

## Situation-Based Approach to the Professional Defence from Prosecution: Background and Significance

*Bektibayeva Olga Sergeevna*

Kazakh Humanities and Law University

**Submitted:** Sep 13, 2013; **Accepted:** Nov 13, 2013; **Published:** Nov 30, 2013

**Abstract:** participation of a professional defender in criminal proceedings is one of the powerful procedural guarantees of efficient defense of rights of the suspect or the accused. Possibility to involve him/her in the criminal proceedings is specially stipulated in international legal documents, which provide for minimum standards ensuring individual rights within the framework of national legal systems. In its turn, enhancement of advocate's efficiency in criminal proceedings depends largely on the availability of useful tactic recommendations. One of the topical methods applied in the development of such recommendations is a situation-based approach to the professional defense in criminal cases. This article studies key aspects of the formation of the criminalistic theory on defense situations. The author studies the background of the situation-based approach to the activity of professional defender, evaluates its significance from the main standpoints: applied, theoretic and didactic.

**Key words:** Criminal process • Criminalistics • Professional defender • Defense tactics • Situation-based approach • Criminalistic theory on situations • Defense situations

### INTRODUCTION

The right for professional defense against prosecution is one of the universal rights of an individual that is guaranteed both by national legal systems and international legal standards ensuring human rights.

In particular, Art. 14 of the International Covenant of Civil and Political Rights ensures the right of each person involved in criminal prosecution to protect himself personally or through a defender selected by himself [1].

In the Republic of Kazakhstan the same right of a suspect, an accused person is ensured at the constitutional level. Art. 13 of the Constitution states that each person is entitled to protect the rights and freedom of his/her own by all means that are not in conflict with the law, has a right to get qualified legal aid, which is provided for free in cases stipulated by the legislation [2].

Implementing the said constitutional provisions, the Kazakhstan's criminal procedure law provides the right of the suspect or accused person for defense as one of the criminal proceedings' principle, which can be implemented personally or with the assistance of a defender (Art. 26) [3]. In such case, according to part 2 Art. 70 of the CPC RoK, the defender can be represented by an advocate [3].

Participation of professional defenders in criminal proceedings significantly increases the efficiency of representation of interests of the defendants and helps in achieving the goals of justice [4]. Professional advocate has necessary knowledge of jurisprudence and effective legislation as well as practical skills of application of legal standards or procedural and tactical means and methods of defense.

In this context the paramount importance is attached to the development and systematization of tactical recommendations for professional defenders that increase the efficiency of their activity. One of the efficient ways to resolve this issue is the development of situation-based means of defense against criminal prosecution.

**Main Part:** At the contemporary stage of the forensic science development the situation-based approach to its subject is one of the most promising trends in further improvement of forensic methods and recommendations.

In general, the modern science of forensic situations is a dynamically developing study which is mainly targeted at the increase of the efficiency of forensic recommendations, as correctly noted T.S.Volchetskaya and their maximum orientation towards practical activity [5].

Practically speaking we support this position but we would like to note that the situation-based approach to the study of forensic activities not only lets us increase the efficiency of newly-developed recommendations but more logically and reasonably systematize the existing practices. At the same time the application of the situation-based approach in forensic studies of tactical nature can give impetus to their development and show the most popular aspects of this approach.

One of such promising branches of the contemporary forensic science is tactics of professional defense.

Despite of the fact that the idea of such private forensic study originates as far back as in the seventies of the twentieth century, all available scientific works in this sphere are incomplete and have not been properly systematized.

The first attempt to give a detailed definition of the defense tactics was made by G.M. Shafir back in 1967 [6]. Later on, various definitions were suggested by G.A. Vorobiev [7], T.V. Varfolomeyeva [8], R.M. Zhamiyeva and Ye.I. Kairzhanov [9].

O.Ya. Bayev justified the existence of the defense tactics by the conflict interaction between public and private interests, prosecution party and party under defense in criminal proceedings [10]. In his later works he paid much more attention to the tactical aspects of the defense activity in criminal cases [11] and even introduced a new category "criminal advocate science" [12].

