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**The rights and personal freedoms
– the main value in the sphere of
criminal process**

Ensuring the rights of the personality is especially actual in the sphere of criminal process, as in this sphere of imperious activity of government bodies, essential restrictions and even constitutional violations cases, the right of the personality arise and are shown. Here application of various measures of criminal procedure coercion, including measures of restraint which significantly limit the rights and legitimate interests of the personality, involved in the sphere of criminal justice possibly. Each of participating in investigation (citizen of the Republic of Kazakhstan, and equally in the foreigner or the stateless person) is the individual possessing advantage and the inalienable rights belonging from the birth. The state can set laws restrictions of the rights only for the purpose of due recognition and respect of the rights of others and satisfaction of fair requirements of morals and a public order in democratic society.

Key words: personality, rights and freedoms of the person, concept, legal policy.

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**Жеке тұлғаның құқықтары мен
бостандықтары – қылмыстық
процесс саласындағы басты
құндылық**

Тұлғаның құқығын қамтамасыз ету қылмыстық процесс саласындағы өзекті мәселе болып танылады, өйткені мемлекеттік органдардың осы биліктік қызмет саласында тұлғаның конституциялық құқығын елеулі бұзу және шектеу туындайды және көрініс табады. Осы жерде әр түрлі қылмыстық процессуалдық мәжбүрлеу шаралары қолданылуы мүмкін, олар қылмыстық әділет саласына тартылған тұлғаның құқықтары мен заңды мүдделерін елеулі шектейтін мәжбүрлеу шаралары. Тергеуге қатысатын әр тұлға (Қазақстан Республикасының азаматы, сондай-ақ шетелдік азамат немесе азаматтығы жоқ адам) тумысынан тиесілі қасиетті және ажырағысыз қасиетті иеленетін тұлға болып танылады. Мемлекет басқалардың құқықтарын тиісті мойындату және сыйлату және демократиялық қоғамда мораль мен қоғамдық тәртіптің әділ талаптарын қанағаттандыру мақсатында заңдармен құқықтарын шектеуді белгілеуі мүмкін. Қазақстан Республикасы Қылмыстық-процестік кодексінде (ҚР ҚІК) қылмыстық істер бойынша заңмен белгіленген өндірістік тәртіппен тұлғаны негізсіз айыптау мен соттау орын алған жағдайда немесе кінәлі тұлғаның құқықтары мен бостандықтарын шектеген жағдайда дер кезінде немесе толық ақтау қажет, сондай-ақ заңдылық пен құқықтық тәртіптің нығаюына әсер етуге, қылмыстардың алдын алуға және құқыққа деген сенімді қатынасты қалыптастыруға (ҚР ҚІК 8 бабының 2 бөлігі) мүмкіндік береді.

Түйін сөздер: тұлға, адамның құқықтары мен бостандықтары, тұжырым, құқықтық саясат.

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**Права и свободы личности –
главная ценность в сфере
уголовного процесса**

Обеспечение прав личности особо актуально в сфере уголовного процесса, так как именно в этой сфере властной деятельности государственных органов возникают и проявляются существенные ограничения и даже нарушения конституционного права личности. Здесь возможно применение различных мер уголовно-процессуального принуждения, в том числе мер пресечения, которые существенно ограничивают права и законные интересы личности, вовлеченной в сферу уголовной юстиции. Каждый из участвующих в расследовании (гражданин Республики Казахстан, а равно иностранец или лицо без гражданства) является личностью, обладающей достоинством и неотчуждаемыми, принадлежащими от рождения правами. Государство может законами устанавливать ограничения прав исключительно с целью должного признания и уважения прав других и удовлетворения справедливых требований морали и общественного порядка в демократическом обществе. Уголовно-процессуальный кодекс должен обеспечивать защиту от необоснованного обвинения и осуждения, от незаконного ограничения прав и свобод человека и гражданина (часть 2 статьи 8 УПК РК).

Ключевые слова: личность, права и свободы человека, концепция, правовая политика.

**THE RIGHTS AND
PERSONAL FREEDOMS –
THE MAIN VALUE IN THE
SPHERE OF CRIMINAL
PROCESS**

Ensuring the rights of participants of investigation according to Constitution of the Republic of Kazakhstan has to answer ideas of the person, his life, the rights and freedoms as about the supreme values and to correspond to the international principles and norms (standards) in the field of human rights.

The concept of the rights of the individual is the conventional system of representations and views about a place and a role of the rights of the individual in criminal proceedings. The concept of human rights and the priority of the specified rights caused by its provisions cause not only need of essential increase of level of ensuring the rights of the individual at investigation of crimes, but also the purposes, sense, the directions and extent of reforming criminal proceedings as a whole.

