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PERSPEKTYWY ROZWOJU PRAWA KARNEGO PROCESOWEGO W UKRAINIE JAKO ŹRÓDŁA PRAWA

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Adnotacja. W artykule omówiono prawo jako źródło prawa karnego procesowego w kontekście perspektyw jego rozwoju w Ukrainie. Prawo karne procesowe jest porównywane z Kodeksem Postępowania Karnego i na podstawie historycznej wycieczki i doświadczeń zagranicznych określa się jego miejsce w systemie źródeł prawa postępowania karnego. Kodeks Postępowania Karnego jest rozumiany jako wewnętrzna forma prawa karnego procesowego, zapewniająca regulację prawną postępowania karnego w związku z wykroczeniem karnym, realizację w nim praw i obowiązków podmiotów postępowania karnego. Przeprowadzone monitorowanie problematycznych zagadnień prawa karnego procesowego, wskazanych w strategicznych dokumentach państwowych omawianych przez naukowców, praktyków i społeczeństwo, pozwoliło autorowi ukształtować wizję obiecujących kierunków jego doskonalenia. Wymieniono kryteria monitorowania kolizji i luk legislacyjnych w zakresie postępowania karnego oraz określania perspektyw rozwoju prawa karnego procesowego.

Słowa kluczowe: prawo karne procesowe, źródło, Kodeks Postępowania Karnego, postępowanie karne, kolizje, luki, perspektywy.

PROSPECTS FOR THE DEVELOPMENT OF CRIMINAL PROCEDURE LAW IN UKRAINE AS A SOURCE OF LAW

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Abstract. The article considers the law as a source of Criminal procedure law in the context of the prospects for its development in Ukraine. The Criminal procedure law is compared with the Criminal Procedure Code and, based on historical excursion and foreign experience, its place in the system of sources of Criminal procedure law is determined. The Criminal Procedure Code is understood as an internal form of the Criminal procedure law, which provides legal regulation of criminal proceedings caused by a criminal offense, the implementation in it of the rights and obligations of subjects of criminal procedural legal relations. The monitoring of problematic issues of the Criminal procedure law, which are indicated in strategic state documents, discussed by scientists, practitioners and the public, allowed the author to form a vision of promising areas for its improvement. The criteria for monitoring collisions and blanks in the legislative support of Criminal Procedural relations and outlining the prospects for the development of the Criminal Procedural Law are named.

Key words: Criminal procedure law, sources, Criminal Procedure Code, criminal proceedings, collisions, blanks, prospects.

ПЕРСПЕКТИВИ РОЗВИТКУ КРИМІНАЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНУ В УКРАЇНІ ЯК ДЖЕРЕЛА ПРАВА

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Анотація. У статті розглянуто закон як джерело кримінального процесуального права у контексті перспектив його розвитку в Україні. Кримінальний процесуальний закон порівнюється із Кримінальним процесуальним кодексом і на підставі історичного екскурсу та зарубіжного досвіду визначається його місце у системі джерел

кримінального процесуального права. Кримінальний процесуальний кодекс розуміється як внутрішня форма кримінального процесуального закону, що забезпечує правове регулювання кримінального провадження, зумовленого кримінальним правопорушенням, реалізацію у ньому прав і обов'язків суб'єктів кримінальних процесуальних правовідносин. Проведений моніторинг проблемних питань кримінального процесуального закону, що вказуються у стратегічних державних документах, обговорюються вченими, практиками і громадськістю, дозволив автору сформувати бачення перспективних напрямів його удосконалення. Названо критерії моніторингу колізій та прогалин законодавчого забезпечення кримінальних процесуальних відносин і окреслення перспектив розвитку кримінального процесуального закону.

Ключові слова: кримінальний процесуальний закон, джерела, Кримінальний процесуальний кодекс, кримінальне провадження, колізії, прогалини, перспективи.

Introduction. The law in the system of Criminal Procedure legislation is designed to define the tasks of criminal proceedings, ensure their implementation, regulate the procedure for criminal proceedings and proper legal procedure, while combining state policy in the fight against crime and respect for the rights and freedoms of individuals. As a form of expression of criminal procedural legal relations, the law acts as a source of Criminal Procedural Law, which is the basis, the basis for law enforcement in the criminal procedural sphere.

