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Problems of participation of a defender in criminal process of Azerbaijan Republic

Abstract: It is determined a system of protection from criminal prosecution, studied a status of a defender in criminal process of Azerbaijan Republic.

The rights of defender are not ensured by appropriate procedures.

Suggestions on changing and supplementing of criminal procedures legislation are given.

Keywords: defence; a defender; a lawyer; criminal proceedings; guarantee; deception.

According to article 7.0.27 of the Code of Criminal Procedure (further, the CCP), the defence is procedural activity, which is carried out to refuting or mitigating of accusations that brought against a person, who is suspected in commission of crime, protect his rights and interests; and also to restoring violated rights and freedoms of a person who illegally subjected to criminal prosecution. Suspected or accused person, a defender and civil defendant.

Right to defence is guaranteed by the Constitution and CCP of Azerbaijan Republic. Article 19 of the CCP says that in course of criminal prosecution an inquiry officer, investigator, prosecutor or court are obliged to ensure the rights of victim, suspected or accused person to legal aid assistance, including aid of lawyer before detention, police custody or before a first interrogation as suspected person or from time of brought accusation; to receive clarification of his rights; to have adequate time and facilities for the preparation his defence; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free.

It thence transpires that a system of the defence from criminal prosecution

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consists on the following interlinked elements: a) the basic principles and conditions of criminal proceedings; b) participation of a defender and representatives; c) personal defence; d) ensuring the rights.

Enumerated elements of various levels, some of which have subsystems, form the system, which has to ensure the defence from criminal prosecution [8, p. 73].

According to article 92 of the CCP, only a lawyer, who has a right to fulfills advocacy in territory of Azerbaijan Republic, might be participated as a defender in criminal process. In opinion various authors and ours, this point is to be wrong as, from one side, monopolizes this activity, and other one, contradicts the basic international documents and limits the right to defence [8, p. 75].

According to article 92.2 of the CCP, suspected or accused person may have few defenders. Failure to participate one of them in procedural actions, on which their participation is mandatory, cannot be ground to recognize these actions as illegal [14, p. 94].

Participation of a defender in criminal process should be ensured at the following cases: if this is requires by suspected or accused person; if suspected or accused person cannot protect his right to defence due to dumbness, blindness, deafness, either due serious shortcomings in speaking, functions of sight, hearing, because of long severe illness and dementia, explicit of mental retardation and other deficiencies; if in course of criminal case production a suspected or accused person will be found an exacerbation of mental illness or temporary mental disorder; if suspected and accused person does not speak in language of criminal proceedings; if suspected or accused person does not reach an adulthood; if accused person is an enlisted man; if suspected or accused person is incriminated a commission of especially grave crime; if suspected or accused person forcibly confined to special medical (inpatient psychiatric treatment) institution; if suspected or accused person detained or arrested, except refusal from defender's aid; if criminal prosecution is carried out despite expired period of limitation to bringing to criminal responsibility; if it is existed contradictions between legal interests of accused and one of them has a defender; if criminal prosecution carried out in respect of a person committed crime

in a state of insanity; if suspected or accused person is legally incapable [14, p. 94-95].

Some of listed provisions, in our point of view, are presented to be wrong. So, enumeration all physical and mental disabilities, excluding carrying out a right to defence in person, as it requires a special knowledge and keeps danger to miss some disability or not to consider the circumstance, which detected by modern science, as such.

It is justly noted in criminalistical books that one should speak about completeness of carrying out a right to defence in person, but not about impossibility to. In connection with this, participation of a defender should be mandatory in all cases of availability of physical or mental disabilities to a suspected or accused person, which confirmed with appropriate medical documents (references, epicrisis, conclusions etc) [12, p. 63].

Provision, according to which defender's participation is mandatory if accused person is an enlisted man, is presented to be right, but suspected enlisted men should be also related to this category.

In our point of view, in some cases, the contents of listed rights of defender in article 92 of the CCP are not ensured with appropriate procedures that negatively influence to a role of a defender in ensuring of the rights of suspected and accused persons.

So, it is presented that defender's right to participate in investigative or other procedural actions committed with participation of suspected or accused person in the CCP is not properly regulated. This excludes its proper use.

