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Participants of criminal proceedings in respect of individuals not reached the age of bringing to the criminal responsibility

Abstract: The problems of participation in criminal proceedings in respect of the individuals not reached the age of bringing to criminal responsibility are considered.

It is analyzed the right and obligations of the persons participating in criminal proceedings in respect of the incapacitated minors.

It is given the suggestions on changes and amendments to the criminal procedural legislation.

Keywords: participant; criminal process; criminal proceedings; the age; status; criminal responsibility.

As rule, in legal books criminal process and criminal proceedings are considered as equivalent and identical notions [1, p. 4; 8, p. 10, 29, 41; 9, p. 7]. CPC Azerbaijan SSR of 1960 used only notion of criminal proceedings [10, p. 5].

Meanwhile, according to the CPC of Azerbaijan Republic of 2000, the criminal process and criminal proceedings are different notions. In our opinion, this is caused necessity resolution this artificially created problem as it influences on the methodology implemented research. So, according to article 7.0.3 of CPC, the criminal process is a combination of the procedural actions and accepted procedural decisions on criminal persecution, and criminal proceedings (article 7.0.8 of CPC) is production carried out before court examination, and also in the courts of the first, appeal and appeal-cassation instance in an order provided by CPC [11, p. 6-7].

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If not to consider an issue on criminal persecution, then there are no principle contradictions between stated notions. In the both courses it is accentuated activity essence of the definitions. And if it to be derived from provisions of the article 45 of CPC, then it turns out that criminal proceeding is an activity on collection (formation) of the materials of criminal case of simplified pre-trial production or complaint to a private prosecution at time of pre-trial and judicial proceedings.

But, in activity on criminal persecution a defense party does not accept any participation and consequently it cannot be considered as a participant of the criminal process.

From our point of view, the criminal process and criminal proceedings are the identical notions, and criminal persecution is their element, but not a goal. Consequently, it is presented necessity to exclude from the articles 7.0.3 and 7.0.5 of CPC the affirmations about criminal persecution, otherwise a court also becomes its participant and this is a wrong.

As for the notion of a participant of the criminal process, there is no a unified opinion in the legal science. So, B.A. Galkin recognizes as participants of the process all participating subjects of the criminal process [2, p. 11], L.D. Kokorev considers to the participants of process all who possess to equal rights [3, p. 12], and Rakhunov – those, to whom the state bodies should clarify and explain their rights etc. [7, p. 41].

On construction of CPC of Azerbaijan Republic, Section Two “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 assignees” that is allowed to assert that the listed subjects are referred by a lawmaker to the participants of criminal process.

Article 7.0.18 of CPC considers an enquirer, investigator, prosecutor, victim, private prosecutor, civil plaintiff, their legal representatives and representatives, suspected or accused individual, their legal representatives, civil defendant, his legal representative or representative to the participants of criminal process.

According to article 7.0.29 of CPC considers an attesting witness, witness, specialists, expert, secretary of court session and interpreter to other persons,

participating in criminal process. Consequently, according to the general notions of criminal procedural 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 assignee of the victim (art. 106 of CPC) are not included in the list of the participants of criminal process. This is wrong and should be corrected.

It appears that a participant of criminal process should be recognized any physical person who participates in it, during determination and normative fixation his legal status. Under participation in criminal process should be understood any actions or inaction of an individual (if he is recognized in presentation and passive observance) in investigative and other procedural actions, and also organizational measures, carried out on criminal case.

According to article 7.0.37 of CPC, under procedural actions are understood all actions of the participants of criminal process that is provided by CPC and implemented in compliance with its provisions. Consequently, a notion “procedural action” is wider than notion “investigative action” and “organizational measure”, and at the same time, any organizational measure and investigative action is procedural one.

Somewhat differently, and, as it appears, more correct, an issue about participants of criminal proceedings (criminal process) is resolved in CPC of Russian Federation. So, Section Two “Participants of criminal proceedings” of the CPC of RF is divided on 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 the CPC of Azerbaijan Republic, CPC RF artificially separates the judges and jurors from the participants of criminal process; this is considered to be right as the judges and jurors take part in criminal process, and not in other activity [4, p. 851-852].

