ISTOTA WŁAŚCIWEGO OKREŚLENIA STRUKTURY NORM PRAWA KARNEGO PROCESOWEGO W CELU ICH REALIZACJI

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W artykule przeanalizowano zagadnienie dotyczące strukturyzacji norm prawa karnego procesowego w aspekcie ich realizacji przez uczestników postępowania karnego. Rozpatrzono podejście teoretyczne, co do liczebności i jakości elementów strukturalnych norm prawa procesowego. Podtrzymywane jest stanowisko, że struktura norm prawa karnego procesowego składa się z trzech elementów. Zaproponowano, aby element normy prawa "zaprzeczenie dyspozycji", obecność którego została uzasadniona przez J. O. Motowilkowera, określić jako "ignorancja dyspozycji". Wyciągnięto wnioski, co do braku w obowiązującym karnym ustawodawstwie procesowym sankcji zachęcających.

Słowa kluczowe: norma prawa karnego procesowego; hipoteza normy prawa; dyspozycja normy prawa; sankcja normy prawa; realizacja norm.

THE VALUE OF THE CORRECT DEFINITION OF THE STRUCTURE OF THE CRIMINAL PROCEDURE LAW TO USE THEM

The article analyzed the question of the structuring of the criminal procedure standards of law in the aspect of their realization by the participants of criminal proceedings.We investigated the theoretical position regarding the quantity and quality of the structural elements of criminal procedure standards of law.It was supported position on the three-element structure of criminal procedure standards of law.The author proposed to call "the disposition of ignoring" the element of the standard of law as a "denial of disposition," whose presence has been proven by J.A. Motovilovker.It was concluded that there is no the incentive sanctions in the current Criminal Procedure Act.Keywords: the criminal procedure standard of law; hypothesis of standard of the law; the disposition of standard of the law; the sanction of standard of the law; implementation of standards of the law.

Formulation of scientific problem.Recently, the parties and the court, applying the standards of criminal procedure law, have to "look" for its provision in various articles of the Criminal Procedure Act.For example, it was stated in the decision of the Supreme Court of Ukraine on 23 June 2016 that the prosecutor believes that it was wrong using of the standard "of its Code", which "in paragraph 6 of Article 425 (hypothesis), part four of Article 36 (disposition) part three of article 429 CCP (sanction) relative to the court of cassation appeal of court decisions by prosecutor, although the court of cassation applied the only sanction of the rule contained in Article 429 CCP in the challenged judgment "[10]. That standard "of the CPC» is dispersed in three different articles, one of which (Art. 36) is placed in the "general part" of CPC of Ukraine - Section 1 «General provisions".

The need for practitioners to study questions about the structure of the criminal procedure standards has become topical after the legislature allowed to review the judgments of the Supreme Court of Ukraine as the unequal application of the court of cassation of these standards.Law of Ukraine on February 12, 2015 "On the right to a fair trial" [4] added article 445 CPC new grounds for judicial review by the Supreme Court of Ukraine, namely: "the different application of the same standards provided by this Code by the Court of cassation, which led to the adoption of different content of judicial decisions". This provision of CPC came into effect March 29, 2015.

Analysis of recent research. The Structuring of the law were the subjects of investigation as in the general theory of law (Alekseyev S.S., M.I. Baytyn, I.Y. Dyuryahin, E.G. Lukyanov, A.V.Malko, Muradyan E.M., Nedbaylo P.E., V.S. Nersyesyants, V.N. Protasov, P.N. Rabinovich,

T.N. Radko, Y.A. Tikhomirov et al.) and in the science of criminal procedure (Y.M. Groshev, E.V. Kaplin, J.A.Motovilovker, M.A. Pohoretskyy, V.D.Sorokin, L.D.Udalova, O.Shilo et al.).However, the problem of properly determination of the structure of criminal procedure standard is not considered in the aspect of their implementation as in the science of criminal proceedings, and in the general theory of law.

Formulating of Article tasks. For the study, carried out in this article were set the following tasks: to clarify the basic views on the structure of the standards in general and of the criminal procedural standard in particular; determine whether the correct definition of the structure of criminal procedure standard affects correct using of them by participants of criminal proceedings.

