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The problems of criminal prosecution and defense of the individuals not reached the age of calling to criminal responsibility

Abstract: The provisions of the law about production on criminal prosecution in form of criminal case in respect of the minors, who committed grave and especially grave crime, contrary to the provisions of article 435-1.1 of the CPC about refusal in institution of criminal case.

It is considered aspects of criminal prosecution and defense in respect of the minors not reached the age of criminal responsibility.

Keywords: criminal prosecution; minor; criminal procedure; defense; the age of criminal responsibility.

According to article 139 of CPC of Azerbaijan Republic, "…during of production on criminal prosecution only on evidences are established: a fact and circumstances of criminal incident; relation of a suspected or accused to criminal incident; signs of a crime in act, provided by the criminal law; a guilty of a person in committing of the deed, provided by the criminal law; circumstances mitigating and aggravating of punishment, provided by the criminal law; circumstances by which a participant of criminal process or other individual (who participating in criminal process) is motivated his demand if other is not provided by the CPC" (19, p. 154-155).

The law (article 435-1 of CPC) provides two kinds of the situations of criminal prosecution of the minors committing the grave and especially grave crimes but not reached of the age of calling to criminal responsibility: a) on the criminal cases and

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b) on the materials so named “pre-investigative” examinations without initiation of criminal case (19, p. 428).

The second situation, when criminal case is not initiated, to criminal case is related conditionally, since it is absent it mandatory requisite – production on the criminal prosecution reflecting in the materials of simplified pre-trial production or in the materials of a complaint in order of private accusation (19, p. 33).

In addition, according to article 39.1.4 of CPC, the refusal in initiation of criminal prosecution in connection with not reaching of the age for calling to criminal responsibility is excluded if in respect of a person should be applied the coercion measures of educative nature (19, p. 28).

Consequently, assertion about refusal in the initiation of criminal case containing in the article 435-1.1 of CPC is wrong and is created a vicious circle, especially as an issue on coercion measures of the educative nature is resolved on the subsequent stages of court proceedings by the commission on the matters of the minor and a court.

But, this issue is initiated by the body carrying out a criminal process, as rule, by an investigator who under availability of proviso in the article 39.1.4 of CPC has no the right to refuse in the initiation of criminal case on the grave and especially grave crime since the article 435-1.1 of CPC is obliged him to begin a procedure consideration of the matter about coercion measures of the educative nature.

Thus, it turns out that a production on the criminal prosecution as criminal case in respect of the minors committing the grave and especially grave crimes is obligatory, and the assertion about refusal in the initiation of criminal case containing in the article 435-1.1 of CPC is wrong on the core and contents and therefore is subjected to exclusion from the law text.

The stated is presented to be correct as the minors are such participants of a process that an issue no guilty or non-guilty of which can be resolved only under using all opportunities of the criminal proceedings.

Let us consider how is correlated the provisions of the articles 435-1 and 435-2 of CPC with the provisions about criminal prosecution as one of the criminal procedural functions.

On opinion of V.M. Savitsny, A.I. Khudaberdiyev, G.G. Chadov and others, the function of accusation accepted to consider as a procedural activity of authorized bodies or individuals that is directed on exposing of a person in committing of crime in order to provide crimination of accused and application to him justifiable punishment (14, p. 8; 21, p. 21-22; 22, p. 51-52).

In article 7.0.20 of CPC under accusation is understood an assertion about committing by an individual a specific deed that provided by the criminal law and made in established order in compliance with the CPC. This order is fixed in the articles 223-225 of CPC.

In article 7.0.4 of CPC under criminal prosecution is understood the criminal procedural activity carrying out with purpose of establishing of a crime, exposing of a person committing an act provided by the criminal law, bringing an accusation, supporting this accusation in a court, imposition of him a punishment, in case of need ensuring the measures of procedural coercion. It should be noted that criminal prosecution carrying out in purpose of imposition of a punishment is an invasion in sphere of justice.