Comparison of the recommendations on the tactics of implementation of investigative actions and organization of the tactical combinations with provisions of the CPC, in respect of the participants of criminal process, are allowed asserting on

presence of the contradictions, gaps and essential errors, impeding, and sometimes, excluding a participation of a certain individuals in criminal proceedings.

So, according to article 236 of CPC, an investigator and two testifying witnesses are mandatory participants, and a defender, specialist, owner of home or premise, representative of Housing and communal office or local body of executive authority, institution, military unit and others are the alternative participants. Meanwhile, the status of an owner of home (premise) and the representatives of institutions and organization etc. are not indicated in the CPC.

There are the recommendations in the juridical sciences about involvement to inspections of photographers, police officers, suspected, accused persons, witnesses, victims, maintenance workers, drivers, lighting workers etc. [5, p. 475-477; 6, p. 513-515].

Some of listed persons (photographers, lighting workers etc.) might be conditionally included to the specialists, the status of which are determined by the article 96 of CPC, although, this is also wrong. More complicated is a matter with police officers, who are involved in guarding of a place of the incident and conveying suspected or accused individuals to it, and also with the persons, which escorting old men, sick and wounded victims, but not being their representatives. Police officers cannot be related to the inquirers and specialists, but, from our point of view, the participation in procedural action they should fix with their signatures.

It seems that an issue about signing of a record of the procedural action is solved incompletely and uniquely in the CPC, and consequently the law should be changed and supplemented in this part.

So, according to article 236.7 of CPC, "... examination record is signed with investigator and all participants of the investigative action, which have the right to demand including their remarks in it. If the record is compiled in few pages then each page should be signed by all participants of the investigative action". The same provisions are contained in the article of CPC, which regulating an order of 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), property arrest (art. 252.2

of CPC), arrest of postal, telegraph and another correspondence (art. 258.2 of CPC), checking of penalties on a scene of incident (art. 261.2 of CPC), investigative experiment (art. 263.2 of CPC), seizure of the samples (art. 276.2 of CPC).

According to part one of the article 236.7 of CPC and other listed articles, the record of investigative action is signed only the participants who have the right demanding including in the record their remarks. These are a victim, civil plaintiff, suspected, accused, defender, civil defendant, testifying witness, specialist, expert, witness, interpreter etc. i.e. all except a representative of the witness and assignee of a victim. According to the second parts of the listed articles, each page of a record is signed by all participants of the investigative action.

Meanwhile, the CPC provides the participation in exhumation (art. 237 of CPC) of close relatives; in examination (art. 238 of CPC) – a doctor or specialist of forensic medicine; in identification of a person (art. 239) – not less than three statisticians; during search and seizure (art. 244 of CPC) an individual in respect of which is produced a search; arrest of property (art. 257 of CPC) – a proprietor, owner of property or members of their families, specialist-commodities expert, employees of guarding; arrest of correspondence (art. 257 of CPC) – chief and the employees of the communication institution; interception of conversations (art. 259 of CPC) – authorized person; during checking of testimonies on a scene of incident (art. 260 of CPC), investigative experiment (art. 262 of CPC) and seizure of the samples for studying (art. 275 of CPC) – a specialist, teacher, doctor and other persons.

In addition, juridical books recommend involving the specialists (in wide sense of the word) in sphere of the art, jewelers, coin collectors, philatelists, biologists, physicians etc. and also the employees of rapid response team, State Supervision Service for hunting, a huntsman of the hunting area, inspector of the licensing office, servicemen – frontier officers, accountants, economists, auditors, inspectors, blasting technicians, employees of the housing department in a search participation, arresting of property, confiscation of samples and other actions [6, p. 209; 312].

But, according to CPC, nobody of listed persons and also the employers of inquiry (MIA, MNS, SCS and others) are authorized with the right to sign a record of procedural action, what is wrong.

