

MODERN CHALLENGES OF CRIMINAL JUSTICE IN THE REPUBLIC OF ARMENIA

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The last decade of the 20th century in the Republic of Armenia was marked by political, economic and other stormy events deriving directly therefrom. The achievement of independence (1991) and the following drastic changes of economic relations predetermined the adoption (1995) of the new Constitution which, in its turn, outlined new directions and criteria of development in all legal fields, including the sphere of criminal justice. The logical continuation of this process was the adoption (1998) of the new Criminal Procedure Code (hereinafter referred to as “the Code”) and its application (1999).

The Code is one of the most important legal acts adopted as a result of judicial and legal reforms implemented in the Republic of Armenia. It regulates the legal relations linked with the examination and resolution of criminal cases in a unified, coordinated and comprehensive manner, yielding, by its legal force, only to the Constitution in the system of legal acts regulating the criminal proceedings.

In the correlation of time and conditions of its adoption, the Code was certainly progressive. The main democratic principles and guarantees providing the protection of the rights and legitimate interests of a person were reinforced therein for the first time. Besides, the Code outlined a range of key criteria related to the restriction of person's constitutional rights and freedoms. It

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established and introduced ideas and institutions in the RA legal system, which were unknown prior to that (for example, the judicial supervision over the pre-trial proceedings or the review of judicial acts by appealing procedure). Thus, the clear purpose and direction of the Code was obvious and even within the shortcomings revealed in the course of time it had a certain internal logic.

However, shortly afterwards, it became clear that the most conservative and stable sectors of Soviet years, the criminal procedure stopped being so and by the order of time it had to become more flexible and be ready for changes.

The reasons for that were mostly objective. Firstly, within its obvious advantages and positive significance the Code was applied just four years after adoption of the Constitution and in such conditions it could not objectively realize the democratic values fixed by the basic law of the new legal state. In addition, in the initial period of application of the Code, some events were regularly taking place in the social and political life of the country, which presupposed inevitable changes in the regulation linked with the relations of criminal case examination and resolution. Firstly, they were conditioned by the country's undertaken international obligations, in particular, by signing (2002) the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

This event was the beginning of a new cycle of the internal legal processes which determined the key changes taken place in the RA Constitution through the referendum (2005). Those changes had a logical and expected influence on the sphere of criminal justice making the modification of the Code inevitable.

Conditioned by mentioned processes and not only by those, some essential and significant amendments and supplements were made in the Code (2004, 2006, 2007 and 2008) which did not have only positive, but also negative manifestations during their application. Not denying the reasonable and progressive nature of the great part of those changes, however, we must say that most of them were made without conceptual development and scientific justification. In addition, the amendments and supplements were not

complex; they mostly had an episodic nature and were often not coherent to legal acts, institutions and norms.

While in the legal system of the state the role and significance of the Criminal Procedure Code definitely allows us to conclude that the key shortcomings and mistakes existing in such legal act cannot be corrected through individual or situational amendments and supplements. Therefore, they could not completely fulfill the aim for which they were implemented.

Thus, automatically, the amendments made to such conditions also had contextual crucial consequences for the Code, for the sphere which is regulated by the Code. At the moment of its adoption the Code was endowed with a certain ideology and presented a system of certain logic, in the form of an internal link between different criminal procedural institutions and principles. In many cases the above mentioned amendments broke the balance, arose contradictions in its different provisions, as well as between the Code and other legal acts.

Though important but also to some extent strange (for example the accelerated procedure of the trial), and for the given times also weird institutes (modifying or filling the charge in the court) were introduced in the criminal procedure legislation which organically did not integrate in the current system, thus causing a lot of theoretical and practical problems.

The permanent legislative amendments also resulted in institutional instability which in recent years has had a negative impact on the formation of law enforcement and particularly judicial practice. Perhaps, it is enough to mention the range of amendments and supplements to the functions and powers of the Cassation Court during few years.

