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Current state of the source of evidence in the form of testimony of the accused

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Abstract. This scientific article examines certain issues of the current state of the source of evidence in the form of testimony of the accused. Scientific interest has been aroused in this issue against the backdrop of the construction of a new three-tier model of judicial and law enforcement activities, providing for maximum respect for the rights and legitimate interests of citizens. The current state of the legal norms governing applications in criminal proceedings is analyzed in abstract form, especially at the stage of completion of the pre-trial investigation and in relation to such an active participant in the criminal process as the accused, in terms of correlation with the rules of evidence. Of particular interest in the scientific article is the presence of a legislative situation in which such a source of evidence as the testimony of the accused has actually dropped out of the system of sources of evidence, despite its formal presence as such among the factual data relevant for the correct resolution of a criminal case. Situations in the current legislation are analyzed in which there is a discrepancy with the previously theoretical interpretation of the rules on evidence, but which make it possible to identify new theoretical solutions that allow resolving such inconsistencies in the provisions of the current norms of the Criminal Procedure Code of the Republic of Kazakhstan, preserving the current system of sources of evidence or justifying a new position in terms of using the testimony of the accused as a source of evidence in modern realities.

Keywords: accused, testimony, source of evidence, prosecutor, indictment, petition.

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Introduction

In the Republic of Kazakhstan, the construction of a new three-tier model of judicial and law enforcement activities continues, based on the experience of OECD countries. Significant changes and additions have been made to the criminal procedural legislation on the issue of delimitation of powers between the investigator, prosecutor and court. Moreover, certain Laws of the Republic of Kazakhstan have revised the procedure for making key procedural decisions in criminal cases, including at the stage of completion of the pre-trial investigation, which contributes to depriving the investigator and interrogator of the function of prosecution and is aimed, first of all, at solving the problems of criminal proceedings specified in part first article eight of the Code of Criminal Procedure of the Republic of Kazakhstan (hereinafter referred to as the Code of Criminal Procedure of the Republic of Kazakhstan) - impartial, quick and complete disclosure, investigation of criminal offenses, exposure and prosecution of those who committed them, fair trial and correct application of criminal law, protection of individuals, society and the state from criminal offenses.

Meanwhile, the changes and additions made, for example, regarding the preparation of a report on the completion of the pre-trial investigation and the indictment, raised a number of questions about the rights of the suspect, the accused, the advisability of leaving the system of sources of evidence in the form in which they are present to the present day, as well as in some cases, questions arose about the real right to freedom of appeal against decisions and actions of criminal prosecution authorities, since the analysis of the norms of the Criminal Procedure Code regulating these issues states the fact that there is no correlation between them and does not correspond in general with the Code of Criminal Procedure, as well as with individual principles of the criminal process.

Solving these issues and existing problems will be the next task for both legislators, scientists, and law enforcers. Let us express our thoughts and formulate a number of conclusions.

Methods

In the process of working on the study, the authors methodologically proceeded from the provisions on a comprehensive analysis of the stated goal. In this regard, general scientific, private scientific and special research methods were used. But they used system analysis as a priority, since an analysis of the evidence used was carried out, thanks to which activities are carried out in the process of cooperation with other law enforcement agencies and other state structures.

Results

The current state of certain criminal procedural norms does not allow us to clearly judge their positive or negative aspects, since it requires thought and time to implement them. But it is obvious that issues arising with the redistribution of procedural powers of the investigator, interrogating officer, prosecutor and court must be analyzed constantly, taking into account

constructive criticism and scientific discussions. The orientation of national legislation towards the experience of foreign countries is always accompanied by inconsistencies with national law. The rules of evidence are no exception. A one-time introduction of changes and additions to the current legislation once again states the fact that with any changes and additions, even to individual norms, their systematic analysis and comparison with others is required, since the negative aspects are obvious. Not so long ago, the President of the Republic of Kazakhstan set the task of conducting an audit of the current criminal and criminal procedural legislation, with a view to eliminating everything that interferes with the work of law enforcement, special government bodies, the prosecutor's office and the court, in the administration of justice. The audit carried out, namely its results, unfortunately, did not become available to the wider scientific community, and many proposals from scientists to optimize the current legislation are still on hold [1], [2].

