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SYSTEM OF JUSTICE DEVELOPMENT PROBLEMS

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Development of the system of justice is one of the most urgent and most complicated questions reflecting the core of the problem of interaction of person's rights protection and provision of criminality prevention means efficiency. International experience testifies to the fact that when fighting organised crime causing «criminal weather», traditional means are powerless or, at the best, are ineffective. Therefore, for the purpose of organised crime eradication in Ukraine it is necessary to strengthen legal means in the course of proof collecting by means of establishing new criminal interdictions and application of increased sanctions and new measures of legal protection for the purpose of struggle against illegal actions of the persons relating to organised crime. All this demands elaboration and introduction of new, including nonconventional, means and methods, as well as new approaches to the choice and realisation of these means into law enforcement bodies activities, otherwise today's struggle against criminality cannot be productive and effective. But there is a number of obstacles in the course of solution of this problem: discrepancy between tasks for fighting criminality put before law enforcement bodies and possibilities given for their solution; obvious inconsistency in solution of problems of development of means and methods of struggle against it; insolubility within the limits of the accepted approaches and contradiction in correlation of human rights protection and provision of necessary conditions for struggle against criminality.

Nowadays in order to develop means and methods of struggle against criminality it is not enough to study only a crime and ways of its commitment, it is necessary to investigate criminal activity as a social phenomenon, as it is merely impossible to combat, for example organised crime, using old means and methods. Today in order to disclose and study crimes, with the purpose of struggle struggle against criminality as a whole, it is necessary to study not only who and how commits a crime but also the way the world is arranged, what actions beyond the limits of direct crime commitment and how are carried out by criminals for maintenance of their living.

The judicial-investigatory system of Ukraine is not contestant in its essence, however, in the process of its modernisation elements of a contestant one are being introduced into it, but this concerns the form and not the essence. For example, starting from participation of the defender from the moment of appearance of the suspect and actually up to real competitiveness of the parties which are to be judged. Consequently, as a rule, procedural difficulties arise before the investigator. Conditions of provision of the right to protection in Ukraine are much wider, than those accepted in Europe.

It testifies to the fact that at "introduction" of "advanced provisions of procedural systems of the West» concerning human rights protection in criminal legal proceedings of Ukraine we seek to be «ahead the whole planet», forgetting about essential differences of our judicial-legal system and conditions in which it operates. Solution of this state does not lie in

refusing introduction of democratic achievements in criminal process of Ukraine, but in their combination with the adoption of criminal-procedural innovations which would essentially simplify and increase efficiency of criminal legal proceedings. For example, in the USA, as well as in Ukraine, the accused has the right to remain silent, but for giving false testimonies criminal responsibility in the form of imprisonment is stipulated. And how much time forces and means we spend on processing of obviously false data of the accused, forgetting that we «should protect the society from criminals and not vice versa»!

At realisation of procedural activity it is always necessary to make a difficult choice between justice and efficiency, therefore, a constant search of such means and methods which would provide both efficiency and justice is necessary. It should be born in mind that all procedure of investigation and its regulation is a competition between rights and interests of victims and criminals, interests of the person and the society. It is stipulated by the legislation of Ukraine that for examination in living areas the order similar to carrying out a search is established. This means that human rights protection (inviolability of dwelling in particular) is considerably increased, but the procedure of carrying out an examination indoors becomes essentially complicated. Provision of possibility of a contactless identification is a guarantee of safety of the identifying person, but simultaneously strikes the rights of persons being identified. This sort of examples makes the essence and the content of the whole process of criminal legal proceedings. Therefore, accepting any criminal and criminally-procedural norm, the legislator should consider the noted dialectics of relations of the rights and interests of various participants of criminal legal proceedings. It is necessary to precisely define the priority of interests of one or another party, i.e. to decide, what in a given concrete case the preference is given to – protection of the rights, privacy, defining of objective truth, creation of conditions for struggle against criminality, etc.

