Right to protect in cidential procedure, taking into account the use of videoconferencing

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Abstract. The practice of ensuring the right to protection of persons from suspicion or accusation in some countries, including taking into account the decisions of the European Court of Human Rights, indicates that not all issues of its legal regulation have been resolved to a degree that satisfies science and practice, and there are violations of human rights enshrined in international legal standards, the principle of adversarial parties in criminal proceedings is not fully implemented, so there is increasing scientific interest in problematic issues of protection from criminal prosecution. The purpose of the study is to analyze international standards in the field of human rights, as well as the experience of Russia and some foreign countries in the field of ensuring the right to protection from criminal prosecution in criminal proceedings, to identify problematic issues of a legal nature in this part and to formulate scientifically based recommendations for their solution (minimization). The methodological basis of the study is also the formal-logical and comparative-legal methods, taking into account the processes of development of the regulatory framework.

1 Introduction

Taking into account the above it seems necessary to adjust the concept of defender in the national legislation and consolidate the possibilities of its participation since the official nomination of the suspicion or accusation, but from the moment of implementation of procedural actions affecting the rights and freedoms of the person against whom it is made, and aimed at his denunciation of the crime. Many disputes among the processalists are caused by the rule on the possible participation as a defense lawyer of a close relative or other person for whose admission the accused applies, as well as questions concerning the scope of the requirements imposed on such persons, the criteria by which the court decides on the application for admission as a defense lawyer of a person who does not have the status of a lawyer.

In accordance with article 47 of the Criminal Procedure Code of the Republic of Moldova, other persons who are granted the powers of a defender by law may participate as a defender from the moment of assuming the obligation to protect the interests of the person in the case

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and with his consent. In accordance with part 2 of article 49 of the code of criminal procedure protection in criminal proceedings can realize not only a lawyer, but one of the relatives of the accused as well as any other person on the admission which he makes intercession, but such participation is only possible along with the lawyer, but the production of the world judges the person can be admitted and instead of a lawyer. The participation of a close relative or other person is allowed by a court decision. This provision of the law has an ambiguous interpretation and contains a number of controversial issues.

According to part 1 of Article 48 of the Constitution of the Russian Federation, everyone is guaranteed the right to receive qualified legal assistance. Further, Part 2 of the above-mentioned norm establishes the right to use the assistance of a lawyer (defender) from the moment of detention, detention or indictment, respectively. I would like to note that in part 2 of Article 48 of the Constitution of the Russian Federation there are two concepts "lawyer" and "defender". Thus, the Basic Law does not prohibit a person who does not have the status of a lawyer from providing legal assistance. The legislation contains no clear definition of «qualified legal assistance», so perhaps for fear of a conflict between part 1 of article 48 of the Constitution of the Russian Federation and part 2 of article 49 of the code of criminal procedure, the legislator has envisaged that other persons and close relatives may participate in criminal proceedings as defenders only along with the lawyer, not in every case, a person or a close relative will have a set of qualities that fit the concept of «qualified legal assistance».

According to the judges of the constitutional Court of the Russian Federation E. M. Ametistov, qualified legal aid is the constitutional duty of the state to provide to everyone a fairly high level of legal assistance, however this does not mean the duty of a citizen to use only such a level, of course, if it does not violated the constitutional principles of justice, and the rights and interests of other persons [1].

Modern law enforcement practice develops in such a way that in pre-trial proceedings, as a rule, only a lawyer acts as a defender, and the participation of "another person" is extremely rare. However, the accused may see in the defense lawyer not only a lawyer, sometimes psychological assistance, as well as moral support, which do not depend on the monetary payment for the provision of services, are more significant for the person. In addition, the quality of protection, for example, by a person who has an economic education, in cases of an economic orientation, in some aspects may be more effective than persons with a legal education. The participation of such persons, along with a lawyer, will strengthen the quality of the defense, by attracting specialists from certain fields of activity, and will also help ensure the participation of persons in the case, regardless of the monetary remuneration.