Being a dynamic category, the law evolves with the development of public relations and requires constant legal monitoring of its quality and effectiveness. And although the norms of the domestic code of Criminal Procedure regarding criminal procedure legislation and the operation of the code in space, time, and the circle of persons differ in a certain constancy, and in the national legal system the concept of law is perceived at the axiomatic level, the content of the categories «Criminal procedure law», «Criminal Procedure legislation», their relationship with other sources, cause scientific discussion.

Despite the fact that the sources of Criminal procedure law and Criminal Procedure legislation, as complex objects, are defined by separate areas of research in the field of criminal procedure (according to the specialty passport), they do not lend themselves to active scientific searches (the sources were studied in 2004 (Дроздов, 2004)). So, this area of research is not distinguished by a comprehensive development. The state of scientific development of the chosen research subject indicates that there are no modernized complex monographic works devoted to the law as a source of Criminal Procedural Law; sectoral influence on Criminal Procedure legislation of other criminal procedural categories and concepts (legal relations, structure and system of process, subject and method of Legal Regulation) and ambiguity of operation of certain term systems; the presence of an interdisciplinary nature of a significant number of concepts, categories and institutions in the field of sources of law; election as an object of study of international treaties, judicial precedents, the validity of the Criminal procedure law, defects in the Criminal Procedure legislation and gaps in Criminal procedure law, the evolution of the Criminal procedure law, the conceptual apparatus of Criminal procedure law, the analogy of the Criminal procedure law and other related categories and phenomena-to the update of the code of Criminal Procedure of Ukraine (Кримінальний процесуальний кодекс України, 2012).

It is worth noting that for the Ukrainian parliament, as a legislative body, the regulation of issues related to regulatory legal acts has been identified as one of the priorities of legislative activity in recent years.

Consequently, the purpose of the publication is to determine the prospects for the development of the Criminal procedure law in Ukraine as a source of Criminal procedure law.

The main part. Instability of Criminal Procedure legislation, active lawmaking, in the absence of a concept of Criminal procedure law, existing gaps and conflicts indicate the expediency of using a systematic method in the study of issues related to Criminal procedure law, finding out the effectiveness of its norms and areas of improvement. The relevance of the chosen subject of research is also based on the solution of problems to clarify: the expediency of updating theoretical and methodological approaches to the content of the category «Criminal procedure law», determining its legal nature and place in the system of Criminal Procedure legislation, the formation of Criminal Procedure norms, generalization of problematic issues and ways to solve them.

Results and their discussion. The word «law» is used to refer to both legal (legal) norms and necessary connections in nature and society. «In theory and practice, the term «law» procedure law criminal is used to define any rule that is binding on everyone and as a normative legal act of the highest state authority that has the highest legal force», the researchers note (Омельченко, 2013: 32). The word «law» developed through a complex semantic structure. After the adoption of Christianity, it is widely used in the Church language. The figurative use of this word turns it into a polysemantic unit, between the meanings of which a metonymic connection is established. In the modern language, the word «law» as the main one has a legal meaning – a normative act of the highest state authority, adopted in accordance with the established procedure, is endowed with the highest legal force (Сичинава, 2013).

The national legal system at the axiomatic level perceives the law as a normative legal act adopted by the legislative power of the state, which has the highest legal force. Research of a versatile understanding of the concepts of «form», «source», «Public Relations (Legal relations)» (Кримінальний процесуальний кодекс України, 2012; Іщенко, 2002; Мамка, 2019), established that the law, having belonging to the sources of law, being their variety, is a form of fixing (a way of expressing) the order of regulation of public relations arising in a particular sphere.

Researchers suggest that the Criminal procedure law should be understood as «a set of normative legal acts that have the legal force of law, contain criminal procedure norms and regulate public relations in the sphere of criminal proceedings, that is, pre-trial investigation and judicial proceedings, procedural actions in connection with the commission of an act provided for by the law of Ukraine on criminal liability» (Щериця, 2013: 5). With this

approach, the Criminal procedure law, in our opinion, plays the role of Criminal Procedure legislation, and therefore, there is a substitution of concepts.

