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CRIMINALIZATION OF VIOLATION OF THE RIGHT TO LEGAL ASSISTANCE IN THE REPUBLIC OF AZERBAIJAN: THEORETICAL JUSTIFICATION

The article analyzes the means of criminal legal protection of a person's constitutional right to legal assistance and defense. It turns out that the activity of a defender of a person is an important part of justice in the modern democratic state. The author substantiates the need for independent criminalization of "violation of the right to legal assistance and defense" in the Azerbaijani Republic. Analysis of current legislation of the Azerbaijani Republic permits to conclude that enforcement of the constitutionally enshrined right for legal assistance is a complex intersectional institute which is initial for all this process, acts at all its stages, reflects dominant in the society idea on endorsement of human rights and freedoms. The author concludes that the constitutional right of everyone to legal assistance is highly important in the system of constitutional guarantees of the rights and legitimate interests of a person participating in trial. This right is general for all branches and implemented through the provisions of various legal acts of the Law of the Azerbaijani Republic. The corresponding amendments to the current Criminal Code of the Republic of Azerbaijan were offered.

Keywords: justice, defender, lawyer, right to legal assistance, right to defense.

The constitutional right of each person to legal assistance is highly important in the system of rights' and legitimate interests guarantees of a person participating in a trial. Significance of this right as an additional guarantee for abidance of other rights and legitimate interests of a person is determined by its role of the element in legal protection mechanism which is understood as dynamic system of legal rules, means and actions aimed at prevention of human rights violation or their restoration in case of violation.

Nowadays the Criminal Code of the Azerbaijani Republic does not provide for sufficient list of criminalized actions against lawful activity of defense lawyer or person's representative. In particular, *corpus delicti* of such crimes as violation of the right to defense, intrusion in the activity of defense lawyer or person's representative, intentional destroy or damage of lawyer's property are absent in the Criminal Code of the Azerbaijani Republic. It is considered necessary to remove this gap and consequently suggested to criminalize the action on 'violation of the right to defense' and amend accordingly the Special Part of the Criminal Code of the Azerbaijani Republic which is substantiated by the below mentioned.

Work of defense lawyer is an integral part of justice. Without guaranteed right of a person to professional legal assistance the pretrial investigation turns to punitive, and trial becomes inquisitional process. Establishing of truth in a trial upon objective and impartial examination of evidence and taking of equitable decision is not possible without participation of professional defense lawyer.

The background for criminalization of socially dangerous encroachments on the human right to legal assistance and defense in the Azerbaijani Republic is person's particular value and requirement of criminal legal defense of his/her rights and freedoms observance during court proceedings. Existence of the Republic of Azerbaijani as democratic, legal, secular state is not possible without ensuring of legal assistance accessibility to all layers of the society and establishing by this of real opportunity of efficient legal protection of citizens rights, freedoms and legal interests.

We are convinced that criminalization of violation of the right to legal assistance and protection in the Azerbaijani Republic corresponds to scientific principles of criminalization, especially to the principles of action's public danger, criminal political adequacy, constitutional conformity, system-legal non-contradiction of certain action criminalization, definiteness and consistency of terminology.

The principle of action public danger is decisive in determination of various offenses as criminal. Public danger is often understood as main substantive feature of a crime which reflects its key content and means crime's capability to cause or threat causing damage to the object of criminal legal defense. This is objective feature of an action, real breach of relations established in the society, impeding their existence and development. Objectivity of crime's public danger is expressed by objective character of the damage which it causes (material, physical, moral)¹.

The necessity of criminal legal protection of person's right to legal assistance from certain types of infringements is determined primarily by damage character and size caused in the result of such actions. For instance, danger of this crime is growing if an innocent person was found guilty in this crime or ensuing of harsh consequences for a person.

One of the criteria for estimation of public danger level is an assessment of infringements subject. The number of features related to crime subject may impact estimation of danger level of the one and the same crimes' type. Such features are the age, occupied position, stability of crime scene and so on. The crime's 'violation of the right to defense' subjects are state officials (investigators, prosecutors, judges) who are given by law with authoritative powers in relation to a person (indicted person, witness, accused person, etc.) and a priori entitled with greater volume of competence and professional knowledge.

Hence, it is found that encroachment on person's right to legal assistance is characterized by the level of public danger sufficient for defining such infringement to be criminal.

