

Evidentiary Privilege as a Specific Compromise in Russian Criminal Law

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ABSTRACT

The evidentiary privilege complies with the norms of international law, is based on the Constitution of the RF, procedural and other legislation of the RF. In terms of its "legal root" it is national, in terms of the procedural position of the immunized person – witness, in terms of socio-demographic – kin-ship and functional; in terms of the range of crimes – limited (in relation to one crime).

The domestic procedural legislation enshrines a variety of subjects with immunity. Criminal law prohibits the questioning of a person as a witness and the right to refuse to testify, which differ both in substance and volume. In the latter case, the consent of the immunized person to give relevant evidence is not excluded, which raises a problem: whether there is an offence under Article 308 of the Criminal Code. Literature also discusses the meaning of the term "testifying against oneself and one's loved ones" in relation to the problem in question, and attempts are made to delineate the boundaries of information about which an immunized person cannot be interrogated.

In the current version, the note to Article 308 of the RF Criminal Code does not cover all persons vested with immunity by procedural or other federal legislation. This fact demonstrates the fragility of the regulation of this type of immunity. In order to ensure the completeness of the criminal legislation, the note should be supplemented with an indication of other categories of immunized persons, using a blanket form of the norm presentation.

Keywords: *immunity, refusal to testify, evidentiary privilege, liability of a witness, immunized persons, interrogation of a witness, witness testimony*

1. INTRODUCTION

The problem of criminal immunity in general, witnesses and other persons who have the right not to testify in court, in particular in the criminal law literature, is practically ignored, as opposed to the procedural one. Recently only the thesis research by Girfanova E.I., who is devoted to immunity in criminal law in general, saw attempts to consider the issue of excluding the criminal liability of the said persons for refusing to testify at the preliminary investigation and court proceedings. This topic has not been sufficiently researched in foreign literature. Meanwhile, in our view, the criminal-legal immunization of a witness and other persons as a specific compromise between the interest of the state in the disclosure of a crime, the investigation of a criminal case and the punishment of a guilty person and the personal interest of a person due to a relationship of kinship as well as the need to keep secret information obtained in connection with the performance of his or her duties requires an independent research.

2. RESEARCH METHODOLOGY

The general methodological basis of the research is the universal dialectical method based on the laws and categories of dialectical and historical materialism. In addition, private and special methods of scientific cognition are used: system-structural, formal-logic, comparative-legal analysis, content analysis, etc.

3. RESEARCH RESULTS

According to some reports, the evidentiary privilege date back to the English common law (XVIII century), which contained the principle that "one cannot turn a person into a tool of one's own condemnation". At present, this principle is reflected in the international legal instruments and is taken into account by the European Court of Human Rights (ECHR) in interpreting the right to silence as part of the right not to testify against oneself.

In contrast to international acts, the Constitution of the RF (Article 51) expands the circle of immunized persons and includes not only the accused but also the close relatives: spouse, parents, children, adoptive parents, adopted

brothers and sisters, grandparents and grandchildren (Clause 4 of Article 5 of the Russian Federation Code of Criminal Procedure).

The question of extending the immunity in question to a person who is actually married has arisen in jurisprudence. Thus, the Meshchansky Court of Moscow, excluding a number of evidence in the case, in particular, the testimony of the accused's cohabitant, incriminating her in the commission of the crime, considered that the investigation had violated his constitutional right not to testify against his cohabitant. The Supreme Court of the RF did not agree with such a decision, pointing out that the actual marriage cannot be equated with an officially registered marital relationship, and therefore a witness who is not a spouse cannot be exempted from the obligation to testify against his or her cohabiting partner.

A.A. Vasyaev in connection with that notes: "The stamp in the passport creates kinship relations unlike the psychological closeness that is characteristic of kinship relations".

The decision of the Supreme Court of the RF fully corresponds to the legislation and legal positions of the Constitutional Court of the RF. The Decision of the Constitutional Court of the RF of May 17, 1995 No. 26-O "On refusal to accept for consideration the complaint of citizen Ionina Vera Petrovna" says: "Legal regulation of marital relations in the Russian Federation is carried out only by the state ... The law does not recognize unregistered marriage and does not consider cohabitation of a man and a woman to be a marriage. It does not produce legal consequences".

Constitutional provisions on the right not to testify against oneself and one's loved ones have been implemented in the Criminal Code. According to the notes to Article 308 of the Criminal Code, a witness, victim, spouse or their close relatives are not criminally liable for refusing to testify against themselves, their spouse or their close relatives.

So we are talking about the so-called evidentiary privilege. The concept of the latter is among the controversial ones. It seems to us that there are several approaches to defining it. So, V.G. Daev believed that the evidentiary privilege is a set of privileges, the exclusive right of a person not to comply with certain requirements (rules). His position found support from Agaeva F.A., Galuzo V.N., Malakhova L.I. et al.

