

SOME CONTROVERSIAL PROVISIONS ON THE RELATIONSHIP BETWEEN THE CONCEPTS OF THE PROSECUTOR AND THE PUBLIC PROSECUTOR AT AZERBAIJAN CRIMINAL JUSTICE

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The thesis is related to the criminal procedural legislation in the field of supporting of public prosecution; the disputable issues of the concept of public prosecutor are raised, the statuses of the prosecutor and the public prosecutor dedicated in details, the correlation of the concepts and procedural statuses are considered prosecutor and public prosecutor on the basis of their procedural functions. The issues of exercising the powers of the prosecutor in the sphere of pre-trial and trial by the prosecutors' assistants are raised and investigated. The works of procedural scientists in the given field are analysed. The author gives his vision of the solution of these controversial issues.

Key words: prosecutor, public prosecutor, criminal process, criminal prosecution, procedural supervision, trial.

The driving force of the criminal process is the function of criminal prosecution (charge), i.e. procedural activities carrying out by the prosecution to expose the suspect accused of a crime [1, p. 406]. The essence and objectives of these activities are clearly set out in the Article 8 of the Code of Criminal Procedure.

The analysis of the Chapter 8 of the Code of Criminal Procedure of the Republic of Azerbaijan, which establishes the system of parties to a criminal proceeding, leads to the conclusion that the interests of the state in the criminal process are ensured only by officials acting in the pre-trial and subsequent stages of the process.

These parties are the prosecutor, investigator, investigative authority chief, inquiry officer and inquiry body. It seems that at the trial stage

of the criminal procedure, the prosecution represented by public entities doesn't appear prominently and actively. However, the requirement for the mandatory participation of the prosecutor in the court examination of criminal cases and detailed analysis of some provisions of Articles 7 and 84 of the Code of Criminal Procedure of the Republic of Azerbaijan indicate the impropriety of such an impression.

Public interests are ensured in court proceedings by a special official acted as the public prosecutor, i.e. by the prosecutor (Article 84.6 of CCP).

The fact that a different party acting as an independent public prosecutor is not provided for in Chapter 8 of the Code of Criminal Procedure of the Republic of Azerbaijan, especially in the above mentioned Article 84, can be explained by mutually exclusive causes: either the legislator does not make a significant distinction between the procedural statuses of the prosecutor and public prosecutor and regards them as a whole, or this is a legal gap that should be filled.

Article 7.0.23 of the Code of Criminal Procedure of the Republic of Azerbaijan introduces the concept of "prosecutor" and, in a broad sense, the concept of the Prosecutor General of the Republic of Azerbaijan and prosecutors subordinated to the Prosecutor General includes deputy prosecutors and other officials of the prosecutor's office who have the powers provided for by the Law on Prosecutor's Office and participate in the criminal process. An example is the Assistant Prosecutor (Law on Prosecutor's Office, Article 15). The Code of Criminal Proce-

ture of the Republic of Azerbaijan considers the prosecutor's officers who, as the public prosecutor, uphold the accusation in the case on behalf of the state. Interestingly, it is the prosecutor who is responsible only for administration of public prosecution before the court in the Law on Prosecutor's Office (the Law on Prosecutor's Office, Article 5, 19).

The procedural law details the status of the prosecutor as a party to the criminal justice: "The "prosecutor" is a person who exercises procedural control over pre-trial investigation, as determined by his/her powers and the Code of Criminal Procedure or acts as a **public prosecutor** upholding public or public-private prosecution in court" (Article 7.0.23 of CCP of the Republic of Azerbaijan). Then it follows therefrom that, "the scope of the prosecutor's procedural status is the powers he/she exercises on behalf of and for entrusted interests commissioned to him by state" [2, p. 28].

Based on the official concept of 'prosecutor' and the scope of powers passed to him, it is possible to talk of different authorizations exercised by the prosecutor at different stages of criminal proceeding: pre-trial and trial.

Depending on the procedural function exercised by the prosecutor at the stage of pre-trial proceedings, the powers of the prosecutor are conducting of the guidance of criminal prosecution related to the implementation of procedural management and supervision over activity of the pretrial investigative agencies. The legislator's position on the powers of the prosecutor in criminal trials provided by the courts of the Republic of Azerbaijan is set forth in Article 7.0.23 of the Code of Criminal Procedure of the Republic of Azerbaijan and in the provisions of the Law on Prosecutor's Office showed that during the trial, the prosecutor upholds the state prosecution and ensures its legality and validity. So, summarizing the above, we can say that the main areas of activities (functions) of the prosecutor in criminal proceedings are as follows: criminal prosecution, procedural management and supervising on the activities of the investigative bodies. In addition, these functions can also include state prosecution. We should especially note that the Code of Criminal Procedure of the Republic of Azerbaijan provides a clear definition of the areas of the prosecutor's activities.