Thus, based on the meaning of these provisions, a lawmaker considers the criminal prosecution as activity performing in purpose of accusation that presents itself the inference. It is not difficult to note that consideration and correlation of the concepts is implemented in various levels.

A term “criminal prosecution” is actively used long in the procedural works, but the researches of this issue differently determine contents of the criminal prosecution and correlate it with the concept of accusation on various ways.

One of the widespread views on the issue is identification of the concepts “criminal prosecution” and “accusation” (20, p. 3-6). This position was subjected to criticism not only for absence of necessity to indicate with different terms the same activity, and also for that under this approach out of accusatorial function is left, in

particular, an activity on exposure of an individual until bringing him accusation (23, p. 214-215).

In connection with this it is presented as substantiated the point of view that supported by many scholars about that the concepts “criminal prosecution” and “accusation” are correlated as general and quotient (15, p. 38-40).

First of all, in frame of conception of the third criminal procedural functions it should distinguish the criminal prosecution. The content of this function is created an activity of the participants of criminal proceedings from the accusation side. In dependence on this stage of criminal proceedings, in narrow understanding the function of criminal prosecution should be realized, first, for exposure of an individual who committing crime and then it obtains a form of suspension and at last – accusation.

Proceeding from the essence of article 7.0.4 of CPC, criminal prosecution begins before initiation of the criminal case in purpose of establishing of a crime that creates a lot of contradictions with other concepts of criminal procedural legislation of Azerbaijan Republic.

Thus, according to article 45.2 of CPC, production on criminal prosecution is reflected in the materials of a criminal case, materials of the simplified pre-trial production or materials of the complaint in order of private accusation. Production on criminal prosecution in order of public or public-private accusation opens from the time of initiation of the criminal case by an inquirer, investigator or prosecutor (art. 45.3) (19, p. 35).

According to article 7.0.6 of CPC, the criminal case is a combination of materials collected during implementation of the criminal prosecution in connection with committed crime or a crime committing of which is supposed to be. According to article 7.0.7 of CPC, other materials collected in connection with carrying out a criminal prosecution on the simplified pre-trial production or a complaint in order of the private accusation or on a special criminal production. According to article 7.0.3 of CPC, a criminal process is a combination of implemented procedural actions and accepted procedural decisions on the criminal persecution. According to article 7.0.5

of CPC, the bodies which are carried out a criminal process are the bodies of inquiry, investigation, prosecution's office and the courts in production of which have a criminal case or other materials connecting with criminal persecution (19, p. 7-8).

Let us consider what is happening in compliance with mentioned provisions under consideration of a statement about committed murder. There is a statement about murder, inspected a crime scene of incident, in result of which it is found a dead body. It is beginning a criminal persecution with purpose of establishing of the event of crime. But, it is not yet a criminal case or other materials connected with the criminal prosecution (see, please, articles 7.0.6 and 7.0.7 of CPC), and therefore there are no the bodies carrying out a criminal process (see, please, article 7.0.5 of CPC), and nowhere to register production on the criminal prosecution (see, please, article 45 of CPC).

If no a criminal case and other materials connecting with the criminal prosecution then one cannot accept procedural decisions (see, please, article 7.0.43 of CPC) and consequently, there is no a criminal process in which they are mandatory constituent of the conception (see please, article 7.0.3 of CPC). Absence of the criminal process means the absence of the parties of the process etc. These all are in case with finding of a deed body in which everything is relatively clear. What is happening ender receiving a false statement on the extortion of bribe or giving bribe?

The main in all the cases is who will be prosecuted. "The prosecution should be subjected to a guilty person but not an individual who will be able to appear in position of suspected or accused on a mistake or on malicious intention" (9, p. 45).

