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Prosecution and defense: a problem of the equal possibilities

Abstract: Correlations between categories "prosecution" and "defense" are forming the law, an essence of which is in the following equivalent statements: prosecution assumes a defense, and the defense is come into existence only with appearance of the prosecution; there is no defense if prosecution is absent.

Equality possibilities of prosecution and defense in existing system of pre-trial production cannot be on definition. One can speak just on some equalization of the levels of their opposition through authorization of a defense with additional procedural rights.

Keywords: parties of a process; prosecution; defense; possibilities; evidence; investigator; accused person; court.

Conception of a prosecution and defense are related to a number of the basic, fixing knowledge on the main features and connections (law-governed nature) of criminal process. In conceptual apparatus of science they have significance of procedural categories. Unlike of ordinary and narrow concepts reflecting not the most sufficient sides of criminal process, these categories, being by the conceptions of utmost community, are primary in the frames of a scientific system and non-brought out from other its concepts.

Science is distinguished pairs of diametrically opposite categories so named pairs categories: "procedural rights" and "procedural obligations", "prosecution" and

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“defense”, “independence of the judges” and “subordination them only the law” etc. (1, p. 243). In such system it existence of the one category is mandatory supposed a presence the other.

As for the pairs of other opposite procedural conceptions, which we are called alternative then they are mutually exclusive. These categories are “initiation of criminal case” or “refusal in initiation of criminal case”, “verdict of guilty” or “verdict of non-guilty”. They fix the procedural decisions in the basis of which are various grounds. So, a presence of the sufficient information indicating on signs of a crime is caused an initiation of criminal case, and an absence of these data is excluded a production of preliminary investigation. Positive decision of an issue about initiation of criminal case is at the same time a negative response on other question – whether it has the grounds to refuse in initiation of a case. Between these opposites is only logical contradiction, i.e. contradiction in our thought, which is allowed their existence at the same time. In reality these contradictions exclude each other; it is impossible their simultaneous existence.

The pair categories, unlike from alternative conceptions, always exist as a system of two mutually conditioned categories. In court proceeding on the criminal cases, where they have a significance of the categories of the right (component of legal matter), there is horizontal connection between them. This means that fixed by them elements of court proceeding (for example, the parties of a prosecution and defense) are on the same level in a system of procedural relations and are possessed with equal opportunities for realization its functions.

Internal, indissoluble ties between categories “prosecution” and “defense” form the law, the essence of which can be expressed in the following equal opinions: a defense appears only with appearance of a prosecution; there is not defense without accusation. The most important methodological principle is concluded that the defense is raised not from prosecution and it appears in connection and simultaneously with it. Otherwise, the category of defense must be considered as derivative from the category of prosecution, i.e. as notion of less level that applicably to the production on a criminal case carrying out at the court stages that would be a principal mistake. Prosecution and defense are raised from unified base, they are

consequence of various interpretations of the same circumstances of criminal case and having circumstances that are caused opposite positions of proper participants of court proceeding, as result, relations between them have a nature of confrontation and counteraction (2, p. 24-27). The prosecution tries to attain to approve a version of happening, to prove unsoundness of the defense position, refute it arguments. The defense, in turn, is strived for exclusion of the points of accusation as have not had confirmation or removal of accusation in whole as unfounded. Owning to efforts of the defense the prosecutors had to refuse from accusation of convicted in the second half of 2002 on 2139 criminal case, in 2003 – on 1167 cases whole and partially on the grave accusations – 4000 cases.

Counteraction with usage of legal means to the prosecution from defense is lawfully and objectively normally. The natural connections between prosecution and defense show themselves with various ways in dependent on type of criminal process. In the process of mixed type built on a principle of division powers where pre-trial production is carried out by the bodies of executive authorities. In such system of relations the defense is turned out to be "measured out" from the prosecution party and as a matter derivative from it. The bodies of criminal prosecution realizing its considerable superiority over the defense continually go on the way of unfounded restrictions it wretched possibilities to withstand their actions and decisions.