The constitutional Court of the Russian Federation (1997) considered the complaints in which the applicants were asked to check the constitutionality of provisions of the criminal procedure code of the RSFSR, according to which as defenders in the criminal proceedings is allowed only lawyers and representatives of trade unions and other public associations (part 4 of article 47 UPK RSFSR). The applicants, who are in the status of accused persons, wanted to involve lawyers who do not have the status of a lawyer as defense lawyers during the preliminary investigation, which the investigators who carried out criminal proceedings refused, arguing that the participation of such persons is not provided for by law. The court and the prosecutor's office recognized this opinion of the bodies that carried out the preliminary investigation as legitimate [11]. 4 judges of the Constitutional Court of the Russian Federation, who participated in the consideration of these complaints, expressed their dissenting opinion. Judge V. O. Luchin in his dissenting opinion recognized that the provisions of Part 4 of Article 47 of the Criminal Procedure Code of the RSFSR restrict the right of suspects and accused persons to use qualified legal assistance of persons who are not members of bar associations and do not comply with the Constitution of the Russian Federation [11]. Judge E. M. Ametistov in his dissenting opinion stressed that the admission

of lawyers who do not have the status of lawyers to the defense of suspects and accused persons does not contradict the goals of the defense. Taking into account the position of the legislator, allowing for the protection of persons who are not required to confirm their qualifications at all, and even allowing the accused to refuse to defend themselves and defend themselves independently, does not contradict the basics of legal proceedings, enshrined in Part 3 of Article 123 of the Constitution of the Russian Federation [1].

The dissenting opinions of judges N. T. Vedernikov and V. I. Oleynik also confirm that the admission of a person who does not have the status of a lawyer to participate does not harm the quality of the defense [11]. In addition, the above-mentioned international legal acts do not restrict the right of a suspect or accused to choose a defense lawyer, including another person who does not have the status of a lawyer.

Taking into account the above, it seems that the admission of close relatives and other persons as defenders along with a lawyer at the request of the accused is very justified from the point of view of strengthening the protection, but the legislation does not clearly establish the procedural procedures for admitting such persons, the requirements imposed on them, which creates certain problems in law enforcement practice.

According to the Decree of the Plenum of the Supreme Court of 29.03.2016[9]and the Decision of the constitutional Court of the Russian Federation from 13.06.2019[10]under the criminal prosecution is understood to be the acceptance concerning one of the procedural decisions referred to in paragraph 1 of article 46 or paragraph 1 of article 47 of the code of criminal procedure, under which it recognizes the suspect or accused, or the point at which the person started the production of one of the proceedings in accordance with part 1.1 of article 144указанного Code or investigative actions directed on his conviction of a crime, prior to the recognition him as a suspect or accused.

Analysis of the decisions of the European Court of Human Rights (ECHR)It shows that complaints about violations of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950, which establishes the right to defend oneself personally or through the representation of a defender, are not uncommon among complaints against the Russian Federation. As a rule, the ECtHR finds violations of international law and concludes the consideration of complaints with a decision on the award of monetary compensation. Thus, the ECtHR identified violations related to the failure to ensure the right to use the help of a lawyer or with the late provision of this right[1], which indicates the need to study the issues of protection from criminal prosecution. The main approach to the research is the dialectical method of scientific cognition of objective reality, from the position of which the object and subject of research are considered in a complex way, in the development and interrelation, interdependence, and interpenetration of social phenomena.

International standards provide protection from prosecution embodied in the criminal procedural legislation of many countries, including countries of the Commonwealth of Independent States (CIS). For example, in the Criminal procedure codes of the Russian Federation (CPC RF) [2], the Republic of Kazakhstan (CCP RK) [3], the Republic of Belarus (criminal code) [4], of the Republic of Uzbekistan (CPC PY)[5], Republic of Moldova (CPC RM)[6] contains rules of principles on ensuring the right to protection (article 16 of the code, 26 code of criminal procedure, 17 of the criminal code, criminal procedure code 24 RU, 17 of the CPC of the RM). In these rules, we are talking about ensuring the right to protection of persons who are officially in the status of a suspect or accused, which they can exercise, both personally and with the help of a lawyer. The exception is the norms of the Criminal Procedure Code of Kazakhstan and Moldova, where the list of participants in the process who are guaranteed the right to defense is not limited to suspects and accused. Thus, under article 26 of the criminal procedure code eligible and the witness, if it is specified in the statement and the report of a criminal offence as a perpetrator, or against him testifying

witness involved in criminal proceedings, but it has not applied the procedural detention is either not issued a decision on the recognition him as a suspect.