An investigator should investigate crime identifying exposing and justifying evidences and not to persecute anybody even if he escapes. And who should be prosecuted in a direct meaning of the conception if a person committed crime is unknown or to the moment of initiation of a criminal case he was dead; committing a crime in a state of the diminished responsibility or under not reached the age of criminal responsibility?

Resuming above stated one can make a conclusion that criminal prosecution is the criminal procedural function of authorized by the law participants of criminal

process which consists in duties at detection of the signs a crime to accept the measures on establishing an event of a crime, establishing and exposing an individual or persons accused in committing of crime and bringing them accusation.

Consequently, the function of accusation side is a form of criminal prosecution, realizing from a moment of calling a person as accused or passing of a final protocol according to the results of performing of the simplified pre-trial production.

The law (article 7.0.27 of CPC) determines the function of a defense as procedural activity carrying out with purpose of the denial or mitigation of the accusation of an individual; defense his rights and responsibilities, and also restoration of the violated rights and freedoms of a person who is illegally subjected to the criminal prosecution.

M.M. Vydrya considers the function of a defense as an activity protecting against violations not only the rights of a suspected and accused, but and a victim, civil plaintiff, a witness (6, p. 89-91).It seems, that one should agree with opinion that the right of an accused to defense appears in connection with criminal prosecution; as for a victim, civil plaintiff, witness – they are used the right to defense provided by the state and its bodies, they have also the procedural rights but the right to defense in criminal procedural sense does not belong them (16, p. 206). The conclusion that the function of a defense is caused by implementation of accusation is also confirmed by the norms of the law: it is not accidentally in article 7.0.27 of CPC this function is mentioned as a defense against accusation. In addition, according to article 7.0.28 of CPC the function of a defense is executed by a suspected or accused, their defender and civil defendant – the party of a defense.

Science of the criminal process has no a unified opinion from what moment begins implementation of the function of a defense. Ones authors believe that protection function appears from the moment of a call of a person to the criminal responsibility (24, p. 12); others ones think that this function appears at the moment of initiation of a criminal case and also holds out against the measures of procedural coercion, but not only accusation (24, p. 21-22); on opinion of the third ones – the function of a defense covers a suspected also (10, p. 34).

The functions of criminal prosecution and a defense are closely interconnected and are understood as opposite. This opposition appears due to the fact that the party of accusation should collect accusative evidences, and the party of defense – justifying ones. The core of opposition of the function of a defense is that it enables to contest a conclusion of a prosecutor as a whole so and particular; to contest proof of suspicious or accusation, it legitimacy, decision on application of the measure of coercion, a conclusion on qualification of the deed and measure of punishment etc.

In connection with above stated understanding of the criminal prosecution, it seems that the function of a defense against criminal prosecution occurs from the beginning its implementation in respect of a specific suspected or accused including from the moment of initiation of a criminal case in respect of a person, and completes itself after a criminal case is stopped or production is completed with the entry of a sentence into legal force.

Thus, a defense should be defined in CPC as criminal procedural function which opposes to criminal prosecution, consisting in activity of the party of a defense on denial of accusation (or suspicious) a full or in any it part.

The concept of criminal procedural function settlement of a criminal case is inextricably linked with the concept “settling a case on merits”. It is not worked out an unambiguous understanding of these categories in the law and procedural theory. So, establishing competitive building of criminal proceedings, the articles 23 and 32 of CPC forbid entrusting on the same body or official person the functions of accusation, defense and settlement of the criminal case. From other side, the criminal procedural law does not point out what should be understood under “settlement of a criminal case”, and whether the authorities on cancellation a criminal case that entrusted on an investigator or inquirer is included in the content of this function on pre-trial production.