The judicial practice made some attempts to rectify the situation. In particular, in dozens of their decisions the RA Constitutional Court and the Cassation Court assessed a number of shortcomings and omissions revealed during the Code's application. In particular, in a range of cases (2006-2012) which were examined by the RA Constitutional Court, the court recognized a dozen of

norms unconstitutional and invalid (in particular, the provisions regarding sending the case for an additional investigation).

The RA Cassation Court in its case-law gave interpretations of different provisions of the Code aimed at the regulation of the law enforcement practice (in particular, it is worth mentioning the adjustment of a range of criteria related to the application of the arrest).

Of course, this surgical intervention had a significant, largely also a positive influence on the regulation of criminal-judicial legal relations, and in certain cases, even changed the ideology of legal understanding and application of some principal provisions of the Code. The time showed that in a long-term perspective, this tool either cannot be the most effective option for solving the existing problems.

The set of the factors listed above, as well as the constant and rapid development of public relations led to a situation in which the Code with its philosophy and logic, structure and potential, successful and unsuccessful amendments, integrated and not integrated institutions, progressive and modern provisions, diverse and contradictory interpretations, spotted and controversial practice was objectively unable to comprehensively regulate the procedure for examination and resolution of a criminal case, to ensure the balanced protection of public and private interests, consequently also the achievement of goals and the solution of problems in criminal justice.

Hence, taking into account the set of all the existing objective prerequisites (legal, economic, social, political, etc.) the RA President's Decree (2010) marked the beginning of the new RA Criminal Procedure Code development process. The first visible result was recorded on March 10, 2011 when on the scientific basis and practical experience the Government reinforced the concept of the new Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as "the Concept").

The duty of both the Concept and later also the new draft

Criminal Procedure Code³ (hereinafter referred to as “the Draft”) developed on the basis of the Concept is to ensure a smooth transition of the semi-competitive (in separate episodes — also inquisitorial) trial into a complete competitive system without any uneven shocks. It is also aimed at fixing such objective and productive prerequisites that should ensure court-centered formation of the criminal procedure, as well as under the effective exercise of person’s fundamental rights and freedoms in the framework of criminal proceedings.

Taking into account the requirements of the RA Constitution and RA international obligations, the Draft outlines the main directions of further development of the RA criminal justice. In this regard, the development of the new Criminal Procedure Code is firstly considered as a unique phase for the normal development of criminal justice in Armenia and is perceived as a means of testing (approbation) the ideas, institutes which will be applied in the further stage of development of the RA criminal procedure legislation.

Such an approach is mostly conditioned by the fact that the essence of the current system of criminal procedure institutions and the drastic change can have a significant negative impact on the practice of law (professional, psychological, moral and other aspects) In addition, the current criminal justice system is not ready for such a drastic change for different objective and subjective reasons (personnel, material, etc.). At the same time, the investment of new procedural ideas inevitably requires a fairly bold initiative and innovation which must be combined with moderate conservatism.

Based on these principles, the Draft outlined the problems of the future criminal-procedural system, as well as it envisaged the tools the application of which must allow to solve those problems even more effectively. Let us try to discuss the basic ones:

1) One of the primary objectives of the reform of the criminal justice system is to ensure the balanced protection of public and private interests based on the well-known principles of law in the

³ Currently, the RA new draft Criminal Procedure Code is discussed by the Permanent Committee of State and Legal Affairs of the National Assembly.

