Gorbacheva E.V., PhD in Law, Associate Professor ♦

The function of a defense as necessary element of the competitive process

Abstract: Competitiveness principle can be considered existed only upon equal rights of the parties of criminal process including in collection of the evidence.

An idea of parallel investigation as obligatory condition of classical competitiveness has not fully fixed in legislation.

It is considered a system of defense in criminal proceedings.

Keywords: defense; criminal process; competitiveness; parallel investigation; court proceedings.

The world practice shows that lawful state exists in that case when it has and efficiently functions a court power in country, which should carry out supremacy of the law into life, put into reality and maintain of the intrinsic value of human, his dignity and freedom. In spite of that in the theory of criminal process are enough long made discussions about competitiveness in criminal proceedings and it place in a system of principle of criminal process, only the Criminal Procedural Code of Russian Federation fixed in article 15 competitiveness as a principle of criminal proceedings.

If to apply to the issue about necessity of the competitiveness fixation as a principle of criminal proceedings then we have here diametrically opposite opinions. So, for example, V.G. Dayev denied of a presence of the competitiveness principle since all its structural elements consist a content of other principles of criminal process, i.e.: the justice is carried out only by a court, presumption of innocence, ensuring of an accused the right to defense, equality of the rights of the participants of criminal proceedings (8, p. 71). It was expressed an idea that the competitiveness principle could not have a place because the first, it does not possess with the signs

♦**Gorbacheva Elena Vasilyevna** – PhD in Law, Associate Professor, a chief of Department of Court right and prosecutor's supervising of the Irkutsk State University. Juridical Institute (Russia). E-mail: pravosudie@law.isu.ru

inherent to the notion of a process principle; the second, what is understood under the competitiveness principle is a reason, a source of the process principles, but not a consequence. All principles of a process are only the manifestation of its form and consequently, a system of the principles should be formed with bearing just a form of criminal proceedings (4, p. 25-34), and competitiveness is presented itself a way of investigation of the evidences in a court session, but not a principle of a process (9, p. 109). Sometimes the competitiveness is treated as a form of the process (28, p. 55-56).

Can one consider the indicated arguments as convincing? If to address to the signs of procedural principles then the competitiveness is met in full to them. The competitiveness is fixed in the Russian Constitution (p. 3 of art. 123) and reflected just as a principle of a process in the article 15 of the CPC of RF, in article 12 of SPC of RF, in article 9 of APC of RF. In its decisions from 28 November 1996 (about constitutionality of the article 418 of CPC of the RSFSR); from 20 April 1999 (§ 1 and §3 of p. 1 of art. 232, p. 4 of art. 248 and p. 1 of art. 258 of CPC of RSFSR); from 14 January 2000 (the powers of a court on initiation of criminal case); from 14 February 2000 (p. 3, 4 and 5 of art. 377 of CPC of RSFSR). The Constitutional Court steadily and consistently marked of the tendency on expansion of the action of the competitiveness principle in criminal process. According to the Constitutional Court, the competitiveness in criminal process consists not only in delimitation of the functions of prosecution and defense, possessing with equal procedural rights in court proceeding, and separate their activity from a court, but also in that a court:

- guarantees just and impartial resolution of a case ensuring of the parties with equal procedural rights to assert their positions;

- is not obliged to make decisions on initiation of criminal case or rejection in it initiation;

- is not obliged to make decisions about return a criminal case (upon absence of a petition at least, one of the parties) due to incompleteness of an investigation, to bring another accusation or change this accusation to the more serious or essentially differing from earlier brought, to call to the criminal responsibility on this case of the new persons;

- cannot participate in formulating of accusation on criminal case;

- is not obliged to continue proceeding of a case and to resolve it in general order if a prosecutor stated refusal on accusation upon absence of objection of the victim party;

- cannot on its initiative to examine new accusatory evidences.

The conclusions made by the institution of the Constitutional control have not been approved by all lawyers (2, p. 9-10). The Constitution Court was imputed incorrect interpretation of the legislation and distributing on the Russian criminal proceedings that relating to the mixed type of a process, constructions are characteristic to the competitive process. Decisions of the Constitutional Court of RF expanded the bounds of action of the competitiveness principle in the detriment of the principles of publicity and objective truth. It was happened not only correction of the separate procedural norms, and in reality, the reform of the criminal procedural law: in actually The Constitutional Court essentially modified the former criminal procedural legislation that in turn meant a some substitute of a lawmaker with institute of the Constitutional control. The actions of the Constitutional Court called a suggestion to deprive it decisions of a feature of mandatory (3, p. 67) that, in our view, is the extreme but it might be discussed.

