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EXPLICATION OF THE IRRATIONAL COMPONENT OF THE RIGHT TO THE FAIR COURT IN THE CRIMINAL PROCESS OF KAZAKHSTAN

The article analyzes the principle of judicial protection of the rights and freedoms of a citizen in criminal proceedings, which is dictated by the genetic need of a person to seek justice in resolving the current conflict situation with the help of a neutral authority, an impartial judge. The principle being an integral component of the ideological system of law as a phenomenon of civilization and culture of mankind. At the same time, the principle of protecting the rights and freedoms of a person and a citizen is explicated in procedural norms and acts by national courts in different ways, which affects the completeness or declarativeness of its practical action. An analysis was also made of the implementation of the principle of judicial protection of the rights and freedoms of a person and a citizen in criminal proceedings by applying the transformation of the accusatory bias paradigm, establishing cause-and-effect relationships, manifestation and prevalence of the irrational component in the content of this principle through methods of analysis and synthesis. To increase the role and implement its, it should not be limited to institutional mechanisms and bureaucratization of going to court.

The branch of criminal procedural law, which regulates the powers of the defense to collect evidence, is the most sensitive to criticism from society, since there is an imbalance of capabilities between the defense and prosecution, which contradicts the principle of adversarial and equal rights of the parties.

Key words: principle of judicial protection, human and civil rights and freedoms, irrational component, rational component, accusatory bias paradigm, transformation, court, explication, justice.

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Құқықтың иррационалды компонентінің Қазақстанның қылмыстық процесіндегі әділетті сотқа экспликациясы

Мақалада қылмыстық сот ісін жүргізуде азаматтың құқықтары мен бостандықтарын сот арқылы қорғау принципі талданады, ол адамның қазіргі жанжалды жағдайды бейтарап биліктің, бейтарап судьяның көмегімен шешуде әділдік іздеуге генетикалық қажеттілігінен туындайды. Ол қағидасы адамзат өркениетінің және мәдениетінің феномені ретіндегі құқықтың идеологиялық жүйесінің құрамдас бөлігі бола отырып, қисынсыз сипатқа ие. Сонымен қатар, адамның және азаматтың құқықтары мен бостандықтарын қорғау қағидасы іс жүргізу нормалары мен ұлттық соттардың актілерінде әртүрлі тәсілдермен түсіндіріледі, бұл оның практикалық әрекетінің толықтығына немесе декларативтілігіне әсер етеді. Сондай-ақ, қылмыстық сот ісін жүргізуде адам мен азаматтың құқықтары мен бостандықтарын сот арқылы қорғау принципін іске асыруға айыптау парадигмасын түрлендіруді қолдану, себеп-салдарлық байланыстарды орнату, талдау және синтез әдістері арқылы осы принциптің мазмұнындағы иррационалды компоненттің көрінісі мен таралуы арқылы талдау жүргізілді. Ол қағидатының рөлін арттыру және іске асыру үшін институционалдық тетіктермен және сотқа жүгінуді бюрократиялаумен шектелмеуге тиіс.

Дәлелдемелерді жинау жөніндегі қорғаныс өкілеттіктерін реттейтін қылмыстық іс жүргізу құқығы саласы қоғамның сынына өте сезімтал, өйткені қорғаныс пен айыптау арасында тараптардың бәсекелестігі мен теңдігі принципіне қайшы келетін мүмкіндіктер теңгерімсіздігі

Түйін сөздер: сотты қорғау принципі, адам мен азаматтың құқықтары мен бостандықтары иррационалды компонент, рационалды компонент, айыптау парадигмасы, трансформация, сот, экспликация, әділеттілік.

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Экспликация иррационального компонента права на справедливый суд в уголовном процессе Казахстана

В статье проанализирован принцип судебной защиты прав и свобод человека гражданина в уголовном судопроизводстве, который продиктован генетической потребностью человека в поиске справедливости решения сложившейся конфликтной ситуации с помощью нейтрального авторитета, беспристрастного судьи. Он по своей природе носит иррациональный характер, являясь составным компонентом идейной системы права как феномена цивилизации и культуры человечества. В то же время принцип защиты права и свобод человека и гражданина эксплицируется в процессуальных нормах и актах национальными судами по-разному, что сказывается на полноте или декларативности его практического действия. Также проведен анализ реализации принципа судебной защиты прав и свобод человека и гражданина в уголовном судопроизводстве путем применения трансформации парадигмы обвинительного уклона, установления причинно-следственных связей, проявления и превалирования иррационального компонента в содержании данного принципа через методы анализа и синтеза. Для повышения роли и реализации его не должно ограничиваться институциональными механизмами и бюрократизацией обращения в суд.

