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Wordplay in Criminal Procedure Legislation

Abstract: The current Code of Criminal Procedure of the Republic of Azerbaijan contains errors and contradictions that prevent it from being used for its intended purpose.

This article aims to give renewed impetus to the process of eliminating errors and illogical provisions in the Code of Criminal Procedure.

Keywords: criminal procedural legislation; fundamental principle of criminal proceedings; violation of the principles or conditions of criminal proceedings; procedural actions; objectivity; impartiality; justice; challenge.

However, joking aside: can I raise the question of setting aside all procedural decisions adopted from 1 September 2000 to the present (rulings, judgments, etc.) in criminal cases in which I acted as defence counsel and a representative? I repeat that I am not joking. I know full well that, for lawyers, joking about legislation is inadvisable, fraught with various adverse consequences, and harmful to their health.

Let us set aside a couple of dozen cases in which the time limits for appeal have expired; hundreds of others remain, and these are the cases of just one lawyer.

Under the laws in force, in accordance with the Constitution of the Republic of Azerbaijan and the international treaties to which our state is a party, I am entitled to initiate such a process. I am therefore doing so, all the more because there are grounds for it.

The current Code of Criminal Procedure of the Republic of Azerbaijan entered into force on 1 September 2000. Since then, and to this day, Article 23 has been enshrined in it as a fundamental principle of criminal proceedings, stipulating that criminal proceedings in the Republic of Azerbaijan are conducted exclusively by a court. Article 23 of the Code of Criminal Procedure is expressly entitled "Conduct of Criminal Proceedings Exclusively by a Court" [8].

Under Article 7.0.8 of the Code of Criminal Procedure, criminal proceedings are proceedings conducted before trial, as well as in courts of first instance, appeal or cassation, in accordance with the procedure prescribed by the Code of Criminal Procedure.

Thus, on the basis of Article 23 of the Code of Criminal Procedure, it can be argued that proceedings conducted before trial are excluded from the scope of criminal proceedings. Yet this is the work of prosecutors, investigators, inquiry officers and operational officers. Under this fundamental principle of criminal proceedings, such work is deemed unlawful.

Article 9.2 of the Code of Criminal Procedure of the Republic of Azerbaijan states: "… a violation of the principles or conditions of the criminal process, in cases specified by the Code of Criminal Procedure, may lead to a finding that completed criminal prosecution proceedings are invalid, to

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the setting aside of rulings adopted in the course of those proceedings, or to a finding that the materials collected have no evidentiary value."

If the word "may", which a number of scholars classify as a corruption marker, is removed, the substance of the provision is unequivocal: it is prohibited.

Under Article 10.2 of the Code of Criminal Procedure, "Except in accordance with the provisions and rules established by a law of the Republic of Azerbaijan that has entered into force and has been published, no one may be subjected to criminal prosecution as a suspect or an accused person, apprehension, remand in custody, placement on a wanted list, compulsory appearance or other measures of procedural coercion, nor may anyone be convicted, punished or subjected to any other form of restriction of their rights and freedoms."

Under Article 10.5 of the Code of Criminal Procedure, "Procedural acts performed in violation of the requirements set out in this Article of this Code, and rulings adopted in violation of those requirements, have no legal force."

Under Article 28 of the Code of Criminal Procedure, objectivity, impartiality and fairness in criminal proceedings are prescribed only for courts.

Under Articles 112 and 113 of the Code of Criminal Procedure of the Republic of Azerbaijan, a prosecutor, investigator or inquiry officer must be disqualified if they lack the requisite authority to participate in criminal proceedings.

Under Article 125.2 of the Code of Criminal Procedure of the Republic of Azerbaijan, information, documents and objects are inadmissible as evidence in a criminal case if they have been obtained:

- by depriving participants in the criminal process of their legally guaranteed rights, or restricting those rights, in violation of constitutional human and civil rights and freedoms or other requirements of this Code, where this must or may affect the validity of the evidence;

- in criminal prosecution proceedings, or through investigative or other procedural acts, conducted by a person not authorised to do so;

- with the participation of a person who should be disqualified, where circumstances precluding that person's participation in the criminal process are known or should be known.

Under Article 125.3 of the Code of Criminal Procedure, information, documents and objects obtained in the circumstances specified in Article 125.2 of this Code are deemed to have no legal force and may not be used to prove any circumstance relevant to the proper determination of the charge.

The foregoing provides grounds for the unequivocal conclusion that, as long as Article 23 of the Code of Criminal Procedure of the Republic of Azerbaijan remains in place, the question posed at the beginning of this article may confidently be raised.

Indeed, the law unequivocally states that, in Azerbaijan, proceedings must be conducted solely by courts; investigators, prosecutors, inquiry officers and others are not permitted to conduct them, that is, they are prohibited from doing so; the results of such "unlawful" activities are deemed illegitimate, and the evidence collected is devoid of evidentiary value.