Thus, in accordance with paragraph 22 of Article 7 of the Criminal Procedure Code of the Republic of Kazakhstan, criminal prosecution (prosecution) is a procedural activity carried out by the prosecution in order to establish an act prohibited by criminal law and the person who committed it, the guilt of the latter in committing a criminal offense, as well as to ensure the application of punishment or other measures of criminal legal influence to such a person. A similar definition is fixed in paragraph 48 of Article 6 of the Code of Criminal Procedure of the Republic of Belarus.

European Court of Human Rights considers the concept of "accusation" as an autonomous concept and is used independently of the content that is put into it by national law. Under prosecution within the meaning of article 6 of the Convention for the protection of human rights and fundamental freedoms European Court of human rights understands not only the formal notification of the charges, but also other measures related to the suspected crimes that have serious consequences or significantly affect the position of the suspect (judgment of 27 February 1980 in the case of Deweer, Series A, no.35, para 42, 44, 46; judgment of 15 July 1982 in Eckle case, Series A, no.51, para 73; judgment of 10 December 1982 on the case of Foti, Series A, no.56, para 52), ie considers it necessary to proceed from the s The classic judgment of the European Court in this matter is the decision in the case of «Deweer against Belgium» (of February 27, 1980 in the case of Deweer, Series A, no.35, para 42, 44, 46), which stated that the court should lean towards the choice in favor of «meaningful» and not «formal» concepts charges and «called to see what's beyond the outside of the case, and to explore the realities of the procedure» (para 44). Further, the concept of «accusation» is defined by the European Court of Justice as "official notification of a person by a competent public authority of the existence of an assumption that this person has committed a criminal offense», which has significantly affected the situation of this person (para46).

The Constitutional Court of the Russian Federation in 2000 made an attempt to expand the definitions of «suspicion and accusation». This ensures the conditions that allow this person to get a proper understanding of their rights and obligations, of the charges brought against them, and, consequently, to defend themselves effectively, and to guarantee in the future that the evidence obtained during the investigation is inadmissible (Article 50, part 2, of the Constitution of the Russian Federation) [7]. This position is reflected in further decisions of the Supreme Court and the constitutional Court of the Russian Federation, in which the concept of criminal prosecution, «charge» shall be interpreted wider than in the code of criminal procedure.

The Resolution of Plenum of the Supreme Court 30.06.2015[8] indicated that ensuring the right to defense is one of the principles of criminal procedure in force in all its stages, and in accordance with the principle of the right to protection also have a person in respect of which are affecting his rights and freedoms procedural steps for verification of a crime report in the manner prescribed by article 144 of the code of criminal procedure, as well as any other person, rights and freedoms which significantly affected or can be affected significantly by the actions and measures attesting against him, prosecutorial activities, regardless of the formal procedural status of such person.

2 Results

Persons may not participate in the work of a defense lawyer along with a lawyer.: 1) under the age of 18 years; 2) recognized by the court as incompetent or limited by the court in their legal capacity; 3) registered in a narcological or neuropsychiatric dispensary in connection with treatment for alcoholism, drug addiction, substance abuse, chronic and prolonged mental disorders; 4) suspected or accused of committing crimes, convicted persons; 5) do not

speak the language in which the proceedings are conducted; 6) having physical or mental disabilities that prevent full participation in the consideration of a criminal case by the court. The decision on the application may be appealed in accordance with the procedure established by Chapter 16 of this Code».