Отрасль уголовно-процессуального права, регулирующая полномочия защиты по сбору доказательств, наиболее чувствительна к критике со стороны общества, поскольку существует дисбаланс возможностей между защитой и обвинением, что противоречит принципу состязательности и равноправия сторон.

Ключевые слова: принцип судебной защиты, права и свободы человека и гражданина, иррациональный компонент, рациональный компонент, парадигма обвинительного уклона, трансформация, суд, экспликация, справедливость.

Introduction

Scientific research in the field of human rights, protections and freedoms has been carried out since the 20th century. In any legal democratic state, both the state and the citizen must correlate their actions with the law. Thus, with any conflict of interests or different legal understandings, legal conflicts are possible. Thus, this situation will be resolved by the courts – an independent link of state power, which, having a special apparatus, protects the rights and freedoms of people, asserts legality and justice.

Thus, the principle of protecting the rights and freedoms of man and citizen is irrational in nature, being an integral component of the ideological system of law as a phenomenon of civilization and culture of mankind. At the same time, the principle of protecting the rights and freedoms of man and citizen is explicated in procedural norms and acts by national courts in different ways, which affects the completeness/declarativeness of its practical action.

Everyone has the right to fair protection. Therefore, the content of the irrational component in this principle is its expression.

So it can be argued that the principle of judicial protection of human rights and freedoms is a reflection of international norms that form the constitutional system of natural human rights and freedoms.

Yes, Art. 14 of the International Covenant on Civil and Political Rights (https://www.un.org/ru/documents /decl_conv/conventions/pactpol.shtml) states the legal postulate of the inalienability of the human right to a fair and public (public) trial.

The explication of the principle of judicial protection of human rights and freedoms in the form of a rational component of the legal law, national normative and procedural acts, embodies the guarantee of complete equality of the parties, which forms an integrative paradigm of concepts: a semantic outline of the nature and basis of the charge (the principle of the language of legal proceedings); a real possibility of exercising the right

to protection; direct and immediate access to justice; the right to legal assistance; cross-examination; putting forward their own version of the defense and refuting the position of the prosecution; witness immunity (https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights).

This position of the principle of judicial protection of rights and freedoms is dictated by the genetic need of a person to seek justice in resolving the current conflict situation with the help of a neutral authority, an impartial judge. Therefore, starting from the accusatory form of legal proceedings, the disputing parties turn to priests, patriarchs, elders and other independent mediators for a fair resolution of the conflict, capable of leading the parties to a peaceful settlement of the dispute and deontologically conditioned compensation for the damage caused.

Methods and materials

To study the explication of the frame construction of the principle, a descriptive and experimental research method was used.

To confirm our main hypothesis, as well as quantitative and qualitative characteristics of the application of the principle under study, as well as the alleged and possible transformation of the accusatory bias paradigm, causal relationships were established for the manifestation and prevalence of the irrational component in the content of this principle through analysis and synthesis. To substantiate the hypothesis about the presence of certain reasons that determine the dependence of judges on certain normative provisions of national legislation, structural subordination and accountability that affect the judiciary, a comprehensive comparative legal analysis of national legislation and foreign experience, as well as law enforcement practice, was used.

In the course of the study, it is proposed to use general and specific methods of understanding objective reality, as well as an integrated approach, which includes the study of scientific literature, analysis of national and foreign legislation, the use of a systematic approach, sociological research method, as well as comparative. In addition, a comprehensive comparative legal analysis will make it possible to more fully reveal the essence and content of the presence and dependence, as well as the impact on the judiciary, based on an analysis of national and foreign legislation and law enforcement practice.

The systematic approach we use in scientific research will allow us to identify and compare the relationship of components that determine the presence of irrationality or rationality in the principle of judicial protection of human and civil rights and freedoms, as well as to determine the disposition of judges in the national system.