The principle of constitutional conformity is implemented in part 1 of the Article 12 of the Constitution of Azerbaijan stipulating that ensuring the rights and liberties of a person and a citizen, decent living conditions for the citizens of the Republic of Azerbaijan is the highest objective of the State. The Article 61 of the Fundamental Law of the Azerbaijani Republic guarantees that everyone has the right for obtaining qualified legal advice. In specific cases envisaged by legislation legal advice shall be rendered free, at the governmental expense. Every citizen has the right for the lawyer's advice from the moment of detention, arrest or accusation with crime by competent state bodies².

Mentioned constitutional rules confirm the right to legal assistance and right to defense for any person. The essence of the constitutional right for legal advice is a guaranteed by the Constitution and other state laws possibility to obtain qualified legal assistance related with application of legislation in practice for asserting of person's rights and interests³.

Consequently, ensuring of proper implementation of the right to legal assistance and defense by means of criminal legal protection corresponds to the principle of constitutional conformity.

Principle of criminal political adequacy of criminalization includes requirements on its compliance with key trends of social and criminal policy of the state, to the level and character of legal consciousness, and social opinion.

Ensuring of person's rights and freedoms in Azerbaijan has tasked drastic democratic legal reforms in the country. For implementation of Constitutional provisions in February 1996 the President of the Azerbaijani Republic adopted the Order provided for establishment of the Commission on legal reform which is composed of famous specialists in legislation, judges, scientists-jurists, law enforcement authority officials.

Within the framework of judicial legal reform in Azerbaijan numerous events were held aimed at harmonization of judicial legal system with international and European standards. One of the first steps of judicial legal reform was a creation of the Concept of its implementation where the main objectives and tasks of judicial reform were determined, namely ensuring independent functioning of judicial authority within law-governed state, ensuring citizens right for fair trial, obtaining of legal advice. Judicial legal reform gradually held in Azerbaijan is targeted at fixing and guaranteed implementation of person's and citizen's rights in all areas.

The Law 'On lawyers and advocacy' as of December 28, 1999 elaborated in partnership with experts of the Council of Europe, German Society of Technical Cooperation (GTZ) and the World Bank, ensures

¹ Кривоченко Л.Н. (1983). *Классификация преступлений*. Харьков: Высшая школа, 32.

² Конституция 1995 (референдум Азербайджанской республики) *Официальный интернет сайт Президента Азербайджанской Республики* <<http://ru.president.az/azerbaijan/constitution>> (2018, June, 11).

³ Смах, В.В. (2011). Уголовная ответственность за нарушение права человека на правовую помощь: *Диссертация на получение научной степени кандидата юридических наук*. Львов: Львовский государственный университет, С 54.

equity of the rights of the part of charge and defense, provides for strong guarantees of constitutional rights for legal protection, right for fair treatment in the court and independent advocacy. The Law stipulates main principles of defense independence in its functioning. According to legislation the party of defense participates in all investigative procedures and in the court and has the right to present proofs of defense confidentially and without barriers in meeting client. Present Law stipulates legal status of advocates, their independency and fundamentals of self-government guaranteeing by this independence of lawyer profession.

Since 1 September 2000 the Criminal, Criminal Procedural, Civil, Civil Procedural Codes and the Code on Administrative Offences, the Code on Punishment Execution were enforced being elaborated under participation of authoritative foreign experts with regard to international and European standards.

In particular, the Article 19 of the Code of Criminal Procedures of the Azerbaijan Republic states that during the criminal prosecution the inquiry officer, investigator, prosecutor and court must take measures to guarantee the right of the victim, the suspected and the accused person for proper legal assistance. During the questioning of the victim or witnesses, the prosecuting authority may not prevent the lawyer invited by them as their representative from accompanying them¹.

For investigation of crimes against justice the Investigation Department was established at the Ministry of Justice. For deepening the cooperation with local and international non-governmental organizations and ensuring observance of the rights of condemned persons in detention places, the Department on human rights was launched in the Ministry of Justice²

At modern stage of Azerbaijan development the strengthening of efforts in establishing of law-governed state and protection of human rights is determined as one of key directions of the state policy. The Azerbaijani Republic promotes cooperation with powerful international institutions performing activity in human rights area, the state became a participant of more than 50 international documents in human rights protection and made significant progress in execution of international obligations in this field.

