



Safety of participants of
criminal trial and ensuring
balance of interests of
charge and protection.

SAFETY OF PARTICIPANTS OF CRIMINAL TRIAL AND ENSURING BALANCE OF INTERESTS OF CHARGE AND PROTECTION

SEGURIDAD DE LOS PARTICIPANTES EN EL JUICIO PENAL Y GARANTÍA DE EQUILIBRIO DE INTERESES DE CARGO Y PROTECCIÓN

ABSTRACT

Ensuring the safety of participants in criminal proceedings is one of the important guarantees for the achievement of the goal of modern Russian criminal justice: involvement of a guilty person or release of an innocent person from punishment. The achievement of this important result can be based on an assessment of the evidence obtained. The citizens' assistance to establish evidence in the work of law enforcement agencies causes certain contradictions. The interests of the state in combating crime and the legitimate interests of a citizen can be asymmetric. In this regard, the state shall create the necessary and sufficient conditions for motivating such assistance. Otherwise, the citizen is not able to potentially assist in the criminal proceedings, as this constitutes a threat to his/her (close relatives) interests. It is particularly relevant to define the optimal balance of state and personal interests in the criminal proceedings. The citizens can facilitate the investigation only when they feel completely safe. At the same time, not only witnesses and victims (their relatives) shall be provided with the protective measures, but a suspect (accused), who promotes criminal justice, as well. The article presents an analysis of the formation and development of the personal security institution in the Russian criminal process. The articles shows the main problems of balancing the interests of the state in combating crime and ensuring the legitimate personal interests of a citizen.

KEYWORDS: victim, witness, security, criminal justice, prosecution and defense, balance of interests, combating crime, tactical and criminal means.

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RESUMEN

Garantizar la seguridad de los participantes en los procesos penales es una de las garantías importantes para lograr el objetivo de la justicia penal rusa moderna: involucrar a un culpable o liberar a una persona inocente del castigo. El logro de este importante resultado puede basarse en una evaluación de la evidencia obtenida. La asistencia de los ciudadanos para establecer evidencia en el trabajo de las agencias de aplicación de la ley causa ciertas contradicciones. Los intereses del estado en la lucha contra el crimen y los intereses legítimos de un ciudadano pueden ser asimétricos. En este sentido, el estado deberá crear las condiciones necesarias y suficientes para motivar dicha asistencia. De lo contrario, el ciudadano no puede ayudar potencialmente en el proceso penal, ya que esto constituye una amenaza para sus intereses (parientes cercanos). Es particularmente relevante definir el equilibrio óptimo de intereses estatales y personales en el proceso penal. Los ciudadanos pueden facilitar la investigación solo cuando se sienten completamente seguros. Al mismo tiempo, no solo los testigos y las víctimas (sus familiares) deben recibir las medidas de protección, sino también un sospechoso (acusado), que promueve la justicia penal. El artículo presenta un análisis de la formación y el desarrollo de la institución de seguridad personal en el proceso penal ruso. Los artículos muestran los principales problemas de equilibrar los intereses del estado en la lucha contra la delincuencia y garantizar los legítimos intereses personales de un ciudadano.

PALABRAS CLAVE: víctima, testigo, seguridad, justicia penal, persecución y defensa, equilibrio de intereses, lucha contra el crimen, medios tácticos y criminales.

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INTRODUCTION

The problem of ensuring safety of the participants in the Russian criminal process is directly related to the promotion of criminal proceedings. The state's duty is to counteract criminality, however, the interests of the individual are not directly related to this process. This is a certain contradiction. It is needed an effective balance between the implementation of the state's interests in combating crime and the protection of legitimate interests of an individual in the criminal process. The difficulty of collecting evidence, uncovering a crime and identifying the perpetrator can be resolved by establishing the motivation of the victims and witnesses to facilitate the criminal process. Such assistance of the citizens can be implemented only with the guarantee of safe participation in the criminal process and assisting this by fulfillment by the state of its duty.

RESULTS

The fundamental foundations of the institution of state protection and security of the participants in the Russian criminal process were formed at the end of the XX and the beginning of the XXI centuries. The basis of the theory of personal security in the field of criminal proceedings was the doctoral theses of O.A. Zaitsev (1999), L.V. Brusnitsyn (2002), A.Y. Epikhin (2004), A.A. Dmitrieva (2017). The subsequent development of the fundamental principles of the process of the person's safe participation in the criminal proceedings was laid down at the level of candidate dissertations (I.V. Kharitonov (2010), T.K. Kurbanmegomedov (2011), G.A. Skripilev (2013), Ya.I. Bobkov (2015), et al). In addition, the monographic works were published on this issue [1]. It shall be noted that the issues of ensuring the security of protected persons from the standpoint of criminal procedural law are mainly considered in the above-mentioned scientific research. However, the study of the problematic situation (es-

tablishing a balance of interests of the state and the individual) was not conducted at that time while ensuring the safety of the participants in the criminal process.