process of criminal-legal disputes and their resolution. The solution of this problem is sought in all the legal systems and in all the countries which carry out reforms with the expectation of finding a perfect balance. Armenia is not an exception either, the approaches of which are very cautious regarding this issue. The problem is that during a long time while determining the correlation of public and private interests the Armenian criminal justice had polarized or extreme approaches. During the Soviet period and the preliminary years succeeding the independence, the criminal-procedure legislation was obviously bent to the public interest (for example, the highlighted incriminatory inclination of the court or the practice of the nearly widespread application of detention). Later, after the adoption of the Constitution and the Code, the center of gravity shifted to the defense of person's rights, sometimes ignoring the justified public interest (for example, endowing the accused of the privilege of giving false testimony or the lack of legal mechanisms to confront unfair behavior of the litigation participants, in particular, the defense attorney). Therefore, this problem first of all presupposes the existence of such mechanisms which will not only allow to determine the priority of this or that interest in a certain situation but will also provide the criteria of fair decision-making. For example, according to the criteria of the Draft, in pre-trial proceedings while making a discretionary decision about not filing a criminal prosecution the prosecutor must take as a basis not only the facts of person's compensation of the damage caused by the crime and the facts supporting the disclosure of the crime's circumstances, but also take into account the circumstance that in order to correct the person or to restore the social justice there is no need of criminal liability. Or the court refuses to apply reconciliation proceedings if, examining the criminal case, comes to the conclusion that the act which the guiltiness of which is addressed to the accused was obviously done by another person who is not an accused or by his participation or the legal assessment of the act of the accused obviously does not correspond to the factual circumstances of the accusation. These and other similar settings enable to balance the public and private

interests in different stages of the proceedings or different situations by giving the preference to one or to the other criterion based on reasonable justifications.

2) The next important issue mentioned in the Draft is the enhancement of the role and significance of the judiciary power and the court in the sphere of criminal justice. Actually this issue has a strategic role and is aimed at taking the burden of examination of criminal cases from the pre-trial proceedings to the court as well as to reduce the volume and the influence of the preliminary investigation in criminal proceedings. It is not a secret that even after some constitutional reforms and perfection of the procedural legislation the criminal justice of Armenia continues to be bipolar: the preliminary investigation nearly does not yield to the case examination by its content and meaning, and in some cases factually exceeds the very process of administering justice by its consequences. In order to achieve significant and rapid changes in this issue, the Draft envisages both procedural and just a range of contextual innovations. They are primarily aimed at reducing the volume of preliminary investigation. In particular, it is planned to move the investigation of private charge proceedings to the court, as well as carry out the preliminary investigation of small and medium-gravity crimes proceedings by a simplified procedure (in short terms and with a limited subject of proof). In addition, it is envisaged to expand the scope of judicial supervision in the pre-trial proceedings by giving greater opportunities and significant influence to the court at this stage of the proceedings. For example, the confidential investigative operations⁴ can be done only by a court decision, and putting an arrest on the person's property during the proceedings is subject to mandatory judicial review. Finally, the court gets a greater freedom while determining the admissibility of the evidence collected during the preliminary investigation or the questions of

⁴ As confidential investigative operations are considered: the internal and external review, the supervision over correspondence and other non-digital communications, the supervision over telephone conversations, the supervision over financial deals and imitation of taking bribe and giving bribe.

their restrictions (for example, in case of objecting the expert's conclusion or the opinion the evidence cannot be used without questioning the expert), as well as it is constrained only by the underlying charge facts, but not by the legal evaluation of the defendant's act given by the preliminary investigation body. That is to say, the court is empowered by an exclusive jurisdiction to make autonomous and final decisions regarding all the key issues discussed during the criminal proceedings and, in particular, during the judicial examination (turn a verdict of guilty including the case when the prosecutor rejects the charge).

3) One of the key ideas underlying the Draft is the creation of effective mechanisms guaranteeing the exercise of fair trial's elements, in particular the provision and implementation of full competition in criminal procedure. The proposed regulations are intended to turn the competition from a procedural principal into a procedural form (mode). The solution of this problem is firstly related to the expansion of the rights of defense party in pre-trial proceedings. In particular, the accused and the defense attorney are entitled to represent evidence to be examined (which must be attached to the case materials by the investigation body) and the defense attorney also has the possibility to get an expert's opinion about some questions which require special knowledge for carrying out the protection of the accused. This opinion is an individual type of evidence.

