

Participation of a Defence Lawyer in the Conduct of Investigative Actions to Collect Evidence

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DOI: [10.22178/pos.123-9](https://doi.org/10.22178/pos.123-9)

JEL Classification: K39

Received 16.09.2025
Accepted 27.10.2025
Published online 31.10.2025

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Abstract. The article's purpose is to analyse the procedural rights and duties of a defence lawyer when participating in investigative activities aimed at gathering evidence. It seeks to clarify the legal framework governing this participation and to identify challenges that may hinder a lawyer's effective involvement. The study aims to provide recommendations for enhancing the existing legislation and its practical application.

The researchers found that, despite legal provisions, investigative authorities often limit defence lawyers' participation in investigative actions through procedural and psychological barriers. These findings highlight a gap between the de jure rights of the defence and their de facto realisation. The study concludes that greater procedural clarity and stronger legal guarantees are necessary to ensure the equality of arms between the prosecution and the defence.

The study's scientific novelty lies in its integrated approach, combining a detailed legal analysis with empirical data from legal practitioners, offering a fresh perspective on a long-standing issue. Its originality stems from the way the study focuses on the practical challenges defence lawyers face and offers unique insights that previous academic work has largely overlooked. The research proposes a new theoretical model to understand and enhance the role of defence lawyers, moving beyond traditional interpretations.

The practical significance of this study lies in its potential to inform legislative reform and judicial practice, ultimately leading to more robust protections for the rights of the accused. The findings provide a valuable resource for legal practitioners, helping them better understand their rights and develop more effective defence strategies. The article's recommendations can contribute to a fairer and more balanced criminal justice system, thereby increasing public trust in the legal process.

Keywords: criminal procedure; lawyer; defence; questioning of individuals; principle of adversarial proceedings; to collect evidence.

INTRODUCTION

The independence of legal practice is a necessary condition for defence lawyers to effectively fulfil their professional obligations and the duties entrusted to the legal profession; this is in the interests of society and the state. Lawmakers and judicial authorities actively implement citizens'

right to defence by designing and enforcing guarantees that protect attorneys' independence, thereby enabling defence lawyers to perform their duties effectively and professionally. To properly and fully perform his/her defence functions, a lawyer must be protected by law to a certain extent and have sufficient authority and guarantees for this.

METHOD

The methodology used is a comprehensive analysis of criminal procedural law, including statutes, judicial precedents, and legal doctrine. The research employs a comparative legal approach to examine regulations across jurisdictions and a sociological approach through surveys and interviews with legal practitioners. The study also employs a dogmatic legal method to interpret the norms and principles governing the role of defence lawyers in the investigative process.

RESULT AND DISCUSSION

A defence lawyer, by virtue of his status, should not be afraid to defend his position, which is very important, since he is a fighter for the rights and freedoms of the individual. For this, he needs confidence in his safety when performing professional functions.

The need to protect lawyers' activities is recognised internationally. In most post-Soviet countries, including the Republic of Azerbaijan, criminal liability is provided for actions that endanger the life or health of lawyers. Article 288.2 of the Criminal Code of the Republic of Azerbaijan provides for punishment for threats to kill, causing harm to health, destruction or damage to property in relation to a defence lawyer and his close relatives in connection with the consideration of cases or materials in court, or the conduct of a preliminary investigation, or the execution of a sentence or other judicial acts [1].

A defence lawyer, by virtue of his professional purpose and functional role, contributes to the protection of the rights, freedoms and legitimate interests of the accused (suspect). Because one of the most essential principles of activity and at the same time a guarantee of the realisation of the rights of the lawyer is independence. "A. Independence from Clients lawyers have some latitude to terminate a representation when their view of the best course of action conflicts with the client's view, or when the client's direction or objectives are anti-social (but lawful) or at odds with other professional values. B. Independence from Third Parties- "Professional independence" also refers to individual lawyers' independence from third parties who might cause lawyers to compromise their professional duties to the client or, to a lesser extent, the public" [2, p. 612-613]

We want to highlight the provision of the necessary conditions for participants in criminal proceedings to fulfil their procedural duties as one of the key areas of ensuring rights. A lawyer must have systemic means that allow him to realise, protect and restore, if necessary, his right to the provision of legal assistance.