There is a further argument in support of this conclusion.

As noted above, the current Code of Criminal Procedure of the Republic of Azerbaijan was adopted and entered into force in 2000. In the same year, the International Organization for Legal Research (hereinafter, IOLR), of which I have the honour to be a member, published its first scholarly work setting out its views on the errors in the Code and ways to eliminate them [2].

Among other matters, attention was drawn to errors in Article 23 of the Code of Criminal Procedure and in the definitions of the criminal process, its parties, participants and other concepts.

From 2000 to the present, IOLR, with my direct involvement, has submitted more than a hundred scientifically substantiated proposals to the Milli Majlis, the Presidential Administration, the Supreme Court and other institutions and agencies. These proposals have been presented at various conferences. In 2004, the monograph "Paradoxes of the Code of Criminal Procedure of the Republic of Azerbaijan" was published. The identified errors in the Code have become the subject of a number of dissertation studies in Azerbaijan, other scholarly works, and so forth [3].

However, during the 25 years in which this defective Code of Criminal Procedure has been in force, we have, regrettably, not been heard, and everything has remained unchanged.

This provides grounds for asserting that all the aforementioned organisations and their staff regard the existence and operation of Article 23 of the Code of Criminal Procedure as correct and lawful, that is, as binding.

A few more words on an important and long-standing concern.

In 2000, a concept of the criminal process that was new in both meaning and content was introduced into the Code of Criminal Procedure of the Republic of Azerbaijan. In our view, it has no legal value, yet it has generated dozens of contradictions, illogical provisions and legal defects throughout our state's system of criminal procedure legislation.

Previously, in the 1960 Code of Criminal Procedure of Azerbaijan, the concepts of the "criminal process" and "criminal proceedings" were treated as synonyms. The same approach was, and continues to be, adopted in all countries belonging to the civil law tradition and in a number of states with other legal systems. Thus, in all the current codes of criminal procedure of several dozen countries that we have examined, the concepts of the "criminal process" and "criminal proceedings" are regarded as identical. Some codes do not use the concept of the "criminal process" at all, relying solely on a definition of criminal proceedings (for example, the Code of Criminal Procedure of the Republic of Armenia, which, incidentally, has been recognised by a number of international organisations as consistent with the principles of the rule of law) [7].

Indeed, under Article 7.0.3 of the Code of Criminal Procedure of the Republic of Azerbaijan, the criminal process is the aggregate of procedural acts and procedural rulings adopted in connection with criminal prosecution, whereas under Article 7.0.8, criminal proceedings comprise pre-trial proceedings as well as proceedings in courts of first instance, appeal and cassation, in accordance with the procedure prescribed by the Code of Criminal Procedure.

Thus, the new definition of the "criminal process" has given users of the Code of Criminal Procedure a static aggregate of acts and decisions relating to criminal prosecution, while the dynamic element has remained within the concept of criminal proceedings. Moreover, the new concept of the criminal process leaves no place for the bodies and participants involved, in either legal or organisational terms.

Meanwhile, in terms of the underlying meanings of these concepts, a static phenomenon or object is one in which there is no movement, development or change: it is a frozen state. An aggregate, in turn, is a collection of characteristics, objects or people that together constitute a single whole.

In these circumstances, the substance and purpose of the new interpretation of the concept of the criminal process lose their meaning, since that interpretation remains outside the realm of criminal procedural relations.

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Каламбуры уголовно-процессуального законодательства

Аннотация: Действующий УПК Азербайджанской Республики содержит ошибки и противоречия, исключающие использование его по назначению.

Настоящая статья имеет цель актуализировать процесс по устранению ошибок и алогизмов УПК

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Ключевые слова: уголовно-процессуальное законодательство; основной принцип уголовного судопроизводства; нарушение принципов или условий уголовного процесса; процессуальные действия; объективность; беспристрастность; справедливость; отвод.

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Cinayət-prosessual qanunvericiliyin kalamburları

Xülasə: Azərbaycan Respublikasının qüvvədə olan Cinayət-Prosessual Məcəlləsində onun təyinatı üzrə tətbiq olunmasına maneçilik törədən xətalar və ziddiyyətlər mövcuddur.

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Bu məqalə Cinayət-Prosessual Məcəlləsindəki xətaların və məntiqsiz müddəaların aradan qaldırılması prosesinə yeni təkan vermək məqsədi daşıyır.

Açar sözlər: cinayət-prosessual qanunvericilik; cinayət mühakimə icraatının əsas prinsipi; cinayət prosesinin prinsiplərinin və ya şərtlərinin pozulması; prosessual hərəkətlər; obyektivlik; qərəzsizlik; ədalətlilik; etiraz etmə.

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