Some considerable changes have been made for the accused and the defense attorney regarding the access borders of factual data received during the preliminary examination. Firstly, the accused is entitled to receive for free, upon his or her request, the copy of the record of proving and other procedural operations carried out by his participation, as well as the copy of the expert's conclusion, and the defense attorney may, upon his or her request, receive the copies of the records of proving and other procedural operations carried out by his or his defendant's participation, as well as the copies of such procedural documents which his or her defendant is entitled to receive according to the present Code. Besides, the possibility of the

defense attorney to obtain evidence has been expanded as he received an unconditional right to participate in any proving or other procedural operations which are carried out by his or her defendant's participation, as well as participate in a proving or other procedural operation which are carried out by his or her or his or her defendant's motion. In other cases, the defense attorney may participate in the proving or other procedural operation upon investigator's proposal. One of the new and key tools which strengthen the competition in the pre-trial proceedings is the institution⁵ of judicial deposition of testimonies. The deposition guarantees for the defense party the right to have a counter questioning in case when there is a justified assumption that the person who is subject to be interrogated may not be represented in the trial or may lawfully refuse to give testimony during the trial.

Furthermore, it makes a possibility to interrogate the accused who gives a confession testimony and does not have a defense attorney, in the presence of the judge (it is the first step of introducing the mechanism of making the accused stand in front of the court for the first time and accusing him in the presence of the judge).

The proper implementation of this procedure, which is carried out with the participation of the parties, solves several problems at once. Firstly, in the pre-trial proceedings the exercise of the fundamental right of the accused — envisaged by Article 6 of the European Convention regarding examination of the persons who witnessed against him or her — is ensured. Secondly, the probability of extorting confession testimony from the accused by unlawful means in the pre-trial proceedings is considerably reduced (we may even say that it is reduced to zero). Finally, due to this kind of mechanisms some objective prerequisites of carrying out an

⁵ The procedure for deposition is a completely new phenomenon for the Armenian criminal justice. It was implemented based on the summary of the results of judicial process monitoring and represents a special format of person's interrogation in the pre-trial proceedings which is called to ensure the lawfulness of getting his testimony in case of further use.

appropriate proving are created during criminal proceedings.

As to ensuring competition during judicial proceedings, let us mention that it is first of all displayed in the form of procedural equality. It presupposes equal rights in proving process, the main pledge of which is guaranteeing equivalent possibilities for presenting evidence and participating in their examination.

At the same time, the Draft clearly indicates that the procedural equality of the parties must be perceived more broadly spreading it not only on the factual but also on the legal side of the proceedings. For example, in response to the prosecutor's initial speech, the defense attorney may have an opening statement, too, and after the speech, before the court leaves for a separate room, he or she is entitled to represent to the court in a written form his or her justifications or formulations concerning the application and interpretation of law regarding some questions which are to be solved by the court while delivering a decision.

Moreover, while doing preparatory operations, amongst other issues, with the participation of the parties the court must solve also the issues regarding the volume of the evidence subject to examination, as well as the issues regarding the admissibility of the evidence, and during the examination of the evidence the defense party gets a full possibility of disputing the charge (for example the possibility of obligatorily interrogating in the court the witnesses who were interrogated during the preliminary investigation or to call to the court the investigator or the policeman who obtained the evidence).

4) The solution of the aforementioned problems may not be effective and ensure the desired result if the protection of the rights and freedoms of the person involved in criminal-procedural field is not guaranteed, no proportionate, and transparent mechanisms of their limitation are not developed and reinforced based on the famous principles of law. This is the next decisive issue predetermined by the Draft, the solution of which assumes envisaging and operation of complex and interrelated mechanisms. In this regard the issues concerning the provision of person's liberty, personal security,

confidentiality of private and family life, as well as the right to judicial protection in criminal proceedings (in particular, in pre-trial proceedings) are very important. In particular, in order to provide harmony in the domestic legislation and the case law of the European Court of Human Rights and another international obligations of RA, the order and conditions of the arrest have beyond a reasonable doubt been clarified and made more predictable, the minimal rights of the arrested person (for example, the right to remain silent, to call for an attorney, to be subject to a medical examination, etc.), as well as the guarantees necessary for their implementation have been defined. The review of the grounds and procedure for applying detention, including the augmentation of the effectiveness of judicial supervision over its legitimacy, the expansion of the frames of alternative detention means of restraint (home detention, police surveillance, etc.), as well as with the tendency to reduce the application of detention envisaging the possibility of the application of combined alternative means of restraint have the same purpose.