To confirm our hypothesis about the dichotomy of the irrational and rational, in principle, judicial protection of the rights, freedoms of man and citizen, during observation, primary empirical data of judicial practice will be collected, which will establish a record of ongoing situations in criminal proceedings with the presence or absence of a component of irrationality in the implementation of the principle of independence of the judiciary .

Results

In the national legislation of the Republic of Kazakhstan, the right to fair assistance is realized through an investigating judge.

During the pre-trial investigation, a citizen has the right to apply for judicial protection in cases of illegal or unjustified investigation, inquiry, criminal prosecution by the body of a search, seizure, termination of a criminal case, etc. (Part 1, Article 106 of the Code of Criminal Procedure of the Republic of Kazakhstan).

In cases where preventive measures related to deprivation of liberty are applied to the suspect, the law also guarantees judicial protection and is applied only with the sanction of the court. When a suspect is detained and the prosecutor supports the petition of the person conducting the pre-trial investigation to authorize the detention, the prosecutor is obliged to submit to the court a decision and materials confirming its validity no later than twelve hours before the expiration of the detention period.

The sanction of the court is also required during the inspection, search, seizure, personal search.

Sentences, decisions of courts of first instance may be appealed on appeal. Persons who are not parties to the process appeal against court decisions affecting their rights and legitimate interests.

When determining jurisdiction, the procedural law proceeds from the complexity of the case and its social significance, as well as ensuring its quick and efficient resolution.

Thus, the bulk of criminal cases in the first instance fall under the jurisdiction of district and equivalent courts. Criminal cases on especially grave crimes are within the competence of specialized inter-district courts for criminal cases, if they are not

under the jurisdiction of specialized inter-district military courts for criminal cases.

Predominantly, a criminal case is subject to consideration in court at the place where the criminal offense was committed. In those situations when a criminal offense was started at the place of activity of one court, and ended at the place of activity of another court, the case becomes jurisdictional to the court at the place of completion of the investigation (Article 314 of the Code of Criminal Procedure of the Republic of Kazakhstan).

If a violation of this rule is established at the stage of the main trial, the court has the right to leave the case in its proceedings, but only with the consent of all participants in the process (part 2 of article 316 of the Code of Criminal Procedure of the Republic of Kazakhstan).

Another component of the disclosed principle is the guarantee of the law, which obliges the state to provide everyone with access to justice and compensation for the damage caused.

First of all, this concerns the victim, since his role is significantly limited by the powers of the prosecutor.

In this regard, based on the procedural status of the victim, the body conducting the criminal process is obliged to compensate for property damage. The issue of compensation for moral damage to the victim in the criminal process is considered within the framework of the claim filed by him. In cases where such a claim was not brought in a criminal case or was left without consideration, the victim has the right to bring it in civil proceedings.

The implementation of the principle of judicial protection of human rights and freedoms from illegal actions and unreasonable decisions, objectified in the norms of the current national law, correlates with the operation of the general legal principle of legality (Leigh, I. 2007; 174-205). Thus, the courts are not entitled to apply laws and other regulatory legal acts that infringe on the rights and freedoms of a person and citizen enshrined in the Constitution of the Republic of Kazakhstan. If the court sees that a law or other normative legal act to be applied infringes on the rights and freedoms of a person and citizen enshrined in the Constitution of the Republic of Kazakhstan, it is obliged to suspend the proceedings and apply to the Constitutional Court of the Republic of Kazakhstan with a motion to recognize this act as unconstitutional.

The latest novelty of national law in terms of expanding human rights state mechanisms is the transformation of the institution of constitutional control, the transformation of the Constitutional Council into the Constitutional Court, which provided a real opportunity for the citizens of Kazakhstan to protect their constitutional rights and freedoms, bypassing red tape, bureaucracy and institutionalism.

Thus, according to Article 45 of the Constitutional Law of the Republic of Kazakhstan "On the Constitutional Court of the Republic of Kazakhstan", the Constitutional Court, upon the appeal of citizens, considers for compliance with the Constitution of the Republic of Kazakhstan the regulatory legal acts of the Republic of Kazakhstan that directly affect their rights and freedoms, enshrined in the Constitution of the Republic of Kazakhstan.

