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**Procedural guarantees in
criminal legal proceedings of the
Republic of Kazakhstan**

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**Қазақстан Республикасының
қылмыстық сот өндірісіндегі
процессуалдық кепілдіктері**

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**Процессуальные гарантии в
уголовном судопроизводстве
Республики Казахстан**

In this article the concept and value procedural guarantees in the sphere of criminal legal proceedings by the legislation of the Republic of Kazakhstan reveal. And also, procedural guarantees are considered as an instrument for ensuring of the rights of the personality in criminal legal proceedings. Different views of scientists are analyzed, and also own opinion of the author on this problem is given.

Key words: personality, human rights, procedural guarantees, criminal legal proceedings, standards of the Constitution of the Republic of Kazakhstan, rule of international law.

Бұл мақалада Қазақстан Республикасының заңнамасы бойынша қылмыстық сот ісін жүргізу саласындағы процессуалдық кепілдіктердің ұғымы мен мағынасы зерделенеді. Сондай-ақ, процессуалдық кепілдіктер қылмыстық іс жүргізуде жеке тұлға құқығын қамтамасыз етудің құралы ретінде қарастырылады. Бұл мәселеге байланысты әртүрлі ғалымдардың және авторлардың жеке пікірі беріледі.

Түйін сөздер: жеке тұлға, адам құқықтары, процессуалдық кепілдіктер, қылмыстық сот өндірісі, Қазақстан Республикасының Конституциялық нормалары, халықаралық құқық нормалары.

В данной статье раскрываются понятие и значение процессуальных гарантий в сфере уголовного судопроизводства по законодательству Республики Казахстан. Процессуальные гарантии рассматриваются авторами как средство обеспечения прав личности в уголовном судопроизводстве. Анализируются различные взгляды ученых, а также приводится собственное мнение авторов на данную проблему.

Ключевые слова: личность, права человека, процессуальные гарантии, уголовное судопроизводство, нормы Конституции Республики Казахстан, нормы международного права.

**PROCEDURAL
GUARANTEES IN
CRIMINAL LEGAL
PROCEEDINGS OF
THE REPUBLIC OF
KAZAKHSTAN**

Criminal legal proceedings – very difficult, being in dynamics substance, one of ways of existence of a social matter. Procedural guarantees are its integral part, representing set of the components of very difficult system of the mechanism of right providing which are in close internal connection.

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 heavy 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: «The 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. The people in shoulder straps allocated with big powers have to differ in irreproachable conduct and high professionalism» [2].

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 human rights more actively. The country joined the International Covenant on Civil and Political Rights of 1966.

As it is noted in the Concept of legal policy of the Republic for the period from 2010 to 2020 approved by the Decree of the President of the Republic of Kazakhstan from August 24, 2009 No. 858 «the most important link of legal policy of the state is the criminal policy which improvement is carried out by the complex, interconnected correction criminal, criminally – procedural and criminally – the executive right, and also right application» [3, 2 p.]. All this demands to reconsider cardinally settled ideas of mechanisms of ensuring the rights of the personality.

The place which is taken by human rights in culture of society in general, in political culture in particular, in many respects is defined

by character of a political regime, level of social and economic development of the country, laws and historical traditions, and also features of mentality of citizens. All history of development of humanity, in fact, accumulates and reflected in security of the personality – in other words, in human rights. Among cultural wealth of a modern world of law of the person occupy one of the most important places. Besides, for Kazakhstan the situation with protection of human rights becomes an important indicator, guided by democratic legal values which have to become the most important factor of strategy of development of Kazakhstan.

Creation 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, restriction of freedom and security of person, application of measures criminally – procedural coercion [4, 12 p].

The interrow Covenant on Civil and Political rights provides obligations of each State Party of the Pact «to provide to any person, the rights and which freedoms recognized by the present Pact are broken, an effective remedy for legal protection ... to provide application of remedies by the competent authorities when they are provided» (item 3 of Art. 2) [5, 52 p.].

In Russian the word «provide» means to make quite possible, valid, really feasible [6, 424 p.]. This term most successfully characterizes the condition of its rights and legitimate interests wished from the point of view of the individual. Using in rules of law (for example, the Art. 26, Art. 28 of the Code of criminal procedure of the Republic of Kazakhstan) the formulation «ensuring the rights», the legislator emphasizes what exactly the personality and the qualitative properties defining it are in this case direct object of legal protection.

