

COMMENTARIES

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GENESIS OF THE INTER-BRANCH INDIVIDUAL SAFETY INSTITUTE IN THE RUSSIAN CRIMINAL LEGAL PROCEEDINGS

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Abstract: The safety of witnesses, victims and other participants in the criminal process correlates with increasing effectiveness of evidence and protection of the rights and legitimate interests of the participants. To study the laws of development and establishment of the institution of personal security, it is relevant to identify new vectors for the development of criminal proceedings and eliminate existing intersectoral contradictions. It is also essential to compare respective Russian legal acts with the international standards.

The main issue of criminal proceedings correlates with proving person guilty or innocent of in the incriminated event. This complex process is diverse and unpre-

dictable, since the collection of sufficient evidence for a criminal case (Article 73 of the Code of Criminal Procedure of the Russian Federation) can be hindered by an unlawful act preventing crimes' detection, impeding the investigation and the offender's evasion from criminal punishment. By providing substantial evidence, the parties to criminal proceedings face risks a priori. For these reasons, ensuring the security of an individual in criminal proceedings correlates with its purpose, principles and tasks. It also implements the constitutional priorities and security of an individual (rights, freedoms and legitimate interests).

Keywords: witness and victim protection; the process of establishing the institution; security; state protection; criminal proceedings; criminal prosecution; anonymous witness.

The ongoing processes in modern Russian society and the condition of law enforcement practice highlight the scale of the socio-legal issue of ensuring state protection and procedural safety of an individual at every stage of criminal proceedings. In this regard, the most important task of Russian criminal policy at present is to develop and implement the strategies and tactics aimed at ensuring the security of bona fide participants of criminal procedures (hereinafter the protected persons). Moreover, the degree of participants' protection is one of the main criteria to determine the compliance of the principles of the criminal process and the level of civil society.

At the same time, both Russian¹ and foreign researchers² study numerous problems of protecting witnesses, victims and other participants in criminal proceedings.

¹ See Alexander Yurevich, E., Oleg Aleksandrovich, Z., Ekaterina Pavlovna, G., Andrey Viktorovich, M., & Gulnar Isaevna, A. INTERNATIONAL LEGAL PROTECTION OF JUVENILE VICTIMS (CHILD VICTIMS) FROM CRIME. *Humanities & Social Sciences Reviews*, 7 (5), 687–691; Epikhin, A. Yurievich, Gataullin, Z. Shakirovich, Zaitsev, O. Aleksandrovich, Grishina, E. Pavlovna, & Mishin, A. Viktorovich (2019). CRIMINAL PROSECUTION OF TERRORIST CRIMES IN JURY TRIAL: LEGALITY AND APPROPRIATENESS. *Humanities & Social Sciences Reviews*, 7 (5), 674–677; Epikhin, A. Yurievich, Zaitsev, O. Aleksandrovich, Grishina, E. Pavlovna, Mishin, A. Viktorovich, & Aliyeva, G. Isaevna (2019). ANTI-CORRUPTION THE CRIMINAL PROCEDURE LEGISLATION OF RUSSIA. *Humanities & Social Sciences Reviews*, 7 (5), 646–649; Epikhin, A. THE SUBJECT MATTER OF CRIMINAL EVIDENCE RELATING TO THE DISCLOSURE OF INFORMATION ON SECURITY MEASURES APPLICABLE TO LAW ENFORCEMENT OR CONTROL OFFICIAL / Epikhin, A., Zaitsev, O. // *Internal Security*. 2018. Volume 10. Issue 1, pp. 261–270; Epikhin, A. Y. et al. Protection by the government and security support for the parties of modern criminal process in Russia: Problems and perspectives, *Journal of Legal, Ethical and Regulatory Issues* Volume 19, Special Issue, 2016; Epikhin, A. Y. et al. Protection of the Witnesses and Victims: International Legal Acts, Legislation of some States and the Modern Russian Legislation. *Journal of Advanced Research in Law and Economics*, [S.l.], v. 7, n. 2, pp. 313–322, may 2016; Epikhin, A. Y. et al. Problem of Definition of Personal Security in the Modern Russian Criminal Procedure. *Journal of Advanced Research in Law and Economics*, [S.l.], v. 7, n. 6, pp. 1539–1545, Feb. 2017 and other.