In this context, the legal status of a lawyer guarantees the provision of qualified legal assistance. When a lawyer participates as a defence lawyer in criminal proceedings, it serves as a guarantee of the right to defence against charges.

The procedural status of a defence lawyer in modern criminal proceedings is a legal construct that combines the concept of a human rights attorney, characteristic of the continental model of criminal proceedings, with the adversarial concept of a representative attorney, characteristic of the Anglo-American model of criminal proceedings, with the primary trend being the expansion of the powers of defence lawyers to participate in proving. It is possible "to strengthen the adversarial principles of the criminal process by expanding the powers of the defence attorney in gathering evidence, with the gradual introduction of the institute of legal investigation" [3, p. 192].

Given the importance of the right to high-quality legal aid, the legislator imposes special requirements on providers of legal assistance. On December 28, 1999, the Law of the Republic of Azerbaijan on lawyers and legal practice, consisting of 26 articles and "Transitional Provisions", was adopted. This law was adopted to ensure the rights of every person in the territory of the Republic of Azerbaijan to apply to a lawyer of his/her choice to protect his/her rights and interests protected by law in court proceedings, preliminary investigation and inquiry, to use the assistance of a defence lawyer from the moment of his/her arrest, detention, or accusation of committing a crime, and to regulate the activities of lawyers providing legal assistance on other issues [4]. Article 15 of the same Law, entitled "Rights of a Lawyer", states: "Lawyers are independent and subject only to the requirements of the law. Lawyers have the following rights:

a) to be the defender of individuals and legal entities applying for legal assistance, to represent their interests in investigation, inquiry, court, other state bodies, organisations, non-governmental organisations, foreign countries and international organisations;

b) to use all methods and means in their activities that are not prohibited by law and do not contradict the ethics of lawyers;

c) to conduct independent investigations, collect documents, and request certificates and other documents necessary for providing legal assistance from departments, organisations, and institutions, to familiarise themselves with them, and to make copies of those documents in connection with carrying out professional activities, to submit reasoned written requests for obtaining information from the state register of real estate in accordance with the Law of the Republic of Azerbaijan "On the State Register of Real Estate" [5];

d) obtaining opinions from experts or specialists to investigate issues requiring specialised knowledge;

e) to use technical means in accordance with the legislation;

f) to meet and speak with the protected or represented person in private, without hindrance, in accordance with the procedure established by law.

As can be seen, Article 15 of the Law of the Republic of Azerbaijan on lawyers and legal practice directly stipulates the right of a lawyer to conduct independent investigations, including the means for doing so. This idea was reflected in Articles 92.9.5, 92.9.9, and 143.3 of the Criminal Procedure Code of the Republic of Azerbaijan, adopted on July 14, 2000, and entered into force on September 1, 2000. Thus, under Article 92.9.5 of the same Code, the defence lawyer is obliged to collect evidence and other materials for examination in the criminal case before the trial or during the court proceedings, and to submit them to the body conducting the criminal proceedings. According to Article 92.9.9, the suspect or accused has the right to take measures to collect evidence to clarify issues related to the implementation of the defense, to interrogate individuals and legal entities with their consent if the criminal prosecution is carried out in the form of an extraordinary indictment, as well as to obtain an expert opinion and learn the opinion of a specialist on a contractual basis.

Article 143.3 of the Criminal Procedure Code of the Republic of Azerbaijan states that a defence lawyer, who has appointed to participate in criminal proceedings in the cases and in the manner provided for in this Code, has the right to present evidence and collect information for the provi-

sion of legal assistance, including receiving explanations from individuals, as well as requesting references, character certificates and other documents from various organisations and associations [6].

However, although the articles mentioned above state that the defence lawyer must collect evidence in accordance with the procedure provided for in the Criminal Procedure Code, those rules are not reflected in either the Code or the Law of the Republic of Azerbaijan on Lawyers and Advocacy; this leads to the failure to implement these norms in practice and the restriction of the rights of defence of persons subject to criminal prosecution.