It is presented that this problem is caused by the absence of clarity relatively a subject of the criminal process, its merits. For example, N.N. Polyansky believed that an issue on criminal responsibility of an accused for the deed is a subject of criminal procedural activity (13, p. 260). Ya.O. Motovilovker thought that this is actual

circumstances connection with the past, knowledge about which allows answering on the main question - about criminal responsibility (11, p. 4-5). M.S. Strogovich pointed out that the main issue of a criminal case is an issue about whether an accused person had committed this crime, whether he is a guilty in committing one (17, p. 188). On opinion of V.A. Teplov, a circle of the main issues of the case is a wider: whether an event of crime had happened; whether it contains a composition of crime; whether a deed had committed by a person, called on this case (18, p. 55). According to position of A.Ya. Dubinsky, a subject of the criminal process is compiled the objectively existing actual circumstances, clarification of which allows obtaining responses at the next questions: whether a crime had committed; who committed it and what measures should apply to a person who committing the crime (7, p. 55).

Consideration of a subject of the criminal process is called to reply on the question on what is directed the criminal procedural activity, what reasons appearing of the legal relations. It is presented in the subject of criminal proceedings should be included the actual circumstances, establishing of which is allowed to resolve issues: whether proved that a crime happened in committing of which was accused a defendant; whether had proved that a deed was committed by an accused; whether this deed is a crime; whether a defendant is responsible in committing of this crime. These issues should be resolved by a court during a passing of the sentence. Consequently, the responses on them are a content of the procedural decisions on the merits of a case, including and a resolution of an investigator on cancellation of the criminal case.

Criminal procedural legislation of Azerbaijan Republic and the trends of it development, defining a new significance and correlation of the functions of a court and bodies carrying out a criminal prosecution on various stages of criminal proceedings, dictate necessity of a new approach to the issues connected with opportunities and necessity to use for it the achievements of the modern sciences during a whole process of the pre-trial production.

As it noted above, the notion of the criminal prosecution is not new, but for many years existing as a theoretical construction or a certain practical activity, as before it attracts attention of the scholars, call out a serious contemplations and discussions.

Specific attention were paid and are paid by the scholar to the procedural aspect of the problem; an epistemological essence of the criminal prosecution is presented in the less extent researched. Being as a form and content, they are closely interlinked; it is difficult to overestimate a significance of each of them. As A.P. Atayev notes, the form predetermines the content of an activity. In its turn, the results of investigation of the activity enable not only act as the basis for working out the most efficient means, ways and methods it implementation but and to stimulate a perfecting of the form (3, p. 11-12).

Taking into account that an activity on performing of the criminal prosecution is a diversified and many-sided; it is presented reasonable to agree with opinion of O.D. Zhuk about necessity to distinguish a procedural and actual criminal prosecution (8, p. 82).

Currently, the developments of indicated range of the issues the most part of authors consider the criminal prosecution extremely as criminal procedural function and they are limited by the frame of criminal process as a specific activity (5, p. 11-14). Agreeing with necessity of a deep investigation of the procedural aspect of the problem, we note, that it is seemed right the point of view of V.G. Asanova and S.G. Muratov. According to them, criminal prosecution is a phenomenon wider and it does not limited by only the frame of the criminal procedural activity (2, p. 4; 12, p. 21-22).

It is presented reasonable and necessity to consider the criminal prosecution as a process of knowledge, which is begun already on the stage of bringing of criminal case. This complex activity where are included various bodies and persons, the rights and obligations of which in context of valid criminal procedural law should be considered currently.

Earlier, during investigation and discussion of the problems linked with activity on implementation of the criminal prosecution, the authors proceeded from necessity to differentiate the stages of criminal proceedings for determination of the aims and tasks of the participants of criminal process. It has independently researched the problems applicably to pre-trial stages, a certain attention were paid to studying of the problems of supporting of the state accusation in a court.

As rightly pointed out G.G. Chadov, development of the principle of competitiveness has changed a situation: for the fore is came other problems, other approaches to determination of the roles and functions of the participants of the criminal proceedings. This is required of rethinking of the earlier existed approaches to determination of a concept "criminal prosecution", its principles and components, which were formulated and developed in compliance with previously existing legislation, and also were continued of its development by the scholars (22, p. 10-11). It is requires rethinking and the approaches to definition of the content of process of knowledge carrying out by the participants of criminal prosecution. Currently, it is presented possible to concentrate the attention on practical problems, which appear in connection with organization of activity on implementation of the criminal prosecution.