Presenting main material. Without analysis of the correct definition of structural parts of the criminal procedure standard by the prosecutors and the courts, we should note the correct application of the definition is important not only to litigation, but also to ensure the right of person for revision of a judgment by the Supreme Court of Ukraine, and by the subordinate courts as well. Given the importance of this issue, its theoretical research and granting appropriate recommendations to practitioners who use the criminal procedural law should facilitate the development of similar approaches of structuring of criminal procedural standards, and therefore the equal using of them by all subjects who have the rights to do like this.

The importance of the matter is also due to the fact the procedural standard almost never matches with a structural part of the article or articles of the law. And so almost always in criminal activities appear the questions about the content of procedural standard and in view of the above circumstances - if another part of procedural law is the standard of law, or only one of its structural elements. In addition, if the professional participants of criminal proceedings (judges, prosecutors, lawyers, investigators, etc.) with the appropriate education and experience in the legal activities are able to determine the structure of the standard, the non-professional participants of the proceedings (victims, suspects and accused persons, witnesses, etc.) have not always this opportunity. So they have a need to apply to the lawyers or the self- study of the theory of law, which under stringent deadlines of criminal proceedings is not always effective. But in any case, the availability of judicial decisions, which defined the structure of procedural standards and placed in the Unified State Register of Court Decisions, promotes that thenonprofessional members, without special training, can get an idea of the content and structure of some of the criminal procedure standards.

In view of the above, there is a need to clarify issues relating to determining the structure of criminal procedure standards. Draws attention to the fact that thesis, defended by author by 2007 [3], the reoffered question we have already discussed. But after ten years, for which there was a personal transformation of scientific views, gained some experience in scientific activities, cardinally reformed criminal procedural law. And the most important thing is the issue of structures of the procedure standard of law previously considered in a "static". The subject of this article needs to consider these issues in the dynamics, in action. We see a significant difference between the consideration of the structure of procedural standard and a consideration of the question of meaning of proper definition of the structure of the structure for their realization. However, on the other hand, it is not possible to clarify the issues and to realize them in criminal proceedings without consideration of general questions about the structure of this kind of standards.

It should immediately be noted the issue of determining of the structure of criminal procedure standard of law completely and definitely were not resolved in the science of criminal proceedings or in the general theory of law. Therefore, presenting our views on definite issues we have to apply to the scientific works both in criminal proceedings and on the general theory of law.

There is an urgent issue statements now of A. Piholkin "... the structure of the legal standard is a logical formula, it allows to deepen the knowledge of law in general and specific legal standards, helps to better understand the objectives of regulation, promotes razor sharp and clear exposition of the standards ... helps the performers to properly understand the meaning and content of the standards, properly and correctly realize them to the specific facts of life ... " [9; p.169].

Some scientists believe it is not appropriate to be limited by the three-term circuit of structure of procedural standard (i.e. the standard has the required three structural elements:

hypothesis, dispositions and sanctions) and offer two-term structure of public standard, which is normally available only two elements of standards items and there are the disposition and hypothesis or the hypotheses and sanctions. S.S. Alekseev supported the presence of two-elemental structure of the standard of law under certain conditions. Based on the fact that any standard of law (including criminal procedure – S.K.) contains in itself the intellectual and volitional moment, the author states: "If you analyze the standard of law in the intellectual context, that all the required material can be presented a three-term structure of the rules, that is composed of a hypothesis, dispositions and sanctions, but if you analyze the law in volitional context, it must be concluded that the standard of law have only two structural elements" [1; p.323]. S.S. Alekseev offers to call this kind of standards the standards-prescriptions[1; p.323].

There is the position in the general theory of law according to which the standard of law (standard of conduct), consists essentially of one element – the disposition. The last one is the basis of standard which "formulates the same rule of conduct" [9; p.174].

Also in the legal literature suggested the position according to which each element of the structure of procedural standard can be "floating", that is, in some of cases serves as disposition, others - hypotheses and even sanctions. Yes, E.G. Lukyanova notes the disposition can evolve depending on its relationship with others, the same as it, dispositions. In one case it serves as a disposition, in the second case it is a hypothesis, a third may be sanction [7; p.178].