V.I. Rudnev recognizes this immunity as an additional guarantee of the inviolability and irresponsibility of the person. The author's point of view was, in our opinion, subject to reasonable criticism, first of all, for the lack of content of the definition.

I.V. Welsch proposes that immunity be perceived in an objective and subjective sense. In the objective sense, it means a set of legal norms (norms-exceptions) regulating the relations characterizing the institution of immunity; in the subjective sense, it means a set of legal norms (norms-exceptions) exempting certain categories of witnesses and victims from the obligation to testify in a criminal case and also ensuring the right of citizens not to testify against themselves in a criminal case. It is not difficult to notice that the distinction between the two senses of immunity is

artificial, and the possibility of giving subjective meaning to immunity in general and to the immunity of witnesses, in particular, is questionable. In addition, the content of the author's proposed interpretations of the essence of immunity are partially overlapping: doesn't the regulation of relations that characterize the institution of immunity imply the right of citizens not to testify against themselves and its enforcement? In addition, national legislation does not limit this right to the interests of the witness or the victim, but also to those of their close relatives.

The evidentiary privilege complies with the norms of international law, is based on the Constitution of the RF, procedural and other legislation of the RF. Thus, by its "legal root" it is national, by the procedural position of the immunized person - witness, by socio-demographic - kinship and functional; by the circle of crimes - limited (only with regard to one crime).

On this basis, in our opinion, Dementiev's approach to the definition of the immunity under consideration is interesting. The author presents it as a multi-stage association of procedural and legal institutions. The essence of immunity is reflected not in any one norm, but in a whole "bundle" of relevant norms, each having its own subject matter of regulation: some, as general prescriptions, determine the purpose of the institute in question, its foundations, and general objectives, while others are more specific.

The hierarchy of norms highlighted by Dementiev I.D. and their nature have a fundamental criminal-legal significance and, first of all, in connection with conflicts of criminal and procedural legislation, gaps in the regulation of criminal-legal immunity in the Criminal Code of the RF.

Russian procedural legislation in some cases is almost literally, in others - in a slightly modified form reproduces the wording of Clause 1 of Art. 51 of the Constitution of the RF, according to which "no one is obliged to testify against himself, his spouse and close relatives ...".

Thus, the abovementioned provision is literally given in Clause 6 of Art. 56 of the Arbitration Procedural Code of the RF. Besides, the Arbitration Procedural Code of the RF, along with the evidentiary privilege, allocates a special witness immunity fixed in Parts 5, 51 and 52 of Art. 56 of the Arbitration Procedural Code of the RF (some authors call this a privilege) to a number of persons, which applies only to witness statements under certain circumstances. However, the Criminal Code of the RF does not know such immunity, which, firstly, demonstrates the inconsistency between the provisions of procedural legislation and the Criminal Code; secondly, the current situation reflects the existence of a gap in the criminal legal regulation of the respective immunities, which requires legislative elimination.

In the Civil Procedural Code of the RF (Clauses 1-3 of Part 4 of Art. 69), the witness immunity was reflected a bit differently than in the Arbitration Procedural Code of the RF. The legislator, having singled out two groups of witnesses, some of whom may not be involved in civil proceedings under any circumstances, and the others have the right to refuse to testify, indicated as immunized persons, including those who are not recognized as such

under the Arbitration Procedural Code of the RF. In some cases, the very basis of the prohibition on questioning is also formulated differently: other circumstances are indicated or open lists are used, which results in the granting of discretion to the courts in the application of both the criminal procedural rule and the provisions of the Criminal Code. Thus, among immunized persons, the Code of Civil Procedure of the RF mentions, for example, a clergyman who is not classified as such under the Arbitration Procedural Code of the RF

As already mentioned, the legislator has identified a group of persons who have the right to refuse to give evidence, and in four cases the officials who are not mentioned in the Arbitration Procedural Code of the RF are named, and in three cases a different method of norm construction was used than in the arbitration procedural legislation. First of all, it is a matter of granting that right to the following entities:

deputies of legislative bodies - with regard to the information which became known to them in connection with the execution of the deputies' powers;

The Commissioner for Human Rights in the Russian Federation, the Commissioner to the President of the RF for the Rights of the Child, the Commissioners for the Rights of the Child in the constituent entities of the RF, the Commissioner to the President of the RF for the Protection of the Rights of Entrepreneurs, the Commissioners for the Protection of the Rights of Entrepreneurs in the Constituent Entities of the RF - with regard to information which they have become aware in connection with the performance of their duties.

While in the Arbitration Procedural Code of the RF the so-called kinship immunity is mentioned in the general form, the Code of Civil Procedure of the RF gives the ratio of the witness to the relatives, in respect of whom the first can refuse to testify:

- 1) a citizen against himself;
- 2) Spouse against spouse, children, including adopted children, parents, adoptive parents against children, including adopted children;
- 3) brothers, sisters against each other, grandparents against grandchildren and grandchildren against grandparents.