V.S. Sorkin, in his turn, devoted his thesis to formation of strategy and tactics of defense [13].

Defensive activity of advocates in criminal cases, without doubt, is a subject of the forensic science as a structural element of crime detection and investigation. Moreover, it is being carried out by professional defenders both at the stage of pre-trial proceedings, during court hearings and sometimes even after the court verdict came into legal force.

Possibility of participation of defending advocate at all stages of the criminal process predetermine the specific nature of tactical recommendations which should contain tactical options that are expedient for preliminary investigation, at the court, case reopening and during the imprisonment.

In this connection, for instance, E.G. Martynchik studies certain aspects of tactical defense in the process of parallel advocate's investigation [14].

In 1998, M.O. Bayev tried to integrate accumulated knowledge and scientific developments in the area of tactical defense in criminal cases [15]. He considered

tactics of professional defense as a subsystem of criminalistic tactics. Without going into a detailed analysis of advantages and disadvantages of the proposed concept, we should note that M.O. Bayev, in one paragraph of his synopsis, studied the situational basis of professional defense without paying insufficient attention to the issue.

In the Republic of Kazakhstan the most complete work devoted to the advocate defense tactics is a training manual of R.M. Zhamiyeva and Ye.I. Kairzhanov. The authors have thoroughly examined theoretic basis of professional defense against criminal prosecution and the content of professional defense in criminal proceedings as a private criminalistic study. The identified main structural elements are represented by categories and concepts of the study, its goals and objectives, situations of defense, defense cases and nature of advocate's decisions in different situations. The proposed structure illustrates a special significance attributed by the authors to the defense situations, which they perceive not only as a mandatory element of the criminalistic science but as a necessary basis of advocate's decisions. In this context, R.M. Zhamiyeva and Ye.I. Kairzhanov give a detailed description of defence situations and propose their author's classification [9].

Both works have a significant theoretic importance because they contain fundamental methodological principles of defense tactics in criminal cases. They elaborated a conceptual basis for the development of the private criminalistic study, however, they do not systematize the existing tactical maneuvers and recommendations for the successful defense.

In our opinion the potential of the situation-based approach as a method of systematization of criminalistic provisions of the tactics is fairly big. Application of the criminalistic situation science and development of well-elaborated classification of defense situations will provide not only tactical background but will indicate ways of further development of the professional defence tactics as the identification and characterization of new defense situations will require new efficient means and methods of their resolving.

From this point of view, the situation-based approach to the defense in criminal cases is able to develop a new structure of the private criminalistic science, which will consist of general theoretic provisions and algorithms of tactical solution of particular defense situation.

In addition to the above stated the use of the situation-based approach in the activity of professional defender would simplify the process of defense by

identifying problematic aspects of defense in every particular moment of time and finding rational means and methods for their resolving. Moreover, the situation-based approach to the study of professional defense aspects would help develop maximum fruitful recommendations regarding its implementation and provide a required theoretical and methodological basis for training and upgrade of qualification of advocates.

### CONCLUSION

The situation-based approach to the activity of professional defender in criminal cases might have a potentially positive impact on the defense process and can help in:

- Enhancing the efficiency of practical activity of defending advocates;
- Developing of private criminalistic studies of criminal advocate science and science of forensic situations;
- Developing of new and improve the existing education and training programs for defending advocates.

**Applied Significance:** Of the situation-based approach to the activity of professional defenders in criminal cases is that it helps in:

- Setting of defense objectives with a high potential of their attainment, their permanent correction depending on the changed conditions and facts that affect the defense situation;
- Modeling of the crime situation by professional defender in order to identify sources of evidence information favorable for the defendant;
- Elaboration of a maximum efficient defense tactics and strategy and in identifying the most favorable attitude on the case;
- Taking of tactic decisions, which increase the productivity of the defense activity and particular circumstances in which the activity is being conducted;
- Forecasting the most likely outcome of the situations with high tactic risks and reduction of such risks through use of means and methods of defense;
- Examining of unfavorable defense situations, taking of measures to resolve or avoid them in the future;
- Selection of the most efficient forms and ways of interaction of defender with different subjects of criminal proceedings;

- In overall accounting of all circumstances and components of the defense situation.