In the theory of law were expressed and substantiated proposals to increase the number of structural elements of the standard of law. Yes, J.A. Motovilovker pointed out that the logical relationship of hypothesis, dispositions and sanctions do not constitute a structural unity [8; p.45]. He claimed no hypothesis or dispositions under the logic rules of law of directly sanction are unrelated: a hypothesis - because it is a condition that causes the effect of the disposition, the disposition - because it is a legal consequence, which completes the regulatory requirement. Thus, sanction, together with the hypothesis and disposition has no logical basis. The author proposed to introduce one morenormativeelement that will be able to overcome the gap between disposition and sanction and logically stipulate it and called "the denial of disposition" [8; p.45]. However, this proposal has not received support among scientists, lawyers, despite the fact that it has a grain of truth to the theory and practice of procedural activities, i.e. activities for the realization of criminal procedure standard of law.

Despite all the above said, we dare to suggest that the acceptance into the sectoral proceedings sciences of "the denial of disposition" as the structural element of the procedure standard of law would mean essentially "the denial of standard of conduct". The word "object" is used in two ways: 1) do not agree with someone, something to express the opposite opinion or evidence against something; 2) does not recognize the existence, value, and feasibility of anything [2; p. 411-412].

Therefore, the use of the word "objection" in the analyzed term is not entirely successful. Because the disposition (or hypothesis) of the criminal procedure law is not denying, but ignoring and not performing by the non-fulfilment of the dictates of law. Therefore, an element of the criminal procedure standard of law that binds the disposition and hypothesis into the holistic logical structure, would like to call "the ignoring of disposition (hypothesis)". The author realizes the offered word by her in that sense can be replaced by a more appropriate word according to the function that it performs in the considered term. It is not important the accuracy ofterm to achieve the objectives ofour research. In order to correct implementation of criminal procedural law the subject of its using should be aware of the existence of such elements as "an ignoring of disposition (hypothesis)." This kind of knowledge is particularly important for the subjects who have the right to use the standard of law in the form of application. Because only this subjects have the authority to use the sanctions for the ignoring of dispositions or hypotheses.

The legislator formulates hypotheses and disposition to set the rules of conduct, which is desirable for the purposes of criminal proceedings. But it establishes the sanctions as well to achieve its goals. The addition to the structure of standard of criminal procedural law the element of undesirable behavior would annul its destination. But "the ignoring disposition (hypothesis)" like "the negative element" of the standard of criminal procedural law, which entails the use of sanctions, has the right to be included in to the standards.

Thus, in order to obtain evidence (and in order to achieve the objectives of proceedings) the witness may be summoned to the prosecutor, the investigating judge or the court (the hypothesis of normal). The summoned witness must arrive on a call (paragraph 1 of Part 2 of

Article 66 of the CPC) and give truthful testimony (paragraph 2 of Part 2 of Article 66 of the CPC) (disposition). If the witness will act in accordance with the requirements set out in disposition, he will not be pulled to any sanctions. If he ignores them, then the negative consequences (penalties) can come. These negative effects can be provided in the norms of various branches of law. But its relationship with the structural elements of the standard of criminal procedure law, which regulates the calling of witnesses, is indisputable. A sanction for not appearing without valid reason or notice of the reasons for non-arrival of a witness who was called in the established order of CPC (including the onhand evidence of receipt of summons or the dissemination of its content by other means) are provided for in Article 139 of the CCP. Also the legislator has provided a legal liability (sanction) for the ignoring of examining disposition by the others who prevents an appearance of a witness in the court, the agency of pre-trial investigation (Art. 386 CC).

In our view, the focus should be no objection on the disposition of procedural rules, and its irregular, wrong using by the subject to which it is addressed. The actions of incorrect implementations of the disposition of standard of the criminal procedural law in the form under consideration become into the disposition of the standard of criminal law. The fact is that in this case the standard of criminal law does not define in an advance of behavior of the subject (e.g. a witness), and "react" to the consequences of a breach of the disposition of the criminal procedural law, which is typical for law rules. By the way, it is not contrary to one of elements of the circuit structuring of standard of law («if - then - otherwise"), namely "otherwise".

Based on the above it can be concluded that "the ignoring of disposition of the standard" are part of the law, but this element is not equal to the value of traditional elements. Otherwise, it must be admitted that there are two contradictory in content and almost equal in the value of the "disposition" and "ignoring (negation" of the disposition ") in the structure of criminal procedure standard. Also, if you go on, it can be found a structural element as "the negation (ignoring) of hypothesis" in the standard as well.