Necessity of affecting any socially significant benefits with the purpose of rescuing others is dictated to by the lack of possibility in certain public conditions to resolve otherwise various problems of social importance. The basis for such a decision is understanding of impossibility to combat criminality in other, harmless ways in all cases in modern conditions. The question of the relation between the rights of the victim and the criminal has been controversial and disputable for a long time. In our opinion, the law should reveal its humanistic principles first of all towards the society, aggrieved citizens and in thereafter – to criminals, instead of the reverse sequence. Practical employees of law-enforcement system interrogated by us adhere to such position. Humanism can be revealed in relation to casual criminals, but a strict approach should be preserved to the persons who have selected crime commission as the basic means of existence – this is the optimal way for improvement of the criminal and criminally-procedural legislation, and increase of its preventive effect. In criminally-procedural legislation the balance of rights and duties of the parties should be observed, which would provide stability and efficiency of the whole system of legal proceedings. In the course of judicial-legal reform development of procedural guarantees is mainly focused on their interpretation as firstly the guarantees of the rights of the person, and not any person, but mainly the person being accused, which leads to the deformed, one-sided development of the procedural form. As a result, the provision proclaimed in the Constitution of Ukraine stating that the person, his/her life and health, respect and decency, inviolability and safety recognised in Ukraine as the highest social value in sphere of struggle against criminality concerns the criminal first of all. Certainly, the suspect requires special protection, mainly due to the anarchy residing in law enforcement bodies, but we should not mix content and orientation of legal instructions defining the order of crimes disclosing and investigation activities, as well as variants of their realisation in real practice, supposing direct ignoring of these provisions. The criminal should have possibility of a reliable legal protection of rights and interests, but not at all at the expense of ignoring of victim's rights and not at the cost of reliability of means of struggle against criminality, while impunity triumphs due to lack of impossibilities to prove the fact of criminal activity.

The problem lies in the fact that modern criminality has become more professional and organised. In particular it is revealed by ability of avoiding criminal responsibility: many criminal cases do not reach court, and real sentences are even rarer. In these conditions the question concerning the fact that for struggle against new criminality which threatens the existence of the state, adequate means are necessary is perfectly just. However, during the last decade practically nothing is undertaken for improvement of means of struggle against criminality in terms of legal base and methods. Unfortunately, Ukrainian legislators and «fighters for human rights» define only the accused person as the person to be protected and cared about. At the same time the victim for the sake of interests protection of which the system of justice is created, is absolutely forgotten, while following the principle: The victim has suffered, this is an irreversible fact, now the main thing is that the suspect is not illegally aggrieved. After introducing changes and additions directed at increasing of protection of the rights of the suspect and the accused into criminally-procedural legislation, the investigator is compelled to spend much more working hours on it. Our system at the stage of pre-judicial investigation is not contestant and attempts to give such a form to it at the expense of immense expansion of the rights and possibilities of defenders cannot lead to anything but obstacles to solution of problems of criminal legal proceedings, which can be proved by worsening productivity of struggle against criminality.

Destination of the Criminal Procedure Code lies in the establishment of an optimum mode of investigation and judicial study of crimes providing both protection of the rights of persons, and effectiveness of legal means of struggle against criminality. At various stages of development of our legal system the first problem was often sacrificed by the second one.

One of the problems of modern

criminal legal proceedings is competitiveness in criminal trial, equality of its entities and the questions connected with it. In jurisprudence opposite opinions on these questions are expressed. For example, as for relation between the rights of protection and accusal: certain people assert that the defender is absolutely deprived of civil rights in comparison with the investigator, others state that to the investigator has essentially limited possibilities in comparison with the defender. These problems are to be solved not at the expense of their opposition, but in interrelation and taking into account priority of the purposes.

The whole procedure of criminal legal proceedings is a competition of the rights and interests of victims and criminals, interests of the person and the society: any provision (rule) of the investigation procedure, any measure which is carried out in the course of criminal legal proceedings, either protects interests of the victim and as a result limits the rights of the person being accused, or provides protection (increases its degree) of the rights of the guilty party and, accordingly, reduces the measure of protection of the rights and interests of the person having suffered from a crime, interests of the society.