Within the State program on human rights protection approved by the Order of the President of the Azerbaijani Republic on June 18, 1998 the legislative and institutional reforms were held. Relying on the principles of democratic justice the new court system, new institutions, such as constitutional supervision, human-rights ombudsman were established, law-enforcement activity was improved, activity of non-governmental organizations and media was enlarged, efficient protection mechanisms in the area of human rights enforcement were created. For the future the following tasks were determined: ensuring of complete correspondence of the legal acts of the Azerbaijan Republic to international standards in human rights, development and execution of new strategy on cooperation with international organizations, enhancement of state bodies activity in human rights protection, promotion of scientific analytical works, expansion of legal education work, development of interrelations between state and civil society.

Considering protection of human and citizen rights and freedoms in the Azerbaijani Republic as general state objective, taking into account the priorities in human rights protection and promotion of democracy and rule of law determined by the United Nations Millennium Development Goals and Third Summit of the Council of Europe, for extension of actions in human rights protection, the National plan on human rights protection in the Azerbaijani Republic was adopted by the Presidential Order as of December 28, 2006, № 1880.

In particular, by the paragraph 29 of the adopted National Plan the measures on strengthening of advocacy in the Azerbaijani Republic, improving performance of its activity and ensuring its independence, as well as increasing amount of professional lawyers in regions for providing people with possibility in obtaining legal assistance were foreseen³.

According to the Article 10 of the Code on Execution of Punishment of the Azerbaijani Republic the right to legal assistance is one of the main rights of the convicted person. In penitentiary institutions

¹ Уголовный кодекс 1999, ст. 251 (Милли Меджлис Азербайджанской Республики). *Собрание законодательства Азербайджанской Республики*, 2000, 4.

² Перечень вопросов, подлежащих обсуждению в связи с рассмотрением третьего периодического доклада Азербайджана 2009 (Комитет ООН по правам человека). *The University of Minnesota Human Rights Center* <http://hrlibrary.umn.edu/russian/hrcommittee/Razerbaijan_2009.html> (2018, June, 11).

³ Смех, В.В. (2011). Уголовная ответственность за нарушение права человека на правовую помощь: *Диссертация на получение научной степени кандидата юридических наук*. Львов: Львовский государственный университет, 54.

of Azerbaijan provision of legal assistance to the convicted person by human rights defender and non-governmental organizations is widely spread practice. For instance, the representatives of the Social Committee on public control of penitentiary institutions functioning attend regularly different detention facilities of the country paying particular attention to provision of relevant legal assistance to sentenced persons.

Based on the Decree of the President of the Azerbaijani Republic 'On modernization of judicial system' and application of the Law of the Azerbaijani Republic 'On amendments and additions to some legal acts of the Azerbaijani Republic' dated on January 19, 2006 the new courts, including regional appeal and local economic courts, were established. Functioning of such courts promotes significant improvement of legal assistance delivery to population in regions and generates motivation for advocacy service.

Hence, the criminal legal protection of relations on ensuring person's right to legal assistance and defense completely corresponds to main trends of state social and criminal policy in the Azerbaijani Republic.

The principle of system-legal non-contradiction of criminalization of the proposed by us infringement lies in determination of hyphenated nature of protection of the right to legal assistance in the Azerbaijani Republic, the part of which is criminal legal protection of this right being a component of single comprehensive mechanism of its legal implementation.

Analysis of current legislation of the Azerbaijani Republic permits to conclude that enforcement of the constitutionally enshrined right for legal assistance is a complex intersectional institute which is initial for all this process, acts at all its stages, reflects dominant in the society idea on endorsement of human rights and freedoms.

The laws of the Azerbaijani Republic on defense lawyer and person's representative activity in rendering legal assistance provide for the right for safety of the mentioned personalities. The Articles 1, 7 of the Law of the Azerbaijani Republic 'On lawyers and advocacy' stipulates that one of the advocacy fundamentals is tackling of intrusion in professional activity of advocates and their associations and pressure from prosecution, judicial, other state bodies, public associations, any enterprise, institution, organization and official; protection and ensuring of lawyers' safety is ensured by the provisions of the Law of the Azerbaijani Republic 'On state protection of the persons participating in criminal proceeding'¹.

The Article 17 of the Law of the Azerbaijani Republic 'On state protection of the persons participating in criminal proceeding' stipulates that established by security authority real evidence on existing danger of execution of murder threat, application of violence to the persons being defending due to the provided by them support to investigation or criminal case proceeding, on destroy or causing of damage to the property of such persons are treated as grounds for application of security measures. According to the Article 3 of the same Law the victims, suspected persons, indicted persons, accused persons, their defense lawyers and representatives are also referred to the subjects of state protection².