Article 232.2 of the CCP "Interrogation of accused" says that an investigator should in advance ensure a defender's participation that stipulated by article 92.3 of the CCP. Similar provisions content article 233 "Interrogation of accused", article 235 "Confrontation", article 236 "Inspection", article 239 "Identification of a person", article 240 "Identification of the items", article 244 "Persons participating in conducting of search and seizure", article 251 "An order of property arrest" and others.

Meanwhile, the CCP does not contain the order of a defender's notification on forthcoming production of investigative action. As rule, defenders are notified with letter or telephone. But, a letter might be sent by postal mail, to be delivered to legal consulting office to the end of day and is registered by a secretary that's why it will exclude timely participation of defender in production of investigative action. It is impossible to draw a record about defender's notice on telephone that will also exclude implementation his rights by the latter [3, p. 107].

In this connection, it seems necessary to add the CCP with provisions regulating an order of defender's notice, and also to change the provisions concerning a defender's replacement.

So, according to article 92.15 of the CCP, "… an inquiry officer, investigator or prosecutor has the right to demand on head of advocacy office to replace a defender by other one… if chosen as a defender a lawyer during 6 hours after detention of arrest of suspected or accused person failure to appear to meeting with this person and if a defender long time (not more than five days in each case) does not participate in investigative or other procedural actions provided by criminal process, and a body, who carries out his functions, has not much opportunities to postpone implementation of these actions" [14, p. 102].

Meanwhile, according to article 232.1 of the CCP, interrogation of suspected should be carried out at once after his detention, and nobody will wait a defender five days in order to fulfill inspection, search or other investigative actions.

In addition, in our point of view, it is required to change and supplement the provisions of the CCP on a right of defender to gather evidence, familiarize with decision on assignment of expertise and conclusion of expert, make copies of necessary documents relating to a client, to receive information from a body, carrying out criminal process, about decisions, which are concerned his rights and legal interest, to refuse on some complaints.

So, the CCP provides detailed list of kinds of evidence (art. 124) and itemized that "… collection of evidence is carried out through implementation of

interrogations, confrontations, seizures, searches, inspections, expert examinations, identifications and other procedural actions" (art. 143 of the CCP).

It seems that under such situation and also as far as "… as evidence on criminal case is inadmissible an acceptance of information, documents and other items received… with violation of the CCP requirements…and with fulfillment of investigative and other procedural actions by a person, who has not a right to fulfill these actions" (art. 125 of the CCP), defender's right to collect evidence has not legal force.

The CCP does not say, when and what decisions about expertise assignment and expert's conclusions a defender has to right to familiarize. In our point of view, this issue should be itemized.

It seems also necessary to make changes in the CCP allowing to a defender to make copies all necessary documents in course of familiarization with them in own expense, as, in our opinion, stipulation about their attitude to a client is wrong. If a person(s) figures in criminal case as accused one(s), then all materials of a case have direct attitude to him (them).

Assertion of a defender's right to refuse of any complaint is also subject to correction. It seems that the CCP has to contain defender's right to refuse of complaint after discussion of this matter with a client.

Defender is prohibited: to produce any actions opposite legal interests of a client including to confirm his complicity in crime and guilt, to find civil plea that brought against him, refusal to participate in procedural actions, which committed with participation of the client and to impede fulfillment of his rights; to publicize data becoming known him in connection with legal aid rendering, if they might be used against legal interests of a client, excepting reception of information about preparation or commission of new crime, and also refutation of client's grounds under resolution of matter about defender's responsibility for improper defence execution.

Defender has no a right to refuse on defence in person or cancel powers of a defender, and also to defend of two and more accused persons if this contradicts their

legal interests, to impede to invitation or participation other defender in criminal process, to trust his powers to other person, to call any person without agreement of a client as a witness or expert, to declare on complicity of suspected or accused person to accident, guilt of suspected or accused person in crime's commission, reconciliation of suspected or accused person to a victim, to recognize a civil suit etc.

In our view, prohibition to a defender to be refused on participation in procedural actions is wrong. First, this is the right of a defender, which cannot be obligation at the same time. Second, refusal on participation in one or another investigation action might be a defence tactics. It appears necessary also correction of provision, according to which a defender has no right to trust his powers to other person. Defender may have few assistants and to instruct them a certain work, including on power of attorney, but it does not mean that he re-entrusts to other to defend of suspected or accused person.