The recognition of the Criminal procedure law as the sole source of Criminal procedure law seems erroneous, given the content of the term «Criminal Procedure legislation». The consistency and hierarchy of Criminal Procedure legislation determine the place of the law among the sources of Criminal procedure law. Taking into account the possible classification of laws in the system of Criminal Procedure legislation, the presence of acts that have the force of law, it is advisable to highlight the use of the term «Criminal procedure law», which, in our opinion, is identified with the Criminal Procedure Code. This approach is based on the normative legal definition of the composition of criminal procedural legislation, the content of the categories «criminal proceedings», «criminal procedural legal relations», «criminal procedural activity», «criminal procedural sphere».

The Criminal procedure law is proposed to be understood as a codified legislative act regulating the procedure for conducting criminal proceedings and achieving their tasks. The Criminal procedure law is recognized as a source of legal regulation of criminal proceedings, and the sources of Criminal procedure law (including Criminal Procedure legislation) form its theoretical foundations, principles, and procedural institutions.

The role of the law in the system of sources of Criminal Procedural Law is due to the fact that the law carries a complex content load and is a key element in clarifying the legal nature of many intersectoral processes, legal phenomena, phenomena, categories of the theory of procedural law.

A historical excursion to the development of the Criminal procedure law allows us to state that the first legislative acts in the field of criminal proceedings had a complex, intersectoral, material and procedural character and features of codification, were not complicated, in particular, one-, two-element structure (articles (articles), united by sections/chapters), the presence of a certain systematization of the first procedural institutions, the consolidation of the basic principles of judicial proceedings. Most legal monuments, despite their different names (code, charter, Universal, Charter, etc.), can be given the status of a code. The source of criminal proceedings has always been the law. Despite the repressiveness of the Soviet system, which on the one hand introduced sectoral codification, and on the other, absorbed democratic values in judicial proceedings and the judicial system, there was the emergence of important procedural institutions and categories, the analysis of the effectiveness of which further contributed to the emergence of new thinking and a new paradigm of Criminal procedure law, allowed the legislator to adopt or reject certain rules for conducting criminal proceedings that would take into account human rights and freedoms as much as possible.

It should be noted that the current code of Criminal Procedure of Ukraine takes into account European values, international standards of criminal proceedings, rules of Norm design, systematically defines the procedure for criminal proceedings in the state and is an integral legislative act that is favorable for a unified law enforcement practice. The code regulates the source base of criminal procedure, improves the rules of operation of Criminal Procedure in time, space and by the circle of persons.

Foreign experience in the legislative understanding of the law as a source of Criminal Procedural Law is also interesting. In particular, the study of relevant normative legal acts of foreign countries of the continental legal system (France, Germany, Switzerland, Spain, Sweden, Denmark, Finland, Bulgaria, Czech Republic, Poland, Albania, post-Soviet states) was conducted (Бугайчук, 2019) it is established that despite the common historical roots, the same heritage and type (model) of the criminal process, all countries are moving towards the application of international standards, new procedural institutions (to one degree or another), but taking into account their national identity and specific norm-design approaches.

A common feature of all countries is the codification of the criminal process (except for the Scandinavian countries) and the recognition of the law as the main source of Criminal procedure law, as well as the consolidation of the procedure for criminal proceedings by its stages. Differences, taking into account the source base, are manifested in different vectors: from the rules of standard design techniques, methods of presenting legislative provisions to the regulation of identical procedural institutions, individual proceedings. The code of Criminal Procedure of European countries distinguishes stability in combination with formalism, casuistry and the presence of indefinite norms; lack of explanatory terms; lack of consolidation of the system of sources of Criminal Procedure. EU countries are characterized by belonging to the sources of Criminal Procedure of national legislation, international law and EU law – in the absence of a direct indication of this in the code of Criminal Procedure. There is a tendency to recognize judicial precedent as a source of Criminal Procedural Law.

The genesis of the domestic legal system and foreign experience confirm that it is the codification of the procedure for criminal proceedings that has an important socio-political, technical, legal, implementation and security significance. Consistency and optimization of due process, as one of the tasks of criminal proceedings, depends on a single (stage-by-stage) Legal Regulation, which is difficult to provide with a set of laws or a blank way of presenting legal norms.

