

# **Actual problems of criminal law, criminal procedure and criminalistics**

## **Materials of scientific conference**

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# **Actual problems of criminal law, criminal procedure and criminalistics**

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### **The activity of the court and adversarial of parties in criminal proceedings**

**Abstract.** The article deals with the activity of the prosecution and the defense in the trial. The court's activity should be in an effort to establish the truth. When there is no dispute between the parties in court, the adversarial principle loses its significance.

**Keywords:** court, defense, truth.

Article 23 of the Criminal Procedural Code of the Republic of Kazakhstan regulates clearly enough the concept of the functions of prosecution, defense and settlement of the case by the court, and establishes the distinction between them. This article specifies that the criminal proceedings are based on the principle of equality of parties and adversarial prosecution and defense. Criminal prosecution, defense and resolution of the case by the court are separated from each other and are the powers of the various bodies and officials.

Consequently, the justice is administered only by the court; prosecutor is responsible to support the public prosecution before the court; Defense attorney is responsible to clarify the circumstances justifying the accused or mitigating his responsibility.

An unusual aspect of the implementation of protection function is that its activity extent is defined not only by the activity of the prosecution, but also whether the defendant actually committed the alleged offense. If so, then the defense, regardless of the intensity of the charges can carry protection for tactical reasons passively, as a means not prohibited by law. In some situations, the protection is more profitable to choose this form of implementation of the function, use of tools (e.g., he refuses to examine witnesses), which relate to unforbidden methods. Both belong to the passive methods.

Passivity as a tactic option of protection must be distinguished from a passive misuse, poor execution of the function.

Defense attorney, in realizing his function plays low key role in solving cases ( he is responsible to make an informed and

legal decision in the court), i.e. it's very convenient for the trial, because defense attorney "does not burden" to take procedural decisions aimed at obtaining additional evidence and not "complicate" the process of evaluation. However, it should be noted that this technique may adversely affect the judgment, the assessment of evidence and the prosecution to deprive work actively. The Court is interested in the parties' maximum activity, since in this case the activity is a guarantee of impartial judgment.

In the main proceedings the protection function is complex, and this is due to the fact that the prosecution function has advantage of the unequal position of the prosecuting authorities and the protection of the pre-trial stages. The prosecutor presents all legal evidences in the court, in some cases evidence of power and their content has already been defined, therefore, as a rule, their evaluation is predetermined too. Such status is opposed to a right of the accused and his defense attorney to declare for the prosecuting authorities, for example, a request for obtaining evidence and the right to an annex to the indictment list to be summoned to the hearing persons. Defender has such information, perhaps he might be informed well but this information is only alleged and consequently it reduces the degree of his reliability, and in comparison with preliminary investigation bodies which will be included to the evidence data during the trial. Such a restriction leads to a violation of equality of the parties, both at pre-trial stage, and often at the trial stage.

even commit crimes against the citizens of their state, as the latter are deprived of the

possibility of the actual start or maintain a lawsuit against their abusers. It is clear that in such circumstances, before the passive vessels scales will always tend towards the top leadership, regardless of the capacity in which they act - the prosecutor or the defendant, plaintiff or defendant. In addition, the passivity of the court called upon to explain and justify the interference of the judiciary, even in cases manifestly criminal administrative arbitrariness and lawlessness of law enforcement or other government agencies and officials against citizens. In these circumstances, the court has the right to use its powers, as a rule, only in those cases where the "Active administration" considers it necessary to apply to the court for the application of penalties for recalcitrant. In contrast to this court activity provides exclusivity and fullness of its authority on the application of the rule of law [1, p. 21-22].

A.S. Koblikov believed that "adversarial in criminal trial involves active participation of the court in the investigation of the case, establishing of the truth. The court is responsible for a fair resolution of the case. It relies on the assistance of the parties, competing in a procedural dispute covering deal with their own, often opposing, positions. But it leads the process and must resolve the matter objectively and impartially. Justice cannot depend on which party has been found stronger [2, p. 38].

It doesn't mean of course, that the court should always be active. Some scientists believe that the court should be passive, because when the court active it takes over the functions of the prosecution and defense, and thus makes it passive in the proceedings. According to I.L. Petrukhin's point of view, the active role of the court is the attribute of inquisitorial process [3, p. 130].

According to N.A. Abdikanov's point of view, prerequisite's of adversarial trial caused activity of the parties with leading role in the court process. Court creates conditions to compete the parties, controls the legitimacy of behavior of participants of the process, critically evaluates researching evidence in terms of affordability, reliability, legality of their receipt, seeks new evidence at the request of the parties. Supervises the course of the

trial, directing the proceedings in fact determine the direction of the test events, eliminates everything from the trial, which has no relation to the trial [4, p. 150].

No court condemns to inactivity, but on the contrary, the court requires the prosecution and the defense to total activity, while keeping them space to perform any action provided for by law in the case of poor implementation by the parties of their procedural functions. And therefore, actively involved in the court process evidence, should be attributed to the position of the court in adversarial proceedings.

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