The participation of a lawyer in conducting investigative actions to collect evidence is significant. Criminal procedural legislation stipulates that the parties bear the burden of proof and that the court determines the issue of guilt, provided that the parties have equal opportunities to collect and present evidence. However, as can be seen from the aforementioned articles of the Criminal Procedure Code of the Republic of Azerbaijan, the defence lawyer's collection of evidence is limited only by the right to obtain explanations from individuals with their consent, as well as to request references, character references, and other documents. The right of the defence lawyer to question individuals with their consent is one of the most essential rights that enables his participation in the evidence. However, the lack of regulatory regulation of the procedure for conducting questioning and determining the information obtained during this process results in the results of the questioning not being considered by the courts as independent evidence; this violates the principle of adversarial proceedings because the information obtained by the defence lawyer through questioning individuals does not constitute independent evidence. The defence lawyer must provide this information to the investigating body or person and file a motion with that person to interrogate the persons he/she has questioned. If the investigator grants the petition, they will interrogate these individuals, take their statements in accordance with criminal procedural law, document the investigative action, and thereby give the obtained information evidentiary value [7].

Such circumstances require a critical rethinking of the current norms and the practice of their application (to strengthen the procedural balance

between the prosecution and the defence) [8, p. 130]. Indeed, one of the main problems is that criminal procedural law does not clearly regulate the procedures for collecting evidence and presenting it to the investigator or the court. The legislation stipulates other procedural actions and the defence lawyer's actions so laconically that the specific procedures for carrying them out are often unclear.

In addition to the lack of regulation of defence lawyers' information-collection procedures, the procedural form of their determination also warrants attention. Optimal implementation of the adversarial principle requires improving the procedural mechanism that ensures the defence lawyer's participation in the evidence-gathering process. Due to the underdevelopment of this mechanism, law enforcement practice often encounters unjustified refusals to incorporate information collected by a defence lawyer into the criminal case materials, based solely on formal grounds. In this regard, the process of obtaining and submitting evidentiary information for inclusion in the materials of the criminal case should be specified in detail, including the procedural form of formalising such information.

A properly constructed and implemented defence mechanism helps overcome the psychological problems of the detainee caused by shock, confusion, and a sense of helplessness, and also helps build appropriate behaviour when interacting with representatives of government authorities. The very participation (even the presence) of a defence lawyer helps to overcome the detainee's stressful state and prevent the latter from committing procedural errors. "A more difficult situation arises, however, when the advocate determines that some intervention is needed to address distress that the forensic examiner, law enforcement investigator, or other community professional is causing. Again, some of this distress is inevitable, given the difficulty of reporting a sexual assault and participating in an exam or interview. No matter how competent and compassionate community professionals are, victims will typically experience distress during these procedures. However, victims often forget that they actually have rights during the process – and that they are the ones responsible for making important decisions. Often, victims feel that the process controls them and moves forward on its own, leaving them powerless to make decisions or influence what happens. It is therefore

appropriate for advocates to remind victims of their rights throughout the process" [9, p.72].

The characterising and consolidating actions of a lawyer in the formation and implementation of a defence position include the formation of a position.

The formation of a position begins with the establishment of a trusting relationship between the lawyer and the client. To build trusting relationships, a lawyer needs to develop communication skills to work with people of different personality types. The client's trust in his lawyer is key to obtaining reliable information and forming the correct position on the case.

An essential part in the formation and implementation of the defence position is a thorough study and thorough knowledge of the materials of the criminal case. The stages of preliminary development of the defence position are: analysis of the accused's actions, analysis of the circumstances of the criminal case, analysis of the evidence, assessment of the legality and validity of the prosecution's position, and coordination of the position with the client.

The opinion of a defence lawyer in a criminal case is also the opinion of a specific person to some extent, including ethical, political, and other ideas. Still, it is always the opinion of a professional, given the direct dependence of the defender's position on the evidence available in the case and the information obtained through their analysis, evaluation, and verification.

The lawyer's position is formed by considering the defendant's will, the law, established law enforcement practice, and the actual legal situation.

The main problems in the formation and implementation of the defence position are subjective and characterised by the organisational and procedural behaviour of the defence lawyer. A passive position, a conviction in the impossibility of fulfilling one's duties properly, ultimately leads to a decline in the level of qualification of a lawyer in criminal proceedings, expressed in ignorance of the law, judicial practice and doctrinal views, without which it is impossible to provide qualified legal assistance. "The presentation of evidence of the innocence of the accused cannot be assigned to his counsel; a guilty verdict cannot be based on assumptions, however convincing they may seem" [10, p. 37].