² See Monica Semrad, Thea Vanags, Navjot Bhullar. Selecting witness protection officers: developing a test battery for Australian police // *Police Practice and Research*. 2014. No. 1. Pp. 6–16; Rezana

The victims, witnesses and other persons assisting the investigating and judicial authorities contribute to the criminal proceedings. E. g., by giving testimony regarding the circumstances of the crime¹.

The investigative and court practice suggests that the interested parties related to victims and witnesses often face with unlawful criminal acts preventing the investigation and consideration of a criminal case, or a revenge for conscientious participation in the proceedings². As a result, such an impact creates real prerequisites for evading the perpetrators of criminal responsibility for the crime committed and hinders the criminal statement.

In this regard, currently, ensuring the safety of persons contributing to the crime solving and investigation as well as to the objective court study of evidence is an integral prerequisite to succeed in the goals of the criminal proceedings (Article 6 of the Code of Criminal Procedure of the Russian Federation).

At the same time, the investigation and court practice suggests that the issues related to the development of a set of effective and coordinated means of criminal, procedural and criminalistic personal security requires further development and modernization at all stages of criminal proceedings.

The historical background of witness protection in the domestic criminal process is predetermined by the relevant Russian socio-political conditions.

The issue of ensuring the safety of participants in Russian criminal proceedings emerged as a result of intensified unlawful acts against victims, witnesses and other participants of criminal proceedings in the early 90s. It was stimulated by

Balla. Witnesses protection in fighting organized crime // European Scientific Journal. URL: <http://ejournal.org/index.php/esj/article/viewFile/550/623> (accessed: 08/19/2016); *Markus Eikel*. Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice // Criminal Law Forum. 2012. No. 1. Pp. 97–133; *Felföldi Enikő*. The rising importance on the protection of witnesses in the European Union // Revue Internationale de droit penal. 2006. No. 77. Pp. 313–322; *Pamela E. Hart*. Falling Through the Cracks: The Shortcomings of Victim and Witness Protection Under § 1512 of the Federal Victim and Witness Protection Act // Valparaiso University Law Review. 2009. No. 2. Pp. 771–858 and others.

¹ In this case, the applicant, the eyewitness, the suspect, the accused (including the one who concluded a pre-trial cooperation agreement in accordance with Chapter 40.1 of the Code of Criminal Procedure), the defendant, the convict, the acquitted, as well as the persons with terminated criminal case or criminal prosecution, a criminal record canceled or withdrawn in the manner prescribed by law may apply to other persons.

² In the first half of 2019, the state defense units of the territorial bodies of the Ministry of Internal Affairs of Russia ensured the safety of 1,528 protected persons as participants in criminal proceedings and their relatives. The share of witnesses and victims reached 28.5% and 27%, suspected and accused – 12.4%, close protected persons – 30%; 4195 security measures were applied to protect them. See Issues of improving the safety of persons subject to state protection. Information and reference materials of the All-Russian meeting-seminar of the Ministry of Internal Affairs of the Russian Federation. Krasnodar, October 2–4, 2019 p. 4.

the increased of organized and professional crime in Russia. For this reason the protection of witnesses and victims was introduced into the Judicial Reform¹ as one of the fundamental elements.

The legal standards for the protection of persons contributing to criminal proceedings are provided in the Criminal Code of the Russian Federation, adopted in 1996. In particular, the code reports on the criminal liability for the security measures applied to the judge and the participants in the criminal process (Article 311), for the disclosure of security measures applied to the judge and the participants in the criminal process (Article 320) and for the disclosure of the preliminary investigation (Article 310).

The relevant regional legal documents were adopted by certain constituent entities of the Russian Federation due to the lack of a unified federal law on the protection of the participants of criminal proceedings.