A citizen of the Republic of Kazakhstan has the right to apply to the Constitutional Court if:

1) the disputed law or other normative legal act has been applied by the court or directly affects the rights and freedoms in a particular case with the participation of a citizen and a judicial act has been issued in the case that has entered into legal force;

2) the appeal was filed no later than one year after the adoption of the above judicial act.

A citizen's appeal is also permissible if the citizen's preliminary appeal to the court does not lead to a different application of the law that directly affects his rights in a particular situation due to the imperativeness of the relevant provisions of the law.

At the same time, legislative attempts by the judiciary to limit access to justice for citizens and return to the past experience of bureaucratization and red tape in the process of appealing against the actions and decisions of the investigative bodies have been a negative trend in recent years. However, the prosecution authorities carefully monitor the implementation of the policy of the President of the Republic of Kazakhstan on the formation of a national three-tier model of criminal justice, the process of de-bureaucratization and ensuring direct access of citizens to justice. As part of their participation in working groups on legislative work, prosecutors did not allow violations of constitutional legality in the framework of law-making activities.

In addition, such attempts to bureaucratize access to justice were critically assessed at the international round table, despite the supporters of individual representatives of criminal procedure science with a sense of justice formed during the Soviet period, to bureaucratize this process. The rationale for such positions was based solely on voluntaristic focusing of individual elements of the movement of the criminal case at the pre-trial stages of the criminal process, which in general does not correspond to objective reality within the framework of the entire system of the national criminal process.

In general, the participants of the international round table, the list of which included civil society, the bar, the Commissioner for Human Rights, prominent scientists of the countries of the Eurasian space, supported the state policy in terms of ensuring maximum access to justice for citizens.

Another form of alienation of the principle of judicial protection of the rights and freedoms of man and citizen is the dominance of the principle of reducing the procedural form. The functioning of all kinds of accelerated and simplified forms that contradict the principles of exclusivity and compensation, in fact, reduce all criminal justice to an administrative and administrative mechanism through the curtailment of the process of proof and its replacement with the fetishization of formal grounds for bringing a person to criminal responsibility (Хан В.В. 2021; 10-16).

Historically, such a legacy has remained in the post-Soviet legal consciousness since the period of the formation and strengthening of the Bolshevik government, from the very beginning of its activity, cultivating methods of extrajudicial reprisals with the help of "police troikas" and special tribunals. As a result, the right to a fair trial is alienated in full, the fate of a person remains at the disposal of the administrative, police authorities, which fundamentally contradicts the content of the legal law.

Discussion

In the customary law of the Kazakhs, a special place in the system of dispute settlement was occupied by biys, which, unlike the khan's power, were a primordial attribute of Kazakh society. Occupying an independent and impartial position in the Kazakh society, the institution of biys ensured the implementation of the principle of justice, leading to an answer in its court of stronger tribal groups and the khan's power itself. Justice as a criterion for deciding a biy was dictated by the lack of means of public coercion, the replenishment of which occurred at the expense of wisdom, which satisfied the needs of society with its content and led to its voluntary fulfillment. The validity of the decision of the biy, based on the norms of customary law and traditions of ancestors, national folklore, professional competence, convinced the parties of the fairness of the decision (Исаев И.А. 2015; 364).

A similar conflict resolution architecture can be found in the earlier sources of the life of the Jewish people, defined by the period of the judges. Shoftim (judges) were identified with the wise men sent down to the Jewish people for the correct interpretation of norms and the fair resolution of conflicts. At the same time, the bearer of the title of judge was a person who had the highest public authority among the Israelis, regardless of gender. The judge in the public life of the Israelis occupied a dominant position, especially in resolving key legal and political issues related to the security of society and the preservation of national traditions.

Thus, the initial position of the irrational component of the right to a fair trial determines the direct effect of the principle of judicial protection of human rights and freedoms from illegal actions and unreasonable decisions on the part of executive and representative authorities.