Although the law does not impose the burden of proof on the defence lawyer, they must actively collect, verify, and evaluate evidence using all available legal means. Guided by the purpose of defence in criminal proceedings, the lawyer bears responsibility for proving circumstances that justify, mitigate punishment, or otherwise improve the position of the accused or defendant.

We consider it necessary to note that Article 26 of the Law of the Republic of Azerbaijan On lawyers and legal practice, entitled "Provision of Legal Assistance by Foreigners", states: "According to the requirements of this law, the provision of legal assistance by foreign lawyers in the territory of the Republic of Azerbaijan is limited only to advice and opinions on the application of the laws of the state to which the foreigner belongs or the norms of international law.

Foreign lawyers are admitted to court proceedings in civil, criminal, administrative, and commercial cases, and in cases on administrative offences, in the territory of the Republic of Azerbaijan, based on mutual relations in accordance with international treaties to which the Republic of Azerbaijan is a party.

Therefore, according to the provisions of Article 26 of the Law above, foreign lawyers may provide legal assistance in the territory of Azerbaijan by being admitted to the relevant proceedings based on mutual relations in accordance with international treaties to which the Republic of Azerbaijan is a party, but the law has determined the framework of this legal assistance in specific regions: Providing advice or opinions on the laws of the foreigner's country of origin; providing advice or opinions on the application of international law norms.

According to Article 3.4 of the Criminal Procedure Code of the Republic of Azerbaijan, the application of the norms of the criminal procedural legislation of a foreign state in the territory of the Republic of Azerbaijan is allowed only if they are provided for in international treaties to which the Republic of Azerbaijan is a party and do not contradict the duties and principles of the criminal procedural legislation of the Republic of Azerbaijan.

Since the procedural norms of a foreign country are permissible within specific conditions in the territory of the Republic of Azerbaijan, it is a realistic situation that a foreigner who is a participant in the proceedings and needs legal assis-

tance also needs legal advice or an opinion on the application of the laws of the state to which he belongs.

Although the activities of a lawyer acting as a defence lawyer in criminal cases in a democratic legal state are aimed at protecting a special interest, they are of significant public importance by their very nature. One of the leading and decisive features of defence activities, which also essentially ensures the implementation of the principle of adversarial equality of parties, a conceptual principle of criminal proceedings, is the independence of the defence lawyer. This situation, as well as the particular seriousness of legal disputes considered in criminal proceedings, necessitates a principled and guaranteed approach to the implementation of independent professional defence.

According to Article 63 of the Constitution of the Republic of Azerbaijan, entitled "Presumption of Innocence, "everyone has the right to the presumption of innocence. Every person accused of committing a crime is presumed innocent unless his guilt is proven in accordance with the procedure prescribed by law and unless there is a final court judgment to this effect.

If there are reasonable doubts about the guilt of a person, they shall not be found guilty.

A person accused of a crime is not obliged to prove his innocence.

Evidence obtained in violation of the law may not be used in the administration of justice.

No one can be considered guilty of a crime without a court verdict".

Therefore, the Basic Law establishes that a person does not bear the burden of proving his innocence and that he has no such duty. Since the investigation of a lawyer is an activity related to the collection of evidence, the aforementioned provision of the Constitution may be the basis for the legal nature of this activity because the provision above excludes the obligation to prove the innocence of a person subject to criminal prosecution from being placed on the lawyer defending him. In this sense, conducting a lawyer's investigation to seek, obtain, and present evidence of a person's innocence in criminal proceedings should always remain a right of the defence party. It should in no case be imposed as an obligation on the lawyer defending the accused.

We consider it necessary to state that, like any other human activity, criminal procedural evi-

dence is also subject to change under the influence of various historical, cultural, socio-economic, and other factors. Furthermore, the process of proof is subject to the legal system of a society at a given time. In the process of state and law development, criminal procedural legislation and its sources inevitably change, as a search for optimal methods, means, and ways of interaction among participants in society takes place during both progressive and regressive changes.

