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Fight to criminality and criminal proceedings

Abstract: On the basis of existed law enforcement practice, law making policy in sphere of criminal proceedings and also a public opinion on the key matters of realization of criminal procedure policy is given a critical assessment of the policy of fight to crime. With considering of international legal standards of defence of the rights and freedoms of person in sphere of criminal prosecution and constitutionally declared priority of private interests in activity of the bodies of public power is analyzed an opportunity of usage of criminal procedure mechanisms in order to achieve the aims of combat to crime.

It is discovered a core of prevailing of the principle of proportionality at criminal procedure regulation, and also is substantiated an idea that legislatively fixed priority of defence of rights and liberties of person in sphere of criminal prosecution with considering of existed modern situation in area of domestic and foreign state policy does not provide the realization of a concept of fight to crime. It might exceptionally be told on restraining of criminality on socially bearable level. Other side, it cannot assume absolutisation of the idea of defence of human rights as this tendency can hinder insurance of security of vitally significant interests, first all, society and state, without that actual protection of rights and freedoms of a person is presented to be unthinkable.

Keywords: criminal process; fight to crime; rights of person; security of person, society and state; criminal procedure policy.

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Occurred last time in Russia reforms, attempts of designing of civil society, formation lawful state, and active inclusion of Russia in international processes determine, from one side, forming new system of values, and other side, necessity cardinal transformation of different institutions of legal system and, first of all, criminal procedure legislation. These transformations in sphere of criminal proceedings have to correspond with Constitution of Russian Federation (according to which a man, his rights and freedoms are the highest value) and world standards in area of defence of individual's rights.

Protection of universal human values in area of criminal proceedings takes especial significance that is confirmed upon analysis of common recognized principles and norms of international law, which, in its nature, is meant to be "homocentric, i.e. oriented to man" [6, p. 61].

Preamble of Universal Declaration of Human Rights of 10 December 1948 especially emphasizes that the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. International Covenant on Civil and Political Rights of 16 December 1966 also contains an indication in obligation of the states to encourage universal respect and observance of human rights and freedoms.

The final acts and decisions of the international conferences give no less significance to human rights protection. So, Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993points out that the states should eradicate all violation of human rights and reasons that cause them, to eliminate obstacles to fulfill these rights, and also to encourage research in this area [1]. The same provisions found its reflection in Resolution of the UN General Assembly of 20 December 1993, in which noted that encourage and protection all human rights are one of the priorities of the international community [2, p. 94].

The UN following the main international standards on protection of civil rights, in Recommendations of 14 December 1990, concerning international

cooperation in area of criminal prevention and criminal justice in context of development in 20 century, especially points out that the most intent attention should be paid to strengthen of communications of cooperation in area of prevention of criminality and criminal justice [5].

But, there is also an important a fundamental axiological base that provides effectiveness of criminal procedure regulation, achievement of state of protectiveness vitally significant interests of individual, society and state.

Presently the most part of research is based on axiological subject that is explained with the newest discoveries in many branches of knowledge, changing of world outlook ideas, and also, which is more important, touching deep, existential characteristics of the person. Modern society is interested in understanding of the ways and forms of universalization of its organized values, world outlook grounds that or other phenomenon.

It is quite natural and so timely applying of researches to value of the law basics, and especially criminal procedure law, dictated one more circumstance – non-effectiveness of legal regulation of criminal procedure relationships. It seems that existed presently the legal situation in Russia might be characterized the following interlinked and mutually conditioned phenomena:

- With critical reduction of trust of people to judicial power and bodies of criminal prosecution [7, p. 25, 171-172];
- With refusal of citizens to assist to justice (non-wishing to be an attesting witnesses, to performance of jurors, and also to give witness testimonies. According to our questioning of 2124 citizens in territory of 18 subjects of RF, 25% of persons refused to be attesting witnesses, 58.9% expressed non-wishing to be jurors, and 26.6% - reluctantly gave testimonies);
- With extreme concern of society with loss of moral values (on results of research of “Public opinion” Fond conducted on order of the MIA of the RF, such concern expressed 61% Russians [4]);

- With growth of criminality, inability of the state to control it (monitoring of latent criminality allowed to state that actual criminality is more than 8 times exceeds a level of registered criminality [11, p. 6]);

- With complex situation in area of foreign policy, at which criminal procedure means of reacting are the most effective and adequate.

In these circumstances it is difficult to determine with opportunities of the state in combat to criminality and place of criminal proceedings in a system of appropriate mechanism. This is necessary for solution of most debatable tasks of theory and practice of criminal process, providing of effectiveness of suggestions on further improvement of criminal procedure legislation.

First of all, it should be determined with initial targeted formulation – with combat to criminality.

Developed by N.G. Stoiko classification of criminal procedure strategies includes together such strategies like protection of rights and freedoms of accused, rationality and effectiveness of criminal proceedings, reconciliation, such strategy like criminal prosecution [10, p. 24-29].

Certainly, it is necessary to emphasize that aforementioned criminal procedure strategies, systemized and suggested by N.G. Stoiko do not exclude each other. On his own fair remark, criminal process should be considered as social integrative, in which the strategies do not contradict, and supplement each other [9, p. 14]. In addition, at choice and announcement of strategy or their combination it is necessary to be guided by such criteria like justice, reasonableness and expediency. We think that these criteria should be taken into consideration in combination, when criminal procedure strategy is chosen.

Here, we have to remember acting in a number of European states the principle of proportionality that includes three main elements - an adequacy, necessity and proportionality of stricto senso (appropriate level of control), which is characterized with the four main features:

- Interference of public authority has to pursue a legitimate aim relating to the general interest;
- Such interference should be assisted to achievement of formulated aim;
- Interference should be necessary for achievement of a goal (idea so named minimum interference: public interference has to be in less cruel, severe form that is sufficient for receiving of result required);
- It is necessary to provide a balance between seriousness of interference and importance of a goal [12].

