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Problems of Human Rights Ensuring and Standards of Unprejudiced Legal Proceedings in the Course of Development and Reforming of Criminal Procedure Legislation of the Kyrgyz Republic

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Abstract: A study is devoted to complex research of theoretical and applied problems of Institute of Human Rights ensuring in the light of the happening changes in the criminal procedure legislation of the Kyrgyz Republic. The main directions are reflected on the basis of the critical analysis of provisions of the Criminal Procedure Code project of Kyrgyzstan, allowing streng thening attention to observance of the rights and personal freedoms and also to guarantees of their providing during criminal legal proceedings. As a result of the conducted research there are developed and stated theoretical provisions on improvement of the procedural norms, directed on protection of constitutional rights and freedoms of citizens also a justice humanization according to the international standards of justice.

Key words: Organized crime, international cooperation, criminal phenomena, criminogenic structure, criminal legal proceedings, judicial and legal reform

INTRODUCTION

It is not incidentally that the one of the basic approaches to reforming of criminal legal proceedings of the Kyrgyz Republic which was noted in the Concept to the Criminal Procedure Code project of the Kyrgyz Republic is improvement of the criminal procedure legislation in general where the special attention has to be paid to the procedural norms, directed on protection of constitutional rights and freedoms of citizens also to a justice humanization.

It is known that the humanization of justice means first of all, recognition of a human right on freedom and guaranteeing human rights at all stages of criminal procedure.

Proceeding from such approaches, the studying of various sources is shown that Kyrgyzstan carries out a certain work on the conclusion of the various international treaties concerning human rights, various categories of citizens.

It is no secret that today rather burning issue is application of tortures concerning suspects and accused in the Kyrgyz Republic.

From a legal side, a guarantee of protection against tortures in the Kyrgyz Republic is found the reflection in the constitution of the country which possesses the highest legislative force. So in the new edition of the constitution of Kyrgyzstan its norms contain a rigid ban on application of tortures.

According to item 1 of Article 22 of the constitution of the Kyrgyz Republic "nobody can be subjected to tortures and to others cruel in human or degrading types of treatment or punishment"; the item 1 p. 4 of study 20 contains a provision that "the guarantees of a ban on application... of the tortures and to others cruel in human or degrading types of treatment or punishment" aren't subjected to any restrictions which were established by the present constitution.

Besides, being the member of the optional protocol to the Convention against tortures, Kyrgyzstan was taken obligations to found the National preventive mechanism for the prevention of tortures. On July 12, 2012 there was signed by the President the law which was approved by Parliament on June 8, 2012: about creation of the National center for the prevention of tortures and other forms of cruel in human or degrading types of treatment or punishment.

But at the same time in our opinion, it is obviously not enough measures taken by the state the favorable environment for this purpose is lack of appropriate legal guarantees on protection of the rights and freedoms of citizens including from abuses of the power. It is testified

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the data, provided in the report on the issue of tortures by the special reporter, Juan Mendez (February, 2012). He noted the numerous messages and firsthand testimonies, specifying that tortures and cruel treatment were historically widespread in law-enforcement system. During all trip, the evidences of victims and their lawyers were pointed to the general practice of application of tortures and cruel treatment from the staff of law-enforcement bodies after arrest and also during the first hours informal interrogation. During conversations with victims, the special reporter received data on numerous cases of tortures which have similar character: suffocation by plastic bags and gas masks without supply of oxygen; punches and by the bludgeons; application of an electroshock, entering of foreign subjects to an anus or threats of rape.

All above only confirms that today problems of the legislation is existed without their permission, it will be rather difficult to provide execution of a row constitutional and other interconnected principles, namely "every imprisoned has the right for humane treatment and observance of human dignity" and further "everyone has the right for freedom and security of person. Nobody can be deprived of liberty only on the basis of non-execution of the civil obligation".

It should be noted that it isn't enough legislative guarantees of protection of the personality against any illegal actions from authorities their observance has to be provided and by means of the corresponding control and supervision, guaranteed by the state.

In connection with the designated problems it is necessary to dwell on separate aspects of the matter. The analysis of the contents of the concept to the Criminal Procedure Code of the Kyrgyz Republic testifies to aspiration of the state to become really legal where the formation of new model of criminal legal proceedings is based on recognition of the international constitutional standards about the rights and freedoms of the person.

Undoubtedly for the solution of objectives, it is followed the laborious work on standards of the Criminal Procedure Code which fully could provide the main objective of reform, planned at the present stage. But at the same time, it is impossible to solve the existing tasks without deep analysis of the reasons which are interfered their realization.

