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How we can reorganize the judicial and legal system

Abstract: In purpose of improving the judicial and legal system, developing the rule of law and ensuring the rights and freedoms of citizens in the criminal law field, it seems necessary to implement a set of interrelated measures of a legislative, organizational-technical and scientific-methodological nature, which include the following proposals.

It is necessary to make mandatory nature to the comments of the Plenum of the Supreme Court of Azerbaijan Republic on matters of judicial practice.

The Supreme Court of Azerbaijan Republic, guided by the decisions of the European Court of Human Rights, should cover with its comments all contradictions, alogisms and gaps in criminal procedure legislation, which, on the one side, will regulate the judicial practice, and on the other one, lay the foundation for formation of new legislation.

Keywords: judicial and legal system; rule-of-law state; criminal process; legislation; alternative expert examination.

In purposes of fulfilling the prescriptions of the President of Azerbaijan Republic Mr. I.H. Aliyev on improving of the judicial legal system, developing the rule of law and ensuring the rights and freedoms of citizens in criminal legal field, it seems necessary to implement a set of interrelated measures of a legislative,

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organizational, technical and scientific and methodological nature, which include the following proposals.

Criminal procedure legislation contains the hundreds contradictions, insuperable collisions, alogisms and gaps, which exclude its full usage on allocation.

In connection with the above, it seems necessary to set up a commission from among of practical workers and scientists on preparation of a draft of the new Criminal Procedure Code of Azerbaijan Republic with arrangement of its wide discussion.

It seems that the first stage of reforming of criminal procedure legislation should be excluding non-concrete, alternative norms from it, which provide unscrupulous users, whether they are judges, investigators, defenders or other participants of the process, an opportunity to use them at their discretion, for personal, sometimes corrupt, purposes.

To do this, it is necessary to exclude from the text of Criminal Procedure Code (hereinafter, the CPC), and first of all, from its Chapter 2 "Tasks, basic principles and conditions of criminal proceedings" such words as "may be", "etc.", "as a rule", "as an exception" etc., which give rise to unjustified alternatives, although an essence of the governing norm should be unambiguous.

In this connection, it is suggested to set forth Article 9.2 of the CPC of Azerbaijan Republic in the following wording: "Violation of the principles or conditions of criminal process is the ground to recognize the results of production on criminal prosecution as invalid" [2, p. 9].

Since reforming of the legislation will take much time, in the next stage of its fulfillment it seems necessary to make a mandatory nature to the comments of the Plenum of the Supreme Court of Azerbaijan Republic on the matters of judicial practice, moreover that par. 3.2 of Decree of the President says of that [3].

The Supreme Court of Azerbaijan Republic of Azerbaijan, guided by the decisions of the European Court of Human Rights, should cover with its comments all contradictions, alogisms and gaps in the criminal procedure legislation, which, on the one side, will streamline the judicial practice, and on the other one, lay the foundation for formation of new legislation.

In connection with the foregoing, it is proposed to set forth Art. 10.4 of the Code of Criminal Procedure of Azerbaijan Republic in the following wording: "Comments of the Plenum of the Supreme Court of Azerbaijan Republic on judicial practice are mandatory for the bodies conducting a criminal process".

Adversarial nature as a principle is only declared in the Code of Criminal Procedure, but not ensured, since the rights of the prosecution are much more than the rights of a defense party, especially in terms of proving [2, p. 18-19].

So, according to Article 143.1 of the CPC, the collection of evidence in the course of pre-trial and court proceedings is carried out through interrogation, confrontation, search, seizure, inspection, examination, presentation for identification and other procedural actions that the defense party has no the right to produce.

It seems that the defense party should be given the right to inspect, organize alternative examination, obtain samples for comparative research, recording, which, to a certain extent, will ensure adversarial of proceedings.

In connection with the foregoing, it seems necessary to state Article 143.3 of the Code of Criminal Procedure as follows: "A defense counsel who permitted to participate in criminal proceedings is entitled to collect and present evidence through inspection, obtaining samples for comparative research, organizing alternative expertise, recording the course and results of legal proceedings, obtaining explanations of individuals, requesting the references, characteristics and other documents from enterprises of all forms of ownership".

The Code of Criminal Procedure contains abstract prejudices that emasculate an essence and purpose of the criminal process.

So, Article 141 Code of Criminal Procedure allows without proof to recognize as established knowledge of the law; knowledge of their official duties; lack of education or special preparation, if there are no relevant documents or the person did not call of the name of an educational institution [2, p. 134-135].

The use of such prejudices is contrary to the goals, objectives and principles of criminal proceedings, and therefore they should be excluded.

In connection with the foregoing, it seems necessary to state Article 141 of the Code of Criminal Procedure in the following wording:

"The parties of the criminal process may agree on existence or a certain assessment of the circumstances relevant to the criminal prosecution, without its investigation. If the court adopts the evidence in the criminal proceedings against the fact that the existence of these circumstances and their assessment do not contradict the law, such an agreement may be adopted as a basis for a sentence or other ruling. In this case, the circumstances established without examination of evidence are considered to be as established in relation to only those who have agreed and not the other participants in the criminal process".