This are the positions for solution of the question of competitiveness in criminal procedure, whereas one more inconsistency observed at attempts to improve our inquisitive (formally mixed) in its essence system is to be eliminated.

Each legal system has its idea – the purpose and means corresponding to it which are resolved specifically according to the European Convention on Protection of Human Rights and Basic Freedoms of 1950 Taking this into account it is obviously important to define an effective relation between the right to fair proceeding and the principle of competitiveness of the parties in criminal legal proceedings.

Competitiveness is not meant as the requirement for it is needed for activities, and not for their organisation scheme. The legislator offers conscientiousness of the parties in search of proofs, but there is charge and protection tactics at their arsenal.

Therefore, considerable time for mastering skills of competitiveness in criminal trial by the parties is required. For real competitiveness it is necessary to expand active participation of the defender in carrying out investigatory actions, but will the investigator have possibility and will he be able to carry out thus professional functions? The new project of the Criminal Procedure Code of Ukraine puts raises new problems before criminalistics – to provide tactical solutions of problems of criminal legal proceedings.

We still cannot dare to refuse the substitute of the investigator's actions objectivity control – witness institute. If our witness institute is so is effective, then why any country has not accepted it during four hundred years of existence of this legal phenomenon? And it is not clear to the end, whether witnesses are present or they participate during proceedings of investigatory actions it.

We should have such a criminal and criminal-procedural legislation which would be effective concerning criminals, i.e. adapt criminals for the law, instead of, on the contrary, adapting the law for criminals. The law should adequately respond to modern problems of struggle against crime for the sake of protection of human rights and freedoms, interests of Ukrainian society and state.

In legal literature there are disputes as for what is more important – the control over criminality or judicial protection of the rights of the person. In our opinion, this question is incorrect in itself. Some consider that the priority of the first is a police state, and the priority of the second is a lawful state. But there should not the disjunctive "or" be put between these questions, but the conjunctive "and" should have place. At the same time it should be taken into account that control over criminality is the purpose of the system of criminal justice, and observance of the rights of the person is one of the most important, but means of its achievement. Another approach to evaluation of the mentioned concepts leads to deadlock. It should be remembered that efficiency of struggle against criminality, especially against organised one, always has its cost, which is why the society should decide whether «it is ready to pay this cost».

The technology of disclosing and investigation of the crimes, being a core of struggle against criminality, cannot vary every day at the cost of introduction of scientific achievements and appearance of new legal norms. Therefore, techniques, means and methods of activities known for a long time should be improved first of all, possibilities of their use for the solution of problems of criminal legal proceedings, including on the basis of deeper analysis of their nature and essence and estimation of a real correlation of human rights and tasks for struggle against criminality, should be extended. The criminality qualitatively grows, therefore, forces and means of struggle against it should be increased. Modern practice of struggle against criminality unambiguously testifies to the fact that it is almost impossible to prove fault of participants of criminal activity, not to mention their leaders (leaders), collecting proofs only by carrying out traditional, known for centuries, public investigatory actions – interrogations, confrontations, searches etc., and is possible only in extremely rare cases. In a number of foreign countries the order of carrying out "special" or «particular investigatory actions» carried out only with instructions of public prosecutor or the judge by a body which is not participating in investigation of certain criminal case is applied for a long time. The decision on carrying out of such investigatory action can be accepted only when data necessary for a legal investigation and proofs is impossible to get or is complicated without its carrying out.

In the activity of disclosing and investigation of crimes there always is a question on charging (or, more precisely, overcharging) of investigators and operational stuff which negatively affects quality and productivity of criminal legal proceedings and generates desire of practical workers as to its independent "regulation" or formal performance of actions connected with procedural activity. It should be remembered that in criminal legal proceedings the basic directions of improvement of labour productivity are as follows: non-fulfilment of

actions which are possible to operate without; increase of return from those actions which are carried out; consecutive release of qualified professionals from fulfilment of actions which can be carried out by workers of lower qualification.