The Russian Federation's new Code of Criminal Procedure was adopted on 18 December 2001². In Russian the code is the normative basis for the creation and functioning of the criminal procedure measures ensuring the safety of participants in criminal proceedings. It contains the grounds, conditions, types of criminal procedural security measures, the subjects of their implementation and the list of protected persons (Part 3 of Article 11 of the Criminal Procedure Code). The security measures provided in the new Code of Criminal Procedure reflect the legislator's intention to consider effective means of affecting crime.

The adoption of (1) the Federal Law 'On the State Protection of judges, officials of Law enforcement and Control bodies' in 1995³ and (2) the Federal Law 'On the State Protection of victims, Witnesses and other participants in Criminal proceedings' in 2004⁴, as well as (3) subordinate legislation that develops their main provisions initiates the legislating safety of participants in criminal proceedings.

¹ Постановление ВС РСФСР от 24.10.1991 № 1801-1 «О Концепции судебной реформы в РСФСР» // Ведомости СНД и ВС РСФСР. 1991. № 44. 31 окт. Ст. 1435 [Decree of the Supreme Soviet of the RSFSR № 1801-1 'On the Concept of Judicial Reform in the RSFSR' (10.24.1991)].

² УПК РФ принят Государственной Думой 22.11.2001 // СЗ РФ. 2001. № 512 (ч. 1). Ст. 4921 [The Code of Criminal Procedure of the Russian Federation Art. 4921].

³ Federal Law of 20.04.1995 No. 45-FL (amended on February 3, 2014) 'On state protection of judges, officials of law enforcement and regulatory bodies' // Collection of Legislative Acts of the Russian Federation. 24.04.1995. No. 17. Art. 1455.

⁴ Федеральный закон от 20.04.1995 № 45-ФЗ (ред. от 03.02.2014) «О государственной защите судей, должностных лиц правоохранительных и контролирующих органов» // СЗ РФ. 1995. № 17. 24 апр. Ст. 1455 [Federal Law No. 119-FZ 'On state protection of victims, witnesses and other participants in criminal proceedings' No. 34. Article 3534. (08/23/2004)].

Currently, the fourth State program regulates the system of financing the state protection measures for participants of criminal proceedings.

On June 29, 2009, Federal Law No. 141-FL 'On Amending the Criminal Code of the Russian Federation and the Code of Criminal Procedure of the Russian Federation', section X of the Code of Criminal Procedure was supplemented by chapter 40.1 'Special Procedure for Making Judicial Decisions when Concluding Pre-trial Cooperation Agreements'¹. This measure aims at ensuring the cooperation between the suspect, accused and the investigating authorities (the court) in order to disclose and investigate the crime and criminal prosecution of accomplices. Also, the measure aims at humanization of the state's attitude to the individual. The Paragraph 3 of Art. 317.4 states that 'in case the safety of a suspect or accused, who concluded a pre-trial cooperation agreement, his close relatives, relatives and close persons, is at threat, the investigator stores the documents referred to in Part 2 of this Article, in a sealed envelope'.

Currently, the legislator takes consecutive measures to further improve the process of ensuring the safety of participants in criminal proceedings in legal regulation of ensuring personal security in Russian criminal proceedings. There are several novelties of the legislation on the state protection and ensuring the safety of participants. Namely, the Federal Law dated 07.02.2017 No. 7-FL On Amending the Federal Law 'On State Protection of judges, officials of Law enforcement and Control bodies' and the Federal Law 'On State Protection of victims, Witnesses and other participants in Criminal proceedings'²; the Federal Law dated 28.03. 2017 No. 46 – FL 'On Amending to the Criminal Procedure Code of the Russian Federation'³; the Federal Law of 28.03.2017 No. 50-FL 'On Amendments to the Criminal Procedure Code of the Russian Federation to improve the procedure of state protection'⁴; the Federal Law dated 17.04.2017 No. 73-FL 'On amending the Code of Criminal Procedure of the Russian Federation'⁵.

