needs to be connected with this moment.

Positions of the specified authors make a start or from the procedural status of the person (the suspect, the defendant) and a possibility of application of measures of procedural coercion to them, or from the beginning of procedural activity.



However, measures of procedural coercion can be applied not only to suspected (defendant), but also to the witness, the victim that does not speak about the beginning of criminal prosecution yet.

Considering that establishment of illegal act, namely its identification and suppression, can be carried out also during investigation and search operations within the Law of the Republic of Kazakhstan “About Operational Search Activity”, that criminal prosecution not always has procedural character.

We are solidary with opinion of A.V. Fedotov who considers that the concept “criminal prosecution” covers not only criminal procedure activity, but also operational search activity (Fedotov 2009: 19).

So, according to us, the beginning of criminal prosecution is the moment of detection of signs of criminal offense which can be found out including during operational search activity. Production of the investigation and search operations directed to identification and disclosure of crimes, according to us, testifies to the beginning of production of criminal prosecution.

The etymological word meaning means “prosecution” “to pursue someone, seeking to overtake, catch, take” (The big modern explanatory dictionary of Russian). In this plan work of the investigator on establishment of the illegal act and the person which made it can be compared to the hunter, tracking down production and following in her tracks. Also as well as the hunter, the investigator, having found signs of criminal offense, “follows” in the tracks of the criminal whose identity can be unknown. Thus, carrying out in the relation even of the unknown person of the investigation and search operations directed to his establishment and detention can testify to the beginning of criminal prosecution.

So, according to D.A. Neganov “criminal prosecution begins both in a stage of initiation of legal proceedings, and till its beginning – registration of the message about crime as a reason for initiation of legal proceedings. Therefore, criminal prosecution can be conducted concerning unknown persons ...” (Neganov 2013: 132).

The opinion of the respondents interviewed by us on the moment of the beginning of criminal prosecution is represented rather contradictory.

So, practically their voices were divided equally, 48% of respondents spoke that the beginning of criminal prosecution is the moment of registration of a statement (message) about criminal offense, and 49% – the moment of detention of the person as the suspect and finding by the person of the procedural status of the suspect or witness having a right of defense. 3% of the interviewed respondents consider the beginning of criminal prosecution the application moment concerning the person of measures of criminal procedure coercion. Despite the specified results of questioning, more than 90%, the interviewed investigators and investigators, answered positively the question “Whether Detection of Signs of Criminal Offence Will Testify to the Beginning of Criminal Prosecution”.

On the basis of the above, it is represented that it is necessary to make the changes and additions concerning an exception of definition of the concepts “charge” and “procedural activity” of it to Paragraph 22 of Article 7 of the Code of Criminal Procedure of the Republic of Kazakhstan.

III Conclusion. Thus, it is possible to conclude the following conclusions. The concept of criminal prosecution regulated by Paragraph 22 of Article 7 of the Code of Criminal Procedure of the Republic of Kazakhstan has contradictions in this connection, it is obviously necessary to make the changes and additions concerning an exception of definition of the concepts «charge» and «procedural activity». Considering the stated, criminal prosecution – it is the activity which is carried out by the party of charge for the establishment of the act prohibited by the criminal law, and which made his faces, guilts of the last in commission of criminal offense and also for ensuring application to such person of punishment or other measures of criminal influence.

The beginning of criminal prosecution is the moment of detection of signs of criminal offense. Besides, implementation of criminal prosecution for appropriate authorities and public officials (the prosecutor, the head of investigative division, the investigator, body of inquiry, the head of body of inquiry and the investigator) is a procedural duty, and for the victim (the private accuser), the civil claimant, their lawful representatives and representatives – a procedural law.