In its counteraction to prosecution with it wide powers and powerful resource of the power the defense does not have sufficient possibilities to influence on prosecution in order to prevent of using so named accusatory bias as the only and emphasized method of investigation. For obtaining of accusatory proofs a body of criminal prosecution uses a rich arsenal of investigative and other procedural actions possessing with considerable potential of coercion (from mental up to forced). The requirements, instructions and requests of an investigator as a representative of the state are mandatory for execution by the all institutions, organizations, officials and citizens. Using by an investigator of the results non-procedural operative-search activity is increased opportunity of criminal prosecution. The petitions of the investigator about performance of investigative and other procedural actions linked

with restrictions of the constitutional rights and freedoms of an accused and other individuals are subject to mandatory and operative examination by a judge.

Election a measure of restraint by an investigator with purpose to prevent an accused from possibility to hide an investigative body or a court, to continue doing criminal activity, to counteract to the production on criminal case with illegal ways is reached with restriction of his rights to freedom and personal inviolability, reducing his opportunity to be defended on brought accusation in specially in case of long isolation from the society. Under this, the law does not indicate what materials and proofs must be examined by a judge in order to make a decision on submitted petition about election of a measure of restraint in form of custody. This gap had to fill in the Supreme Court of the RF, which determined practically all list procedural documents and other evidences subjected to attachment to a resolution on initiation of petition about election of a measure of restraint as taking into custody. It made clarification to the courts that in compliance with article 45 of the Constitution of RF they cannot refuse to the participants of a process and their defenders in satisfaction of a petition about familiarization with named materials of a case (5).

It should be added to the stated that actions of investigator is not always adequate with point of view of necessity serious interference in the rights of human or an urgent its production. A significant part of the state coercion on criminal cases is an excessive coercion. It seems such, for instance, in case of production of a search in dwelling at night and while absence of a court decision under the pretext of an urgent of this investigative action when it can be done at day with ensuring all provided by the law the guarantees of human rights. To an excessive coercion is related an election as a measure of restraint taking into custody, when the circumstances of a case and personality of accused had allowed to leave him at freedom, for example, on a guarantee. Here it can be related a production of so named overtired interrogations with duration of eight or slightly less hours.

Application of an excessive coercion may be resulted of the investigative errors, intentionally violation of the law etc. Being sometimes as way of suppression of a will of an accused with unseemly purpose to reach his set behaviour, obtaining a confession by him of his guilt, the excessive coercion due to violation of the law is

presented the most danger as for a man, his rights and freedoms so and for justice. The opportunity of such coercion is laid in the criminal-procedural law due to absence the proper bans in it. So, the CPC of RF does not contain a response of the question, how much time can be interrogated one individual about the same and whether admissible in principle such repeatedly interrogations.

In competition of investigation an investigator makes up an indictment, which is determined not only the bounds of a court proceeding (art. 252 of the CPC of RF), but so it is the base of a sentence or other court decision. In case, if the indictment is made up with violation of the requirements of the CPC of RF that excludes to a court an opportunity of the decision on this base of the sentence (other court decision), a judge returns a criminal case to a prosecutor (§1 part 1 of art. 237). The indictment proceeded from the bodies of non-court power became the act which is predetermined a resolution by a court of the indictment. The bodies of criminal prosecution have obtained additional opportunities to realize through the courts set by them programs "combat crime", including with a separate individuals, accused in non-ordinary publically dangerous actions.

A copy of the indictment is handed in an accused and his defender if they are petitioned about this (part 2 of art. 222 of the CPC of RF), but none of them has the right to submit their objection on this indictment, in which would be stated other, opposite accusation, a vision of the problem of participation of a convicted in crime. In addition, the CPC of RF authorizes of a convicted and his defender with the right to submit cassation petition or to present their objections in writing (part 1 of art. 358). An accused and his defender will have to have the right to submit the objection as an alternative to an indictment. The more suitable time of hearing of the objections on an indictment is the beginning of court examination after statement of accusation by a prosecutor (art. 273 of the CPC of RF).

Awareness by an investigator of the fact that a defense can present objections on an indictment that is subjected to public circulation at the beginning of a court examination objectively should be caused that the investigator will be more responsible under the summing-up of investigation and making up an indictment. As for a defense, it can be more organized, to act in compliance with program and not to

be linked with replica and evaluative judgments of a prosecutor, made an impromptu and under affection of emotions.