The prominent Kazakhstan scientist, professor E.O.Alaukhanov writes: «Person» – broader concept, than «personality». «Personality» – more concrete social characteristic of «person», rather later product of development of the person because aren't born «personality», it become. The personality it isn't simple set of the characteristics of the person created in the social environment, 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 [7, 71 p.].

In the theory of criminal trial as a synonym of «procedural means of ensuring of the rights of the

personality» also such term as «procedural guarantees» is used. The analysis of the current legislation gives the grounds to draw a conclusion that sense and purpose of the called terms identical. In this regard we agree with V.S. Shadrin that they «should be perceived as synonyms» [8, 39 p.].

«In this regard the question of procedural guarantees of human rights at investigation and judicial permission of criminal cases gains huge value because the status of the personality in legal proceedings is a cornerstone of all science of criminal trial. And from how this problem in structure of criminal procedure activity is solved, it is possible to draw a conclusion about a level of development of society and degree of the statement in it universal values of a modern civilization. Reconstruction of the criminal procedure legislation and the essential transformation of procedure of law-enforcement activities for criminal cases connected with it cause need of further theoretical researches for the specified sphere» [9, 6 p.].

Procedural guarantees in the sphere of criminal legal proceedings are derivative of the social and economic, political, moral and ideological and legal means and ways providing appropriate performance of problems of criminal trial, protection and real implementation of the rights and duties of subjects of criminal legal proceedings, and in necessary cases – effective protection against possible violations.

Social and economic, political and ideological (spiritual) guarantees can be carried to number of the general guarantees in criminal trial, while legal – to special guarantees [10, 211-212 p.].

Social and economic guarantees, creating the corresponding economic base, provide the material I will shift protection of the personality, her rights and freedoms, interests of society and the state during criminal procedure activity. Political guarantees give the corresponding orientation to policy of the state on creation of conditions for fast and full disclosure of crimes, criminal prosecution and charge of the persons which made them in an accord with ensuring the rights and legitimate interests of the personality who got to the sphere of criminal justice. Ideological guarantees create the certain moral atmosphere in society expressing approval of purpose of criminal legal proceedings and stimulating citizens to render assistance of criminal legal proceedings to bodies in achievement of its purposes and to exercise public control over observance of the rights and freedoms of participants of criminal legal proceedings.

The general guarantees form a complex of conditions which provide in general reality of compre-

hensive, full and objective production on criminal case. But they define only potential possibility of realization of problems of criminal legal proceedings and achievement of its appointment. These guarantees will automatically not work as represent only the main prerequisites of effectiveness of the right. Which direct implementation is connected with a legal embodiment of the general guarantees? Therefore legal (legal) guarantees possess a special role among measures of ensuring criminal procedure activity. Their social appointment consists, first, in standardly to fix the general guarantees and by that to give them obligatory character. Secondly, legal guarantees detail provisions of the general guarantees, creating the concrete rules of conduct providing the rights and freedoms of citizens in various spheres of public life. Kind of legal (legal) guarantees are guarantees procedural along with which material legal guarantees (the standard establishments defining conditions of realization of the rights and freedoms), ideal legal guarantees are also allocated (for example, legal presumptions, legal fiction) and technical and binding character of precepts of law [11, 206 p.].

On essence and the maintenance of procedural guarantees in legal literature there is no consensus. It is represented that the judgments stated relatively interpretations of this concept can be united in three main points of view.

According to the first group of scientists, as legal (legal) guarantees it is necessary to consider only the rules of law establishing procedural utilities. «Legal guarantees of legality», – I.S. Samoshchenko writes, are special standardly – the legal means (the rules of law and legal sanctions) guaranteeing steady execution of requirements of the right by all participants of the public relations (and in particular, prevention of an arbitrariness from bodies and officials of the states in relation to citizens), providing restoration of the violated rights and punishment of violators of legality [12, 64 p.]. M. S. Strogovich carries to procedural guarantees «the means established by the procedural law which provide the correct implementation on each criminal case of problems of socialist justice» [13, 56 p.].

Supporters of the second point of view identify legal guarantees with procedural activities for realization of rules of law. So, L.A. Krotova, based on that precept of law cause the necessary behavior of participants of the public relations in the course of their realization in one of the forms, considers that «to say that precepts of law can serve as legal guarantees out of process of the implementation, it isn't possible». From here it defines procedural guaran-

tees «as implementation by certain subjects containing in norms criminal procedural the rights of instructions» [14, 102 p.].