From our point of view, CPC should be supplemented with provisions on a status of an individual, participating during production of procedural actions and mandatory signing of the record by all its participants. It is possible cases when a person participating in production of procedural action, but not being of the participant of the criminal process will observe, remember and reproduce the dynamic and results of the action more full and objective than direct participants. In addition, and this is the main, an absence in a record information about all direct and indirect participants of the procedural action is testified about it incompleteness, and, consequently, illegality.

All listed contradictions and deficiencies of the law in part of participation in criminal proceedings are manifested in relief during its implementation in respect of the minors not reached the age of criminal responsibility, as in pre-trial, so in judicial productions.

In pre-trial production when the age of a minor is known from the moment of crime committing and made a decision about rejection in initiation of criminal case, then from participants of criminal process, provided by art. 7.0.8 of CPC, are present only an investigator and prosecutor due to their official status.

For appearance of other participants of the process (not considering a person who detained because of suspicion in crime committing – a suspected person) is necessary a criminal case and appropriate decision – it is necessary a production on criminal persecution.

Under situation of rejection in criminal case initiation – rejection in criminal persecution – not and cannot be any accused person, his defender, a victim, witness, civil plaintiff, representatives and other participants of a process. There are only a minor, not reached the age of criminal responsibility, his parents or guardians and lawyer, who cannot be a defender or representative as it is not provided by the law,

but there are no participants of criminal process (proceedings) in the notions of the article 7 of CPC.

Similar situation will be during institution of criminal case, but in this course also there are a lot of insoluble questions. So, according to article 100.2.2 of CPC, incapacitated in the criminal process is considered to be a victim, civil plaintiff, suspected or accused or civil defendant who not reached 14 years old [11, p.114].

But, according to article 20 of Criminal Code, minors not reached 14 years old cannot be suspected, accused or civil defendants if their age is known to a body carrying out criminal process [12, p. 70].

Consequently, the provisions of the article 101 of CPC about existence of legal representatives at incapacitated on the age suspected or accused persons are not corresponded to reality [11, p. 115-119].

According to article 435-1.1 of CPC, discontinued criminal case or the materials on rejection in initiation of criminal case in respect of a minor not reached the age of criminal responsibility are sent during three days to Commission on Minors in order to place a minor to a special juvenile custodial institution.

Thus, in this stage of proceedings Commission on Minors is appeared its participant. The Commission resolves the main issue of all process in respect of incapacitated on the age i.e. the issue on possibility to send a minor to a special juvenile custodial institution.

According to article 435-1.2 of CPC, basing on materials received from a body carrying out criminal process, the Commission collects other necessary documents to place a minor to a special juvenile custodial institution, files a petition in a court of first instance about that at a place of residing of a minor.

But, the law does not indicate where this case is send if a minor does not have a place of residence.

It should suppose that in course of negative decision of an issue about placing a minor in a special juvenile custodial institution, the Commission gives back a criminal case (rejected materials) together with its resolution to a body carrying out criminal process, from which they were received.

The law does not point out what should be done if a body, carrying out criminal process, does not agree with decision of the Commission.

According to article 435-1 of CPC, during consideration of the materials in court session take part the following: a person not reached the age of criminal responsibility; his defender; parents and other legal representatives; an employee of the Commission on Minor; prosecutor; police officer on the minors affairs on a residence place or territory where crime is committed [11, p. 429].

Participation of the defender is a process is mandatory, and all of the rest are alternative.

On discretion of a court or petition of the listed participants in court session might be invited also other persons.

According to CPC, in a process the main role belongs to an employee on Minor Commission who substantiates in his speech a necessity of placing a minor in a special juvenile custodial institution, responds on the questions of a judge and other participants of a court session, and only after that other participants of a process are heard.

It is presented, that a status (the rights and obligations) of all participants of a court proceedings in respect of a minor not reached the age of criminal responsibility (except a judge) are not determined by the law. It concerns a lawyer (defender) and other participants of criminal persecution, which is stopped and other individuals, which are not the participants of criminal process.

Resuming above stated, from our point of view, we can assert that CPC does not resolve proper the issues of participation in criminal proceedings in respect of persons not reached the age of criminal responsibility. The legislation in this part is subject to changing and supplementing.

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