For example, it is known that the principle of competitiveness of the parties is also one of guarantees of observance of human rights. But meanwhile as it was specified by the professor K.M. Smanaliyev, the head of the working group on development of the Criminal Procedure Code project that the principle of division of participants of process, provided in the current Criminal Procedure Code of KR are contradicted with p. 3 of Article 99 of the Constitution of the Kyrgyz Republic which says that legal proceedings is carried out on the basis of competitiveness and equality of the parties (Smanaliyev, 2013).

Also the problems connected with realization of the principle of competitiveness are specified by other scientists. So, T.T. Shamurzayev considers that "development of competitiveness of the beginnings in criminal legal proceedings of the Kyrgyz Republic is interfaced to a number of problems. These problems are caused not only by an appropriate legal regulation of the principle of implementation of legal proceedings on the basis of competitiveness and equality of the parties as a result of the wrong understanding of the legislator of essence of this principle (Shamurzayev, 2013).

It is testified about necessity of revision of a number of the institutes, interfering realization of this constitutional principle, it will demand a breaking of all structure of law enforcement agencies that today it is rather difficult to do.

Acceptance only of half-hearted measures that was provided on the Criminal Procedure Code new project of KR are: creation of judicial control; transfer of sanctioning to the court where it is supposed the prosecutor intermediate participation; involvement of new participants of the process for example the investigating magistrate; a mediator; the right for the appeal of actions of government bodies and officials, etc. As a result, all above mentioned can not change a situation in a root. Therefore, creation of competitive model of criminal procedure in ideal position isn't possible at the present stage owing to various factors.

DISCUSSION

Important problem is application of "measures of procedural coercion" in particular such measure as "detention". Thus, it should be remembered that today there are two types of detention: actual and procedural detention. In connection with it there are many questions, concerning drawing up the protocol on detention: it can be considered from the moment of his/her actual detention or from the moment of bringing of the detainee to the investigator also since what moment the defender has to participate that certainly, demands permission from legislative positions. There is no secret that exactly at this stage it is occurred an abuse of law enforcement officers, right up to application of tortures.

It was expressed about the same problem in Kazakhstan in general by the Kazakh scientist D. Kanafin who emphasizes that "procedure of arrest sanctioning still

doesn't conform to the standards of "Habeas Corpus" for the Criminal Procedure Code project of Kazakhstan" (Kanafin, 2013).

According to standards of the Criminal Procedure Code of the Kyrgyz Republic, it is guaranteed for all persons an access to judicial protection of their rights and freedoms at any stage of legal process. But the system of investigative actions, operating today, complicates protection of the rights of detainees at the given stage of proceeding.

As the studying of sources is shown, the big share of complaints on tortures is concerned to actions, taken during primary detention of suspects and within the first hours of detention. As human rights activists found that from among the made complaints >87% of cases of tortures are happened when detainees are in Ministries of Internal Affairs establishments: during this period a cruel treatment is generally observed from operational investigative services of Department of Internal Affairs. It is necessary to agree with the monitoring group which is carried out research in Kyrgyzstan according to the project by freedom house that "…practice of application of tortures by employees of Organized Criminal Activity (OCA) is widespread owing to preservation of outdated criteria of an assessment of efficiency of department of internal affairs activity considerable tendencies of judicial system to be based on confession". The given situation is complicated that according to the item 3 study 19 of law "about Operational Investigations (OI)", the officers of this department are accountable to "only direct head". In case the detained person makes the complaint about tortures or other form of cruel treatment for the consideration of the state officials at this stage such complaint can be investigated by the same investigative structures which investigate initial criminal or administrative case. That is for example, the prosecutor's office has the right to investigate malfeasances itself it is body responsible for an investigation result as well. The given fact is testified that the made complaint concerning officials about application from their party of illegal measures, today can be investigated by the same structures concerning of which there was made an accusation from the victims.

Analysis of standards of the existing Criminal Procedure Code of KR is shown that the detainee and the suspect are persons who have the same common procedural status therefore we agree that the protocol on his detention has to be formed from the moment of his actual detention and his bringing to the body of inquiry there will be given the chance to challenge the validity of his detention in court.

At the same time, we understand that our position in a certain degree will cause criticism from legal community also human rights organizations but we especially would like to pay attention to separate aspects.

