Problems of Defense Counsel Participation in Proof in a Criminal Case

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Abstract: In the article the author discusses two legal categories with different target orientation - prosecution and defense, their unity and interdependence. We consider the concept of prosecution and defense, their information base, the dependence of their correlation on the type of legal proceedings and possibility of the legal opposition of defense to prosecution against excessive coercion by prosecution. This scientific article considers various topical issues that arise in the work of defense attorneys during pre-trial proceedings and comes to useful conclusions for improvement of the lawyer’s activities in human rights defense. The author comes to the conclusion that in the system of preliminary investigation there can be no equal opportunities for the prosecution and defense; we should speak only of the need to approach these opportunities, empowering the defense with the rights allowing to counter excessive coercion by the prosecution, as well as the creation of a special unit of investigating magistrates, equally taking into account the interests of the prosecution and the defense in pre-trial investigation.

Key words: Defense · Prosecution · Prosecution · Investigatory actions · Rights of the accused and the defender

INTRODUCTION

The concepts of the prosecution and defense are among the basic, retaining knowledge of the basic properties and relationships (laws) of the criminal process. In the conceptual framework of science they are important procedural categories. Unlike ordinary and narrow concepts reflecting not the most important aspects of the criminal process, these categories, as the concept of limiting generality - are primary in the scientific system and cannot be deduced from its other concepts [1, p.56].

In science pairs of diametrically opposite categories are distinguished, so-called paired categories: "procedural rights" and "procedural obligations", "prosecution" and "defense", "judicial independence" and "their submission to the law only" and etc. Occupying a special place in the scientific apparatus, these categories form a system that reflects the differences between the two extremes of the same essence [2, p. 17]. In this system the existence of one category necessarily imply the existence of other.

As for the pairs of other opposite procedural concepts, which we call the alternative, they are mutually exclusive. These include, in particular, the concepts of "criminal proceedings" or "refusal to institute criminal proceedings", "conviction" or "not guilty verdict". They fix the procedural decisions, which are based on various justifications. Thus, presence of sufficient data indicating essential elements of a crime leads to a criminal case and the absence of such data excludes a preliminary investigation procedure. Positive solution of issue on institution of criminal proceedings is at the same time a negative response to another question - whether there are justifications for refusal of institution of criminal proceedings. Between these opposites, there is only a logical contradiction, which is a contradiction in our thinking that allows them to exist in the same time [3, p 89]. In reality, these opposites exclude one another, they cannot exist simultaneously.

Pair categories, in contrast to alternative concepts, always exist as a system of two interrelated categories. In criminal proceedings, where they are categories of a right (components of legal matter), between them there is a horizontal relationship. This means that criminal proceedings elements fixed by them (for example, the prosecution and the defense) are located at the same level in the process of procedural relations and have equal opportunities to realize their functions [4, p. 5].

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Internal, the inextricable connections between the categories "prosecution" and "defense" form the law, the essence of which can be expressed in the following equivalent judgments: the prosecution involves defense; defense arises only with the appearance of the prosecution; if there is no defense so there is no prosecution [5, p. 34]. The most important methodological position is that the defense arises not from the prosecution, but appears in the connection and at the same time with it. Otherwise, the protection category would be considered as a derivative of prosecution category, that is, the concept of a lower level, which with regard to the criminal proceedings, conducted in a trial stage (the trial itself) would have been the fundamental mistake. Prosecution and defense grow from a single base, are the result of different interpretations of the same circumstances of the criminal case and the proofs available, which makes the opposite positions of the relevant participants in the proceedings, so that the relations between them have the confrontation and opposition. Prosecution seeks to confirm the version of accusatory evidences (exculpatory evidences, as a rule, what happened, to refute the defense position, to refute are not hidden, but are provided to investigator its arguments. Defense, on the other hand, seek to remove prosecution items that did not get a confirmation or withdrawal of prosecution in general, as unnecessary [6, p. 49].

Countering the prosecution from the of defense, in case it chooses available by law, as well as others that are not prohibited by it, means and methods of fighting for the interests of the accused (defendant), not only legally, but also an objective law. Natural connections between the prosecution and the defense manifest themselves in different ways depending on the type of criminal proceedings. In the process of the mixed type, constructed on the principle of separation of powers, where the pre-trial proceedings are performed by the executive authorities, the main function of which is the criminal prosecution, the relationship between the prosecution and the defense are built vertically and have the character of subordination (power and subordination). In such a system of relationships the protection becomes "metered" from the side of defense and of the derivative of it. Prosecuting authorities being aware of its significant advantage over the defense, constantly slipping into the path of unreasonable restrictions of its already meager opportunities to confront their actions and decisions [7, p. 190].