According to article 92.14 of the CCP, refusal of suspected or accused person on defender is indicated in a record. An inquiry officer, investigator, prosecutor or court accept a refusal on a defender only if suspected or accused person submitted application about that on their initiative, voluntarily and with defender's participation, or a lawyer, who is to be assigned as a defender. It is not accepted refusal of a suspected or accused person on a defender due to absence of funds to pay legal aid, and also if he/she has physical or mental disabilities, illnesses, a minor, non-speaking in language of proceedings, incapability etc. He/she is forcibly provided by appointed defender or is kept powers of a lawyer appointed as a defender.

From time of refusal on defender's aid suspected or accused person is considered to be the person who defends him in person; but he/she has right to change his position at any time of criminal process before beginning of judicial examination.

An inquiry officer, investigator or prosecutor has no right to offer to a suspected or accused person to invite a certain defender, but they are obliged to ask a head of advocacy office about assignment of a defender from the lawyers at the following

cases: if it is required by suspected or accused person or if suspected or accused person has no a defender, but when participation of the defender is mandatory.

Certain interest presents the cases when suspected or accused person insists on assignment of a specific defender, no having funds to pay his aid. Typically, defenders, referring to workload or other reasons, are refused on such clients, in our view, if accused person submitted a list of lawyers, from which he wishes a defender to be assigned, then such refusal will be violation his rights, including a right to equality [7, p. 103].

Problem is an issue on the right a defender to lie. Article 15 of the CCP categorically said that deception is prohibited in course of criminal prosecution, but a defender does not take a part in criminal prosecution, vice versa, he is defended from it.

This issue is solved in different ways in legal books. So, N.N. Polyansky in his book "True and lie in criminal process" notes that a defender "is obliged to provide court with those grounds, which note reliability of evidence as he would not be in doubt of their reliability" [10, p. 61]. M.Y. Barshevsky slightly softens this position, asserting that: "Defender says true, but - not all" [1, p. 100].

A.A. Levy indicates the following: "Sure, in compliance with general accepted moral concepts a lie is not admissible, but there is a notion "white lie". There are some provisions of professional ethics, which sometimes admit a deception. So, nobody will reproach a doctor that he/she hides from ill man how long he will be live, though a doctor knows that this man will die soon. He says him opposite. It is recommended and encouraged the deception enemy in a war" [5, p. 41].

R.S. Belkin, in his last book, "Criminalistics: problems of present day" pointed out: "At last, we should openly recognized that state recognizes admissibility of deception in law enforcement activity, it legalized operational searching activity, which is mainly based on disinformation, deception as a means detection and disclosure of crimes. Deception is not considered to be amoral; it is impossible to enter in criminal group, detect grafter, racketeer etc" [6, p. 114].

It is interesting assertion of N.P. Khaydukov, who writes: "If it is appeared contradictions in procedural and tactical situation between separate values and it is

impossible to save them both, then it is reasonable and morally justified will be such tactical decision, which directed to save the most significant values: when legal is such action, to which in purpose to prevent big damage is sacrificed by less one… If under using of techniques and means of influence appeared contradiction between separate values and it is impossible to save both of them under achievement of procedurally and tactically significant goal, then it will be reasonable and morally justified a moral compromise, i.e. such tactical decision, which directed to save the most significant value in this situation" [15, p. 64-65].

"The terms of deception admissibility is very narrow and rather strictly, but it should be admissible in principle" – R.S. Belkin finalizes and we cannot but agree with him [2, p. 114].

But, an issue of admissibility of deception in investigator's actions is resolved by such way, and it is much complicated this decision in relating to a lawyer-defender. So, A.A. Levy writes: "let's imagine situation, when two witnesses confirm alibi of an accused person, and a defender know that testimonies of these witnesses are false and his client is guilty. It is generally accepted that defender has no right to recognize his client guilty when he denied this. But, whether the defender may refer to the testimonies of witnesses, false of which he knows, i.e. to lie himself? It is quite obvious that it cannot be done. This question should be circumvented some way and not recognizing his client a guilty, not to refer to these perjurers' testimonies" [5, p. 43].

In our view, it is difficult to be agreed with this assertion as it emasculates an essence of defence. It seems that deception is admissible during defence as in form of non-giving information, so and giving obviously false information, which should be provided with some terms.