In the Concept of legal policy of the Republic for the period from 2010 to 2020 of the President of the Republic of Kazakhstan approved by the Decree of August 24, 2009 No. 858, it is fixed that, «the most important link of legal policy of the state is the criminal policy which improvement is carried out by the complex, interconnected correction of the criminal, criminal procedure and criminal and executive law, and also right application» [1, p. 2]. 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 – differently, 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 the important indicator, guided by democratic legal values which have to become the most important factor of strategy of development of Kazakhstan. In modern science the personality is considered in various aspects – philosophical, sociological, psychological, ethical and legal. In philosophy the opinion on the personality as about identity of the person, and not biological and social prevails. Social identity, i.e. set characteristic for the person of social qualities, his social originality do the person by the personality. In psychology by the personality mean a kernel integrating the beginning, connecting together various psychological processes of the individual and giv-

ing to his behavior necessary sequence and stability. Thus, the personality is the specific person realizing the place and a role in society, engaged in conscious activity and possessing specific features [2, p. 53].

In psychology it is also considered to be, what not any person – the personality, though any identity of people. The personality appears from the moment of understanding by the person of the «I» and in the development passes a way from «a minimum of the personality» till the social maturity [3, p. 227].

Some scientists believe that the legal understanding of the personality has to be based on her philosophical and psychological concept. So, considering the personality as the subject of the rights and freedoms, V.A.Kuchinsky claims: «The person are born, the personality become. In order to become a personality, person must pass the corresponding stages of natural and social development not only to reach a certain level of physical and intellectual development, but also to get necessary social experience in the process of communication with other people [4, p. 27]. The conclusion in a word is that, for example, children and the insane can't be considered as persons [5, p. 42-43].

In our opinion, it's impossible to agree with this position. People usually participate in legal relations, who possess the mind and strong-willed qualities. However the absence at possible participants of legal communication of such qualities owing to age or psychological features doesn't give any grounds to deny behind them personal (in legal way of the word) properties in general as they don't lose right ability under no circumstances. It's necessary to recognize the correct point of view of V.S.Shadrin that in legal aspect the personality is any person [6, p. 5-6]. About it the analysis of use of the term «personality» in various branches of the right, including in constitutional, criminal, criminal procedure in which it is applied in the broadest sense as a synonym of a concept «person» testifies also. However even at committing of an immoral act or illegal act he doesn't cease to be a personality, and he can't be refused by the right to be considered that. Convicting the person in a crime, the court doesn't cease to consider him as the personality and doesn't deprive him of the right for dignity even in case of application to him the most severe punishment. Told court wise concerns all legislatures and the office-bearers conducting criminal process – judges, the investigator, the superior of investigative office, the prosecutor, body of inquiry and the person who makes inquiry. Making investigative actions and engaging the citizens to the participation in their production, they are obliged to treat them as with persons. The existing criminal procedure law in article 13 directly

forbids to humiliate their honor and dignity [7, p. 42-43]. The constitution of the Republic of Kazakhstan of August 30, 1995 says: «Dignity of the person inviolably. Nobody has to be exposed to tortures, violence, another cruel appeal humiliating human dignity or punishment» (article 17) [8, p. 42-43]. It is impossible no critically to transfer to jurisprudence psychological, philosophical, sociological concepts of the personality though it is impossible to dispense without using of categories of these sciences. The people possessing reason and willful qualities usually participate in legal relations. The criminal procedure law for designation participating and production on criminal case of citizens usually uses the term «face». On literal sense the word «face» concerns to the personality though the phrase «legal entities» which are meant as the various organizations, establishments, the enterprises is widely known also. Without pressing in the detailed analysis of these concepts, at once we will agree with opinion that «face» and «person» is the same (except for legal entities). In the theory of criminal process participating persons in legal proceedings are called differently – «participants of criminal process», «subjects of criminal process», «participants of criminal procedure activity», «participants of the criminal procedure relations». For justification of legitimacy of this or that name various arguments taking into account procedural position of persons, their roles in criminal process, interest in outcome of the case, etc. are used. The point of view about opportunity to unite all provided names under one general concept – «participants of criminal process» as, participating in criminal process is represented to the most acceptable and justified, the person can't but be the subject of the criminal procedure rights and duties, always makes criminal procedure actions or takes in them part, enters the criminal procedure relations. Speech can go only about features of participation. Participants of criminal legal proceedings (individuals), certainly, are persons and in its legal aspect. All of them are allocated with the criminal procedure rights and duties which have to be guaranteed. However the concept «ensuring rights of the personality» extends only for a certain category of participants of criminal legal proceedings.

Any citizen participating in criminal process, irrespective of its procedural situation, is a personality – the person possessing a constitutional law for recognition and protection of his dignity from the state. As the possession with dignity predetermines the attitude towards the participant of criminal process as to the personality, it is obviously necessary to specify what it is meant.