Discussion

Let's begin our consideration of this issue with the provisions of part two of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan, according to which factual data that are important for the correct resolution of a criminal case are established: testimony of the suspect, the accused. It is assumed that the accused can be interrogated as an accused, to express his attitude towards the accusation.

However, today, in accordance with the amendments and additions to the Code of Criminal Procedure of the Republic of Kazakhstan regarding the preparation of a report on the completion of the pre-trial investigation and the indictment, the accused is not interrogated, since he becomes such only after the prosecutor draws up the indictment and signs it. For other forms of completing a pre-trial investigation, for which an indictment is not drawn up, the situation is similar.

In fact, the latter is accused only for a short time; according to the current legislation, he is not interrogated, and he himself is deprived of the opportunity to express his attitude towards the accusation, and does not even have the right to submit petitions to the prosecutor, since all petitions can be submitted or filed by him in in writing only to the investigator, inquiry officer in the process of familiarizing himself with all the materials of the criminal case, before drawing up a report on the completion of the pre-trial investigation, and after familiarizing himself with the indictment - immediately to the court.

The prosecutor neither interrogates him as an accused, does not find out his attitude to the charges, nor considers any petitions or complaints. As a result, the accused cannot give any testimony, and as a result, the accused’s testimony has actually dropped out of the current system of sources of evidence.

Consequently, the question arises: is it necessary to retain such a participant as the accused in criminal proceedings? After all, almost immediately after a suspect is given the status of an accused, he instantly becomes a defendant.

Well-known Kazakh procedural scientists A.N. Akhpanov, A.L. Khan expressed their attitude on this matter in 2022, pointing out the possibility of an expanded format for the prosecutor’s

affirmative resolution on other forms of completing the pre-trial investigation, where an indictment is not drawn up, which will also include a decision on the prosecutor to bring the accused to trial, and also raise the question on the refusal in criminal proceedings of the status of such a participant as "defendant" and replacing it with the procedural figure "accused". And they suggest that the legislator put the second part of Art. 65 Code of Criminal Procedure of the Republic of Kazakhstan. In addition, in part three of Art. 65 of the Code of Criminal Procedure of the Republic of Kazakhstan propose to replace the word "defendant" with the word "accused", as well as to make a similar technical and legal replacement throughout the text of the Code of Criminal Procedure of the Republic of Kazakhstan [3, p. 56].

In general, one should agree with this proposal, offer new arguments in support of this position of the authors, but also at the same time express one's vision not only on these issues, but in particular on the issue of functioning as an independent source of evidence - the testimony of the accused, as well as reforming the norms of the Code of Criminal Procedure on filing and consideration of petitions in criminal proceedings.

In fact, on the issue of the functioning of the testimony of the accused as an independent source of evidence in the form in which it has to be observed, this is nothing more than a fiction. From the above it follows that under the current legislation it is no longer such a source. This should be stated and acknowledged. No actions are envisaged on the part of the prosecutor to interrogate a person as an accused. As a result, we do not have any testimony from the accused and there is no opportunity to use them as evidence. He formally passes only from the status of a suspect to an accused.

The question arises whether there is a need, in addition to those proposed by A.N. Akhpanov and A.L. Khan decisions, for example, in part two of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan, also to make changes on the issue of the functioning of an independent source of evidence, such as the testimony of the accused?

In my opinion, theoretically there are two options for solving this issue. If you follow the logic of A.N. Akhpanov, A.L. Khan, by excluding the defendant as a participant in the criminal process, then some of the problems will indeed be solved. That is, a criminal case sent to court will become a legal fact that the accused can be questioned directly in court, express his attitude towards the charges, file petitions and exercise all the rights of the accused, as is the case in the generally established theory of criminal justice. process, and in the theory of evidence, in particular, which, by the way, has recently been unreasonably remembered less and less. With this approach, there will be no need to change the second part of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan regarding the independent source of evidence - the testimony of the accused.

But another option is also possible. It consists in shifting the emphasis from the rights of the accused to both the rights of the suspect and the rights of the defendant, while, in theory, it will also be necessary to rethink some established provisions in terms of granting broader rights to the suspect and the defendant, and not the accused. Such a shift in rights in criminal proceedings has already occurred, although few scientists write about it in the scientific press. In the new three-tier model of judicial and law enforcement activities, it is already worth recognizing that it is the suspect who should have greater rights than the accused. Since the lion's share of investigative and procedural actions is carried out in pre-trial proceedings, it is in it that his

rights should be realized to a greater extent. After all, before, and objectively, in the theory of criminal proceedings, it was the accused who had full rights. This too will have to be rethought. An analysis of the provisions of Article 65 of the Code of Criminal Procedure of the Republic of Kazakhstan shows that the accused is granted and can exercise the rights of a suspect, which indirectly indicates a practical combination of the scope of procedural rights.