The current provisions of Articles 303 and 318 of the Code of Criminal Procedure are illogical and unspecific, contradict the tasks, principles and conditions of criminal proceedings, lead to mass concealment of crimes and their perpetrators, since they superficially affect only the issues of bringing new charges to defendants, but do not regulate the situations of incorrect combine and separation of cases, as well as the need to bring to criminal responsibility other persons whose acts are in close connection with the criminal case examined.

In connection with the above, it seems necessary to supplement Articles 303 and 318 of the Code of Criminal Procedure with provisions granting the

court the right to return the case for additional investigation from the preparatory session stage and the court proceeding in cases of:

a) substantial incompleteness of the inquiry or preliminary investigation, which cannot be added at the court hearing;

b) such a violation of the requirements of the criminal procedure law made by the bodies of inquiry or preliminary investigation, which prevents the court from examination of the case;

c) the presence in the case of the grounds for bringing the accused to another accusation, other than contained in the indictment or significantly different in factual circumstances from the initial indictment;

d) an existence of grounds for bringing to criminal responsibility other persons whose acts are in close connection with the case under consideration;

e) incorrect combine or separation of the case.

It seems that in order to implement the instructions of the President of the Azerbaijan Republic Mr. I.H. Aliyev in part of private alternative expertise, it is necessary to make insignificant, but substantial changes and additions to the Code of Criminal Procedure, which will eliminate conflicts and turn the declarative right to choice into real one [3].

In particular, if to exclude proviso from Articles 92.9.9, 264.3, 264.5, 264.7, 269.2 and 270.3 of the Code of Criminal Procedure stipulating that "... criminal prosecution is carried out in the form of a private prosecution", then the defense party (with the appropriate additions of Articles 90 and 91 of the Code of Criminal Procedure) will have the right to petition on conducting of alternative expertise in an alternative expert institution on all cases, especially since the production of expertise beyond the state expert institution is stipulated by law (see Article 270 of the CPC).

From Article 268.1 of the CPC should remove the words “carried out by order of an investigator”, and Article 268.1.4 of the CPC shall be stated as follows: “to organize the conduct of an alternative examination at its own expense and submit its opinion for inclusion in a criminal case or other materials for research as evidence”.

In some cases, a certain forensic examinations (medical, psychiatric, psychological, narcological, etc.) require the participation of suspects and accused person who are in custody. It is even more difficult when there is a need for their inpatient examination.

Consequently, the right to an alternative examination must be confirmed by guarantees according to which, if necessary, expert examination outside state expert institutions is required, the prosecution will be obliged to ensure the presence and protection of arrested suspects and accused persons, or, at least, allow experts free access to those arrested places of their detention.

This can provide a joint instruction (provision) of the Ministry of Justice, the Ministry of Health and the prosecutor’s office.

It seems that the organizational aspect of the problem of setting up alternative expert institutions does not exist, since the CPC provides the production of expertise in an expert institution (Article 269) and outside the expert institution (Article 270) when a person acts as an expert is not connected with the Law ‘On activity of forensic examination’ and the Decree of the President of Azerbaijan Republic ‘On streamlining the procedure for issuing special permits (licenses) to engage in certain types of activities’ of 02.09.2002, as well as annexes and supplements to it, does not relate the expert activities to the number subjected to be licensed [2, p. 239-240; 1; 4].

In addition, it seems necessary to add the Article 140 of the CPC of Azerbaijan Republic with the following provisions:

a) correctness of the translation - by a record or document certified by the translator's signature;

b) identification of traces, substances and objects on the samples listed in Article 274 of the CPC - expert opinion;

c) determination of chemical and physical properties, names and constituents of the substances and items - expert opinion;

d) determination and evaluation of technological processes and the technique of their application - expert opinion.

In purposes of further humanize the criminal policy of Azerbaijan Republic, it is necessary to introduce widely the provisions of administrative prejudice into criminal law, according to which the deed is assessed as a crime and criminal responsibility is applied to the perpetrator only after a person commits a similar offense during the year after application to him the administrative penalty.

In particular, it seems possible to include provisions on administrative prejudice (with appropriate additions to the Code of Administrative Offenses) in Articles 143-1, 147.1, 148, 148-1, 162-1, 165, 165-1, 165-2, 165-3, 166, 167, 167-1, 167-2, 168-1, 169, 169- 1, 185, 187, 188, 189-1, 197, 198, 200, 200-1. 200-2 and others of the Criminal Code of Azerbaijan Republic.

In conclusion, it seems necessary to note that, in our standpoint of view, the current state of the judicial legal system cannot be rectified by recommendations to observe the principles of justice. Increase in the material support of judges who, until now, are not accountable before the law in their incomes will not help either.

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