In recent years, actual scientific developments in the field of forensic security for the participants in criminal proceedings have been intensified. This refers to the creation of forensically grounded methods of applying the state protection measures and the safety of persons who contribute to justice, as well as the tactics of conducting investigative and judicial actions associated with the implementation of the procedural security measures.

Timely detection and neutralization of the threat of criminal influence serves as the best defense of participants in the criminal proceedings and an effective means of combating criminality in general. In this regard, it is practically significant to develop a criminalistic characterization of the unlawful impact on persons who contribute to criminal proceedings. Possession of information about the individual elements of such characteristics by the investigator (court) makes it possible to recognize the activities of persons who have undue influence and take adequate measures to neutralize it in a timely manner.

It seems that the safety of participation of victims and other persons contributing to the criminal case is the starting point of modern tactical and criminalistic support for criminal proceedings and forms appropriate tactical tasks in the specific conditions of the investigator's and court's activities. In this regard, the forensic studies aimed at developing typical forensic programs for solving this practical problem are actualized. The use of such programs is intended to provide the investigator and the court with the selection and consistency of specific criminal procedural and other measures to ensure the security of the persons protected in accordance with the tactical task being solved [2].

The adoption of specific criminal procedural security measures against protected persons may be carried out in various tactical directions: when conducting separate investigative and judicial actions, ensuring confidentiality of the investigation or inadmissibility of disclosure of the preliminary investigation data; application of preventive measures; overcoming the opposition to the

investigation and the judicial consideration of the criminal case. When applying security measures to the protected persons, it is important to take into account the peculiarities of unlawful influence on the process participants: the level of danger in the conduct of certain investigative, judicial and other procedural actions, complex (special) conditions for their conduct, etc.

The current state of the scientific development of the personal security institution in the criminal proceedings allows making a conclusion that it is necessary to expand the interbranch relations and research in the balance of interests of the prosecution and defense.

JUDICIAL PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

The security institute of the participants in the criminal proceedings acquired an international nature long ago. The problems of its implementation at the level of national legal systems of various states consist in a disagreement with the conventional provisions. Its legal regulation is noted in a number of documents that have the status of international conventions. It was adopted several decisions of the European Court of Human Rights. The basis for the ECHR judgments is the Convention for the Protection of Human Rights and Fundamental Freedoms.

Thus, in separate decisions of the European Court, it is analyzed the issue of the balance of interest in the implementation of the protection of one's right to question the prosecution witness, on the one hand, and the interest of the protected person whose life is threatened, on the other hand. The judgment in the case *Doorson v. the Netherlands* [3] states as follows: "Article 6 does not specifically require taking into account the interests of witnesses. However, when life, liberty or human security is at stake, then the matter falls within the scope of Article 8 of the Convention under a general rule" [4]. This legal position contains the following key points: if the life (liberty or security) of the protected person is threatened, then the interests of the defense party may be limited in examining the evidence (staging questions to the protected person, etc.). As we can see, the balance of public and private interests of this situation gives preference to the security of the protected person.

Another decision of the ECHR notes that a court decision cannot be based solely on the testimony of an anonymous witness, otherwise the right to defense is violated [5]. Such a legal approach has its justification. Firstly, the charge shall be based on a sufficient set of accusatory evidence. If the prosecution has no other evidence, other than the testimony of an anonymous witness, the court shall not have the right to bring in guilty.

The existence of sufficient grounds for the witness classification was noted in the ECHR decision dated 23.04.1997 "*Van Mechelen (Van Mechelen) and others v. the Netherlands*" [6]. The court's duty to decide in detail the reasons for retaining anonymity of witnesses at the court hearing is detailed in the ECHR decision dated 28.02.2006 in the case *Krasniki v. the Czech Republic* [7].

The ECHR recognizes the court's duty to verify the procedure and conditions for obtaining evidence from the anonymous witnesses. Thus, in the ECHR opinion, the lack of verification in the court session of the procedure and conditions in which the testimony of anonymous witnesses have been received leads to a violation of Art. 6 of the European Convention on Human Rights [8].