The competitiveness sufficiently full expresses a content of the criminal procedural legislation and closely interlinked with the state policy in sphere of criminal proceedings. It is fully distributed on the court proceedings, being of an inter-branch principle; its many elements exist also in a pre-trial production. It is no accident in the theoretical research pointed out on the competitiveness as a principle of a process (7, p. 25). It is noteworthy that even those authors, who believe that the competitiveness is a form of the process, do not exclude an existence of the competitiveness as an element of independent system of the principles in the frame of a system higher order – criminal proceedings (20, p. 59).

With adoption of the new CPC an official support has had an extreme form of the competitiveness in criminal process that is characterized by a refusal in establishing the truth, rather passive role of a court in proving, actual laying of the proving responsibilities to the parties. The burden of an innocent proving has been

transferred to an accused person who will has to ask for help of a defender in order to arrange efficiency activity searching of the exonerating evidences. As it was stated above, a lawmaker has fixed in the article 15 of CPC of RF the main features of the competitiveness of the parties: 1) separation of the defense functions from prosecution one; 2) a court is not an organ of the criminal prosecution; 3) equality of the parties (a defense and prosecution) in front of a court. Currently, it is widespread approach the followers of which assert that a court should not carry out a proving and the responsibility to collect evidences is prerogative of the parties (6, p. 40); the details, objectiveness and completeness of the circumstances of a criminal case is a consequence of the principle of competitiveness of the parties since the truth is born in dispute (18, p. 8). It is fairly criticized a position according to which a judge should take attention on the procedure of proving but not on the goal one (13, p. 12-13).

As justly believed M.S. Strogovich, a reach of the truth on a criminal case is "a guarantee for an accused person in that an innocent will not be charged, prosecution will be taken from him, and he will be rehabilitated and reinstated in his good name. The accused individual will be charged only for what he did; and criminal responsibility he bears for this only" (23, p. 79). A.V. Smirnov notes that pure competitive criminal process as an integral system does not exist in reality and the classical competitive process should be replaced by a post-competitive (publicity competitive) criminal process connected with opportunity making of the active actions by a court, which are made not with purpose of replacing of a prosecutor, and for defense the rights and legal interests of the citizens participating in proceedings: as an accused so and a victim, private prosecutor, citizen plaintiff and citizen defendant and others (21, p. 6).

S. Yefimichev points out that a decision of a court should be based on an independent analysis of examined during proceedings evidences but not on opinion of that or other parties, otherwise it cannot be accepted as the full participant of a process (10, p. 18). It is unlikely might be agreed with the last idea. A court is entitled the right to collect the evidences (p. 1 of art. 86 of CPC of RF), but it can do this only on a petition of the parties (exception – assignment of an expert examination on a court initiative in compliance with p.4 of art. 283 of CPC of RF). It is true; the

indicated powers are not sufficiently and in the area of proving a court is stood in dependant on the parties' position. But, a court should not do a search of evidences replacing its actions of the preliminary investigation bodies.

Attempts to instill the principle of the competitiveness into pre-trial stages of criminal process are quite understandable. But, in the classical kind this principle might be considered implemented only upon equal rights of the parties of defense and prosecution, including in a collection of the evidences. Competitive form in its classical understanding is characterized with equality of the procedural status of the bodies of criminal prosecution and an accused individual as in court so and in pre-trial stages of a criminal process. But an idea of parallel investigation as mandatory term of the classical competitiveness is too odious that to be realized, at least, in nowadays. Differently the competitiveness is understood by A. Tushev, who believes that the essence of a principle of the competitiveness is in performing by the certain subjects of a criminal process the actions, which have competitive nature, and consequently, the competitiveness can be manifested at all stages of a process. A principle of the competitiveness has also a place when the parties are entitled with unequal rights (25, p. 23-24). Such interpretation contradicts acting legislation, which includes in competitiveness just equality of the parties. Discursive competitiveness tries to ensure the parties not simply formally equal rights, but actually with sufficient opportunities for active defense his subjective rights and legal interests. Equality of the functions does not mean their subject concurrence – prosecution, defense and judicial functions are as before strictly differentiated. It is concluded in the equal ability of the parties an equally efficiency to reach their goals.

Analysis of the legislation is allowed making a conclusion that modern criminal process of Russia is a fixed process since the competitiveness is inherent only a court proceeding what does not exclude an enrichment of the pre-trial production with separate elements of the competitiveness (16, p. 18). This does not mean that "a lawmaker has accepted in this direction only the compromise steps (admission of a court to a stage of preliminary investigation for resolution the issues linked with depriving of the Constitutional rights and freedoms of a man; non-principle increasing the rights of an accused person, his defender), which are only discredited a

principle of the competitiveness, limited an action of the principle of presumption of innocent and restricted opportunity of an accused individual to affect on the total procedural decisions" (17, p. 59). Unlikely, it is reasonable to transfer the competitiveness in full volume to the pre-trail production. Realization of a principle of competitiveness at the pre-trail stages will not give positive changes in Russian legislation and caused a lot of harm it.