¹ Федеральный закон от 29.06.2009 № 141-ФЗ «О внесении изменений в Уголовный кодекс Российской Федерации и Уголовно-процессуальный кодекс Российской Федерации» // СЗ РФ. 2009. № 26. Ст. 3139. [Federal Law No. 141-FZ 'On Amendments to the Criminal Code of the Russian Federation and the Code of Criminal Procedure of the Russian Federation' Article 3139].

² URL: <http://www.kremlin.ru/acts/bank/41687>.

³ The official Internet portal of legal information. URL: <http://www.pravo.gov.ru. 03/28/2017>.

⁴ Там же.

⁵ СЗ РФ. 2017. № 17. 24 anp. Ст. 2455 [Collection of Legislative Acts of the Russian Federation. 24.04.2017. No. 17. Art. 2455].

The Doctoral dissertations by professors O. A. Zaitsev¹, L. V. Brusnitsyn², A. Yu. Epikhin³ and A. A. Dmitrieva⁴ lay the theoretical grounds studying the notion of personal security in criminal proceedings. These research works encouraged a number of candidate dissertations on this topic.

The legal regulation of individual security measures (e. g., a pseudonym interrogation – M. N. Naduyev⁵, security measures applied to criminal proceedings – M. E. Kaats⁶ and others) received a thorough legal study tends in the last decade.

In a monographic study performed by the team of authors of the Institute of Legislation and Comparative Law under the Government of the Russian Federation reflects the most urgent problems of legal protection of the victim in foreign countries (Great Britain, the USA, Australia, Germany, France, Czech Republic, Switzerland, etc.). It describes the doctrinal and legislative approaches to the procedural status of the victim in a number of countries, and defines his role in the criminal process, etc.⁷.

¹ Зайцев О. А. теоретические и правовые основы государственной защиты участников уголовного судопроизводства: дис. ... д-ра юрид. наук. М., 1999 [Zaitsev O. A. Theoretical and legal foundations of state protection of participants in criminal proceedings (Moscow, 1999)].

² Брусницын Л. В. Теоретико-правовые основы и мировой опыт обеспечения безопасности лиц, содействующих уголовному правосудию: дис. ... д-ра юрид. наук. М., 2002 [Brusnitsyn L. V. Theoretical and legal foundations and world experience in ensuring the safety of persons contributing to criminal justice (Moscow, 2002)].

³ Епихин А. Ю. Концепция обеспечения безопасности личности в сфере уголовного судопроизводства: дис. ... д-ра юрид. наук. Сыктывкар, 2004 [Epikhin A. Yu. The concept of personal security in criminal proceedings (Syktyvkar, 2004)].

⁴ См.: Дмитриева, А. А. Меры безопасности, применяемые в отношении участников процесса на стадии предварительного расследования уголовного дела // Российский следователь. 2017. № 1; Она же. Предпосылки модернизации процесса безопасного участия личности в современном российском уголовном процессе // Общество и право: научно-практический журнал. 2017. № 1; Она же. К вопросу о содержании теоретической модели безопасного участия личности в российском уголовном судопроизводстве // Вестник Краснодарского университета МВД России: научно-практический журнал. 2017. № 1; и др. [Dmitrieva, A. A. Security measures applied to participants in the process at the stage of preliminary investigation of a criminal case (2017)].

⁵ См., например: Надуев М. Н. К вопросу о механизме реализации допроса под псевдонимом при возбуждении уголовного дела [Naduev M. N. To the question of the mechanism for the implementation of interrogation under a pseudonym during criminal proceedings available at http://pravmisl.ru/index.php?option=com_content&task=view&id=1857].

⁶ Каатс М. Э. Институт уголовно-процессуальных мер безопасности [Текст]: монография. Уфа: Уфимский ЮИ МВД России, 2016 [Kaats M. E. Institute of Criminal Procedure Security Measures (Ufa, 2016)].

⁷ Правовая защита потерпевшего в зарубежных странах: монография / В. Ю. Арменов, И. С. Власов, Н. А. Голованова [и др.]; отв. ред. С. П. Кубанцев, М.: Институт законодательства и сравнительного правоведения при Правительстве Российской Федерации: ИНФРА-М, 2017.