The court is on of the chain in the system of so named criminal justice including in itself also the organs of criminal prosecution, prosecutor's office, and structures carrying out operative-search activity. It is considerable restricted in this system the opportunities of a court to disavow in necessary cases the conclusions of investigative bodies and prosecutor's office on criminal cases because of abolition of the institute of return a case for additional investigation. Believing justifiable this decision of a lawmaker, at the same time we think it necessary to provide a court with additional powers to cancel a criminal case due to violations of the constitutional rights and freedoms of a convicted, non-observance of the procedure of preliminary investigation. Inclusion these and some other grounds in the list of those that are caused to a cessation of criminal case should improve quality of preliminary investigation, observance of the rights and freedoms of a person in criminal process, ensuring legality during production on criminal case. These proposals are corresponded the requirements of the Constitution of RF that a man, his rights and freedoms are the highest value (art. 2), and also on inadmissibility using of the proofs obtained with violation of the Federal law (part 2 of art. 50), etc.

Being made a reception of methodologically correct provision of the CPC of the RSFSR (p. of art. 301), the CPC of RF respectively established that "a sentence of the court can be based only on those evidences, which were examined in a court session" (p. of art. 240), and consequently and on proofs submitted by the party of defense (p. 2 of art. 274). But, this norm contradicts in full of the provision that a court makes a sentence of the basis of an indictment that is on the accusatory proofs. It seems that this is the main reason why the number of the verdicts non-guilty currently as in the last is not too much (1.2% - in 2003; 1.2% - in the first half of 2004).

It seems by an ephemeral, illusory, and without guarantees what an accused can oppose to accusatory activity of an investigator. Moreover, using by the accused person of separate of his rights sometimes can be turned out against his legal interests. It can be caused a perplexity the following provision of the Code: under

consent of an accused to give a testimony he must be notified that his testimonies can be used as the proofs on criminal case (§3, p. 4 of art 47).

In criminal process non-professional participants should be notified about their responsibility for non-performance procedural obligations, for committing of the deeds of criminal nature (ex. obvious false denunciation, false information, divulging the data of a preliminary investigation) etc. The accused individual must be notified that given by him testimonies can be used against him as accusatory proofs. This is the significant legal provision serving of the protection of an accused from brought accusation based on the presumption of innocence took a place only in the subtext of the given norm of the Code. Its formulation is provoked of an accused to give testimonies in hope that they will be checked, found confirmation and served to a defense from prosecution. As result, being non-informed about all possible consequences of such step, an accused gives the testimonies, which are used as exposing; such he actually deprives himself a privilege against self-accusation.

It is the same situation with a suspected individual. Instead of to explain him the right to keep silence and to notify that all he says can be used against him. In case of consent to give testimonies he is notified about their usage as the evidences on criminal case (§2, p. 4 of art. 46 of the CPC of RF). Once more the Code chooses a model of concealing; not mentioning any word about what danger for a suspected could be presented given by him testimonies.

The right of an accused to present the proofs (§4, p. 4 of art. 47 of the CPC of RF) is initially defectively and insufficiently. It is not specifically for an accused and belong to all other participants of a process as on prosecution party so and defense one (p. 2 of art. 86 of the CPC of RF) (3, p. 78-86). Unlike of other participants of production on criminal case, an accused is needed as the right to submit evidence so and the right to attach these proofs to the materials of a case. This is just the main component of a content of his right to collect and submit written documents and items “for attachment them to criminal case as the evidences” (p. 2 of art. 86 of the CPC of RF).The formulation does not contain clear indication that presented by an accused documents and items is subjected to mandatory attachment to a case as the proofs. It is not incidentally. As the material evidences are recognized and attached to

the materials of a case only those items and documents, which can be by the means for disclosure of crime and establishing of the circumstances of a case (§3, p. 1 of art. 81 of the CPC of RF). An issue whether can they have significance for establishing of the circumstances of a case is solved by an investigator, but not an accused (his defender) submitted them as justified documents. The direct indication on this is contained in p. 1 of art. 84 of the CPC of RF: other documents (with exception of the records of investigative actions and court session) are allowed as the proofs if containing in them information has significance for establishing the circumstances that is subjected to proving.