As it known, under deception, lie is understood an intentional distortion and concealment of the truth, untruth, false imagination etc. [9, p. 282, 367, 378].

Article 15 says that it is prohibited to receiving testimonies in course of criminal prosecution through deception and application other illegal actions, which violate the rights of interrogated person. Thus, a deception is classified by the law as illegal action.

But, a lawyer (defender) does not carry out a criminal prosecution. According to article 38 of the CCP, this obligation is imposed at inquiry officer, investigator and prosecutor.

In addition, production of interrogation, confrontation, checking of testimonies at place and other investigative actions are also prerogative an inquiry officer, investigator and prosecutor, as according to appropriate provisions of the CCP (articles 232, 233, 235, 236, 238, 239, 2560 and others), a defender just does not take part in them

Information giving by defender to other participants of these actions in course of investigative actions as not testimonies as according to article 126.1 of the CCP, the testimonies are recognized verbal and written information received from a suspected, accused, victim and witnesses by a body carrying out criminal process. According to article 7.0.5 of the CCP, the bodies carrying out criminal process are the bodies of inquiry, investigation, prosecutor's office and courts, in production of which are examined a criminal case or other materials associated with criminal prosecution.

This is one side of an issue – procedural, analysis of which allows asserting that there are no procedural (legal) prohibitions for defender's deception.

As it known, suspected and accused persons do not bear criminal liability for providing of obvious false testimonies including false denunciation. In some cases a contents of their testimonies are formed with participation of a defender, who willingly or unwillingly has to take part in correction of them. Determination of general position of defence is preceded to this stage, which may be varied at the following forms: a) full denial; b) partial denial; c) full confessing of accusation.

We are talking on varying as at certain stages of process a full denial of accusation may pass in partial confession; full confession into partial or full denial etc. Accordingly this will changed contents of the testimonies or will happen refusal to give them.

As rule, experienced lawyer does not impose his opinion on a client, and, both being analyzed all pros and cons, and being clarified possible consequences in common features, offers to a client to be determined with defence position.

Everything is more or less clear when denial from testimonies giving is chosen as a type of defence. Situation is more complicated when defence party gives testimonies with full or partial denial of accusation.

These situations a lawyer may know or not about guilt of a client, believe or not to his testimonies' truth, but in forming of which he is not obliged to participate.

Let's try to understand at below stated sample the circumstances of a lawyer's participation in formation of testimonies and to response on question about admissibility of deception in lawyer's activity.

On meeting with defender in temporary detention center suspected "A" concisely outlined a content of presupposed testimonies, an essence of which is concluded in denial of possible accusations.

"A story" of suspected "A" had contained obvious contradictions, which were indicated by a lawyer. After discussion, a lawyer gave his client alternative suggestions. In particular, lawyer explained that if he would had denied this or that circumstances then it might be produced a confrontation a suspected with witness "T". In this case everybody would confirm his testimonies, but it is possible that witness "T" may give data, which was not known earlier. This would create a risk that a suspected may lose his head and confess the facts denied and moreover to confess in crime. Similar clarifications were given and in case of other situations.

Thus, actually a lawyer took part in formation of obvious false testimonies otherwise a client would have refused of his services.

Loss of customers and professional authority, which may be resulted by material losses that is essential but not main circumstance in argue about defender's right to lie.

In our view, deprivation of a defender the remedies of criminalistical tactics, an integral elements of which is deception, emasculate a core of defence

It is justly noted in juridical science that there was no and there is no any technique, combination etc. in criminalistical tactics, in base which would not be a deception and lie. "History of criminalistical tactics, especially its soviet period, is characterized with unsuccessful attempts to find moral substantiation of admissibility

of lie and deception or camouflage synonyms that any case was failure as it was in vicious circle of interlinked Jesuitical concepts and provisions" [13, p. 94].

In addition, we should note that as M.C. Strogovich justly noted, a deception and lie presented in especial cunning form. Despite they are left as such but in more qualified and amoral ones [11, p. 20]. Extents and forms of its use by a defender depend on his moral features, application of which will allow asserting about tactical abilities, but not about lie and amorality.

Summarizing above stated, we may assert that criminalistical tactics is an integral part of defence, and a deception is constitute part of criminalistical tactics.

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