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To a question of the principles of criminal proceedings

In this article the author considered the principles of the criminal procedure right as procedural guarantees of the rights and legitimate interests of the personality in criminal trial. The principles express essence and the content of criminal trial, characterize its most important properties and qualitative lines, a subject and a method of procedural regulation. The addressee they have the person and the citizen and the appropriate government bodies. The bodies of the state conducting process have to act on the basis of the established principles and bear all consequences connected with their violation.

Key words: personality, rights and freedoms of the person, concept, legal policy, principles of criminal trial, immunity, integrity of human beings, etc.

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Қылмыстық сот ісін жүргізудің қағидаттары туралы сұраққа қатысты

Берілген мақалада автор қылмыстық-процестік құқықтың қағидаттары, қылмыстық процестегі жеке тұлғаның құқықтары мен заңды мүдделерінің процессуалдық кепілдіктері ретіндегі негізін зерделейді. Қағидаттар қылмыстық процестің мәні мен мазмұнын анықтайды, оның негізгі ерекше қасиеттері мен белгілерін, процессуалдық реттеудің пәні мен әдісін сипаттайды. Адам және азамат, сондай-ақ тиісті мемлекеттік органдар қағидаттардың тікелей әрекет ету аясы болып табылады. Процесті жүзеге асыратын мемлекеттік органдар белгіленген қағидаттарға сәйкес әрекет етуге тиісті және оларды бұзған жағдайда барлық жауаптылықты көтеруге міндетті.

Түйін сөздер: жеке тұлға, адамның құқықтары мен бостандықтары, тұжырымдама, құқықтық саясат, қылмыстық процестің қағидаттары, иммунитет, жеке басқа қол сұғылмаушылық.

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К вопросу о принципах уголовного судопроизводства

В данной статье автором рассмотрены принципы уголовно-процессуального права как процессуальные гарантии прав и законных интересов личности в уголовном процессе. Принципы выражают сущность и содержание уголовного процесса, характеризуют самые важные его свойства и качественные черты, предмет и метод процессуального регулирования. Своим адресатом они имеют человека и гражданина и соответствующие государственные органы. Органы государства, ведущие процесс, должны действовать на основе установленных принципов и несут все последствия, связанные с их нарушением.

Ключевые слова: личность, права и свободы человека, концепция, правовая политика, принципы уголовного процесса, иммунитет, неприкосновенность личности.

**TO A QUESTION
OF THE PRINCIPLES
OF CRIMINAL
PROCEEDINGS****Introduction**

Formation of the constitutional state and development of our society significantly depends on ensuring the rights of the personality in any instances, including in criminal legal proceedings. The problem of ensuring the rights of the personality in criminal legal proceedings is one of constant topical issues of progress in any democratic state. The constitution of the Republic of Kazakhstan proclaims human life, its rights and freedom the supreme values, [1] that confers big responsibility on law enforcement agencies of the state. In the Message to the people of Kazakhstan «The Kazakhstan way – 2050: The uniform purpose, uniform interests, the uniform future» the President of the country N. A. Nazarbayev correctly notes that today: «Equality before the law has to become a real basis of a law and order. The judicial system has to become in practice transparent and available, simply and quickly to solve all disputes. It is necessary to lift quality of work of all law-enforcement system. People in the shoulder straps, allocated with big powers, have to differ irreproachable conduct and high professionalism» [2]. Construction in the Republic of Kazakhstan of the constitutional state assumes strengthening of guarantees of the rights, freedoms and legitimate interests of citizens. This situation is of particular importance in the sphere of criminal legal proceedings which is interfaced to invasion into private life of citizens, freedom and security of person restriction, application of measures criminally – procedural coercion.