Taking into account the fact that in the future the legislator will, in any case, have to resolve the issue of sources of evidence in the context of building a new model of judicial and law enforcement activities, since the source of evidence in the form of testimony of the accused no longer exists, and the legislator leaves the second part of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan unchanged, against the backdrop of the actual deprivation of the accused to testify as an accused, to submit petitions to the prosecutor, I propose, given the current situation in the legislation, the following as an alternative.

In part two of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan, add an addition after the words “suspect, accused" - defendant. The essence of this addition will generally eliminate the existing discrepancy between the rules on the rights of the accused, the defendant and the second part of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan. And it will act as a kind of consensus under the existing legislative regulation of sources of evidence. Since the legislator will not refuse the procedural status of the “accused”, in connection with the exception of the issuance of a separate decision of the prosecutor to bring the accused to trial by the prosecutor, and the dubious decision on the actual elimination (or transformation - S.B. note) of the stage of bringing the accused to trial by the prosecutor, against the background the formal transition of a suspect to the status of an accused, as is possible in the near future, will not exclude such a procedural participant as the “defendant”.

This decision to add evidence as an independent source has a positive side in the form of procedural adaptation to the new powers of the prosecutor. There is no point in disputing the fact that when preparing for the main trial, the prosecutor must possess all the materials of the criminal case, know the position of the defendant, and so on. How can one know the position of the defendant? Definitely, the prosecutor can find out his position only when he, while still an accused, is questioned by the prosecutor as an accused, or, as is happening now, only in court, which is not effective. It should not be surprising that the prosecutor learns about the defendant’s position after the fact - in court and is not ready to build his own qualitative position to support the state prosecution.

Consequently, the duties of the prosecutor, in the event of failure to accept such a design to add a new source of evidence - the testimony of the defendant, should be legally imposed on the duties of the prosecutor to interrogate the accused in order to obtain a valid source of evidence - the testimony of the accused. Yes, yes, exactly that, in order to comply with and fully fulfill the requirements of the second part of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan, since today, when interrogating the defendant in court, his testimony is not a source of evidence; it is not included in the second part of Article 111 of the Code of Criminal Procedure of the Republic of Kazakhstan.

Finally, despite recent changes to Article 305 of the Code of Criminal Procedure of the Republic of Kazakhstan, the issue of consideration by the prosecutor of petitions and complaints

received against him should be considered. It is a rather illogical decision of the legislator, in which the prosecutor is only limited to drawing up an indictment, although the suspect is given a new procedural status - the accused, and has the right, in accordance with the requirements of Articles 99 and 105, to file petitions and complaints at any stage of the criminal process.

Since the stage of bringing the accused to trial by the prosecutor, as noted above, is still formally present and functioning in the legislation of our country and has not been completely excluded, in connection with which, in the author's opinion, part three of Article 305 of the Code of Criminal Procedure of the Republic of Kazakhstan should be changed and its following edition is proposed:

Received petitions and complaints of the accused, or filed on his behalf by the defense attorney, after he has been served with the indictment, must be submitted no later than three days to the prosecutor, and considered by the latter in accordance with the requirements of Article 99 of the Code of Criminal Procedure of the Republic of Kazakhstan.

After the expiration of the specified period for filing a petition or complaint, motions and complaints from participants in the process that have been submitted after the case has been sent to court are sent directly to the court.

Undoubtedly, such a decision would lead to a correlation between the contents of Articles 99 and 305 of the Code of Criminal Procedure of the Republic of Kazakhstan, and as a result, respect for the rights of the accused.

Conclusion

1. Changes in legislation in terms of optimization of certain norms give rise to a situation in which other norms should be promptly amended. In the case considered in the scientific article it is necessary either to exclude a participant of criminal proceedings as a defendant, or to introduce a new source of evidence - testimony of the defendant and to correlate the norms on sources of evidence.

