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Comparative study of the institute of participation in criminal proceedings

Abstract: It is considered a notion of participant of criminal proceedings according to the CPC of Azerbaijan Republic, Georgia, Russia and Estonia; it is made a comparative analysis.

Contradictions and gaps are determined; it is given proposals to change and supplement of the criminal-procedural legislation of Azerbaijan Republic

Keywords: criminal proceedings; criminal process; participant; procedural actions; protocol; Criminal Procedural Code.

A concept of a participant of the proceedings is discussable. So, F.N. Abbasov, A.F. Abdullayev, D.T. Arabuli, M.T. Mirzayeva recognize all subjects participating in criminal process as the participant of the process [2, p. 96-98; 3, p. 77-79; 6, p. 14; 4, p. 51-53], S.S. Ampenov, E.A. Buglayeva, M.V. Gorsky, L.D. Kokorev classify those who have general for them rights [5, p. 51-53; 7, p. 99; 8, p. 17; 10, p. 12], I.F. Kutyagin – those, to whom the state bodies should clarify and explain their rights etc. [14, p. 91-92].

According to the structure of the CPC of Azerbaijan Republic, the Second Section “Court and individuals, participating in criminal process” consists on the following Chapters “Court”, “Prosecution party”, “Defense party”, “Other persons, participating in criminal process” and “Representatives and assignee”. This is allowed asserting that a lawmaker attributes the subjects constituting the notions listed to the participants of criminal process.

Article 7.0.18 of CPC classifies an inquirer, investigator, prosecutor, victim,

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private prosecutor, civil plaintiff, their legal representatives and representatives, suspected or accused person, their legal representatives, civil defendant, his legal representative or representative to the participants of criminal process. According to article 7.0.28 of CPC, testifying witness, witness, specialist, expert, a secretary of the court session and an interpreter are classified to other individuals, participating in criminal process.

Thus, according to the main notions of criminal procedure legislation (art. 7 of CPC) a legal representative of the witness (art. 104 of CPC), a representative of the witness (art. 105 of CPC) and an assignee of the victim (art. 104 of CPC) are not classified to the participants of criminal process; it seems that this is wrong and subject to correction.

From our point of view, a participant of the criminal proceeding should be recognized any physical person, participating in it, under determination and normative fixation his legal status.

Under participation in criminal process should be understood any actions or inactions of an individual (if under this might be understood presence and passive observance) in the investigative and other procedural actions, and also organizational measures, carrying out on a criminal case.

Participation in procedural actions has to find its reflection in a record. According to article 51 of CPC “Obligation of recording the course and results of the procedural actions, carrying out on criminal persecution”, the course and results of the procedural actions, carrying out on criminal persecution, should be reflected in the records and other written documents, and also in attached to them photos, slides, audio records, phonogram, video, plan maps, schemes, copies, pictures, carriage of electronic and other information as the constituted parts [18, p. 40-41].

Consequently, it turns out that suspected and accused persons sign the records of course and results of actions on their persecution; it is presented wrong.

Somewhat differently and as it presented more rightly an issue about participants of criminal proceedings (criminal process) are solved in the CPC of Russian Federation. So, Section Two “Participants of criminal proceedings” of the CPC of RF consists on the following subsections: “Court” (chapter 5), “Participants

of criminal proceedings from prosecution party” (chapter 6), “Participants of criminal proceedings from defense party” (chapter 7) and “Other participants of criminal proceedings” (chapter 8). Unlike of the CPC of Azerbaijan Republic, which artificially separated the judges and jurors from the participants of criminal process, this is presented right so the judges and jurors take part in criminal process, and not in another activity [20, p. 554].

The Section Second “Participants of criminal process” of the CPC of Georgia consists on the chapter 6 “Court”, chapter 7 “Prosecutor”, chapter 8 “Investigator”, chapter 9 “Inquiry bodies and an inquirer”, chapter 10 “Victim and his representative”, chapter 11 “Suspected, accused, defender”, chapter 12 “Civil plaintiff, civil defender and their representatives”, chapter 13 “Other participants of criminal process”, to which are classified a witness (art. 93), expert (art. 96), specialist (art. 98), interpreter (art. 100), testifying witness (art. 102).

According to par. 18 of article 44 of CPC of Georgia, the parties are the participants of criminal process, defending own interests or interests of a client in criminal case [19, p. 17].

The Section Two “Subjects of criminal process” of the CPC of Estonia consists on the chapter 1 “Court”, chapter 2 “Prosecutor’s office”, chapter 3 “Investigative body”, chapter 4 “Suspected and accused”, chapter 5 “Victim, civil defender and third person” and chapter 6 “Defender”.