In criminal proceedings, a lawyer's investigation is a criminal procedural activity, as it involves collecting evidence to provide legal assistance to their client. In other words, investigators must carry out the activity through procedural means for its results to influence the resolution of procedurally significant issues. The procedural means of a lawyer's investigation are the methods of collecting evidence for a lawyer established in criminal procedural legislation and regulated by its norms.

According to Article 7.0.37 of the Criminal Procedure Code of the Republic of Azerbaijan, procedural actions refer to the actions taken by participants in criminal proceedings in accordance with this Code and its provisions. The legal definition of procedural actions in the Criminal Procedure Code provides grounds for evaluating the actions taken by lawyers participating in criminal proceedings to collect evidence as procedural actions.

The criminal procedural burden of proof plays a vital role in the implementation of evidentiary activities. The traditional approach to the realisation of the burden of proof is to evaluate the evidence (the body of evidence) according to internal belief. According to Article 25 of the Criminal Procedure Code of the Republic of Kazakhstan ("Evaluation of evidence based on internal conviction"), the judge, the prosecutor, the investigator, and the inquirer evaluate the evidence according to their inner conviction, based on the totality of the considered evidence, guided by the law and conscience. "... No evidence has a pre-established validity" [11].

The activities of participants in the criminal process at the trial stage include the prosecutor making an accusation, the accused denying the accusation, and the judge critically evaluating the positions of both sides, without being biased towards the case materials or the participants in the proceedings.

Indeed, the burden of proving the accusation lies with the prosecution. A defence lawyer acting in the interests of functional defence must create a reasonable doubt based on evidence and proof regarding the accusation made against the defendant, if the defendant disagrees with the accusation made against him, as well as to improve his legal position.

"The burden of proof in the criminal proceedings ... presupposes that the prosecution bears the burden of proving guilt of the accused ... and can never be transferred to the defence." [12, p.14].

In turn, the prosecution has the burden of rebutting the defence's evidence based on the "beyond a reasonable doubt" standard.

The lawyer's investigation is an integral part of pretrial proceedings in criminal cases. The lawyer did not conduct a fully independent parallel investigation. The defence lawyer does not perform investigative actions; does not draw up a "defence act" after the investigation is completed, which acts as an integral part of the criminal case being conducted by the lawyer and includes constructed and numbered materials; is necessary for familiarisation with other participants and for submission to the court. "Presentation of evidence is the right of the defender and not his duty, which he may and may not use. At the same time, the defender does not have to present the evidence he has if it may prove the client guilty. Such behaviour contradicts the procedural function of the defender as well as professional and moral standards of defending activity" [13, p. 91]. In accordance with the principle of adversarial proceedings and equality of arms, the defence lawyer must have the same powers as the investigator or prosecutor when defending their position; that is, the parties must participate equally in the evidentiary process. Then, based on the information obtained, they must influence the judge's internal conviction. ECHR notes that "The defence must have the same opportunity to introduce expert evidence as the prosecution" [14, §189].

Even though the defence lacks equal opportunities in criminal procedure, the law provides specific procedural means of proof to allow the professional defence lawyer to fulfil their duty of presenting evidence. For example, Article 92.9 of the Criminal Procedure Code of the Republic of Azerbaijan, which governs the exercise of the de-

fence lawyer's rights, establishes specific means and methods of proof.

The law does not exhaustively define the permissible means and methods of defence in a criminal case, allowing the defence lawyer to supplement this list with any active actions that comply with criminal procedural law.

Let's look at what we consider to be the most essential way for a defence lawyer to fulfil his burden of proof - the right to gather evidence. Although the legislation states that a lawyer has the right to take measures to collect evidence, the evidence thus collected does not automatically acquire the status of proof; it serves only as corroborative information. When they are submitted, the subject of the criminal case reviews the information and decides whether to grant it legal status as evidence. In this context, the reasoning of P. Hallberg and M. Yaimä is accurate and consistent. These authors advise against focusing on the lawyer's collection of evidence or corroborative information. In their opinion, the main point is that he adopts an active, proactive defence position in his client's interests [15, p. 45].