At the same time, the activities of the prosecutor during the criminal trial are not limited only to upholding the public prosecution and are carrying out in other areas as well as. This is due to the fact that in the state mechanism, the prosecutor's office from the first moment exercise the function of criminal prosecution. The prosecutor obliged to apply to the court with a petition to address every fact of violation of the law discovered at a the court room. This right differs the prosecutor from other parties to the trial. This does not mean that the prosecutor has the right to supervise judicial activities and the court. He has act as the public prosecutor in the court and satisfactorily persuade the court that the accused was involved in the crime or committed the crime. In our opinion, it is impossible to ensure compliance of the state prosecution with the law in its content and form, until procedural gaps and violations identified in the course of criminal proceedings are not eliminated during the trial.

There is a variety of opinions about the correlation of functions of the prosecutor. Some considers procedural supervision to be an independent function of the prosecutor which does not coincides with the function of criminal prosecution, since the two areas of prosecutorial activities have different goals: in this case, supervision is aimed at ensuring the legality of pre-trial procedural activities and criminal prosecution is aimed at identifying of perpetrators and bringing them to criminal liability [3, p. 158].

According to other scientists, procedural leading and supervision of the prosecutor cannot be separated from function of criminal prosecution, since criminal prosecution is carried out through the exercise of supervisory powers. Exercising these powers, the prosecutor directs the activities of the investigative and inquiry authorities assuring of the impartiality of final conclusions and preventing possible errors and violations of the law and guides the investigating and inquiry agencies to the identification of perpetrators.

Without delving deeply into the analysis of these positions, it should be noted that "any interpretation of the procedural function of the prosecutor undoubtedly includes its supervisory activities designed to provide effective functioning of investigators, interrogators and inquiry

bodies at the stage of Investigation, compliance of them and all other participants in the preliminary investigation with the requirements of the law” [4, p. 158].

The relationship between the prosecutor’s supervisory powers and judicial control is also a matter of debate. One can hardly agree with the researchers who believes that the prosecutor’s supervisory function has become irrelevant and unnecessary due to judicial control over the pre-trial established. According to A.Mikhailov, “prosecutor’s supervision is integral and complete as a specific kind of state activity. Differences in the implementation of the common prosecutor’s supervision are caused by the specifics of the legislation regulating to control over implementation, the variety of subjects enforcing this legislation and, as a consequence, differences in the commissions of prosecutors” [5, p. 10].

Thus, the function of supervision on compliance with law is a category of a higher level than the function of criminal prosecution. The analysis of the prosecutor’s powers at the pre-trial stages shows that the prosecutor is only responsible for initiating a criminal case in the context of criminal prosecution (Article 84.2.1., 207.5.1, CCP), approval of the indictment (Article 84.5.14., CCP) and for a number of other duties. In our opinion, the function of supervision on compliance with law has the secondary importance in relation to the function of criminal prosecution; in this case it is associated with the function of supervision over compliance with law exercised by the authorities carrying out pre-trial. This opinion of A.N.Ogorodov is also supported by others [6, p. 10]. Considering that the prosecutor’s activities cover the entire criminal process and are carried out at different stages of criminal proceedings, we can note their complexity nature. Various procedural functions exercised by the prosecutor at the stages of pre-trial and judicial proceedings are closely interconnected, correlated and complemented each other.

The prosecutor acting as a representative of the state not only carries out prosecutorial activities but also performs another social function: prevents unlawful and unfounded conviction of innocent persons, plays an important role of ensuring the rights and freedoms of participants

to criminal proceedings at all pre-trial and trial stages.

Thus, the legislator has put an end to a dispute about activities the prosecutor carries out in criminal proceedings: the prosecutor is an official authorized to carry out criminal prosecution and procedural supervision over the activities of pre-trial authorities on behalf of the state within the scope of the powers determined by the Code of Criminal Procedure of the Republic of Azerbaijan.

During the court examination of a criminal case, the prosecutor upholds state prosecution and participates in the administration of justice (Constitution, Article 125, Paragraph IV).As already mentioned above, the prosecutor is an official who has appropriate powers specified in Article 4 of the Law on Prosecutor’s Office and is also responsible for the implementation of public prosecution as a party to the process at court room.

The analysis of the above mentioned legal provisions allows to make a conclusion that the lawmaker actually equates the public prosecutor with other employees of the prosecutor’s office. As a result of such a hypothetical idea the public prosecutor is perceived as a prosecutor. The law states that it is the prosecutor who exercises this function (CCP, Article 84.2.3.). As a practical matter, the public prosecution at courts is upheld by relevant officers of the Department for public prosecution defence of the Prosecutor General’s Office. Otherwise, it is impossible to comply with the requirements of the CCP of the Republic of Azerbaijan on the participation of the public prosecutor in the criminal justice. The issues of concern related to the participation as a public prosecutor are widely discussed in the legal literature after the adoption of the new Code of Criminal Procedure. As a result, three main points of view have formed. N.Gunduz notes referring to a German attorney Mittermaier that the most important problem of the prosecution system is that the leading and supervising in the pre-trial investigation and prosecution at the trial are carried out by the same person. According to Mittermaier, that’s why judges sometimes act like prosecutors. This fact undermines the impartiality and objectivity of judges. The best way to ensure justice is to separate public prosecution at court and criminal prosecution on pre-

trial stages. On that way prosecutors shall be able to use their independence only for the sake of justice. Prosecutors act through the protection of the state interests and criminal prosecution of the accused. This situation is incompatible with the requirement for impartiality of the judicial examination [7, p. 17].