In addition, there is no even the complete equal rights of the parties at the stages of court proceeding. If compare p. 5 of art. 246 and p. 1 of art.248 of CPC of RF then one can see some difference in the powers of a prosecutor and defender at the court proceeding. The prosecutor presents the evidences (after performed investigation), and the defender does not have such power. He can only take a part in examination of the evidences, though article 244 of CPC is said about equality of the parties in providing of the evidences. It is seen obvious collision between p. 1 of article 248 and article 244 of CPC, which is confirmed by the rules fixed in p. 6 of article 234 of CPC: Petition of the defense about call of a witness for establishing alibi of an accused is subjected to satisfying only in case if it stated during preliminary investigation and was rejected with an inquirer, investigator or prosecutor. This petition might be satisfied also if about of presence of such witness is became known after completion of preliminary investigation. It is unclear, why an opportunity of submission of a petition about attachment of the evidences by the prosecution party is not limited. A defender, in turn, should prove that he did not know about presence of this evidence earlier or he presented it earlier. Why are existed special rules to attachment of just the justificatory documents to the materials of a case?

In p. 7 of the article 234 is said: "Petition of a defense about discovery of additional evidences or items is subject to satisfying if these evidences and items have significance for the criminal case". As a consideration of this issue is related to a preliminary hearing, rejection of a court (even on the grounds that the evidences are not related to the materials of a case) might be regarded as a prejudice, based on established position of the court before examination of a case in merits. In both cases the parties are stood in unequal position already in the court proceedings.

As it said above, in a basis of the competitiveness is a differentiation of the functions of a defense and prosecution. Until now, an issue about the notion of the criminal procedural function remains discussible in a science of the criminal process. It might be distinguished three main positions as to the definition of a concept of the criminal procedural function: 1) a function is a separate kind, separate direction of the criminal procedural activity (24, p. 9); 2) it is a part of the criminal procedural activity (19, p. 37); 3) it is direction of an activity of the participants of a process, determining their special assignment and role (30, p. 54), or leading procedural obligation which is determined a role and assignments of a participant of a process (29, p. 175).

In our opinion, the function of a defense is directions of the criminal procedural activity on defense the rights and legal interests of an individual who is brought to criminal responsibility, searches of justifying his circumstances and the circumstances mitigating his responsibility. The function of a defense is also determined as “all procedural actions directed on mitigating or refutation of an accusation” (1, p. 35), as the procedural activity directed in search of circumstances justifying of an accused person, eliminating or mitigating his responsibility, and also on protect his personal and property rights (22, p. 3).

It is quite widespread opinion is that the function of a defense is carried out by all participants of a process as from the prosecution party so from defense one. The arguments in favour of this judgement are the following:

1) the function of a defense in criminal proceeding is common on its essence, it is carried out by all interested participants of a criminal process (16, p. 18);

2) the participants of a process can execute at the same time few functions, and consequently, the function of a defense performs the bodies of investigation and prosecutor (26, p. 114);

3) the function of a defense is developed as derivative from accusation, and independently on it a defense as a function is reaction on accusation and exists only there, where it occurred (5, p. 89-90);

4) it is necessary to distinguish a defense on the state legal level (in this sense the function of a defense is performed also by a victim), and a defenses as criminal procedural function (as activity in the interests of an accused individual) (11, p. 61).

The studying of the nature of interconnection of the procedural functions and its carriers should be based on application of a method of the structural functional analysis. It presupposes of appearance of existence of an element of the system in light of performed by it function. It follows from this that the functions is primary against elements, which realize these functions. Consequently, the procedural function is not determined by the role and assignment of appropriate participant of a process, and opposite, a presence of the function is caused necessity appearance that or other participant of a process. Procedural functions and their subjects (the carriers of these functions) are structural elements of the criminal procedural activity as a system, is being in interconnection and interaction. In a system of the criminal proceedings (criminal procedural activity and legal relations) the functions play a system-forming role for the elements of the system. In a basis of the competitiveness is a delimitation of the three functions. This is allowed speaking about the competitive process as the system, in which each element has its own direction (function), content of which distinguish the competitiveness from other systems (for instance, inquisitional, private plaint and other form of process). Therefore, the competitive process is a process in which are participated the parties. In one side, by this is emphasized their equal rights, and other side – their opposite. A party is the participant of criminal process possessing with such legal status, which provides him the real opportunity to exercise influence on a movement of the criminal case in order to realize his procedural interest through using of the procedural means that are identical those ones with help of which other party can perform his procedural interest.