The attention to this problem considerably increased, in particular, because Kazakhstan everything shows commitment to the principles of the constitutional state, to the International standards in the field of the rights more actively person. The country joined the international Covenant on Civil and Political rights of 1966. The constitutional norms and the criminal procedure relations which have arisen on the basis of their direct action provide protection of the basic constitutional laws and freedoms of participants of criminal legal proceedings. This purpose is served, first of all, by the constitutional laws of the personality which are a security measure of other rights, and also additional conditions and rules of appointment and the productions of separate procedural actions preserving the rights of citizens against unreasonable restriction. Besides, the

Constitution of the Republic of Kazakhstan installed system of the principles of criminal legal proceedings and justice that allows to consider it as legal base of the industry legislation. Norma Constitution the Republic of Kazakhstan is also guarantees of application of international legal norms about human rights and the citizen by criminal case production in a stage of preliminary investigation and in court. The universal declaration of human rights and the International Covenant on Civil and Political rights, formulating definitions of the fundamental rights and personal freedoms, notes that recognition of the advantage inherent in all members of a human family, and equal and their inalienable rights is a basis of freedom, justice and a universal peace. According to p.1 Art. 2 of this document each state participating in it undertakes to respect and realize all being in limits of its territory and under its jurisdiction to persons the rights recognized in the present Pact [3, p. 2].

If the personality possesses a constitutional law on inviolability, the state is obliged to guarantee realization it in relation to each individual. This situation is especially actual in the sphere of criminal trial. Therefore integrity of human beings as the right is transferred to other quality and becomes the predetermining and fundamental principle of criminal legal proceedings.

«The principles and tasks, defining a place and a role of criminal trial in structure of the social relations, fix not only an order of counteraction to crimes public legal methods, but also define the status of the personality in system of interaction of the state and the citizen by criminal cases production. Thus it must be kept in mind that the principles and problems of criminal trial not simply the standards of universal character extending the action to all course of criminal procedure activity. The principles and problems of criminal trial are the fundamental ideas defining spirit of the most criminal legal proceedings, a fundamental principle of all regulated by the right public the relation, arising in this sphere» [4, p. 51-52].

The principles criminally process are the fundamental, basic ideas which are cornerstone of criminal legal proceedings. Their regulating influence penetrates all stages of criminal trial. The most important of them are fixed in head 2 the Code of criminal procedure of the Republic of Kazakhstan (RK Criminal Procedure Code), called «Tasks and the principles of criminal trial».

«Value of the principles of criminal trial consists that their violation, depending on its character and importance, attracts recognition of the taken

place proceeding invalid, cancellation of the decisions passed during such production or recognition of the materials collected thus not having a strength of evidence. The code of criminal procedure of the Republic of Kazakhstan consolidates 22 principles: Legality (article 10); Justice Implementation only court (article 11); Judicial protection of the rights and freedoms of the person and citizen (article 12); Respect of honor and dignity of the personality (article 13); Integrity of human beings (article 14); Protection of the rights and freedoms of citizens by production on criminal cases (article 15); Personal privacy. Secret of correspondence, telephone negotiations, post, cable and other messages (article 16); Inviolability of the dwelling (article 17); Inviolability of property (article 18); Presumption of innocence (article 19); Inadmissibility of repeated condemnation and criminal prosecution (article 20); Justice Implementation on the basis of equality before the law and court (article 21); Independence of the judge (article 22); Legal proceedings Implementation on the basis of competitiveness and equality of the parties (article 23); Comprehensive, full and objective investigation of facts of the case (article 24); Assessment of proofs on internal belief (article 25); Providing to the suspect, accused the rights for protection (article 26); To give Release from a duty testimony (article 27); Ensuring the right for the qualified legal aid (article 28); Publicity (article 29); Language of criminal legal proceedings (article 30); Freedom of the appeal of procedural actions and decisions (article 31) [5, p. 4-5].

Main part

Integrity of human beings plays an important role in system of the principles of criminal trial. In legal literature concerning the term «inviolability» there is no unity of opinions. Thus the points of view of scientists concerning understanding of the term «inviolability» the very different. A number of scientists, supporters of broad interpretation understand as inviolability of the right of each citizen on protection and protection against illegal infringement, of the main vital benefits and values, inseparable from the personality (life, health, freedom, honor and advantages) [6, p. 291].

The following group of authors included in contents of the term inviolability and protection a condition of activity of the personality, in that number inviolability of the dwelling [7, p.16] and protection of property of the personality [8, p. 34]. Some of them designed, from our point of view, unreasonably broad concept of inviolability which covers

almost all components characterizing the sphere of private life, proving similar approach by that at violation of inviolability of the dwelling, secrets of correspondence and other attributes of private life of citizens, object of infliction of harm is not the room where there lives the person, not letters, not telegrams, etc., and the personality with views inherent in it, values, interests [9, p.11].