State in part 1 of article 49 the concept of a defender in the following wording: «Defender – a person who, in accordance with the procedure established by this Code, protects the rights and interests of suspects and accused persons, as well as persons against whom proceedings have been initiated in the course of verifying a report on a crime affecting their rights and freedoms, or persons against whom an investigative action has been initiated aimed at exposing them in the commission of a crime and preceding recognition as suspects or accused persons, and provides them with legal assistance». Paragraph 6 of Part 3 of Article 49 of the Code of Criminal Procedure of the Russian Federation should be worded as follows: "6) since the beginning of the implementation of procedural actions affecting the rights and liberty of a person against whom an inspection is carried out of a crime report in the manner prescribed by article 144 of this Code, or investigative actions, aimed at exposing persons to commit a crime." Add Article 49.1 of the Code of Criminal Procedure of the Russian Federation «The procedure for considering the application of the accused, suspect for admission of a close relative or other person as a defender in criminal proceedings» in the following wording: «1. Admission as a defense lawyer, along with a lawyer, of one of the close relatives or another person, is carried out at the request of the accused, the suspect by the investigator, the investigator or the court in which the criminal case is being conducted. 2. The application of the accused or suspect for admission as a defense lawyer, along with a lawyer, of one of the close relatives or another person, shall be considered within the time limits established by Article 121 of this Code. 3. The consideration and resolution of the petition for admission as counsel, along with counsel for one of the next of kin or other person to the investigator, the investigator and the court should consider the possibility of participation in the case of the defender, the presence or absence of the obstacles under article 72 of the criminal procedure code of the Russian Federation, as well as other possible barriers to the participation of such counsel in the criminal process, including health status, age, employment on the main job, education, the legal capacity of such person and other. 4. The inquirer, investigator, judge make the decision about satisfaction of the petition for admission as advocate along with the lawyer of one of the relatives or other person, or the refusal of its satisfaction, and the court determination, which is communicated to the person who filed the petition.

3 Conclusion

Given the above, it seems appropriate to include in national legislation the possibility of participation of the defender not only from the time of nomination of official suspicion or accusation, but from the moment of implementation of procedural actions affecting the rights and freedoms of the person against whom it is made, and aimed at his denunciation of the crime. The criminal procedure legislation of Russia and some foreign countries (members of the CIS) allows the participation of other persons, most often close relatives who do not have the status of a lawyer, as defenders, along with a lawyer, but does not specify in detail the procedural procedure for such admission, the requirements imposed on such persons, which prevents the implementation of this provision in practice. Given the fact that the international legal acts, the right of the suspect or accused to choose counsel, including a person not having the status of a lawyer is limited, it seems appropriate recognition in national criminal procedure legislation detailed procedures for the admission of such person as a defender and criteria for it.

The recommendations made can help to improve the institution of protection from criminal prosecution, strengthen the adversarial nature of the parties in pre-trial proceedings

and implement the purpose of criminal proceedings, which is not only to protect individuals and organizations who have suffered from crimes, but also to protect the individual from illegal and unfounded charges, convictions, restrictions on their rights and freedoms.

References

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3. Criminal Procedure Code of the Republic of Kazakhstan dated 04.07.2014 № 231-V.
4. Criminal Procedure Code of the Republic of Belarus dated 16.07.1999 № 295-Z.
5. Criminal Procedure Code of the Republic of Uzbekistan: approved by the Law of the Republic of Uzbekistan of 22.09.1994 № 2013-XII.
6. Criminal Procedure Code of the Republic of Moldova of 14.03.2003 № 122-XV.
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8. Resolution of the Plenum of the Supreme Court of the Russian Federation of June 30, 2015 No. 29 «On the practice of application by courts of legislation ensuring the right to defense in criminal proceedings».
9. Resolution of the Plenum of the Supreme Court of the Russian Federation dated 29.03.2016 No. 11 «On some issues arising in cases of awarding compensation for violation of the right to trial within a reasonable time or the right to execution of a judicial act within a reasonable time».
10. Resolution of the Constitutional Court of the Russian Federation of 13.06.2019 N 23-P «In the case of checking the constitutionality of Part three of Article 6.1 of the Criminal Procedure Code of the Russian Federation in connection with the complaint of citizen B. A. Sotnikov».
11. Resolution of the Constitutional Court of the Russian Federation No. 2-P of 28.01.1997 «On the case of checking the Constitutionality of Part four of Article 47 of the Criminal Procedure Code of the RSFSR in connection with the complaints of citizens B. V. Antipov, R. L. Gitis and S. V. Abramov».