It is no doubts that the situation, not only in Kyrgyzstan but also in the world in general is characterized by an aggravation of organized crime, increase of terrorism, emergence of ISIS, interpenetration of crime and officialdom thus the forecast of criminologists isn't consolatory. It is about absolute and relative a crime wave and in such circumstances, it is necessary to find adequate measures for counteraction.

It is necessary to remember that without ensuring the rights of the personality and its protection against criminal encroachments, all other rights and the principles risk becoming simple fiction. It is known that even realization of the principle as a presumption of innocence doesn't exclude the detention, sometimes before adjudgement by court. In this case, it is possible to say that thus the rights of accused, suspected are used not only for protection of legitimate interests but also owing to impossibility to avoid these persons from criminal liability for the act of commission. A number of the norms entered into the KR Criminal Procedure Code project really provide protection of the rights of the identity of detainees but rigid procedural terms of detention on such difficult cases as terrorism, connected with a transnational organized crime are unjustified.

It is possible to agree that on the Criminal Procedure Code new project of Kyrgyzstan there are given more opportunities in use of data of Operational Investigations (OI) but nevertheless this matter demands the permission.

In this regard in our opinion, the Russian scientist A.V. Chumakov is right that "until in our country the concept of criminal legal proceedings directed only on protection of human rights will work, the state won't resolve a control issue over crime. In particular, it concerns such most socially dangerous forms as terrorism, organized crime, corruption" (Chumakov, 2005a).

We consider reasonable that in the criminal procedure law it is necessary to provide differentiation of procedural terms on criminal cases, relating to category of especially dangerous crimes in particular it concerns terrorism and organized crime, narcobusiness, investigation of which represents special complexity.

It would be desirable to focus especially attention that the state policy of any country has to proceed from interests of national security taking into account national specifics and those values which are inherent in culture of this or that country.

The foreign researchers are considered that the legal system of the state is built from features which are inherent only for it (Chumakov, 2005b; Glenn, 2001).

It should be noted that the questions concerning concept of proofs their procedure of collecting, check and an assessment are opened.

The provision offered in the Criminal Procedure Code project of Kyrgyzstan about admission of proof inadmissible in case if suspect evidence, accused about commission of punishable act were given during the investigation of criminal case without the defender including a case of refusal from the defender also the defendant's testimony without defender which were given in court, raises doubts. In our opinion, it is surpassed even the constitutional idea about inherent inadmissibility.

Besides, it is necessary to fix legislatively basic provisions, according to actual data which it is necessary to recognize not admissible as proofs owing to certain circumstances in particular if it is connected with the cruel treatment of person who was committed of the investigation.

Thus, it is necessary to revise the maintenance of a number of norms which were concerned to prescription of medical evidence in court, examination.

As the independent monitoring which was carried out in our country, proves that these examinations in a less degree conform to the international standards of the investigative practice assuming possibility of use of the medical opinions as proof of cruel treatment.

The carried-out analysis allows to speak about some factors which in the whole set in a certain degree, create obstacles for carrying out of the effective examinations in the specified area. For example, an important circumstance, creating barrier for this purpose is functional and structural dependence of the health workers who are carried out given investigative actions from government bodies.

The forensic medical examination is generally carried out by the personnel of Republican bureau of a forensic medical examination at Ministry of Health. As E. Khalitova writes "as of 2011, over all country only one staff doctor is had for one Detention Centre (DC). As these establishments are subordinated by the Ministry of Internal Affairs their medical personnel have the same subordination".

Also, it is known that investigating authorities and employees of DC are the part of structure of the Ministry of Internal Affairs thus the situation even more becomes complicated when police officers are accused in commission of actions and malfeasance. Rather serious question is the legal regulation of activity of the defender, exactly providing of observance of the rights of person on criminal legal proceedings in many respects depends on efficiency of professional defense.

In the concept to the Criminal Procedure Code KR project there is specified that "it is necessary to lay down by the law that everyone accused (suspect), claimed about application to him a torture must be immediately examined by the doctor to get an opportunity to meet with the defender, the representative of human rights organization and the prosecutor; before inspection of the claim about torture application accused (suspect) has to be protected by the prosecutor from possible iteration of torture or other cruel in human or degrading types of treatment. Petitions and evidences of the person, made and given on his statement as a result of application to him the unlawful methods of investigation must be admitted inadmissible as proofs if there is a probability that tortures were really applied, even through it wasn't proved with absolute reliability". That also testifies to a significant role of the defender in the course of protection of the rights of accused (suspect) on use of illegal measures against him.