The development of these issues have a big theoretical and practical significance, it should be created a theoretical base for development of new and improving of the existed methods and methodic of an activity organization of the participants of criminal prosecution.

Undoubtedly, it is existed some common regularities which determine a nature and directions of this activity independently on particularities of the procedural provision that or other participant of the criminal prosecution. Investigation of these regularities in logical interconnection with the regularities of more private nature should come to creation of such theoretical base, which props up the development of a system of scientifically substantiated methods and methodical guides. Under this as the private regularities are considered those that reflect a specificity of activity of

different participants of the criminal prosecution in dependence on their procedural status and other particularities.

Only under the condition of such system approach can be correct understood a practical essence of the criminal prosecution as the cognitive process, formulated its main principles and rules, created not only reasonable but and maximal effective methods of implementation of the activity of the kind considered.

From other side, a strong theoretical and methodological base provides opportunity and expediency of using the developed methods and methodical guides in the practical activity of the participants of a process in pre-trial criminal production.

It is impossible to discuss the complicated issues of an organization of the practical activity on performance of the goals and tasks of the criminal prosecution without resolution of number of problems of common nature. Therefore, first of all, it should define the criminalistical content of the motion "criminal prosecution" and how it is correlated with a concept "criminal proceedings" etc. Under this the criminalistical significance of the motion considered is not contradistinguished and cannot be contradistinguished its procedural significance. We are speaking only for that to determine a content of this motion, proceeding from criminalistical approaches to investigation of an event of crime, to organization on implementation of the criminal prosecution of the individuals who committed crime.

On our opinion, it should distinguish the concept "criminal prosecution", which is used in narrow and wide sense. The CPC (art. 7.0.8) determines the criminal proceedings as a combination of two components: pre-trial and court proceedings in the courts of first, appeal and appeal cassation instances. Under this, a pre-trial proceedings is a criminal proceedings from the time of receiving information about crime till submitting a criminal case by a prosecutor to a court for examination on the merits.

Under the criminal prosecution in narrow (procedural) essence is understood the criminal procedural activity, carrying out in purpose of establishing an event of a crime, inculpation of a person committing crime, bringing him accusation, supporting

this accusation in a court, sentencing him, in case of necessity to provide the measures of procedural coercion (art. 7.0.4 of CPC).

Not touching an issue of sentencing which is related to the functions of justice, we note that in article 7.0.4 is not spoken who executes a criminal prosecution.

But, proceeding from the concept of criminal process as a combination of procedural actions on criminal prosecution and accepted procedural resolutions (see please article 7.0.3 of CPC), one can assume that the criminal prosecution carry out the bodies which performing a criminal process – the bodies of inquiry, investigation or prosecutor's office (except the courts), in production of which are the materials connecting with the criminal prosecution (7.0.5 of CPC).

Since, by the parties of criminal process are only those participants of criminal proceeding which are carried out on the base of competitiveness the functions of accusation or defense then might be said that the part of accusation is presented by the participants who, according to order established by the Criminal Procedural Law, bring and substantiate a statement about committing by a certain individual a deed that is forbidden by the criminal law.

Undisputable is presented that the motion "criminal prosecution" (in narrow sense) and "criminal proceedings" are correlated as a private and general. But such correlation is not allowed to define a content of the criminal prosecution in whole scope.

On our view, the right to criminal prosecution (the state and physical persons) appears at time of committing crime by a guilty, i.e. from moment of committing by him a deed for which the legislation provides the criminal liability. As notes A.I. Yudintsev, by other words such right can appear as at time of completion of crime, so and from moment of attempt to commit it (25, p. 60-67).