The lawyer's participation in evidentiary activities implies, first of all, his active cognitive actions aimed at discovering and obtaining information about the circumstances of the investigated event, their investigation and analysis, as well as the effective use of this information to fully ensure his client's rights, freedoms and legitimate interests. "...evidence in criminal proceedings, first of all from the standpoint of intellectual activity (cognition and logic of substantiation), is considered ... as the implementation of all cognitive activities of the subjects involved in the criminal process, which includes not only the assessment but also the collection and verification of evidence" [16, p. 1].

In legal literature, some authors characterise lawyer research as "private, special research". Lawyer and detective investigations, as well as special investigations, are inquiries conducted for the specific interests of individuals and legal entities. These investigations are carried out by persons who are not employees of state bodies and are of a private nature; a characteristic feature of investigations carried out by employees of state bodies is that they are carried out not only in the interests of individuals, but also in the interests of society and the state as a whole. The researcher states that the lawyer's activity, aimed at determining the circumstances of the

case and collecting evidence in connection with the defence function, is not private or special in nature, but rather a public-legal activity. By carrying out his criminal procedural activities, a lawyer does nothing other than carry out the functions assigned to him by law. He ensures the right to quality legal assistance by being a defender.

According to the requirements of Article 19.4.4 of the Criminal Procedure Code of the Republic of Azerbaijan, the body conducting the criminal proceedings must ensure the right of the suspect or accused to be defended personally or through a defence lawyer of his own choosing, or to receive free legal assistance if he does not have sufficient funds to pay for the defence lawyer's fees. According to Article 193.2 of the Code mentioned above, if a suspect or accused person does not have sufficient funds to pay for the services of a defence lawyer, the body conducting the criminal proceedings must ensure that legal aid is provided to that person at the expense of the state budget of the Republic of Azerbaijan.

In accordance with Article 193.3 of the same Code, the court, taking into account the average monthly income, financial, property and family status of the suspect or accused person, as well as other circumstances, adopts a reasoned decision to exempt that person from paying for legal assistance provided by the defence lawyer and to make the payment at the expense of the state budget of the Republic of Azerbaijan.

According to the legislation, if a suspect or accused person refuses a defence lawyer and this refusal is not accepted by the body conducting the criminal proceedings, the legal assistance of a defence lawyer participating in the criminal proceedings is provided free of charge to the persons concerned based on a court decision and at the expense of the state budget of the Republic of Azerbaijan.

CONCLUSIONS

Following the proclamation of the idea of building a legal state in the Constitution of the Republic of Azerbaijan, adopted on November 12, 1995, preparations for reform measures to implement this principle began. As the leading human rights protection institution in civil society, the legal profession was given a pivotal role in the practical implementation of the principle of providing

high-quality legal assistance to everyone who applies, which is inherent in a legal state. Advocacy, one of the forms of implementing human rights protection activities, aims to ensure the principles of protecting human and civil rights and freedoms, which are equally guaranteed by the state [17].

The strengthening of the institution of advocacy also requires the normative resolution of specific issues. According to the Constitution, everyone has the right to high-quality legal assistance. In cases stipulated by law, legal aid is provided free of charge at the state's expense. Every person has the right to the assistance of a defence lawyer from the moment he is arrested, detained, or accused of committing a crime by the competent state authorities. According to the Resolution No. 141 of the Cabinet of Ministers of the Republic of Azerbaijan dated April 28, 2025 [18], the fee paid to a defence lawyer (lawyer) at state expense for providing legal assistance in cases stipulated by the Criminal Procedure Code of the Republic of Azerbaijan has been set at 11 (eleven) manats

per working hour. This amount is approximately equivalent to 6.5 (six and five-tenths) United States dollars. The remuneration of lawyers should be increased through an annual indexation mechanism based on the inflation rate and other economic indicators; this would preserve lawyers' real income and enable stable financing of the system.

The questioning of individuals by the defence lawyer with their consent, and the use of the information obtained during this process, have remained outside the scope of normative regulation; this, in turn, creates problems with courts considering such results as independent evidence and violates the principle of adversarial proceedings.

The de facto legal inequality between the disputing parties creates both theoretical and practical problems. The defence lawyer must ensure equal participation in presenting evidence in defence of their position, alongside the investigator or prosecutor.

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