The realization of the fact by man usually contacts with the concept «dignity» that possesses moral and intellectual qualities significant for him. At the same time dignity is understood also as a set of objective qualities of the person, determining his reputation in society, including a rationality, moral installations, level of knowledge, a worthy way of life etc.

That is in concept of dignity the objective and subjective moments, in the set forming a whole differ.

The objective moment is characterized by the following aspects: 1) human dignity, value of the person independent from qualities and features at all; 2) personal advantage as the value of the specific individual in possession to them positive spiritual and physical qualities; 3) the advantage connected with belonging to a certain social community, to a group – the dignity of the scientist, national advantage, dignity of the woman, etc. The subjective moment of advantage is expressed in understanding by the individual of the value as person in general, as specific personality, as representative of a certain social group. Following to idea of human dignity conducts to recognition of the person by the supreme value that now and received the fixing in the Constitution of the Republic of Kazakhstan.

The person can't be deprived of the advantage which he has. Therefore not absolutely precisely to speak about advantage derogation, about protection of advantage. Object of encroachment is not the advantage, but feeling of advantage. Infringement of feeling of personal advantage – an action of open disrespect for the person, being expressed in the active actions directed to the address of the victim and ignoring value of the personality. The attitude of the state towards the personality, its advantage, interests, the rights is essential for criminal trial. It is that, on the one hand, character and the content of criminal process depends on position of the personality in the state. With another – creation of criminal process has deep impact on the rights and position of the personality in the state. Obviously therefore that criminal process has high political value. Position of the personality in criminal process is reasonably considered as a touchstone of humanity of an existing political regime.

Speaking about ensuring the rights of the personality, we mean ensuring its interests, i.e. the requirements realized by the personality causing statement of problems of its activity. Interests of the personality in criminal process can have public or private character. Public interest expresses the relation of the individual to interest of society as a whole, induces to work so, instead of differently, for the sake of the benefit of all society. Private interest in crimi-

nal process reflects need of the individual for protection against invasion into its private life of other people and public authorities [9, p. 16-17]. Private interest causes need of the relation to certain participants of criminal legal proceedings as individual and certain personality. Not only scientists, but also lawyers – practitioners paid attention on not faultlessness of all creation of criminal legal proceedings and the general condition of the law-enforcement practice which is easily changing depending on a position of public authorities and law-enforcement departments. Similar it is possible because all criminal procedure system is focused on satisfaction of state and political interest. In its basis the prevailing public beginning lies.

Really, an embodiment of the public interests represented by the state in criminal process, the principle of publicity. It expresses responsibility of the government law enforcement agencies for safety of society and their duty to react to everyone crime cases initiation of criminal cases, acceptance of all measures provided by the law to establishment and punishment of the guilty.

The ratio of the public and private beginning in interests of various participants of criminal legal proceedings is inadequate. The investigator, the prosecutor, the judge and other participants of criminal legal proceedings allocated with state powers of authority in the procedural activity, always have to be guided by interests of society and the state which are determined by tasks and purpose of criminal legal proceedings. Even in case of ensuring the rights and legitimate interests of participants of criminal legal proceedings the specified officials carry out before them public tasks, instead of become carriers of private interests in criminal process. They can't pursue achievement of private interest as in case of detection of their personal, direct or indirect interest in outcome of the case they are subject to branch (chapter 11 of the Criminal Procedure Code of RK). Carrying out criminal legal proceedings, officials of government bodies use not the personal rights, and powers of society and the states delegated by it for investigation of crimes and administration of justice. Therefore, their activity is provided not with procedural means of protection and protection of the rights of the personality, and procedural guarantees of justice. According to V. M. Kornukov, the category «personality» in criminal process is applied to designation of the citizen involved in criminal procedure activity, irrespective of his procedural situation [10, p. 47]. In our opinion, this statement can't be considered absolutely true. In it it is correctly noted that the term «personality», to be exact, «interests of the personality», in criminal process is