According to article 16 “Individuals carrying out production and participants of the process” of the CPC of Estonia classifies the court, prosecutor’s office and investigative body to the persons carrying out production, and suspected, accused and their defenders, victim, civil defender and the third person are the participants of a process [21, p. 12].

According to article 17 of CPC of Estonia, prosecutor’s office, an accused person and his defender, and victim, civil defendant and third person are the parties of criminal proceedings [21, p. 12].

Thus, according to the CPC of Estonia, prosecutor’s office is a subject of the criminal process, the person carrying out production and a party of criminal proceedings that possesses the rights of process participant, which are also a

suspected, accused, their defenders, victim, civil defendant and third person. The CPC of Estonia does not indicate with the rights of which participant of the process are possessed a prosecutor's office and why it does not classify to the participants of process. It is presented as contradiction, which excludes an existence and functioning of a system of criminal proceedings. In addition, from our point of view, the paradox of Estonian criminal process are exception from the subjects of a process the following participants – witnesses, experts, interpreters, specialists, testifying witnesses and others. This, together with many of other collisions should be a subject of special research, as their quantity is not gone into a frame of the present studying.

Analysis of the criminalistical recommendations on the tactics of implementation of the investigative actions, organization of the tactical combinations and their correlation with the provisions of CPC, in respect of the participants of criminal process, is allowed asserting about presence of the contradictions, gaps and essential errors, which make difficult and sometimes, exclude a participation of some individuals in criminal proceedings.

So, according to article 236 of CPC, an investigator and two testifying witnesses are mandatory participants of inspection and a defender, specialist, owner of home or premise, representative of housing office or local executive authority, institution etc. are alternative ones. Meanwhile, a status of home (premise) owner and representatives of the institutions, organizations are not indicated in CPC.

There are the recommendations in criminalistical books to involve into the inspections the cynologists, photographers, police officers (for guarding of a scene place), suspected, accused witnesses, victims, auxiliary workers, drivers, light's specialists etc. [13, p. 475-477].

Cynologists, photographers, auxiliary workers, drivers, and light's specialists might be conditionally attributed to the specialists, which status is determined in article 96 of CPC, though this is wrong. It is more complicate an issue with police officers, which are guarded a scene place and escorted suspected or accused persons to it, and also with individuals accompanying old, sick persons or injured victims, but not being their representatives.

It seems that an issue on signing a record of the procedural action is so named a stumbling-stone in the CPC, as it is resolved incompletely and ambiguously.

So, according to article 236.7 of CPC, "... a record of inspection is signed by an investigator and all participants of the investigative action, which have the right to demand including their remarks in it. If the record is drawn up on a few pages then each page is signed by all participants of the investigative action". The same provisions are contained the articles of CPC, regulating an order recording of exhumation (art. 237.5 of CPC), examination (art. 238.7 of CPC), identification (art. 241.2 of CPC), search and seizure (art. 247.2 of CPC), arrest of property (art. 252.2 of CPC), arrest of mail, telegraph and other correspondence (art. 258.2 of CPC), checking of punishment on a place (art. 261.2 of CPC), investigative experiment (art. 263.2 of CPC), seizure of the samples (art. 276.2 of CPC).

If it is based on the first part of the article 236.7 of CPC and other listed articles, then a record of investigative action are signed only with the participants, who have the right to require inserting their remarks in the record. These are a victim, civil plaintiff, suspected person, accused individual, defender, civil defendant, testifying witness, specialist, expert, witness, interpreter etc., i.e. everybody except a representative of the witness and assignee of a victim. According to the second parts of the articles listed, each page of the record is signed by all participants of the investigative action.

CPC provides a participation of the close relatives in exhumation (art. 237 of CPC); a doctor or specialist in forensic medicine in examination (art. 238 of CPC); not less than three statisticians in identification (art. 239 of CPC); an individual, in respect of which is produced a search, during a search and seizure (art. 244 of CPC); participation of an owner of the property or members of his family, specialist-commodities expert, security guards in property arresting (art. 251 of CPC); a chief and employees of the post-and-telegraph office in arresting of correspondence (257 of CPC); an authorized person in interception of conversations (art. 259 of CPC); a specialist, teacher, doctor and other individuals during checking of the testimonies on a scene place (art. 260 of CPC), investigative experiment (art. 262 of CPC) and confiscation of the samples for studying (art. 275 of CPC).