Opponents of broad interpretation of the term «inviolability» pointed to that circumstance that it is necessary to refer only those objects which are directly connected with existence of the personality, instead of with conditions in which there is this existence to security of person. From this point of view, according to A.A. Opalev, objects of security of person is «the physical condition of the person which treat life, health, corporal integrity (physical integrity); opportunity to have itself and at discretion to define a place of stay and an occupation (inviolability of individual freedom); honor, advantage, moral freedom (spiritual inviolability)» [10, p. 23].

We think that the reason of similar ambiguous approach to understanding of the term «inviolability» is covered in ambiguity of definition of object of inviolability. In science there are at least four bases from which researchers proceed when determining object of inviolability:

First, the legal interpretation which is guided by the text of regulations, the majority from which reduces security of person to inadmissibility of illegal arrests and detentions. For example «Everyone has the right for a personal liberty. Arrest and detention are allowed only in the cases provided by the law and only from the court sanction with granting to the arrested of the right of the appeal. Without court sanction the person can be subjected to detention for the term of no more than seventy two hours. « (Article 16 of the Constitution of RK) [1, p. 8].

Secondly, there is a state and legal interpretation which characterizes the right for security of person as a personal freedom from the state as «a complex of the legal norms defining border for invasion of the government in area of physical integrity of the person» [11, p. 311].

In the third, social interpretation which includes in the maintenance of a human right on security of person inadmissibility of restriction of physical (corporal) integrity, individual freedom (freedom to have itself) and spiritual freedom of the person within social need. Thus it is a question of inadmissibility of restriction of freedom of the person not only from the state, but also other people.

In the fourth, etymological interpretation which proceeds from the term «security of person» which

has occurred from an adjective «inviolable», interpreted dictionaries as «preserved, protected by the law from any encroachment from somebody» [12, p.635].

«Person» – broader concept, than «personality». «Personality» – more concrete social characteristic of «person», rather later product of development of the person because «personality» aren't born, it become. The personality it isn't simple set of the characteristics of the person created in the social circle, but such set which gives the grounds to speak about the personality as a certain integrity in which all characteristics interconnected and are mutually caused [13, p.635]. The person in the development can be improved as the personality. to tower in own idea of and in opinion of people around, but can fall, degrade under the influence of various circumstances. However even at commission of an immoral act or illegal act it doesn't stop being the personality, and it can't refuse the right to be considered that. Finding the person guilty of a crime, the court doesn't cease to consider him as the personality and doesn't deprive of it the right for advantage even in case of application to it the most severe punishment. Told concerning court concerns all bodies and the officials conducting criminal trial – judges, the investigator, the chief of investigative office, the prosecutor, body of inquiry and the person making inquiry. Making investigative actions and recruiting in their production of citizens, they are obliged to treat them as with persons.

Besides many authors try to open and designate the terms «inviolability» and «immunity». One group of authors identifies these terms, other group of scientists divides their borders. We consider that these terms certainly closely interconnected, but not the identical. Moreover, inviolability if to take its etymological and legal interpretation as a basis, forms a core of a definition of immunity representing individual freedom and legal protection of certain legal entities from the measures of procedural coercion established by norms of the administrative, criminal, criminal procedure law, for the purpose of guaranteeing free implementation by these faces of the of function in society and the state.

«The person in society is limited by a certain framework. External borders of a frame (integrity of human beings) protect it from invasion of society, the state, other people into its free state, internal limits (personal liberty) – opposite, don't allow the person to dispose of the rights to the detriment of the rests. Integrity of human beings covers only a society field of activity (its separate individual, group of individuals) concerning the particular person,

instead of its own activity. Integrity of human beings covers many rights: the right for life, the right for health, the right not to be exposed to tortures, etc. But doesn't substitute them, and means a ban of any external influence on them without own (personality) on that will (permission), i.e. peculiar «a guarding cover». In its sense of integrity of human beings. The concept of a personal liberty as the second making autonomies of the personality – on the contrary, is defined by its activity, and doesn't cover activity «from the outside». The person constantly is in contact with other people, mechanisms, forces of nature, etc. This contact doesn't take place for it completely: the person constantly is influenced by their influence (physical, mental and so forth) ...» [14, p. 63].