**Theoretic Significance:** Of the situation-based approach is also quite big. Research of situational grounds of the defender's activity will considerably strengthen the situation-based approach to the object of criminalistic science by adding a new section to the private criminalistic study of science of forensic situations, which was not covered before. It will integrate theoretic methods with practical aspects of defense against prosecution.

In addition to the above stated, scientific research of the situational grounds of professional defense will provide necessary theoretic basis for further development of criminalistic advocate science. It will give clear definition and meaning of the defense situation, its structure and types. The mentioned theoretic provisions will provide the basis for algorithms developed for the solution of typical defense situations.

**Didactical Significance:** Of the situation-based approach to the activity of professional defender manifests in:

- The implementation of theoretic insights in the effective programs for students of legal institutes and in the qualification upgrade programs for professional defenders in criminal cases;
- The development of education and post-graduate training programs (specialized master program, PhD doctorate) to train highly qualified advocates;
- The application of situational modeling in the course of studies of advocate science when it is required to resolve various situational problems as practical aid for self-training in the defensive activity;
- Simplifying the process of digestion of professional defense fundamentals, rules of their application, which are determined by typical defense situations.

Therefore, based on the above stated, one can come to a logical conclusion that the situation-based approach used in the activity of defending advocate has a significant potential to optimize the defense process and improve results of defense against prosecution as a whole.

### REFERENCES

1. International Covenant on Civil and Political Rights adopted by Resolution 2200 A (XXI) of the General Assembly dated December, 16. 1966.

2. Constitution of the Republic of Kazakhstan dated August 30, 1995.
3. Criminal and Procedural Code of the Republic of Kazakhstan dated December 13, 1997.
4. Parker, H., M. Casburn and D. Turnbull, 1981. Receiving Juvenile Justice. Oxford: Basil Blackwell, pp: 250.
5. Volchetskaya, T.S., 1997. Science of Criminalistic Situations. Thesis. ... Doctor of legal Sciences, Moscow.
6. Shafir, G.M., 1967. Certain Issues of Methodology and Tactics of Defense During Preliminary Investigation. Defense Issues in Criminal Cases. Edited by P.S. Elkind, L.: LSU, pp: 68-89.
7. Vorobiev, G.A., 1986. Tactics and Psychological Peculiarities of Court Actions. Krasnodar: publishing house of the Cuban University, pp: 87.
8. Varfolomeyeva, T.V., 1984. Issues of Defense Tactics in Criminal Proceedings. Forensic Inquiry and Experts Testimony in Court. Republic's Inter-Departmental Scientific and Methodological Collection. Edition No. 29. Kiev: Visha Shkola, pp: 36-40.
9. Zhamiyeva, R. and E. Kairzhanov, 2000. Tactics of Advocate's Defense in Criminal Cases. Training manual. Almaty, pp: 228.
10. Ya. Bayev, O., 1984. Conflict Situations During Preliminary Investigation (Fundamentals of Warning and Resolving). Voronezh: Voronezh University's publishing house, pp: 132.
11. Bayev, M.O. and O.Ya. Bayev, 1995. Defense from Prosecution in Criminal Procedures: Defense Tactics in Criminal Cases. Right of the Accused for Defense (regulatory acts, clause-by-clause material). Voronezh: Voronezh University's publishing house, pp: 228.
12. Ya. Bayev, O., 1996. Fundamentals of the Professional Defense Theory: Object and Subject of Forensic Advocate Science. Legal Science and Reforms of Legal Education. Edition No. 6. Voronezh: Voronezh State University, pp: 45-59.
13. Sorkin, V.S., 1996. Issues of Formation of Defense Strategy and Tactics. Synopsis of candidate thesis, Grodno
14. Martynchik, E.G., 2009. Advocate's Investigation in a Criminal Case. Theoretic and Methodological Basis of the Advocate's Investigation Doctrines. M., pp: 173.
15. Bayev, M.O., 1998. Tactics of Professional Defense from Prosecution in Criminal Cases in Russia. Thesis. ... Candidate of Legal Science, Voronezh