In our opinion, each of the given points of view is right only partially. Existence of this or that precept of law isn't the operating guarantee of legality and validity of criminal legal proceedings yet. The rights and duties enshrined in precepts of law perform opportunity, but not reality of such providing as the guaranteeing influence of rules of law is shown as a result of their realization through legal relationship. It is necessary to recognize fair S. A. Alexandrov's statement that «if the law – a basis of legal activity, activity – means of implementation of the law» [15, 96 p.]. Implementation of requirements of the precept of law causes a certain behavior of subjects of the public relations which serves as a real, effective instrument for ensuring of problems of criminal legal proceedings. This behavior can be expressed in abstention from commission of illegal actions, as well as in commission of the actions permitted by the procedural law.

At the same time it is impossible to agree that only criminal procedure activity carries out a role of procedural guarantees. First, already fact of existence of rule of law makes preventive impact on behavior of subjects of criminal trial. Their interest achievement of result of criminal legal proceedings, favorable for itself (satisfaction of a personal, state, public legitimate interest) causes their aspiration to work according to instructions of a legal procedure, to use only lawful means and ways for achievement of the problems of criminal legal proceedings facing them. Secondly, emergence, change, development and the termination of legal relationship depends on implementation of precepts of law. They define types of procedural actions and decisions which it is offered tasks and achievement of purpose of criminal legal proceedings. Thus, rule of law, to be exact, the subjective rights and legal duties affirmed in it, are a legal relationship form, and actions of subjects of legal relationship form its contents. In view of indissoluble communication of form and content it is represented to set off the legal procedure regulating the rights of a duty of subjects of criminal legal proceedings by right understanding of procedural guarantees as, and carried out by them according to requirements of legality, activities for application and realization of a legal procedure.

It should be noted that some scientists, recognizing existence of security function as at rules of law, and activity, to consider them independent versatile guarantees. So, E.O. Alaukhanov, along with guarantees refers rules of law, allocates the organized

guarantees representing activity of government bodies, public organizations and officials [16, 236, 240 p.]. N. V. Vitruk writes about need of providing not only the rights, duties and legitimate interests with the corresponding legal guarantees, but also about providing the last. As such means he suggests to consider activity [17, 201 p.]. These points of view are represented disputable. Activity of legal entities has the procedural and legal, but not organizational nature. It evolves from rules of law and is realized in the form of legal relationship. But to recognize the considered statements completely incorrect it is impossible. Their authors fairly note existence of the fact of distinctions as rules of law and procedural activities for ensuring appropriate result. But these differences don't conduct to emergence of two independent types of guarantees. Norms of the criminal procedure right and procedural activity are necessary elements of procedural guarantees and correspond as means and ways of achievement of problems of criminal legal proceedings.

In Russian it is accepted to understand the tool (a subject, set of adaptations) for implementation of any activity as the term «means», and the word meaning is interpreted «way» as the action or system of actions applied at execution of any work, at implementation something [6, 758, 755 p.]. Therefore we consider that set of means (rules of law) and ways (procedural activity) forms uniform legal concept of procedural guarantees.

Criminal procedure guarantees most often classify by their orientation. So, R.H. Yakupov allocates such criminal procedure guarantees, as a) rule of law; b) unity and strengthening of legality; c) protection of the rights and personal freedoms; d) protection of legitimate interests of society; e) protection of legitimate interests of the state [18, 20 p.]; O.K. Kopabayev distinguishes guarantees: a) due process of law; b) rights of the victims; c) from self-accusation; d) self-defenses of the rights and freedoms; e) responsibility for performance of obviously criminal order [19, 103-126 p.].

Despite an essential variety of procedural guarantees, all of them can be united in two main groups: guarantees of the rights and legitimate interests of the personality in the sphere of criminal legal proceedings and a guarantee of justice. On the last, in the narrow sense of the word, we understand the legal means and ways providing criminal procedure activity of bodies of criminal legal proceedings and their officials. They guarantee interests of society and state in criminal trial which are embodied in purpose of criminal legal proceedings. Guarantees of justice and a guarantee of the rights of the person-

ality are at the same time guarantees of establishment of truth, i.e. provide the purpose of the related activity, general for all criminal trial.