In its opposition to the prosecution with its broad powers and a powerful resource defense authorities do not have the capacity, sufficient to influence the prosecution in order to keep from trying to use the so-called accusatory as the only and accented method of investigation [8, C. 3].

The criminal prosecution authority for collecting of accusatory evidences use a wide range of investigative and other procedures that have significant potential for coercion (from the mental to the power). Requirements, orders and requests of the investigator, as a representative of the government, are binding on all institutions, enterprises, organizations, officials and citizens. Using of results of non-procedural operatively-search activity by investigator extends the opportunities of criminal prosecution. Application by the investigator of the commission of investigation and other procedures associated with restrictions of constitutional rights and freedoms of the accused and other persons are subject to mandatory and prompt consideration by the judge. Analysis of the Part 2 of Art. 59 of CPC of RK indicates that the resource of the judiciary is only used for the purpose of criminal prosecution and collecting of accusatory evidences (exculpatory evidences, as a rule, are not hidden, but are provided to investigator voluntarily).

Choosing preventive measure by investigator in order to prevent the opportunity for the accused to escape from investigation or trial, continue criminal activities, to oppose the criminal proceedings in illegal way, that is reached through the restriction of his right to freedom and personal security, significantly reduces the ability of the accused to defend himself against the prosecution, especially in cases of long-term isolation from the society [9. p. 113].

To abovementioned must be added that investigator’s actions are not always adequate in terms of the need for serious intervention in human rights or their immediate proceeding. Significant part of the potential of state enforcement in criminal cases composes an excessive coercion. So it appears, for example, in the case of a search in the house at night and in the absence of a judicial order under the pretext of the urgency of the investigative procedure, when it was quite possible to make in the day time with observation of all warranties of human rights provided by law. To excessive coercion can be regarded choosing detention as a preventive measure, when the circumstances of the case and personality of the accused quite allow to leave him on freedom, for example, on bail. This may also include the production of so-called overdo inquiries with term of the eight hour or a little less [10, p. 475] and special investigations [11, p. 45], the use of "lie detector" [12, p. 14], specific to legislation in several countries of the West.
Use of excessive coercion may be the result of investigative errors, intentional violation of law, etc. Excessive coercion due to violation of the law, being sometimes a way to suppress the will of the accused with the unseemly to achieve his specified behavior, to get the recognition of guilt by accused, is more dangerous for both human and justice rights and freedoms [13. p. 22]. Possibility of such coercion lies in the Criminal Procedure Code, as a result of lack of appropriate restrictions in it. Thus, the CPC of RK does not answer the question of how many times one person may be questioned about the same things and if such repeated questionings are acceptable in principle.

At the end of investigation, the investigator makes the indictment, which not only defines the limits of the proceedings (Art. 320 of CPC of RK). The indictment, coming from non-judicial power bodies, became an act of predetermining sentencing by a court. Prosecuting authorities got additional opportunities to realize through the courts set of "crime fighting" programs, including with individuals, accused of extraordinary socially dangerous acts.

Although a copy of the indictment is given to the accused and his defender, if he applies for the same (Part 2 of Art. 284 of CPC of RK), but neither the one nor the other is entitled to apply for this conclusion objections setting out the other, opposite to prosecution concept, vision of problem of involving the defendant to the incriminated act. However, CPC of RK gives, in particular, convicted, acquitted, their advocates the right to bring to the cassation complaint or represent their objections in writing (Part 1 of Art. 401 of CPC of RK). The accused and his defense counsel should also have the right to file an objection to the court as an alternative to the indictment (protocol). The most appropriate time for the hearing of objections to the indictment is a beginning of a judicial investigation, after presenting by the state prosecutor indictment brought against the defendant and calling by chairman the defendant with the question whether he or his counsel wishes to express their attitude to the substance of the indictment (Art. 345 CPC of RK).

Investigator awareness of the fact that the defense may raise objections to the indictment, that are subject to public announcement at the beginning of the judicial investigation, objectively should help to ensure that the investigator will be more careful and responsible in summing up the results of the investigation and filing of the indictment. As for defense, it can become more organized, work on the program (according to the objections) and be not limited by cues and value judgments of prosecutor made impromptu and under the influence of emotions [14, p. 11].