Practice of activity of law enforcement bodies shows that they do not cope with the mass of modern criminality which has changed qualitatively and has increased quantitatively. Its consequence is not only necessity of mobilisation of internal reserves of law-enforcement departments, but also raising a question on possibility of finding means against sluggishness of criminal justice not only using means and methods peculiar to it, but also by a better definition of priorities in criminal policy, both in terms of the form, and the content: use of the principle of expediency of criminal prosecution; compromise of the victim and the accused, replacing judicial investigation; expansion of investigation procedure differentiation of criminal cases diverse as for their danger categories; establishment of the definite size of the sum of damage on property crimes, below which incident would be registered, but is not investigated; exclusion work on criminal cases without any prospects for investigation (except for particularly dangerous crimes); estimation of work of a body on the basis of productivity of its activities on revealing, disclosing and investigation of particularly dangerous crimes and acts with considerable material and other consequences; provision of the procedure of compromising in the trial (agreement of the parties on the volume and nature of responsibility). Solution of the mentioned and similar questions by the legislator would essentially strengthen protection of rights and interests of the person (including suspected and accused whose destiny is being decided about now for months and years, including those who are eventually justified), and strengthen productivity and effectiveness of struggle against criminality, promote improvement of law enforcement officers work quality, and lower necessity of "manipulation" with indicators.

ПРЕСТУПНЫЕ ПОСЯГАТЕЛЬСТВА НА ПРАВОСУДИЕ В ЗАКОНОДАТЕЛЬСТВАХ УКРАИНЫ И МОЛДОВЫ: ОТЛИЧИЯ В ЧАСТНОСТЯХ, ОБЩЕЕ В БАЗИСЕ

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SUMMARY

The comparative analysis of legal regulation mechanisms of crimes against justice in Ukraine and republic Moldova and other countries of former USSR was held, taking into consideration the historical component of state building and the development of their legal system, determined trends of structuring the penal code, categories of crime and their role in the main part of panel codes.

Key words: basis of legislation, penal code, justice, crime, the Constitution

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Проведено порівняльний аналіз механізмів правового регулювання відповідальності за злочини проти правосуддя в Україні, Республіці Молдова, а також інших колишніх республік СРСР, з урахуванням історичної складової розбудови держави та розвитку їх правових систем, визначено тенденції структурування кримінального закону, категорії злочинів та їх місце в особливої частини кримінальних кодексів.

Ключові слова: основи законодавства, кримінальний кодекс, правосуддя, злочини, конституція

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Проведен сравнительный анализ механизмов правового регулирования ответственности за преступления против правосудия в Украине, Республике Молдова, а также других бывших республик СССР, с учетом исторической составляющей государственного строительства и развития их правовых систем, определены тенденции структурирования уголовного закона, категории преступлений и их место в Особенной части уголовных кодексов.

Ключевые слова: основы законодательства, уголовный кодекс, правосудие, преступление, конституци.

Изложение основных положений. *Истоки зарождения и особенно дальнейшее развитие любого государства, независимо от общественно-экономических формаций, всегда были определяющими для понимания его роли в механизме правового регулирования сложившихся общественных отношений.*

В равной мере, а по нашему убеждению – в первую очередь, изложеное является справедливым применительно и к механизму государственного регулирования уголовно-правовых и уголовно-процессуальных правоотношений.

В отличие от общности образования и исторического развития славянских государственных систем нынешних Украины, Беларусии и Российской Федерации (отсутствие языкового барьера, существенных бытовых различий, единство веры), общность правовых систем Украины и Молдовы имеет несколько иное содержание. В частности, если не упоминать турецкого влияния (вплоть до XIX века) на развитие государственности нынешней Республики Молдова, польского – на Украину, и господствующего (вплоть до известных событий 1917 года) влияния