Freedom and security of person – concepts interconnected. The personal freedom is given the chance to the person to think and arrive according to the belief, views and representations about due and desirable, to achieve implementation of goals and thus to realize the «I» in the objective world [15, p. 45]. The personal liberty – is freedom moral, moral, physical. On the one hand, it represents opportunity to carry out legal acts, and with another – independence of compulsory influence from the outside. Thus, it is possible to draw a conclusion that freedom – is the possibility of implementation guaranteed by the state the subject of any actions in compliance with the belief formed according to provisions about necessary and due, which restriction can be carried out only in exceptional cases, the provided norms international and national legislation.

On E.G. Vasilyeva's veracious statement, the personal liberty – is opportunity to dispose of themselves, реализуя own forces, knowledge and means; integrity of human beings – «the right for such state at which constraint of moral, moral, physical and other integrity of the person by coercion isn't allowed from the state, officials, other citizens», and together – it «a two-uniform basis of psychophysical integrity and an autonomy of the personality» [14, p. 32]. Thus, integrity of human beings – is a peculiar protective barrier from the external encroachments, allowing fully to realize a personal freedom.

Besides, by consideration of concept of integrity of human beings in a section of criminal procedure legal relationship it becomes obvious: its contents includes two competences – the right for freedom of the citizen from illegal and unreasonable arrests, personal searches, surveys and other illegal coercive measures from government bodies and officials and the right for freedom of the citizen from criminal encroachments of individuals.

Thus, in our opinion, under integrity of human beings in constitutional and legal sense the protection of a physical, psychological, sexual, moral personal freedom guaranteed by the state from criminal encroachments, and also protection against illegal and unreasonable restriction of these freedoms is understood. Consolidating legislatively the right for security of person, the state thereby establishes possibility of the person not to allow infringement of the freedom, to protect it from illegal restriction. Thus, integrity of human beings as a state is realized by means of fixing of the right for such state.

The measure of a personal freedom is directly connected with level of freedom of society. Anywhere in the world there is no absolute freedom. The personality can't be free from society, the same as she can't be free by nature. The person is free in society so as far as it is allowed by level of freedom of the society. Freedom of the individual isn't boundless. Restrictions are connected, first of all, with need of providing a public order, the rights and freedoms of other individuals, the state, ecological security, the constitutional system, an international consent, etc. However, and these restrictions also aren't boundless. So, for example, according to ч.3 Art. 39 isn't allowed in any form the right and freedom restriction, the provided Art. of Art. 10, 11, 13-15, item 1 of Art. 16, Art. 17, Art. 19, Art. 22, item 2 of Art. 26 of the Constitution of the Republic of Kazakhstan. In this case, the speech came about the constitutional norms of the rights and freedoms of the person and the citizen which as much as possible protect from application of measures of the state coercion to them.

As it is truly noted in literature, purpose of criminal procedure activity can't be reached due to unreasonable and illegal restriction of the rights of citizens, violation of their constitutional freedoms. In legal literature there is a lot of divergence concerning concept of the principle of integrity of human beings. Here we concordant with classification of integrity of human beings put forward by E.G. Vasilyeva.

1. Physical integrity (assumes protection against violence, life-threatening and health, violence, not life-threatening and health, protection of sexual freedom).

2. Moral inviolability (honor and dignity protection of the personality).

3. Mental inviolability (protection of a normal course of mental processes).

4. Individual freedom (protection is right to define at discretion a stay place, a freedom of move-

ment, the right for lack of supervision or protection).

5. The general freedom of action (protection of the actions which aren't covered by the formalized right).

6. Personal security (ensuring lack of threat of infliction of harm) [14, p.55].

The rights for integrity of human beings according to I.L. Petrukhin: it is the personal security guaranteed by the state and freedom of the citizen, as well as any person in general, consisting in prevention, suppression and punishability of infringement of physical, moral, mental integrity and personal security [15, p.35].