Currently, the security of participants in criminal proceedings is covered in the intersectoral research.

In particular, N. A. Tikhonov (1995) analysed criminal procedural measures taken to ensure the honor, dignity and personal safety of the victim and witness. In his Ph.D. thesis, V. A. Bulatov (1999) researched the duty of the investigator to ensure the rights, legitimate interests and safety of victims and witnesses. In the dissertation paper, M. A. Ignatieva (2000) studied the procedural and organizational issues of respecting the rights and legitimate interests of victims and ensuring their personal safety. The tactics of ensuring personal security in criminal proceedings are described in the candidate's dissertation of V. V. Voinikova (2002). M. V. Novikova (2006) studied the main problems of ensuring the safety of participants in criminal proceedings that guarantee the administration of justice in modern conditions. A. A. Tymoshenko (2006) describes non-disclosure of the identity of the victim and witness as a criminal procedure security measure. N. V. Maltseva (2007) highlights the legal regulation of ensuring the safety of victims and witnesses sentenced to imprisonment. I. A. Mishchenkova (2008) studied the protection of witnesses and victims in the Russian criminal proceedings. N. S. Tomilova (2009) explains the system of principles of state protection for victims, witnesses and other participants in criminal proceedings. The dissertation research of V. I. Krainov (2009) thoroughly analyses the features of the state protection of the victim and witness in criminal proceedings. Yu. V. Anokhin's (2009) considers safety as one of the components ensuring the rights and freedoms of the individual in the law enforcement of the internal affairs bodies. Babkina (2009)¹ aims to ensure the safety of witnesses during the preliminary investigation.

Currently, the determination of the forensic contents of ensuring the safety of persons contributing to criminal proceedings is of particular relevance. This branch of forensics lacks deep understanding and, in our opinion, requires mandatory scientific justification.

The protected persons should be ensured with a sufficient level of security for the participation and forensic support at every stage of criminal proceedings. For these reasons the investigator and the forensic court are introduced into the practical work. Moreover, the skills and abilities to use tactical and forensic tools and scientific recommendations are applied to solve tactical tasks of the procedural protection of these persons.

[Legal protection of the victim in a foreign country V. Yu. Armenov, I. S. Vlasov, N. A. Golovanova (2017)].

¹ Дмитриева А. А. Теоретическая модель безопасного участия личности в российском уголовном судопроизводстве: дис. ... д-ра юрид. наук. М., 2016. С. 16 [Dmitrieva A. A. A theoretical model for the safe participation of individuals in Russian criminal proceedings (Moscow 2016)].

It seems that, currently, tactical and criminalistic support of the criminal process should priorities the safe participation of the victims, witnesses and other persons contributing to justice in the proceedings. These persons provide more effective evidence-based activities in criminal proceedings; help to reduce and eliminate the opposition to justice exerted by criminals and their environment; increase the effectiveness of investigative and judicial actions involving criminal procedural security measures and allow to optimize the tactics of their production; contribute to finding optimal solutions to tactical security tasks.

In our opinion, the forensic security of participants in criminal proceedings should be viewed as an independent concept of the structural system of forensic science.

We believe that, forensically, the security of protected persons includes the following components: a typical forensic characteristic of unlawful acts; forensic tools and methods for detecting and neutralizing unlawful acts in typical situations; the tactics of separate investigative and judicial actions involving criminal procedural security measures.

The need to ensure the safety of protected persons is one of the important tasks of the preliminary investigation and trial, which is a specific set of certain tactical issues determined by the need to take security measures in the course of investigative and judicial actions.

The tactical and criminalistic means to ensure the safety of protected persons are viewed as the intellectual act of will of the investigator (court) to take security measures, due to the specific conditions of the case investigation associated with tactical behavior¹.

The tactical decisions of the task in question constitute the program for coordinated interaction of all subjects of forensic activity, in particular, during investigative (judicial) work applying measures of criminal procedural security.

The formation and options for solving the tactical task of ensuring the safety of protected persons should be based on the forensic analysis and assessment of the situation by the investigator (court) at a particular moment of the investigation or judicial review, as well as predicting and planning the use of the necessary tactical means (tactics and tactical complexes).