At the same time it is impossible to deny that in criminal trial is and always there will be many provisions really capable in a varying degree to serve at the same time ensuring interests of the personality, society and state. The personality and the constitutional state – not the opposite, conflicting parties though the government limits leaning on possibility of coercion and possibility of lawful intervention in private life of citizens for achievement of the objectives of fight against crime concerning the personality have to be strict and are unambiguously defined. Recognizing a priority of the rights of the personality in relation to interests of the state, it is necessary to understand clearly that without the state, without the legal procedures established by the state and provided to them these rights can't be exercised [20, 11-13 p.]. The strong state recognizing in relationship with the personality her priority on the basis of the rule of law capable if necessary effectively to protect democracy all lawful means, is the guarantor of a democratic legal status of the personality.

Applying measures criminal procedural coercions, the state provides interests of society in disclosure and investigation of crimes and fair punishment of the persons guilty of their commission. Possibility of use of procedural means of compulsory influence for the solution of problems of criminal legal proceedings is a guarantee of the right of the victim for access to justice and on indemnification, caused by a crime. As it is paradoxical, but application of criminal procedure coercion concerning one accused can be a procedural guarantee for others – expressed desire and aspiration to render assistance to justice.

Guarantees of the rights of the personality in criminal legal proceedings, first of all, act as a security measure from illegal and unreasonable restriction of the rights and freedoms of participants of process. They allow the citizen and in criminal trial to remain the personality and also to exclude or, at least, to reduce to a minimum investigative and miscarriages of justice.

Thus, between guarantees of the personality and guarantees of justice in criminal trial there is a certain interrelation. Ensuring interest of the personality shouldn't destroy possibility of protection of public interest and vice versa, protection of public interest shouldn't interfere with legal possibility of protection of private interest. The ratio of guarantees of the personality and justice has to be focused

on the accounting of balance of interests of the participants of criminal legal proceedings allowing achieving it the objectives. The systematization of criminal procedure guarantees testifying to their coherence is means of a legal compromise of interests of the personality and society (state) in the sphere of criminal legal proceedings.

Definition of essence and orientation of procedural guarantees allows us to formulate their concept. Procedural guarantees in the sphere of criminal legal proceedings are the means and ways providing achievement of purpose of criminal legal proceedings and possibility of realization by all participants of criminal trial of the rights and performance of duties established by the law.

The scientists studying a perspective of legal (procedural) guarantees the set of their classifications by various bases is offered. Each of them has the estimated value as opens separate aspect of the legal characteristic of procedural guarantees.

To define concrete legal means as a procedural guarantee it is possible only within one or several uniform legal relationship directed on achievement of criminal trial of result, certain, significant for the participant. Depending on the solved tasks the procedural means which are carrying out a role of the main tools, and auxiliary and security, i.e. serving in this legal relationship as procedural guarantees are defined. If there is a need for realization of a procedural guarantee, it becomes the main content of new legal relationship, and its place is taken by other procedural guarantee. Invariable is only a specific belonging of the used group of legal means to guarantees of justice or guarantees of the rights of the personality in criminal trial.

Thus, the concept of procedural guarantees of criminal trial is broader than concept of criminal procedure guarantees. It is only expedient to carry to the last what are fixed in the criminal procedure law and work only in the sphere of criminal legal proceedings.

Ensuring the rights of the personality and achievement of the objectives of criminal legal proceedings is possible only as a result of coordinated actions of all types of procedural guarantees. Norms of international law establish the minimum standards of the rights and freedoms of participants of legal proceedings and their special procedural guarantees which have to be fixed in the national legislation. They serve as a reference point for the legislator, obliging him to make corresponding changes and additions to the Code of criminal procedure and other laws containing criminal procedure norms. International legal guarantees can directly are applied to ensuring the rights of the personality in cases of absence of those in the Kazakhstan right or contradictions to standards of the criminal procedure legislation of Kazakhstan.

The constitutional norms and the criminal procedure relations which evolved from their direct action provide protection of the basic constitutional rights and freedoms of participants of criminal legal proceedings. This purpose is served, first of all, by the constitutional rights of the personality which are a security measure of other rights, and also the additional conditions and rules of appointment and production of separate procedural actions preserving the rights of citizens against unreasonable restriction. Besides, Constitution of the Republic of Kazakhstan installed system of the principles of criminal legal proceedings and justice that allows considering it legal base of the industry legislation. Norma Constitution of the Republic of Kazakhstan are also guarantees of application of international legal norms on human rights and the citizen by criminal case production in a stage of preliminary investigation and in court. Having included many universally recognized norms of international law in Constitution of the Republic of Kazakhstan (Art. 13,14,16, the Section VII), the legislator thereby promoted their entry into system of the real existing rules which are sources of procedural guarantees.

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