The Criminal Procedure Code is defined as an internal form of the Criminal procedure law, which provides legal regulation of criminal proceedings caused by a criminal offense, the implementation in it of the rights and obligations of subjects of criminal procedural legal relations. It has common features of procedural codes, but the code: it is not stable; it has a high degree of novelization in various aspects of criminal procedural legal relations; establishes the principle of uniformity in the application of intersectoral concepts, categories and institutions, procedures and rules; is accessible and socially requested; contains a number of rules on which it is necessary to provide explanations by higher courts and law enforcement agencies; has provisions recognized as unconstitutional. The

code of Criminal Procedure is regarded as a logically constructed legislative act, according to the formula – from general to specific. Structurally, it is advisable to distinguish its general, special and special parts.

The current code of Criminal Procedure of Ukraine is legally endowed with such features as: (A) priority in the system of Criminal Procedure legislation; (B) basicity in relation to other normative legal acts within the field of Criminal procedure law; (C) exclusivity in regulating the procedure for conducting criminal proceedings at all stages. The subject of regulation of the code is the procedure for criminal proceedings, using mandatory, dispositive and adversarial methods of Legal Regulation.

Conclusions. Summing up, it should be noted that the Criminal procedure law, which regulates the procedure for criminal proceedings, is called a type of legislative acts, a source of Criminal procedure law. The term «Criminal procedure law» should not have a broad (set of legislative and other acts), but a narrow (Criminal Procedure Code) content. Other laws and acts that have the force of laws, despite belonging to the system of Criminal Procedure legislation, are not covered by the term «Criminal procedure law». These laws are related to the criminal procedural sphere, affect criminal procedural legal relations and are elements of the system of criminal procedural legislation. In order to avoid ambiguity in understanding the relevant criminal procedural categories, it is necessary to distinguish between the sources of Criminal Procedural Law and the source of legal regulation of criminal proceedings. Being the only source of legal regulation of the procedure for criminal proceedings, the Criminal procedure law (CPL) establishes the procedural form of its implementation. Categories related to the law: (1) relate to its application (interpretation, hermeneutics, action, analogy); (2) affect its content (defects, gaps, collisions, alogisms); (3) is a way of creation (rule-making technique, definitions, conceptual apparatus, laws of logic); (4) reflect its essence as an object of knowledge (signs, types).

In the context of the subject under study, the dynamic development of legislative techniques for resolving issues of criminal procedural legislation is noted. Improving the Criminal procedure law in the direction of optimizing criminal proceedings and ensuring the rights, freedoms and legitimate interests of its subjects, ensuring a balance between the interests of the state and the individual occupies an important place in the reform of priority areas of public life.

Among the priorities and prospects of the domestic Criminal procedure law are: conceptual and terminological coordination, practical mechanisms for ensuring the implementation of the principles of criminal proceedings, consideration of the case by a jury, the procedure for reviewing sentences for which persons were convicted without a proper evidence base and compensation for damage caused, issues related to the reform of the bar, forensic expert activities, updating methods of combating crime, the use of electronic Justice.

In the application of the Criminal procedure law, its operation (reverse action, analogy), there are diametrically opposite points in scientific circles: from unconditional perception to categorical denial. In this context, legal certainty requires the application of an analogy in the Criminal Procedure Code of Ukraine, as well as a theoretical and methodological update of perception in the industry sense (in particular, the spread of action) – the institution of the law's operation by a circle of persons. The starting point for improving the Criminal procedure law and long-term development is the systematic identification of gaps and conflicts in the legal regulation of criminal proceedings and comprehensive rule-making.

Updating the Criminal procedure law should be the result of integrating the efforts of scientists, practitioners and lawmakers. In our opinion, the criteria for monitoring conflicts and gaps in the legislative support of Criminal Procedural relations and determining the prospects for the development of Criminal Procedural Law should be called: (1) the content of conflicts and gaps (scientific and doctrinal approach to the need to improve a particular norm, institution, stage, form of criminal proceedings); (2) institutional sources: based on the results of parliamentary control (plenary sessions, parliamentary, committee hearings), based on the results of law enforcement activities of law enforcement, judicial bodies, human rights organizations, based on judicial practice (generalizations, conclusions, recommendations) and positions of higher judicial institutions (ECHR, Constitutional Court, Supreme Court), reasoned views of scientists and the Public; (3) reflection of proposals to eliminate conflicts and gaps in draft legislative acts.