The court continues to appear as one of the links in the system, the so-called criminal justice system, which includes also the criminal prosecution authorities, the prosecution authorities, the structures involved in the operational-search activity. In this system, the possibility of the court to disavow conclusion of investigators and prosecutors in the criminal case in the necessary cases is even more limited. Considering this decision of the legislator as reasonable, at the same time, we believe it is necessary to give additional powers to the court to stop the criminal case due to violations of constitutional rights and freedoms of the defendant, the non-compliance with the pre-trial investigation procedure (for example, in the case of investigative actions without counsel when his participation is mandatory, as well as when proving prosecution by evidences recognized by court as inadmissible and so on). The inclusion of these and some other justifications in the list of those that involve the termination of the criminal case should help improve the quality of the preliminary investigation, protection of the rights and freedoms of the individual in criminal proceedings, maintenance of the rule of law in the criminal case. These proposals are appropriate to establishments of RK Constitution on that a person's rights and freedoms are the supreme value (Art.1) and that evidences obtained in illegal way have no legal force (items 9, paragraph 3 of Art. 77), etc.

The CPC established that "the judgment may be based only on the evidences that had been tested in court..." (Part of 3 Art. 311) and, consequently, on the evidences presented by the defense (this can be inferred from the interpretation of Part 2 of Art. 347). However, this rule is completely contrary to the rule that the court decides to sentence on the basis of the indictment, that is, on the evidence of guilty. The desire of the legislator to prevent "tyranny" of the court in relation to the position of power structures, expressed in the indictment can be seen. It seems that this is one of the main reasons why the number of defendants acquitted by the courts in our time, as in the past, is very small.

The fact that the defendant may oppose the prosecution activity of the investigator (e.g. evidence of the prosecution, evidence submission, the participation in the investigation), in reality is largely ephemeral, elusive, not having reliable guarantees. Moreover, the use by...
the accused of some of its rights in some cases can turn against his legitimate interests. For example, the following rule from the Code should cause confusion: in case of consent of the accused to testify, he should be warned that his testimony may be used as evidence in a criminal case (Part 2 of Art. 217 of CPC of RK).

The patient is warned not to that prescribed medicine - a good remedy for the treatment of disease, but the inadmissibility of its overdose, possible negative side effects of the application, etc. In criminal proceedings, its non-professional participants should be warned about their responsibility for the failure of procedural obligations for acts of a criminal nature (e.g., misleading information, false testimony, the disclosure of preliminary investigation data), etc. Defendant also must be notified that evidences given by him may be used against him as evidence of guilty. This is an important legal position, serving the case of defense of the accused from the prosecution, based on his presumption of innocence, appeared only in the subtext of named norm of the Code. Its editorial provokes accused to give evidence in the hope that they will be tested, will find confirmation and serve as protection from prosecution. As a result, being uninformed about all the possible consequences of such a step, the accused gives evidence, which are used as incriminating, so he deprives himself of the privilege against self-incrimination [15, p. 344].

The defendant's right to present evidence (Part 2 of Art. 69 of CPC of RK) is initially defective and inadequate. It is not specific to the accused and belongs to all the other participants in the process by the prosecution and the defense (Part 4 of Art. 125 of CPC of RK). It is puzzling that the CPC of RK has given such a right any other individuals and organizations (Part 4 of Art. 125). The accused, in contrast to the other participants in the criminal proceedings, requires not only the right to present evidence, but the right to ensure that the evidence was attached to the case. The wording of the rules of above articles do not contain a clear indication that documents and things submitted by the defendants are subject to mandatory attachment to the case as evidences. This is no accidental. As physical evidences, for example, are recognized and attached to the case only those objects and documents that can serve as a means for the detection of crime and establishing the circumstances of the case (Part 1 of Article. 121 of CPC of RK). The question whether they can be relevant to establish the circumstances of the case, is solved not by the defendant (his defense counsel), presenting them as exculpatory evidences, but by the investigator. Direct instruction to that is contained in Part 1 of Art. 123 of CPC of RK: "Documents are recognized as the evidences if the information contained or certified in them by organizations, officials and citizens, are relevant to the criminal case."

Thus, only the investigator decides what evidence is in a criminal case and what does not meet the requirements for evidence. In our opinion, in a criminal case must be the evidences obtained by the investigative and other procedural actions and also what is provided by the accused and his defense counsel as evidence. The right of the accused (his defense counsel) to submit evidence can be effective when it is complemented by the duty of bringing them to the case. Because the investigator is free to evaluate the evidences, including provided by the defense, he may not recognize them as such in terms of their relevance, validity and reliability and may not include in the system of evidences of the case. But in this case also they should remain in the case. This is to ensure that each time at a later stage of the proceedings they could be the subject of investigation by the actors of the prosecution or judiciary power who is in charge of the case and other participants in the proceedings both as the defense and the prosecution. All of them also evaluate evidences - freely, according to their own opinion and therefore the fact that the evidence previously submitted by the defendant and rejected by the investigator may be claimed as relevant to the case can not be excluded.