It is necessary to note that the point of view of Sh. A. Kerimbayeva, stated on this aspect, can't be disclaimed: "…the assuring by the bodies, conducting criminal procedure, the rights of the suspect, accused defendant condemned acquitted on protection in total with other principles of criminal procedure are guarantees of fair trial and adoption of the correct decision on case" (Kerimbayeva, 2013).

Important aspect is also protection of the rights of minors at administration of justice that assumes reforming of judicial system.

But at the same time as A.A. Koombayev fairly writes " … the most actual and difficult resolved tasks in criminal procedure there is remained the person security first of all, of the rights and legitimate interests of persons, victims of crimes protection of society against criminal encroachments". It is necessary to consider not only the rights of the suspects, accused, defendants but also security of persons-victims of commission of crimes.

CONCLUSION

Thus, on the basis of the aforesaid it is possible to draw the following conclusions. The analysis of various points of view of the leading procedural scientists of the

CIS countries concerning realization of competitiveness in criminal legal proceedings at the present stage allows to state the following positions: first, the principle of competitiveness of criminal legal proceedings is almost disseminated in all Post-Soviet states and in our opinion, the following main circumstances interfere for its full realization.

Criminal legal proceedings in particular in the CIS countries are more characterized as mixed type in particular at a stage of pre-judicial production where search nature of criminal procedure with competitiveness elements prevails and the constitutional principle of competitiveness and equality of the parties in fact assumes change of nature of criminal procedure activity and the essence of the maintenance of the criminal procedure relations so there has to be changed a form of criminal legal proceedings, namely competitive.

It is difficult to speak about action of this principle so far it is modern pre-judicial production the investigation authorities belong to the party of charge. Therefore, for realization of the principle of competitiveness there would be correct a creation of separate department and introduction to criminal legal proceedings of institute of investigators. The offer by developers of the Criminal Procedure Code project of Kyrgyzstan on introduction of the investigative judge doesn't correspond to his mission in full sense as his main function will be consisted only in implementation of one of function of judicial control at a stage of pre-judicial production, namely-sanctions on production of procedural actions where constitutional rights of citizens separate measures of restraint are affected. Therefore, there would be expedient to call his as "a judge on pre-judicial production" here, it is necessary to include in his power the conclusion on procedural agreements on consideration of complaints from participants of process at a pre-judicial stage.

Actually competitiveness of the parties of charge and protection according to the Criminal Procedure Code of a number of the countries is observed only in stages of judicial proceedings the materials for a variety of reasons, provided as proofs by the parties aren't equivalent as today there are problems in a regulation of powers of the lawyer (defender); the right to make "parallel investigation" for the purpose of formation of "the lawyer file" is not provided in full degree; the obtained materials aren't proofs as they are collected outside of the procedural form. Today there is no corresponding judicial control and also the reform of jury trial doesn't finish which are provided by the existing Criminal Procedure Code of Kyrgyzstan.

Secondly, realizing the "peculiar" concept of competitiveness of criminal procedure, provided by the KR Criminal Procedure Code project where there is created a system at which each of participants of process will defend only their own interests and won't go over the line of the tasks, set up by the legislation. There is necessary to consider the question about nonadmission of obstacles to a comprehensive protection of the state interests and society including to protection of the rights of the personality.

It is necessary to revise the content of norms, concerning to observance of ensuring human rights according to the Constitution of the Kyrgyz Republic, namely in part on the obstacle of the violence application, tortures, threats and other illegal measures.

It is also necessary to stop practice of abuse of provisions of the criminal procedure legislation when the charge is based only on confession accused, often representing of the false confession on the testimonies of another accused (or in certain cases witnesses). In standards of the Criminal Procedure Code it is necessary to provide an obligatory application of a sound recording and video during carrying out of interrogation.

At the same time in our opinion, along with the planned acceptance of a number of the positive norms in the Criminal Procedure Code project of KR concerning human rights it should be remembered that the carried out policy of the state shouldn't be reduced to uncomplaining perception of all European standards. It is necessary to proceed from positions that the developed Criminal Procedure Code project of KR must n't put the constitutional priorities of the suspect, accused defendant above the constitutional priorities of the persons, suffered from other criminal actions and also it is necessary to recognize that absolute and universal values in modern society aren't present can't be in principle.

Therefore, it should be remembered that the power is strong at effective criminal legal proceedings by means of which it is able to protect the citizens from criminal offences from offenders.

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