Certainly, we can speak that a court defenses interests the parties, an investigator and prosecutor – interests of a victim (27, p. 38-40), but it does not mean that indicated state institutions carry out the function of a defense since an activity of a court directed to establish the actual circumstances of a case and made decisions, and an activity of investigator – on exposure of a guilty. Therefore, it is wrong a

judgement that criminal procedural function can be considered on the state-legal and procedural level; that the function of a defense can be in the broad sense of the word and narrow. At the time, a general notion of a defense in criminal process includes not only criminal-procedural function of a defense, but the elements of a defense in other criminal-procedural functions.

L.D. Kokorev under the criminal-procedural activity is understood "an activity of each separate taken participant of criminal proceedings. This activity is formed from procedural actions, which as if are its elements. The procedural activity is also a possible system of the actions certain circle of the participants of proceedings, which is directed on resolution of the nearest procedural tasks" (12, p. 49-50). Criminal-procedural activity is also determined as activity forming from the two main components: investigation of the specific facts and application to them the norms of law (15, p. 411). In the last case an attention is accentuated on a substantial side of an activity. One is undoubtedly, a specific character of the criminal-procedural activity is that 1) it order is strictly limited by the frames of the procedural law; 2) it together with the criminal-procedural relations constitutes a content of the criminal process; 3) in it inevitably takes part an individual in respect of which is had supposition about his guilt.

Since the function of a defense determines the direction of activity as the defense as criminal-procedural activity is, first of all, the activity on protection and defense of an accused and suspected person from illegal violations and restrictions the rights, freedoms, interests, in preventing of these violations and restrictions. Does it mean that defensive activity is carried out only by the defense party? Unlikely on this question can be answered positively since the activity on a defense the rights and interests of the participants of a process is a many-sided notion:

1) in compliance with the procedural function of a defense, a defensive activity is linked with certain circle of the participants of a process (defense party), for which defensive activity is either by the right (an accused, suspected) or by duty (a defender). Other words, it is noted quite steady connection between procedural activity and the function as the last is mediated a content of the activity. It is

naturally, the content of activity is determined with specific circumstances of a criminal case;

2) a defense as an activity appears in connection with violation of the subjective rights, which is generated the right to defense. In this sense the defensive activity is characterized for the all interested participants of criminal process: a victim, citizen plaintiff, citizen defendant;

3) a defense is included in a content of the activity of the bodies of investigation and prosecutor as the party of prosecution since they, carrying out a criminal prosecution, protect the rights and interests of a victim.

Defensive activity is characterized for all participants of a process but it does not mean that it can be put a sign of equality between the defensive activity of a defender and prosecutor. The activity on implementation of a defense of the participants from the prosecution party is always caused by the violation of subjective right. For the victim, it connected with violation of such rights as the right to life, health, property etc. therefore he has the right to protect his rights and interests with all means which are not forbidden by the law (p. 2 of article 45 of the Constitution of RF). The activity of the bodies of investigation and prosecutor is determined with tasks, which are stipulated in the Law "On Militia" of RF from 18.04.1999 No.1026-I and the Law "On Prosecutor' office of Russian Federation" from 17.11.1995 No. 168-FZ.

Above stated is allowed making a conclusion about existence in a criminal process of the defensive activity in common-legal sense and special defensive activity carried out by the defense party. Therefore, legitimate the judgements that a defense is an activity that includes a protection of an individual from illegal violations and restrictions the rights, freedoms, interests, in preventing of these violations and restrictions, and also in compensation for the harm, if could not prevent the violation or restriction (14, p. 169). It is also right a statement that a defense is "all complex provided by the law procedural actions of an accused (suspected) and his defender directed on refutation of accusation (suspicion), clarification of the circumstances which is justified of accused, released or mitigated his responsibility, and also on protection of personal and property rights and legal interests of an accused (suspected)".

The defense in criminal process as the unity of the law enforcement and legal-providing activity includes the following powers: 1) restoration of violated right; 2) protection of an individual from violation and restriction his rights and interests; 3) prevention of a violation of the rights of participants of a process; 4) compensation for the harm.

Thus, it can be said that in criminal proceedings the defense as activity is connected with realization of the subjective rights of participants of the process; the existence of which give to an authorized person the right to their defense. It is not mandatory linked with implementation of the functions of a defense and inherent to any participant of the process.

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