inapplicable to officials of bodies of criminal legal proceedings. But to extend it to all other participants of criminal legal proceedings being individuals, also would be unreasonable. In our opinion, private interest also is absent at the citizens involved in criminal legal proceedings owing to professional qualities, official position, and also the persons participating in criminal procedural activity owing to a public obligation. It, first of all, participants of criminal legal proceedings and other persons representing in it interests of society (jurors), and also rendering assistance in production on criminal case (the expert, the teacher, the translator). Through its activities they contribute to the realization of the public interest, so their rights and duties provided the procedural safeguards of justice. Specially addressed the issue in question in relation to the witness. The performance of his legal duty to assist the justice does not exclude cases where the witness is interested in the outcome of the case. Therefore, the rights and legitimate interests are protected, not only guarantees justice, but also the procedural means to ensure the rights of individuals in criminal proceedings. So, for example, protecting the private interest of the witness from the invasion of his privacy, part 3 of Article 82 of the CPC RK gives him the right not to testify against himself, his relatives and his wife. A separate group of participants in criminal proceedings, persons who have a criminal case, his legal interest. The accused, a suspect, victim, civil plaintiff and civil defendant always have in the criminal case his private interest, which is caused by certain personality traits that result from the commission of the offense under investigation, determining their procedural status. They make these participants essential subjects of the criminal process. Social interest in relation to their self-interest as defined lines of possible behaviors that participants in criminal proceedings may be taken in whole or in part. But even fully coincide with the public interest, personal interest is not absorbed by them. It only shows that the interests of the individual in this case are social in nature. And the rights and obligations of such participant provided not only by special procedural means and methods, but also guarantees of justice. Among the participants in the criminal proceedings are also individuals who represent and protect the interests of other participants of the proceeding. It defender of suspect and the accused, their legal representative, and a representative of the victim, civil plaintiff and civil defendant. Despite the fact that the criminal-procedural activity defender aims to promote the interests of his clients, in criminal justice he pursues interests of society. To criminal-procedural activities of defender inherent a public interests. The word «public» – derived

from Latin, it means «national». In the literature it is treated as «social, not private» (11, with. 629). It is advisable to use the term in relation to the activities of the defender in this sense. About the public nature of the defense suggests the following. Firstly, the need to implement the activity in question is due to public demand to protect innocent citizens from the use of state enforcement of criminal and criminal-procedural nature. Secondly, the defense attorney does not appear as an individual person, but as a member of the organization which accept the performance of the very important role in the law enforcement mechanism – providing qualified legal assistance to citizens (paragraph 3 of Article 13 of the Constitution of the Republic of Kazakhstan). He is required to act within the law of the profession in which the requirements are presented to him much higher than to ordinary citizens. Thirdly, an implicit admission of the public of the defender's legal status shows: the prohibition to refuse to accept a lawyer to protect themselves, the possibility of the suspect and the accused legal aid at the expense of the state. Consequently, the duty of the defense to carry out their activities in accordance with the requirements of the client is limited to the scope of public interest expressed in the law. In contrast from the defender to the representative is relevant presumption of legitimacy of interest of the participant of criminal proceedings. His procedural position must fully and in all cases correspond to the position, electing a person whose interests he represents.

Violation of the procedural rights of the defender and at the same time leads to the violation of the rights of defense of the suspect and the accused, which he must provide competent legal assistance. Consequently, the rights and obligations of the defender (representative), as well as the rights of other participants of the criminal proceedings are subject to the rights of the individual in criminal proceedings. Today our state introduce reform measures to improve the work of the courts. For example, recently introduced the institution of mediation – court dispute resolution. This corresponds to international practice. In short, there are all preconditions for a truly constitutional state in which a person's rights and freedoms are the highest value, as it is recorded in our Basic Law.

In addition, the Concept of Legal Policy of the Republic of Kazakhstan, define improvement of criminal procedure in the coming years in the following areas:

- Legislative regulation of pre-investigation, defining its limits;
- Creating conditions for increased use of preventive measures alternative to arrest, including security;

– The gradual introduction of new institutions of restorative justice based on reconciliation of the parties, and reimbursement of damages;

– The possibility of expanding the categories of criminal cases in which the prosecution and the prosecution in the trial can take place in private and private-public order;

– The gradual expansion of categories of criminal cases before the court by jury;

– Further improvement of mechanisms for providing quality legal assistance in criminal matters, not only for defendants and suspects, and victims, witnesses.

Each of the parties participating in the investigation (citizen of the Republic of Kazakhstan, as well as a foreigner or a stateless person) is a person, whose a dignity and inalienable rights are owned by birth. State laws may impose restrictions on the rights of the sole purpose of recognition and respect for the rights of others and of meeting the just re-

quirements of morality and public order in a democratic society.

Ensuring the rights of participants in the investigation, under the Constitution of Kazakhstan, shall meet the conception of the man, his life, rights and freedoms as the highest value and in accordance with international principles and norms (standards) in the field of human rights.

Kazakhstan's integration into the world community, chairmanship in the OSCE (2010) requires careful study of international standards of human rights, consideration of the rights of participants in criminal proceedings in foreign countries. Human rights and freedoms – these are universal legal values, which are characterized by the establishment of common international legal standards for the protection of individual rights. Contemporary international law has recognized and, therefore, is binding on all states for defining the fundamental rights and freedoms of the individual who is in the area of criminal procedure relations.

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