In addition, criminalistics recommends enlisting the specialists (in wide sense of the word) in art, jewelers, numismatists, philatelists, biologists, physicists and other to participation in search, arrest of property, confiscation of the samples and other actions [12, p. 363, 380, 381, 395].

So, V.V. Egoshin, studying the method of illegal hunting writes: "... It is reasonably to include in the investigative operation team in addition to an investigator, operation officer, local inspector, specialist-criminalist also a specialist-veterinarian, huntsman, if it is necessary also other police officers and an employee of licensing office. It should be used assistance of the frontier guards if the poachers try crossing the state frontier of RF [9, p. 84].

O.V. Chelysheva and M.V. Feskov suggest drawing the accountants, economists, auditors, inspectors and others to participation in investigative actions [22, p. 71], I.I. Safonov - explosive technicians [17, p. 101], Yu.V. Novikova – employees of housing department [16, p. 107], V.T. Abasov – narcologist [1, p. 92].

According to acting CPC nobody of listed persons and also employees of inquiry are not authorized to sign a record of the procedural action; this is presented to be wrongly.

We believe that the CPC should be supplemented with provisions about status of an individual participating during production of procedural action and mandatory signing a record by all participants of it. It is not excluded the situations when a person, participating during production of procedural action, but not being a participant of criminal process, will observe, remember and reproduce the dynamics and results of the action more completely and objectively then the participants. In addition, and this is the main, an absence of information all direct or indirect participants of the procedural action is an evidence its incompleteness and consequently, illegality.

An issue about the status of the chiefs of an investigative subdivision and inquiry body is a subject of special consideration, which is not determined proper in CPC. According to article 85.6 of CPC of Azerbaijan Republic, a chief of investigative subdivision has all rights of an investigator, i.e. he is the right to institute a criminal case, take to his production and produce investigation, reject in

initiation of criminal case etc. In addition, the chief of investigative subdivision in compliance with criminal procedure law, organizes a registration of received applications and information about committed or prepared crimes, charges to an investigator or a group of the investigators their consideration, production preliminary investigation or some investigative actions on criminal case; controls a course of investigation; accept necessary organizational measures for detailed, objective production of preliminary investigation on criminal cases etc.

Providing the chief of an investigative subdivision with the rights give a reason to consider of his by the subject of criminal process, and during realization by him above mentioned rights or obligations, he becomes the participant of criminal proceedings [11, p. 9]. But, the norm, which would directly provide a procedural status of a chief of the investigative subdivision, is absent in CPC that, on our opinion, is wrong.

It is presented that the rights of a chief of the investigative subdivision do not correspond to placing on him duties, and consequently he becomes just an administrator. As justly writes R.T. Mansurov, if a chief of the investigative subdivision must “carry out a control over timely acceptance necessary measures by an investigator for disclosure, investigation and restrain of a crime” then it is necessary to establish legal mechanism for realization of this function [15, p. 97].

Due to the fact that a chief of the investigative subdivision is deprived the right to check the materials of criminal case, give to an investigator mandatory for execution written instructions about production of certain investigative actions or acceptance of necessary procedural decisions, take a part in production of investigative actions, withdraw a criminal case from production of one investigator and pass to another one the provision, providing the duty of a chief of the investigative subdivision “to make necessary organizational measure for detailed, completeness and objective production of the preliminary investigation on criminal cases” looks illogically.

On opinion of R.T. Mansurov, the provisions of article 85.6.1 of CPC (a chief of the investigative subdivision has the rights to give to an investigator instructions about production of a certain procedural actions on criminal case) is also declarative

as criminal procedure legislation of Azerbaijan does not provide the forms of such instructions and the duty of an investigator to fulfill them [15, p. 98-99].

All chiefs of the investigative subdivisions have stated powers, and the chiefs of investigative subdivisions of the prosecutor's offices in addition to them have all rights that the law provides a prosecutor (art. 1 of the Law Azerbaijan Republic "On Prosecutor's office").

It is presented that CPC does not concretize the status of the Deputy of a chief of investigative subdivision, who obtains the powers of a chief of the investigative subdivision if the latter is absent (art. 85.6 of CPC of AR). As R.T. Mansurov notes, in this course is appeared the issues connecting with notion of the term "absence", so with documents confirming this fact: whether consider "absence" as non-respectable if a chief of the investigative subdivision is absent due to his personal or family issues and what kind of document should testify it [15, p. 99].

In our opinion, in order to eliminate stated gaps and providing an opportunity to fulfill by the chief of investigative subdivision and his deputy a real control for activity of the investigators he should be had the rights, with which he had till 1 September, 2000.

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