The Draft has also a highlighted intent to strengthen the protection of the confidentiality of the private life of the persons who are involved in the criminal proceedings. This standard requires that:

- a) the apartment search, the seizure, the examination;
- b) the supervision over telephone conversations, mail, telegram and other communications must be carried out only by the court decision;
- c) the information containing bank, notary, and insurance secrecy must be collected only by the court decision.

At the same time, the Draft draws a special attention to the optimization of providing compensation to the victims of judicial errors, which presupposes both the establishment of rehabilitation institute and the possibility of filing a lawsuit for the compensation of the damages from which the justified person suffered, within the framework of criminal proceedings, and the possibility of its solution.

Along with all this, the Draft does not ignore the issue of protecting the rights and legitimate interests of the victim of a crime.

The clarification of the victim's status, the expansion of his rights (being presented by a professional attorney, representing evidence, receiving the records of the proving operations carried out with his or her participation), as well as giving greater opportunities for requesting judicial protection against the actions and decisions of the investigation body can balance the means of procedural battle for the persons who are involved in the criminal proceedings but are in different procedural camps.

5) One of the conceptual directions of the reform of the criminal justice system is the creation of even more optimal and effective procedures for the examination of crimes. That is why; the system of criminal proceedings has been changed to a considerable extent first of all by refusing some stages remaining yet from the Soviet years, such as bringing a criminal case (the preparation of materials) and the performance of judicial acts. The first of them traditionally preceded the preliminary investigation, but for the reason of tight deadlines, the limited scope of actions and not definite regulations it was never able to contribute to the effective solution of the pre-trial proceedings problems. The Draft included this stage in the content of preliminary investigation organically integrating it in a more simplified model of the pre-trial proceedings. As well as the stage of performing the judicial acts is concerned, it should be mentioned that the complex analysis of its frame of participants, the questions which are to be solved and the court decisions made as a result of it clearly shows that all these legal relations are out of the boundaries of criminal proceedings; consequently, they are out of the boundaries of criminal procedure regulation. The modification of the criminal proceedings system includes both the change of the current stages' content and the implementation of completely new stages. In particular, the Draft reviewed the criminal-procedural correlation of the constitutional notions "inquest" and "preliminary investigation". In this way, it was tried to incorporate the operational and search action to the Criminal Procedure Code considering it similar to the inquest. As a result, "the inquest" did not precede the "preliminary investigation" but became a supportive, serving activity which

included also the operational-search measures and the performance of confidential investigative operations. At the same time, taking into account the requirements of the practice and the theoretical justifications, the Draft undertook the realization of the idea of establishing the institute of preliminary court hearings (of middle judicial proceedings). According to it, this obligatory procedure which has the aim to solve clear frames (the volume of evidence subject to be proved the admissibility of evidence, the application of means of restraint, etc.) of issues and occurs within the competition and equality of the parties, must ensure a more rational check of the results of the pre-trial proceedings and the effective performance of the future trial. The Draft considers the development of the simplified procedures of certain category case examination and solution as well as the expansion and perfection of the differentiated proceedings as an inalienable component of the effectiveness of the criminal proceedings. They must entirely ensure harmonious combination of human resources, means, the justified time savings and the protection of the interests of justice.

In particular, the application of the simplified procedure (conciliation proceedings) of trial in case the accused agrees upon the presented charge in the court or envisaging clear grounds, conditions and guarantees of signing a prejudicial agreement about collaboration with the accused (collaboration proceedings) for the sake of justice allows us not only to perform the international practice which has been studied, but also to considerably reduce the corruption risks and other similar negative phenomena in the sphere of criminal justice.

Thus, the aforementioned directions reinforced in the Draft in essence predetermined the new vector of the development of the RA criminal procedure. It has a highlighted progressive and evolutionary nature, intends to develop the achievements of the international experience study and domestic reforms and finally to form a new system of justice which works effectively and is based on democratic values.