It appears that the process (technology) of making a decision to ensure the safety of persons contributing to the investigation made by the investigator (court) comprises the following stages: to analyze the investigative (judicial) situation and construct its model; to understand the task (goal) of tactical impact; to chose

¹ In the process of ensuring the safety of protected persons, the investigator takes along with tactical and other decisions (procedural, organizational and managerial, technical, planning, etc.) that differ from each other in their content.

variable tactical means of the solution; to identify the implementation methods; to assess the results.

The tactics of ensuring the security of protected persons may be provided by the investigative and judicial actions related to criminal procedural security measures (in accordance with Part 9 of Article 166 of the Code of Criminal Procedure of the Russian Federation (hereinafter CCP RF); Part 2 of Article 186 of the CCP RF; Article 186.1 of the CCP RF; Part 8 of Article 193 of the CCP RF; Clause 4 of Part 1 of Article 241 of the CCP RF; Part 5 of Article 278 of the CCP RF).

In fact, the choice of the reasonable tactics to ensure the security of protected persons should rest on the assessment of all options possible, during each of the indicated procedural actions. In this case, the decision of the investigator (court), allowing tactical task (goal), should be considered reasonable. The adoption and implementation of such a decision (1) increase the efficiency of procedural actions performed by the security measures, (2) resolve complex (problematic) investigative and judicial situations and (3) eliminate the errors of the subjects of proof.

In our opinion, currently, forensics should be applied to improve the tactics and organization of procedural actions associated with the application of security measures, as well as their legislative regulation¹.

The tactics of investigative and judicial actions applying criminal procedural security measures of protected persons is specific. In particular, this is due to organization and tactics established by an investigator or the court for the safe participation of protected persons when implementing these actions.

The investigator or the court should establish sufficient grounds (conditions) before investigation and judicial actions implementing criminal procedural security measures for protected persons. Moreover, the existence (objectivity) of the threat of unlawful act against the participant should be considered. At the same time, the tactics of the actions taken should be planned and prepared thoroughly in advance. It would contribute to the effective cooperation of protected persons with the bodies of preliminary investigation and justice.

For practical reasons, we believe, special forensic programs should be developed to assist in designing the tactics ensuring the safety of protected persons in typical investigative and judicial situations. The programs will facilitate the tactics' choice for the investigator and the court in specific criminal, procedural and other security measures appropriate for the given conditions of the preliminary investigation and trial.

¹ См. подробнее: Епихин А. Ю. Обеспечение безопасности лиц, содействующих уголовному судопроизводству: учеб. пособие / А. Ю. Епихин, А. В. Мишин. – Казань: Изд-во Казан. ун-та, 2018. С. 82–92 [Epikhin A.Yu. Ensuring the safety of persons contributing to criminal proceedings (Kazan, 2018)].

Of primary concern should be the criminalistic characteristics of unlawful acts against participants in criminal proceedings, the classification of typical acts of the kind, and tactical means to resolve the acts.

In our view, there are practical reasons to develop a group criminalistic methodology for investigating the assault of participants in a criminal process.

Essentially, the development of the institution of security in criminal proceedings correlates with the improvement of the criminal procedure legislation itself. An analysis of recent amendments and additions made to a number of laws shows that the Russian legislation aims to consistently enhance and protect individuals in criminal proceedings.

At the same time, admittedly, the legal regulation of personal security in the criminal process and its separate stages, in particular, tends to be specified.

Improving the effectiveness of protecting participants of criminal proceedings correlates with the need for intersectoral and interdisciplinary studies that extend criminal procedure itself. The studies, as we believe, should combine the data from (1) different branches of law, such as forensic science, criminal law, criminology, prosecutorial supervision, criminal-executive law, as well as (2) other sciences, for example, psychology, conflict resolution.

We believe that Russian legislation and law enforcement may use positive international practices in applying security measures to protected persons in a criminal case. Such an implementation would enrich the contents of the modern doctrine of ensuring personal security in Russian criminal proceedings.

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