According to the Part 2 of Art. 69 of CPC of RK the accused has the right to participate in the investigation with the permission of the investigator or the inquiry officer, made at his request or the request of his legal counsel or the request of his legal representative. However, this norm in reality does not state the right of the accused to participate in the actions made by the investigator, but the right to apply for it. Satisfy the application or deny - this is the power of the investigator. However, if the implementation of the rights of one subject of legal relations may only be at the discretion of the other, then it is not a right but a petition. The fact that a defendant has a certain right may be spoken only if this right meets the procedural obligation of another subject of legal relations (investigator, prosecutor). Limited, cut rights of the accused to participate in the investigation can not be regarded as complete and real rights.
Under the law, the accused and his defense counsel shall have the right to submit petitions to establish only such circumstances that are relevant to the criminal case, maintenance of the rights and legitimate interests of the accused (Part 1 of Art. 102 of CPC of RK). This article does not say anything about the responsibilities of the investigator to consider applications of the accused. Thus, the investigator can leave petition of the accused, as well as any other initiative of defense, without satisfaction, if it finds that the action on the proceeding of which petition has been made, is not relevant to the circumstances of the case. Only the investigator decides which facts relevant to the case. This last rule is quite logical, since he carries out a preliminary investigation and is responsible for it. But the procedural autonomy of the investigator, in our view, does not contradict the following solution of considered problem: before making a judgment on the importance to establish the circumstances of the case, for example, examination of the witness, first he must be questioned, including, possibly with the participation of the accused who applied petition.

Following also should be beard in mind. Rejection of petition does not deprive the accused of his right to renew the petition (Part 3 of Art. 102 of CPC of RK). But the accused has no guarantee that the renewed application will be granted. He, unlike the investigator is not entitled to go to the court with petitions. The defendant's right to go to the court with complaints about illegality of already committed actions and decisions by the investigator serves to the restoration of its violated rights and the protection of legitimate interests. This right, however, is not enough for the defendant to be an active participant in the pre-trial, opposing the prosecution and influencing on the course and results of the preliminary investigation. If the investigator will reject the petition of the accused going of the accused to the court with complaint is inappropriate and incorrect, because the investigator did not act contrary to the law, but in accordance with it.

In our view, in case of rejection of petition of the accused by the investigator he may apply with the appropriate petition to the court (on solicitation (recess) of the necessary documents, re-examination of the crime scene, the production of an independent examination; exclusion of evidences obtained by investigator illegally; proceeding of investigative steps by the body of inquiry for determining separate persons, such as eyewitnesses, compulsory interrogation of persons present at night searches made without the judicial order on that and so on).

The absence of the accused the right to petition the court at a time when the criminal case is under the investigator, that is the inability to use this sufficient reserve of defense indicates a significant inequality of opportunities between defense and prosecution. Treatment of the accused with the petition to the court frees him from the tyranny of the investigator and adds him opportunities to actually affect prosecutorial power. Judicial power through the implementation of prosecutorial power through the implementation of judicial control should serve not only the interests of the prosecuting authorities, giving them permission to produce certain legal investigative and other activities, but also the interests of protecting, recognizing its reasonable petitions and obliging investigator to satisfy them. However, the solution to this problem is only possible through the formation of an additional structure of the judiciary power - "investigative judges", which provides by Concept of judicial reform. These judges must exercise judicial review, as well as checking on complaints on compliance of actions and decisions of the police with the law and to be free of criminal cases on the merits [16, p. 144].

CONCLUSION

In view of the above it is possible to say that the CPC of RK in terms of procedural regulation of pretrial proceedings in a criminal case does not fully meet the standards inherent in the rule of law based on respect for and protection of the rights and freedoms of man and citizen. This stage of the criminal process, as noted, is characterized by the presence of the suspect and the accused of very limited process rights also without reliable guarantees, compared to the broad powers of the investigating authorities, using the powerful potential of coercion as the main method of the functions of the crime and criminal persecution and taking unilateral decisions on all criminal cases often without protection position and, as a consequence of this situation - the existence of a deep divide between the prosecution and the defense on their abilities to implement their respective functions.

However, we must recognize that equality of opportunities between prosecution and defense in the current system of pre-trial investigation cannot be determined. We can speak only of a certain alignment of levels of resistance by giving defense additional procedural rights (e.g. the right to appeal a petition to the court), that is appropriate at the pre-trial stage of the criminal process.
Only in court, where the relationships between the fighting parties of the prosecution and the defense have a single-level character, they are equal and act on the basis of competition.

REFERENCES