Under this it should be noted that criminal prosecution can be implemented a lawfully or unlawfully. It would be lawful in case if the subjects realize their right and arrange an activity in compliance with the requirement and rules that determined by the criminal procedural legislation. Such activity will be unlawful if a subject sufficiently violates indicated rules, on any reason he deviates from them.

Independent on the goals following a subject, the results of unlawfully performed criminal prosecution cannot be the basis for acceptance a lawful decision. Moreover, they enable to give the right to other subjects to implement criminal prosecution on the fact of committing of new crime.

On opinion of S.S. Amirbekov and S.I. Khojayev, a lawful criminal prosecution carries out with initiation of criminal case, using the procedural abilities of collection, investigation and assessment of the evidences, with acceptance of justice decision (about bringing to criminal liability and passing a criminal case to a court, about cancellation of criminal case or criminal prosecution on the grounds provided by the legislation etc.). Unlawful one can be carried out as with partial violations or deviations from the requirements of the law (for instance, using of the methods and means contradicting to the letter and spirit of the law and etc.), so and fully unlawful (for example, performing of the criminal prosecution by the improper subjects, out of the frame of criminal proceedings). Under this, in the second case, the prosecution will be named as criminal conditionally because the reason of this is a crime, i.e. criminally punished act (1, p. 91-93).

A.T. Atayev believes that appropriate subjects are not just receiving information about committed crime, therefore besides of the right to criminal prosecution should be considered such category as obligation to accept all provided by the law measures on establishing of an event of crime and identifying of the culprits. This obligation appears to appropriate official persons from the moment of finding a crime or its features (3, p. 100).

From the time finding of an event of crime it should be begun an activity on collection and assessment of information to resolve an issue on initiation of criminal case. This activity before initiation of criminal case is not regulated by the criminal procedural legislation in the details as the activity on the subsequent stages of criminal proceedings. A lawmaker defined only the reasons and grounds to initiate of a criminal case and a circle of the subjects carrying out a verification of information about committed crime or the crime that will be committed. On content of this

activity can be judged indirectly, based on what materials are attached to the resolution about initiation of criminal case.

In addition, this activity has a great practical significance, since just on this stage can be collected the initial criminalistically importance information on base of which will be solved not only the procedural but and tactical and methodical issues (bringing of the versions, determining of the activity direction, choice of technical, tactical and methodical means and methods etc.).

It seems that the activity is not only antedated of the criminal prosecution in a narrow procedural essence, but and presented itself an integral part of the process of learning, providing its opportunity, successfulness and efficiency from the informational point of view. Therefore, as I.S. Belov thinks, it also should be carried out by the lawful ways, to be based on the results of knowledge those general regularities, which reflect a core of the considered kind of activity (4, p. 61-62).

In addition, it is important to define not only the time of beginning of the activity, but and the moment it finishing. It is presented that it does not end and cannot be finished by the completion (cancellation) of the criminal prosecution. Traditional tasks for the criminalistical science are the development of the methods, techniques and mean not only identifying, exposing and bringing to justice the individuals responsible in committing of crime, but and indentifying of the reasons and conditions, which were caused of the committing of these crimes, for organization of the prophylaxis and preventing crimes in future.

The techniques, ways and means, which are called to improve efficiency of learning activity in the process of criminal prosecution, are constituted it essence, at the same time expands above considered procedural concept of the criminal prosecution.

Thus, it is necessary and expediency to consider the concept of criminal prosecution in wider then procedural sense. Since a content of this concept is supposed to be determined on a base of the practical goals and tasks then offered wider concept of the criminal prosecution is criminalistical.

In any case, whether the concept of criminal prosecution is considered in narrow or wider sense, it is possible an existence of few varieties of each; selection of them necessary to understand the core of the criminal prosecution and development of the more detailed recommendations on implementation of the criminal prosecution in whole and each kind of it.

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