Consequently, only an investigator decides what the evidence on criminal case is and what does not meet the requirements of the proofs. In our opinion, in criminal case should be both as the evidence obtained by an investigator through the investigative and other procedural actions so the proofs submitted by the defense party. This right of an accused can be effective when it is supplemented by the obligation of an investigator to attach them to a case. As the investigator is free in evaluation of the proofs, including submitted by the defense, he may not recognize them as evidence from point of view their relevance, admissibility and reliability, and not include in a system of proofs on a case. But in this case they should be left in a case. This is necessary in order to each time on the consequent stages of production on criminal case they could be a subject of examination by those subjects of prosecution or juridical power and other participants of court proceeding. They all assess the proofs – free, on their inner conviction and therefore it cannot be excluded that earlier submitted by an accused evidence and rejected by an investigator can be required as having attitude to a case.

According to §10, part 4 of article 47 of the CPC of RF, an accused has the right to take part with permission of an investigator in investigative actions produced on his petition or petition of his defender. But, in actually, in this norm is said about the right to petition but not about the right of an accused to participate in actions produced by the investigator. To satisfy this petition or refuse in its satisfaction is a prerogative of the investigator. But, if realization of the right one subject of legal relations depend on discretion of other then this is petition, but not the right. Limited,

cut right of the accused on participation in the investigative action cannot be considered as the sound and real right.

According to the law, an accused and his defender have the right to submit petitions about establishing only such circumstances, which have significance for criminal case, ensuring the rights and legal interests of the accused (p. of art. 119 of the CPC of RF). They cannot be refused in interrogation of the witnesses, production of forensic examination and other investigative actions if the circumstances have significance for this case (p. 2 art. 159 0f CPC of RF). But, only an investigator decides what circumstances have significance for a case. The latter provision is quite logic since the investigator carries out preliminary investigation and bears responsibility for it. But from our point of view, before to make a decision about significance for the circumstance establishing of a case, for instance, for interrogation of a witness, it is necessary first to interrogate his, possible, with participation of the accused submitted a proper petition.

Unlike to an investigator, the accused individual does not have the right to submit petition to a court. He has the right to appeal to the court with complaint about illegality of committed actions and accepted decisions by the investigator. It serves to restore violated rights and defense of legal interests. But this right is not sufficient to be active participant of pre-trial production, contradicting to prosecution and affecting on a process and results of preliminary investigation.

In our opinion, an accused has the right to appeal to a court if an investigator rejected his petition about seizure of necessary documents; repeated inspection of a place of incident; production of independent expert examination; excluding the proofs obtained with violation of the law; etc.

Impossibility to use the right to appeal to a court with petition on the stage of preliminary investigation testifies about sufficient inequality of opportunities of the defense and prosecution. Appeal with petition to a court makes free an accused from tyranny of an investigator and adds him chances really affect on accusatory power. Juridical power through implementation of a court control should be served not only to the interests of the bodies of criminal prosecution and also to the interests of the defense recognizing founded its petitions and charging of an investigator to satisfy

them. In addition, resolution of this issue is presented possible only through a creation of additional structure of the juridical power – “investigative judges” that is foreseen by the Concept of juridical reform. These judges should carry out juridical control, and also inspection on the complaints of correspondence to the law the actions and decisions of the bodies of criminal prosecution and to be free from examinations of the criminal cases in the merits.

In connection with stated, it seems it possible to assert that the CPC of RF in the part of the procedural regulation of the pre-trial production of criminal case rather not fully meets to the standards inherent to the lawful state based on respect and protection the rights and freedoms of a man and citizen. As it noted, for this stage of criminal process is characteristic a presence to a suspected and accused rather restricted procedural rights not having in addition the reliable guarantees in compare with wide powers of the investigative bodies. These organs are used a powerful potential of coercion as the main method implementation the functions disclosure of crimes and criminal prosecution and accepting in one-side order all decisions on criminal case very often without considering a position of the defense, and, as result, the existence of the deep precipice between prosecution bodies and defense party on their capability to carry out the proper them functions (4, p. 73-77).

In addition, it should be necessary recognized that equality of capabilities the prosecution and defense in existing system of the pre-trial investigation cannot be on definition. We can speak only about some make even the levels of their withstanding through granting to the defense party with additional procedural rights (for instance, the right to appeal with petition to a court), quite appropriate on pre-trial stages of criminal process.

Only in the court, where relation between opponent parties of prosecution and defense have one-level nature; they have the equal rights and act on the base of competitiveness.

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