### References

- Enikeev Z. D. Criminal prosecution. – Manual. Ufa: Publishing house of BashGU. 2000. – 131 pages.
- Skórzewska-Amberg M. Global Threats But National Legislations – How to Adapt to the New Cyberspace Society // *Cybercrime, Organized Crime, and Societal Responses*. – Springer, Cham, 2017. – P. 67-86.
- Gordon S., Ford R. On the Definition and Classification of Cybercrime, 2 J. Computer Virology 13, 14 (2006); see also *Convention on Cybercrime*, pmb., Nov. 23, 2001, CETS No. 185.
- Ransomware and the Legacy Crypto API // *Risks and Security of Internet and Systems: 11th International Conference, CRiSIS 2016*, Roscoff, France, September 5-7, 2016, Revised Selected Papers. – Springer, 2017. – T. 10158. – P. 11.
- Viano E.C. Cybercrime: Definition, Typology, and Criminalization // *Cybercrime, Organized Crime, and Societal Responses*. – Springer, Cham, 2017. – P. 3-22.
- Tahir R. et al. Mining on Someone Else's Dime: Mitigating Covert Mining Operations in Clouds and Enterprises // *International Symposium on Research in Attacks, Intrusions, and Defenses*. – Springer, Cham, 2017. – P. 287-310.
- Gupta B.B., Arachchilage N.A. G., Psannis K.E. Defending against phishing attacks: taxonomy of methods, current issues and future directions // *Telecommunication Systems*. – 2017. – P. 1-21.
- Jakobsson M. (ed.). (2016) *Understanding social engineering based scams*. – Springer New York. – P. 1-3.
- Kethineni S., Cao Y., Dodge C. Use of Bitcoin in Darknet Markets: Examining Facilitative Factors on Bitcoin-Related Crimes // *American Journal of Criminal Justice*. – 2017. – P. 1-17.
- Kott A. Towards fundamental science of cyber security // *Network science and cybersecurity*. – Springer, New York, NY, 2014. – P. 1-13.
- Cheltsov M.A. Initiation of criminal prosecution and procedural position of the investigator // *Socialist legality*. 1937, No. 3. – Page 28.
- Inatullin Z.Z., Inatullin T.Z. Common problems of charge and protection on criminal cases: Manual. Prod. the 2nd, corrected and added. Izhevsk: Detective inform, 1997. – 79 pages.
- Rokhlin V.I. Coordination of supervision of the investigation and inquiry and the general supervision in prevention of crimes: yew. ... edging. юрид. sciences. – М, 1971. – 167 pages.
- Solovyov A.B., Yakubovich N.A. To a question of the concept of legal support of function of criminal prosecution // *Modern problems of criminal law, process, criminalistics*. The m is Kemerovo, 1996. – Page 78-86.
- Haliulin A.G. (1997) Implementation of function of criminal prosecution by prosecutor's office of Russia. – Kemerovo: Kuzbassvuzizdat. – 223 pages.
- Tarasov-Rodionov P.I. Preliminary investigation: A grant for investigators / Under the editorship of M.A. Cheltsov-Bebutov. – М.: Yurid. M-va publishing house of justice USSR, 1948. – 129.
- Golunsky S.A. Principles and features of the Soviet military criminal proceedings: Scientific works of All-Union institute of jurisprudence, Issue VIII. М, 1946. – Page 82-88.
- Criminal proceedings. Textbook / Strogovich M.S. – М.: Yurid. MU publishing house USSR, 1946. – 511 with.
- Bagautdinov N.F. (2002) Psychological features of testimonies of eyewitnesses. – М. – 156 p.
- Alexandrov G. Investigator on interrogation of the witness to announce testimonies of other witnesses? *Legality*. – 2002. – P. 57-59.
- Malakhova L.I. Function of criminal prosecution as type of procedural activity // *Russian investigator*. – 2003. – No. 7. – P. 25-26.
- Fedotov A.V. Essence and maintenance of the concept "criminal prosecution" of modern Russian law of criminal procedure. – *History of state and law*. – 2009. – No. 2. – Page 19-22.
- Big modern explanatory dictionary of Russian // <https://slovar.cc/rus/tolk/88954.html>.
- Neganov D.A. (2013) Action of the principle of legality in a stage of initiation of legal proceedings: yew. ... PhD in Law. – Kazan. – 132 p.