The Administrative Court Procedure Code of the RF includes among the persons not subject to interrogation, except for those mentioned in the Arbitration Procedural Code of the RF and the Code of Civil Procedure of the RF, also those "who cannot be interrogated as witnesses in accordance with federal law or an international treaty of the RF". (Clause 4 Part 3 Art. 51). For example, according to Clause 2. of Art. 31, the Vienna Convention on Diplomatic Relations (1961), a diplomatic agent is not obliged to testify as a witness.

The Code of Administrative Judicial Procedure of the RF expands the range of persons having the right to refuse to testify and additionally includes a guardian and custodian. It also specifies the kinship of brothers and sisters, naming as such full and partial (i.e., having a common father and/or mother).

In the Criminal Procedural Code of the RF (Art. 56) the wording of the evidentiary privilege is also peculiar. On

the one hand, criminal procedure law does not grant immunity or benefit to certain persons considered immune under other procedural codes (e.g. representatives in civil or administrative proceedings, arbitrator, etc.); on the other hand, it includes other persons who are not immune, e.g. in arbitration or civil proceedings. Thus, the Criminal Procedural Code of the RF grants immunity to an official of the tax authority. It may not be questioned about the circumstances that became known to it in connection with the submitted information contained in a special declaration submitted in accordance with the Federal Law of June 8, 2015, No. 140-FZ (as amended on December 2, 2019) "On voluntary declaration by individuals of assets and accounts (deposits) in banks and on amendments to certain legislative acts of the RF".

The prohibition on questioning a person as a witness and the right to refuse to testify differ both in substance and scope. In the latter case, the consent of the immunized person to give appropriate testimony is not excluded. But there is a problem with that: whether there is an offense under Art. 308 of the Criminal Code of the RF in a situation where the immunized person first agreed to be interrogated and then (for example, in the event of the need to specify the information, etc.) refused to give evidence. It seems to us that in this case he is also subject to criminal immunity.

The literature discusses the meaning of the term "to testify against oneself and one's loved ones" in relation to the problem in question, and attempts are made to delineate the boundaries of information about which an immunized person cannot be interrogated. For example, according to Reshnyak M., "the law should indicate that the right to refuse to testify against oneself and close relatives arises when the witness' answers to the questions asked can be used as evidence of the involvement of the said persons in the crime".

A number of authors, in determining the limits of the evidentiary privilege in criminal proceedings, rely on the heterogeneity of information established during interrogation: one part contains information of a general nature (e.g. the identity of the witness), the other part contains information about facts. Thus, Fokina M., Gromov N. and Konev V., Aberkhaev E.R. believe that immunity can only extend to the second part of the testimony.

Even more narrowly interprets the nature of the information that is included in the content of immunity, Petukhovskiy A. He believes that "... the right to refuse to testify against oneself and close relatives arises when the witness's answers to the questions raised can be used as evidence of the involvement of the said persons in the crime".

It should be noted that the above and other circumstances characterizing the scope of the concept in question directly affect the content and application of the note to Art. 308 of the Criminal Code.

The European Court of Human Rights considers that the right not to testify against oneself or one's loved ones cannot be reduced to, inter alia, a confession of the accused of wrongdoing or an explicit statement. "Coerced

testimony that does not appear to be whistle-blowing - such as statements in defence or simply information about factual circumstances - may subsequently be used in a criminal case in support of the prosecution, for example to counterbalance other statements of the accused or to question the testimony given by the accused during the trial, or otherwise undermine his credibility ...". It is clear from the position of the European Court that the immunity of a witness cannot be restricted on the basis of any circumstances, including a reference to the public interest, etc.

The same approach is inherent in the legal position of the Constitutional Court of the RF in its Decision of April 25, 2001, No. 6-P "On the Case of Verification of the Constitutionality of Art. 265 of the Criminal Code of the RF in Connection with the Complaint of Citizen A.A. Shevyakova"

4. RESEARCH RESULTS

The note to Art. 308 of the Criminal Code of the RF does not cover all persons vested with immunity by procedural or other federal legislation. This fact demonstrates the fragility of the regulation of this type of immunity. In order to ensure the completeness of the criminal legislation, the note should be supplemented with an indication of other categories of immunized persons, using a blanket form of the norm presentation.

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- From the procedural law point of view, to testify (in the most general form) is not only to testify as a witness, confirm or deny an event but also to provide evidentiary information about circumstances and facts, to indicate the source of this information. The certificate acts as proof, evidence, incriminating fact. As stated by the Constitutional Court of the RF in the case of Shevyakova A.A., the right not to testify against herself implies that a person may refuse to testify, but also to provide any other evidence.
- At the same time, there is no indication in any legislation that the immunized person is obliged to explain the reasons for refusing to testify. Preliminary investigation bodies and the court are obliged to ensure its implementation without any additional conditions and at any stage of criminal proceedings.
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