At the same time, depending on the historical form of the criminal process, the realization of the right to a fair trial can be bureaucratic in nature and proceed from the principle of institutionality. Thus, the primitive inquisitorial form of the criminal process presupposes a consistent movement of citizens' appeal through administrative instances before it falls into the hands of a judge to resolve the existing conflict. Such bureaucratization was typical of the Soviet criminal process, in which all actions and decisions of the criminal prosecution body were subject to appeal exclusively within its powers: the head of the investigation department, the body of inquiry, the prosecutor and the higher prosecutor, which, within the established deadlines for appeal, actually did not allow the exercise of the right citizens for judicial protection at pre-trial stages,

A similar bureaucratization existed during the period of the Code of Criminal Procedure of the Republic of Kazakhstan in 1997, which was recognized by the normative resolution of the Constitutional Council of the Republic of Kazakhstan "On the verification of the constitutionality of the first part of Article 109 of the Criminal Procedure Code of the Republic of Kazakhstan at the request of the West Kazakhstan Regional Court" dated January 24, 2007 No. 1 corresponding to the Constitution of the Republic of Kazakhstan, despite the provisions of the descriptive and motivational part defining the right to judicial protection (https://adilet.zan.kz /rus/docs/S070000001).

Questions about the purpose of the principle of justice in Kazakh criminal proceedings are caused by the comprehensiveness of this provision and have been the subject of discussion among academic lawyers since the formation of an independent, rule-of-law state. The fairness of criminal proceedings means the impartial, independent, objective activities of pre-trial authorities, as well as a fair, open and

honest trial of the case. Justice, as we know from world experience, among other things, presupposes, within certain limits, a healthy balance between the activities of the parties to criminal prosecution and defense attorneys in criminal proceedings. It is undeniable that the activities of defense representatives, who sometimes represent the interests of clients alone, in most cases they cannot compete in strength with representatives of the state who have superiority and advantage. At the same time, the criminal procedural law, based on the principle of legality, presupposes that state representatives are obliged to comply with the rules established in the Constitution of the Republic of Kazakhstan, in legislative regulations, and other legal acts of the state, at the same time, these rules limit the lack of rights, lawlessness in relation to ordinary person and equalizes her chances in criminal proceedings. In other words, criminal procedural institutions and procedures, guided by higher laws, give every person the opportunity to defend their rights and interests within the framework of the justice system the criminal procedural law, based on the principle of legality, assumes that state representatives are obliged to comply with the rules established in the Constitution of the Republic of Kazakhstan, in legislative regulations, and other legal acts of the state, at the same time, these rules limit the lack of rights, lawlessness in relation to the ordinary person and equalizes her chances in criminal proceedings. In other words, criminal procedural institutions and procedures, guided by higher laws, give every person the opportunity to defend their rights and interests within the framework of the justice system the criminal procedural law, based on the principle of legality, assumes that state representatives are obliged to comply with the rules established in the Constitution of the Republic of Kazakhstan, in legislative regulations, and other legal acts of the state, at the same time, these rules limit the lack of rights, lawlessness in relation to the ordinary person and equalizes her chances in criminal proceedings. In other words, criminal procedural institutions and procedures, guided by higher laws, give every person the opportunity to defend their rights and interests within the framework of the justice system lawlessness against an ordinary person and equalizes her chances in criminal proceedings. In other words, criminal procedural institutions and procedures, guided by higher laws, give every person the opportunity to defend their rights and interests within the framework of the justice system lawlessness against an ordinary person and equalizes her chances in criminal proceedings. In other words, criminal procedural institutions and procedures, guided by higher laws, give every person the opportunity to defend their rights and interests within the framework of the justice system.

It is generally accepted that justice is a fundamental, international legal requirement for the apparatus of any national system of criminal legislation.

Conclusions

The principle of protecting the rights and freedoms of man and citizen is irrational in nature, being an integral component of the ideological system of law as a phenomenon of civilization and culture of mankind. The principle under study is explicated in procedural norms and acts by national courts in different ways, which affects the completeness/declarativeness of its practical operation. In particular, according to the just opinion of the President (https://baiterek.gov.kz/), society should not put up with the bias of judges, it is necessary to look for ways to solve the current problem, eliminating the paradigm of the accusatory bias of the court, its passivity in the field of protecting the rights and freedoms of man and citizen, as well as a long distance between the court and man, debureaucratization in the administration of justice.

Thus, the right to a fair trial is a natural human right to protect their rights and freedoms from all sorts of encroachments on the part of the executive and legislative branches of government.

The right to a fair trial has direct effect and cannot be limited by institutional arrangements and bureaucratization of going to court.

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