According to L.V. Brusnitsyn, the Russian Criminal Procedure Code does not stipulate the disclosure of statements of anyone from security considerations in the court, although it is recognized admissible by the European Court of Human Rights, provided that the defense party, within the framework of the pre-trial proceedings, has had the opportunity to ask questions to be protected person directly or through the person conducting the proceedings in the case [9].

LEGISLATIVE LEVEL

Until recently, the procedural situation of the victim of a crime was very difficult both in Russia and in certain foreign countries. The reason was that many Western proceduralists viewed the criminal process primarily as "the struggle of two opposing interests, namely, the state persecuting the criminal, on the one hand, and the persecuted (suspect, accused or defendant), on the other hand. The persecuting state sees its interests in the possibility of implementing the norms of substantive criminal law and not leaving the guilty unpu-

nished. The persecuted, in turn, defends the opposing interests in the field of freedom, i.e. he/she tries to make less intrusions into his/her personal freedom, property, home, secret of correspondence, etc., if possible [10]. Thus, all criminal procedural activity was viewed as a confrontation, primarily of the state and the criminal, and the interests of the crime victim and, especially of the other participants in the process, took the second place.

As a result, the victim was considered not only by the legislator, but also by the law enforcement agencies, primarily as a source of information, and his/her rights, including the right to security of participation in a criminal case, were not properly implemented. An unpleasant experiences from communicating with the prosecutorial authorities led the victim (witness and other participants in the criminal process) to the real danger that some of the victims were afraid of submitting applications. As a result of this process, the number of hidden and unpunished (latent) crimes increased.

The imperfection of the current criminal legislation aimed at ensuring the victims' safety is confirmed by the fact that 68.2% of the interviewed victims who had been threatened noted the uncertain nature of such a threat ("think about your children, health", etc.). The current Russian criminal law establishes a clearly defined language for such threats: compulsion to refuse to promote justice by changing testimony, combined with blackmail, the threat of murder, causing harm to health, destruction or damage to the property of these individuals or their relatives (P. 2 of Art. 309 of the Criminal Code of the Russian Federation).

The current operating Criminal Procedure Code of the Russian Federation established 5 criminal procedural safeguards for the process participants in P. 3 of Art. 11. The law applies to the security measures as follows: do not include data on the identity of the protected person in the record of the investigative action (P. 9 of Art. 166); to control and record telephone and other negotiations (P. 2 of Art. 186); to conduct identification in the conditions that exclude visual observation of the identifying witness by the identifiable witness (P. 8 of Art. 193); to consider a criminal case in a closed court session (clause 4 of P. 2 of Art. 241); to interrogate the witness (the vic-

tim) in court without disclosing the true data about him/her, in the circumstances precluding the visual observation of the witness by other trial participants (P. 5 of Art. 278, 277).

In the context of the adversarial process, it is actualized the development of effective theoretical provisions and practical recommendations for the implementation of security measures with the help of forensic tools. In particular, it is necessary to improve the methodological recommendations for investigating criminal cases related to unlawful effects on victims, witnesses and other participants in the criminal proceedings, as well as tactical and criminal aspects of ensuring safety of the protected persons.

We share the position of individual scientists who offer to give the defense the right to appoint a forensic examination and use the obtained conclusion as evidence in the criminal case (including with a view to refuting the opinion of the official expert appointed by the prosecution) [11]. In our opinion, the proposed one is coordinated with ensuring competitiveness and equality of the parties in the criminal proceedings. The European Court of Human Rights indicates in favor thereof as it has found the violations by the Russian courts of clause 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular "on the equal rights of the prosecution and the defense in obtaining expert opinions" in the decision dated March 2017, 2014 on the case "Matytsin v. the Russian Federation" [12].

CONCLUSIONS

1) it is established the statement of changes in the theory, legislation and practice of personal protection in the criminal process for the period from 1991 to 2017; 2) it is shown an analysis of theoretical developments and it is determined the main vectors for the further development of state protection of the individual in the criminal process; 3) it is established the existence of the application of conventional international norms and legislation of foreign countries; 4) it is noted the main prospective problems to be investigated.

SUMMARY

Since the protection of victims, witnesses and other participants in the process is a guarantee of establishing the truth in the case,

in terms of establishing the circumstances of the crime commission, the person's guilt and other procedurally significant factors, the burden of ensuring security shall lie on the prosecution, that is, on the state bodies. A priority in this complex process shall be given to the interests of the individual. In the absence of sufficient guarantees to ensure the safety of participants in the criminal proceedings, the state shall not require assistance in the criminal proceedings.

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