The above mentioned rules comply completely with content of the Basic Principles on the Role of Lawyers adopted by the VIII United Nations Congress on the Prevention of Crime in 1990 obliging governments to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority³.

Giving that security for mentioned persons under circumstances and procedure stipulated by law is an important guarantee for ensuring person's right to legal assistance and defense, than the criminalization of infringements on this right corresponds to the principle of system-legal non-contradiction of criminalization.

The principle of terminology definiteness and consistency means that criminalization of infringements on the human right to legal assistance shall be carried out with help of notions determined

¹ Закон об адвокатах и адвокатской деятельности 1999, ст. 19 (Милли Меджлис Азербайджанской Республики). Сборник законодательных актов Азербайджанской Республики, 2000, 1.

² Закон о государственной защите лиц, участвующих в уголовном процессе 1998 (Милли Меджлис Азербайджанской Республики). Законодательство стран СНГ <http://base.spinform.ru/show_doc.fwx?rgn=2736> (2018, June, 11).

³ Распоряжение об утверждении Национального плана деятельности по защите прав человека в Азербайджанской Республике 2006 (Президент Азербайджанской Республики). Газета Азербайджан, 293.

by the law. In current legislation of the Azerbaijani Republic on ensuring human rights for protection during court proceeding the unified notion has not been articulated yet.

The Constitution of the Azerbaijani Republic guarantees the right for obtaining a qualified 'legal advice' for everyone. At the same time, in the context of criminal proceeding the notion 'lawyer's advice' is applied (art.61). The Criminal Procedural Code of the Azerbaijani Republic establishes the procedure on execution of the right to 'legal assistance and defense' (art. 19)¹.

The Law of the Azerbaijani Republic 'On police' uses the notion 'lawyer's assistance'. The Article 1 of the Law of the Azerbaijani Republic 'On lawyers and advocacy' defines that advocacy is independent legal institute, which professionally conducts 'legal defense'².

According to the Article 10 of the Law of the Azerbaijani Republic 'On courts and judges' at any stage of the trial everyone is provided with the right for 'judicial defense'. As well, 'the right to defense' is guaranteed by the means foreseen by legislation and the circumstances for free rendered 'legal advice' at governmental expense are stipulated in pursuance of the Constitution provisions³.

Following the Article 14.4 of the Civil Procedural Code of the Azerbaijani Republic the persons participating in trial may freely choose the lawyers for obtaining of 'professional legal assistance', representation of their interests or execution of their procedural rights.

Based on the analysis of current legislation, taking into account the principle of the highest legal power of the Constitution of the Azerbaijani Republic it is found appropriate to define the proposed by us criminal infringement as follows: 'violation of the right to legal assistance and defense'.

Therefore, the constitutional right of everyone to legal assistance is highly important in the system of constitutional guarantees of the rights and legitimate interests of a person participating in trial. This right is general for all branches and implemented through the provisions of various legal acts of the Law of the Azerbaijani Republic.

Taking into account the validity of grounds for action criminalizing and compliance to scientifically founded principles of illegal actions criminalization, it is suggested to amend the Chapter 32 of the Special Part of the Criminal Code Law of the Azerbaijani Republic with additional Article 290¹ as follows:

"Article 290¹. Violation of the right to legal assistance and defense.

Non-admission or failure to ensure defense lawyer in-time presence and other gross violation of the rights of victim, suspected or accused person for qualified legal assistance and defense committed by inquiry officer, investigator, prosecutor or judge, – punished by imprisonment up to 2 years along with deprivation of the right to occupy determined posts or to engage in a determined activity up to 3 years.

2. The same actions which resulted in miscarriage of justice or other serious consequences, - punished by imprisonment of 3 to 7 years along with deprivation of the right to occupy determined posts or to engage in a determined activity up to 3 years".

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¹ *Уголовно-процессуальный кодекс Азербайджанской республики 2000 (Милли Меджлис Азербайджанской Республики)*. *Газета Азербайджан*, 2001, 162.

² *Закон о полиции 1999 (Милли Меджлис Азербайджанской Республики)*. *Сборник законодательных актов Азербайджанской Республики*, 11, 611.

³ *Закон о судах и судьях 1997 (Милли Меджлис Азербайджанской Республики)*. *Собрание законодательства Азербайджанской Республики*, 5, 413.

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