Thus, the officers of the Public Prosecutor's office who participated in the pre-trial investigation does not have the right to act as a party at the stage of the judicial examination. This requirement is clearly spelled out in the law (CCP, Article 84.4.).

It is premature to consider the matter closed and the problem solved. According to Chapter 84.2.4 of the Code of Criminal Procedure of the Republic of Azerbaijan, only the prosecutor can uphold the state prosecution in the criminal justice.

In our opinion, the procedural status of the public prosecutor should be enshrined in a different way by next amendments to the Code of Criminal Procedure of the Republic of Azerbaijan. Such amendments will serve the correlations between the court (judge) and the prosecutor's office (in this case, the public prosecutor representing the prosecutor's office) based on the principles of justice in accordance with the recommendations of the Bordeaux declaration (2009) [8].

The rights and obligations of one of the key participants of criminal proceedings, the public prosecutor, are not clarified in the CCP of the Republic of Azerbaijan. With the existing approach, the public prosecutor appears as an undefined subject who carries out activities in an incomplete and limited manner based on the instructions of the prosecutor which are not of a procedural nature. All this does not contribute to the systematic and planned efforts of the public prosecutor in criminal proceedings. I, therefore, consider it correct to amend Article 7 of the CCP of the Republic of Azerbaijan by adding clause 7.0.48 as follows: "the public prosecutor is an official who upholds the public or public-private prosecution in court as an independent party to the criminal proceedings". It is also advisable to revise Article 7.0.23 of the CCP to read: "the prosecutor is a person who carries out the procedural management of the pre-trial investigation on criminal cases within the limits

of his/her competence in the manner prescribed by this Code".

At the same time, should be suitable to clarify in details at the legislation the status of organizational subordination of the public prosecutor by determining its status and scope of powers at the stage of judicial examination.

Thus, the prosecutor, as a legal party to criminal proceeding, exercises three procedural functions: the implementation of criminal prosecution, supervision on the activities of the investigative and inquiry agencies and upholding public prosecution. Prosecutor's activities "provides protection of the legal rights and freedoms of individuals and citizens as a universal legal remedy", i.e. these activities are manifested in cases where there is a need for special guarantees of legal protection of a person in the situation of restriction of their rights" [9, p. 174].

Despite the differences in the aspects of legal relations arising from the execution of these functions, the procedural activities of the prosecutor's officers in all identified areas are closely interrelated. Determination of the status of the public prosecutor is a more complex issue which should be resolved as soon as possible. The public prosecutor being a party to the trial carries out criminal prosecution of the accused person (or persons) within the scope of upholding public prosecution in the forms established by the criminal procedure legislation through opposing to the defense party and on the basis of equal procedural opportunities. We share the view of M.N.Gavrilova that the practice of coordination of the position of the inferior prosecutor who acts as an accuser, which is reflected in the law, with the prosecutor of a higher rank who issued an order to uphold the public prosecution and confirmed the indictment, is not limited to the status of an independent party to criminal proceedings in a specific criminal case [10, p. 20-22].

In our opinion, upon the confirmation of an indictment and prior to a final judgement on a criminal case, it would be appropriate to include the public prosecutor in criminal proceedings and enshrine his/her independence in the law by drawing up the prosecutor's procedural powers to release the prosecutor from the influence of the prosecuting bodies which manage and supervise the pre-trial activity of investigative agencies. We believe that it is ap-

propriate to consider the idea of removing the public prosecution from the subordination to the prosecutor's office and fixing it in a separate institutional form in future.

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НЕКОТОРЫЕ СПОРНЫЕ ПОЛОЖЕНИЯ О СООТНОШЕНИИ ПОНЯТИЙ ПРОКУРОР И ГОСУДАРСТВЕННЫЙ ОБВИНИТЕЛЬ В УГОЛОВНО-ПРОЦЕССУАЛЬНОМ ЗАКОНОДАТЕЛЬСТВЕ АЗЕРБАЙДЖАНА

В статье проводится анализ уголовно-процессуального законодательства в сфере процессуального статуса прокурора руководящего предварительным следствием и государственного обвинения, поднимаются спорные вопросы понятия государственного обвинителя и прокурора, детализируются статусы прокурора и государственного обвинителя, рассматривается соотношение понятий и процессуальных статусов прокурора и государственного обвинителя на основе выполняемых ими процессуальных функций. Также исследуются спорные вопросы осуществления полномочий прокурора в сфере досудебного и судебного разбирательства сотрудниками прокурора, исследуются труды ученых процессуалистов в данной области, анализируется законодательство в этой сфере, Автор дает свое видение решения данных спорных вопросов.

Ключевые слова: прокурор, государственный обвинитель, уголовный процесс, уголовное преследование, процессуальный надзор, судебное разбирательство.