Moreover, the incentive regarded as a facultative structural element of the standard of law in the general theory of law. Thus, P. Rabinovich, in addition to the three traditional 'basic' elements of the standard distinguishes an optional element the incentive as well. In his opinion, it is a part of the standard, which indicates the certain values, goods. The subject can get them in the case of voluntary discharge of disposition [11; p.152].

It stated in the literature on criminal proceedings meet the requirements of the standard of criminal procedure law also ensured by the incentives, along with other public means like a constraint and a sanction [6; p.46].

There is also mentioned the incentives of relationships that are realized in the criminal proceedings in the general theory of law and the special (criminal procedure) literature as well.

In legal science such means sometimes are called like the incentives (positive) sanctions, which are used for the purpose of encouraging participation method of the efficiency regulation. O.M. Kiseleva, for example, holds the position according to which the incentive sanction is the logical result of termination of the same methods and means of ensuring legal regulations in the life [5; p.12].

Because of this approaching to the understanding of sanctions of the law, the question comes if there is the so-called "incentive sanctions" in the criminal procedural law. It is impossible to find such sanctions in the current CPC. During 1960 the CCP it was considered thatthe incentive criminal procedural sanction was presented in Ch. 3. Art. 23-2, according to which "the court may inform the company, institution or organization about the shown high national consciousness, courage by the person in the performance of public duties, which contributed to the demise or detection of crime by the separate decision (ruling)". But can we consider «the bringing to the knowledge» like the incentive sanction of criminal procedural law? To properly answer this question we should take into account the following.

The sanction of any standard of the law, including the standards of criminal procedure law is adopted to ensure the realization of the provisions which are set in the disposition, and sometimes in the hypothesis as well. So if the «the bringing to the knowledge» is regarded as a sanction, there should be a disposition and / or hypothesis, the using of which it would provide. The appropriate disposition (hypothesis) legal norms would have to be contained in Ch. 3. Art. 23-2 CPC 1960. But this rule is not of legal duty, it is the duty of the public, which gives grounds to assert a disposition and a hypothesis that would be consistent with the rule of «the bringing to

the knowledge» of the enterprises, institutions and organizations on the using of national public debt are not available. But this rule is not of legal duty, it is the duty of the public, which gives grounds to assert a disposition and a hypothesis that would be consistent with the rule of «the bringing to the knowledge» of the enterprises, institutions and organizations on the using of national public debt are not available. So the analyzed provisions should not be seen as a sanction of criminal procedure standard, but as a disposition of independent standard which is governing the corresponding right of the court. It is obvious that the said fact has become one of the grounds for legislators for the refusal presenting of encouraging sanctions of CPC 2012. The need to review the promotional product which existed in the CPC in 1960, due to the fact that in any moment the question may arise to restore it in the current CCP.

Described above the point of view of structuring of the standard of criminal procedural law (and the standard of law in general) ("hypothesis" - "ignoring (objections) of hypothesis," disposition "-" ignoring (objections) of disposition "," sanction "-" encouraging (positive sanction) sanction ") from a logical point of view is unacceptable. Because then the legal science in general and the criminal procedural science in particular will have to make the questions not only about the elements of the rules, but its opposite element. Thus, the standard of procedural law consists of three elements - a hypothesis, dispositions and sanctions, but other phenomenon described above should be considered as elements that bind them together - the standard of law.

It is clear that some of the criminal procedure law cannot be arranged in three parts, and therefore they do not have those elements that bind them together.

Among these standard are standards- principles, standard- definitions, standard- tasks (rules, goals), operational standards which the legal theory calls an atypical standards.

Conclusions. Based on the above we can draw the following conclusions: the criminal procedure standard of law consists of three parts: the hypothesis, dispositions and sanctions; " the ignoring (objections) of disposition" is part of the standard of law, but by value it cannot be equated to its traditional elements; the rejection of the traditional structure of procedural standards of law may mislead the subject of realization of these standards in determining the relationships between different parts of the standards of law set out in various places of legislation and, therefore, to the poor quality of realization of law.

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