2. When building a new three-link model of judicial and law enforcement activity it is necessary to harmonize the norms of criminal procedural legislation in the part of application of petitions and complaints at the stage of prosecutor's bringing the accused to trial.

3. At the legislative level to solve the issue of interrogation of the accused by the prosecutor, with the purpose of his attitude to the prosecution and formation of the position of the state prosecution in court, qualitative preparation of the state prosecutor for the main trial.

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The contribution of the authors

Bachurin S.N. prepared the main content of the article, summarized previous research by the topic, and was responsible for the novelty of the article.

Kussainova L.K. prepared the introduction and methodology of article, translated the references, abstract and information about the authors of the article.

Kalmaganbetova D.B. prepared the materials of the legal practice and the conclusion of the research, as well as translated the text of the article.

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Айыпталушының айғақтары түріндегі дәлелдеме көзінің қазіргі жағдайы

Аннотация. Бұл ғылыми мақалада айыпталушының айғақтары түріндегі дәлелдеу көзінің қазіргі жағдайының жекелеген мәселелері қарастырылған. Азаматтардың құқықтары мен заңды мүдделерін барынша сақтауды көздейтін сот және құқық қорғау қызметінің жаңа үш деңгейлі моделін құру аясында бұл мәселеге ғылыми қызығушылық туды. Қылмыстық сот ісін жүргізудегі арыздарды реттейтін құқықтық нормалардың қазіргі жағдайы абстрактілі түрде, әсіресе сотқа дейінгі тергеп-тексерудің аяқталу сатысында және айыпталушы сияқты қылмыстық процеске белсенді қатысушыға қатысты өзара байланыс тұрғысынан талданады. дәлелдеу ережелерімен. Айыпталушының айғақтары сияқты дәлелдемелер көзінің өзекті деректер арасында ресми болуына қарамастан, дәлелдеу көздері жүйесінен іс жүзінде шығып қалған заңнамалық жағдайдың болуы ғылыми мақалада ерекше қызығушылық тудырады. қылмыстық істі дұрыс шешу үшін. Қолданыстағы заңнамадағы дәлелдемелер бойынша нормаларды бұрын теориялық түсіндірумен сәйкессіздік бар, бірақ Қылмыстық іс жүргізудің қолданыстағы нормаларының ережелеріндегі осындай қайшылықтарды шешуге мүмкіндік беретін жаңа теориялық шешімдерді анықтауға мүмкіндік беретін жағдайлар талданады. Дәлелдеу көздерінің қазіргі жүйесін сақтай отырып немесе қазіргі заманғы шындықта айыпталушының айғақтарын дәлелдеу көзі ретінде пайдалану тұрғысынан жаңа ұстанымды негіздейтін Қазақстан Республикасының Кодексі.

Түйінді сөздер: айыпталушы, айғақ, дәлелдеу көзі, прокурор, айыптау актісі, өтінішхат.

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Современное состояние источника доказательств в виде показаний обвиняемого

Аннотация. В настоящей научной статье рассматриваются отдельные вопросы современного состояния источника доказательств в виде показаний обвиняемого. Научный интерес вызван к данному вопросу на фоне построения новой трехзвенной модели судебной и правоохранительной деятельности, предусматривающей максимальное соблюдение прав и законных интересов граждан. Подвергаются анализу в тезисной форме современное состояние правовых норм, регулирующих заявления ходатайств в уголовном процессе, особенно на этапе окончания досудебного расследования и применительно к такому активному участнику уголовного процесса как обвиняемый, в части корреляции с нормами о доказывании. Особый интерес в научной статье вызван наличием законодательной ситуации, при которой такой источник доказательств, как показания обвиняемого фактически выпал из системы источников доказательств, несмотря на формальное присутствие его в качестве такового в числе фактических данных, имеющих значение для правильного разрешения уголовного дела. Анализируются ситуации в действующем законодательстве, при которых возникает несоответствие ранее имеющему теоретическому толкованию норм о доказывании, но позволяющих выделить новые теоретические решения, позволяющие урегулировать подобные несоответствия положений действующих норм Уголовно-процессуального кодекса Республики Казахстан, сохранив действующую систему источников доказательств либо обосновать новую позицию в части использования показаний обвиняемого, как источника доказательств в современных реалиях.

Ключевые слова: обвиняемый, показания, источник доказательств, прокурор, обвинительный акт, ходатайство.

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