Analysis of modern procedural law allows asserting that indicated criteria are also important for Russian criminal process. Lawfulness of the goal in the Code of Criminal Procedure of the Russian Federation (hereinafter, the CCP of the RF) is ensured, for instance, the fact that only court has right to agree in limitation of the constitutional rights of citizens at production on criminal cases. Necessity of substantiation of any decision, which is adopted at production on criminal case, raised to rank of the principle: par. 4 of Article 7 of the CCP of the RF fixes that determinations of a court, decisions of a judge, prosecutor, investigator and an inquiry officer should be lawful, substantiated and motivated. Minimum interference (I think in criminal process one is talking on limitation of constitutional rights and freedoms of an individual), in particular, it is manifested in the fact that detention is allowed only on cases about crimes, punishment for which provided in form of deprivation of freedom (cl. 1 of Article 91 of the CCP of the RF); extension of maximum permissible period of detention on general rule is not allowed (cl. 3 of Article 109 of the CCP of the RF); reconduction is not allowed in respect of pregnant women, persons not reached 14 years old, diseased persons (cl. 6 of Article 113 of the CCP of the RF); upon resolving an issue about choice of restraint measure it is necessary every time to take into account seriousness of crime, identity of suspected or accused, his age, state of health, family status, kind of business and other circumstances (Article 99 of the CCP of the RF). Aspiration to ensure balance between seriousness of interference and

importance of goal might be explained a duty of court to dismiss production on cases of private accusation in case of actual conciliation of the parties (cl. 5 of Article 319 of the CCP of the RF). Number of such samples demonstrating the principle of proportionality in action in area of criminal prosecution might also be continued further. But now we may say that Article 2 of the Constitution of the RF, Article 6 of the CCP of the RF from one side, and also introduced the last years new reduced forms of production of criminal cases, and other side, do not allow definitely asserting that state fights to crime. Moreover, principle of proportionality and combat to criminality has contradicting to each other aims. More appropriate to modern realities of criminal procedural regulation should be recognized position not combat to crime, and control over it, its refraining.

Here, it is appropriate to remember of L.E. Vladimirov, who fair asserted that "words 'combat to crime' so often mentioned… should not mislead you. Justice does not fight. State does not combat to crime like with enemy army, and is related to them like erring its children. For committed crimes it punishes, imposes sufferings…" [8, p. 27]. As we noted above, monitoring of latent criminality allows asserting: actual criminality more than 8 times exceeds a level of registered one that gives reasons to assert that at this moment state is unable effectively to combat to crime. Therefore we think that it would be more honest to speak about control of crime's level.

In addition, scientists have noted that citizen and society not so crave the fight to danger as protection, i.e. security, such approach is richer with social content. At last, fight to crime supposes availability of winner and loser in final. It seems that more socially value is a policy of social control of crime.

It should especially emphasize that in modern period of development of criminal procedural relationships an interest of society and separate citizens coincides in that part, in which "the both, citizen and society not so crave the fight … as protection…" [3, p. 26]. Other words, necessity to change conducting by state criminal policy and to form new priorities in the system those values, which

are under state protection have found its reflection in changes and alterations of criminal procedure legislation of the last period.

There might be related introduction of special procedure of production of criminal cases in respect of separate categories of persons (Chapter 52 of the CCP of the RF) and special procedure of court decision making at consent of accused person with brought accusation (Chapter 40 of the CCP of the RF), promotion of special procedure of court decision making at conclusion of pre-trial agreement on cooperation (Chapter 40.1 of the CCP of the RF), regulating of inquiry in brief form (Chapter 32.1 of the CCP of the RF).

Indicated notations directed to simultaneous solution several tasks: realization of criminal procedural policy common accepted reaction of state to commission of crimes, and also ensuring an adequacy level of protection of an individual's rights.

In addition, it should particular note that despite visible obviousness of necessity to protect an individual, his rights and liberties (especially in area of criminal prosecution) indicated trend is subject to be more criticized in the last time. Certainly, actual domination of external manifestations, form over essence, content, nature of those or other researched phenomena and values in matters of human rights defence, his legal interests in criminal process leads to pushing off duties of a man in a second plan. The last time there is more obvious become necessity awareness the circumstance that individuals, communities, states bear in respect of each other duties. Wider performance the rights are possible only if everybody fulfills his obligations at all levels.

Moreover, apart from declarative announcement of the rights and freedoms of an individual as supreme value in Russian state, the Constitution of the RF does not contain other values, for example, the Russian statehood that indicates presence of forcibly shortened value row. The same way, the CCP of the RF does not clear express proper guarantees of protection of society and state, without of which it is impossible to ensure protection of interests of person through a system of the rights and freedoms. Consequently, it is necessary to synchronize defence of interests of

person with interests of society and state. Namely in this is seen a social value of criminal proceedings by 13.9% judges, 7.3% prosecutors, 7.4% investigators and inquiry officers, 18% lawyers of questioned respondents.

Thus, legislatively fixed priority of defence of rights and freedoms of person in area of criminal prosecution with considering of formed modern situation in sphere of internal and foreign state policy does not contribute to execution of a concept of combat to crime. It might be spoken only restraining crime on socially tolerable level. Other side, one cannot assume absolutisation of an idea of human right defence as this trend can be impede to ensuring of safety of vitally significant interests, first of all, society and state, without which it seems unthinkable to protect of the rights and interests of an individual.

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