In the right theory guarantees of human rights and the citizen, as a rule, are understood as system of conditions, means and the ways providing with everything and everyone equal legal opportunities for identification, acquisition and realization of the rights and freedoms. Procedural guarantees of legality and validity of restriction of integrity of human beings set of conditions, means and the ways established by norms of international law and the Kazakhstan legislation, and also the procedural activity carried out on their basis, providing persons protection and protection of its physical, moral and mental integrity, individual freedom, the general freedom of action and personal security from any encroachments in the course of excitement, investigation and consideration of criminal case enters.

Some authors distinguish concept of procedural guarantees of narrow and broad sense. In a broad sense they understand the means established by the procedural law which provide the correct implementation on each criminal case of problems of justice as procedural guarantees; in narrow sense are the those means established by the law with which the rights and legitimate interests of persons participating in criminal trial are protected and provided. According to others, all procedural guarantees promote removal of the correct sentence (and in this sense they are justice guarantees) and therefore help innocent accused to avoid unreasonable condemnation (and in this sense are guarantees of the personality).

As procedural guarantees of the rights and legitimate interests of the personality in criminal trial are considered 1) the principles of criminal trial; 2) procedural form of legal proceedings; 3) the rights enshrined in the law and duty of participants of criminal trial.

The principle of integrity of human beings defines the bases and conditions of restriction of

freedom of the person in criminal legal proceedings, and also a circle procedural guarantees from any violation of the right for security of person. The law define a circle of people concerning which freedom and security of person restriction by criminal case production can be allowed more exhaustively. From sense of Art. 14 of the Criminal Procedure Code of RK follows that such persons, first of all, can be suspected and accused of commission of crime. Besides, the victim and the witness (for example, in case of the room in a medical or psychiatric hospital) can be such persons. The considered principle defines also the bases of restriction of freedom of persons in criminal legal proceedings. To such bases, according to h. 2 Art. 104 of the Criminal Procedure Code of RK, it is necessary to carry: detention, imprisonment, the room in a medical or psychiatric hospital. Application of each of the called measures of criminal procedure coercion is possible only in the presence of properly proved actual basis and observance of the conditions provided by the criminal procedure law. The principle of integrity of human beings also establishes that freedom restriction in criminal legal proceedings is allowed only for strictly certain term after which the person has to be immediately released. So, according to h. 2 Art. 14 of the Criminal Procedure Code to the judgment the person can't be subjected to detention for the term of more than 72 hours.

The most important guarantee of integrity of human beings in criminal legal proceedings is providing the right of restriction of freedom of the citizen only to court. Only for short-term detention of the suspect (for the term of no more than 72 hours) the judgment isn't required. The considered principle provides as well appropriate conditions of the maintenance of the person under guards. In h. 7 Art. 14 of the Criminal Procedure Code are said that the persons detained on suspicion in commission of crime, and also taken into custody, have to contain in the conditions excluding threat to their life and health, other contradicts the international norms [5].

Restriction of the right of integrity of human beings is carried out only in an order and on the bases specified in the law, the bodies possessing the corresponding competence, and only concerning the persons established by the law (those, for example, the suspects accused, witnesses, experts etc. can be). Besides, at restriction of this right it is necessary to be based on the principles of expediency and validity. In this case the purposes of criminal legal proceedings and means of their achievement have to be commensurable. Thus, it is possible to understand the procedural activity of representatives

regulated by the law as restriction of the right of integrity of human beings on that the persons, directed on establishment of right restrictions for permission of the tasks facing criminal procedure legal proceedings.

Correctness of restriction of integrity of human beings is reached if norms of coercion are applied only in the presence of strong reasons (arguments) – proportional on the status with proofs – under by which a pravoprimeritel the data meeting the

requirements of sufficiency, relevancy and the admissibility, capable to convince the reasonable and careful person that coercion is necessary are understood. For ensuring legitimacy and efficiency of restriction of integrity of human beings not the smaller role is played also by perfect observance legislatively the established procedure. However norms have to conform not only to the international standards in this area, but also meet the requirements of morals and moral.

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