The adoption of the state strategy on the basic principles of Criminal Procedure policy and the development of the concept of Criminal procedure law on its basis will contribute to strengthening the relationship between legal Science and lawmaking.

Список використаних джерел:

1. Барабаш Т.М., Левицька Л.В. Законотворчі реалії реформування у сфері кримінальної відповідальності та кримінального провадження: сучасний стан та перспективи. *Наукові записки Інституту законодавства Верховної Ради України.* 2018. № 4. С. 57–63.
2. Бугайчук А.А. Закон як джерело кримінального процесуального права держав пострадянського простору. *Национальный юридический журнал.* 2019. № 2(36). С. 103–108.
3. Дроздов О.М. Джерела кримінально-процесуального права: автореф. дис. ... канд. юрид. наук. Харків, 2004. 24 с.
4. Іщенко В.М. Джерела (форми) кримінально-процесуального права. *Право і безпека*. 2002. № 3. С. 42–45.
5. Кримінальний процесуальний кодекс України від 13.04.2012 № 4651-VI
6. Мамка Г.М. Засади кримінального провадження: наукові та правові основи: дис. … докт. юрид. наук. Київ, 2019. 478 с.

7. Омельченко О.Є. Джерела, які визначають порядок кримінального провадження. *Юридичний часопис Національної академії внутрішніх справ*. 2013. № 2. С. 32–37.
8. Сичинава Н.Г. Слова «Закон» в древности и сегодня. *Сборник материалов конференции «Язык и право: актуальные проблемы взаимодействия».* Грузия: Кутаиси, 2013. URL: http://www.ling-expert.ru/conference/langlaw3/sichinava_ng.html
9. Щериця С.І. Чинність кримінально-процесуального закону: автореф. дис. ... канд. юрид. наук. Київ, 2013. 20 с.
10. 10. Bradley, C. (1996). The Convergence of the Continental and the Common Law Model of Criminal Procedure. *Criminal Law Forum*, № 7 (2), 474-477.
11. 11. Kulesza, C. (2012). Projektowana nowelizacja trybu postępowania karnego z perspektywy niektórych zasad prawa procesowego karnego. URL: http://repozytorium.uwb.edu.pl/jspui

References:

1. Barabash, T.M., Levytska, L.V. (2018). Zakonotvorchi realii reformuvannia u sferi kryminalnoi vidpovidalnosti ta kryminalnoho provadzhennia: suchasnyi stan ta perspektyvy [Legislative realities of reform in the field of criminal responsibility and criminal proceedings: current status and prospects]. *Naukovi zapysky Instytutu zakonodavstva Verkhovnoi Rady Ukrainy.* № 4. pp. 57–63. [in Ukrainian].
2. Buhaichuk, A.A. (2019). Zakon yak dzherelo kryminalnoho protsesualnoho prava derzhav postradianskoho prostoru [The law as a source of criminal procedural law of post-Soviet states]. *Nacional'nyj juridicheskij zhurnal*. № 2(36). S. 103–108 (Respublika Moldova).
3. Drozdov, O.M. (2004). Dzherela kryminalno-protsesualnoho prava [Sources of criminal procedure law]: avtoref. dys. ... kand. yuryd. nauk. Kharkiv. 24 p. [in Ukrainian].
4. Ishchenko, V.M. (2002). Dzherela (formy) kryminalno-protsesualnoho prava [Sources (forms) of criminal procedural law]. *Pravo i bezpeka*, № 3. pp. 42–45. [in Ukrainian].
5. Kryminalnyi protsesualnyi kodeks Ukrainy [Kodeks postępowania karnego Ukrainy] vid 13.04.2012 № 4651-VI [in Ukrainian].
6. Mamka, H.M. (2019). Zasady kryminalnoho provadzhennia: naukovi ta pravovi osnovy [Fundamentals of criminal proceedings: scientific and legal foundations]: dys. … dokt. yuryd. nauk. Kyiv. 478 s. [in Ukrainian].
7. Omelchenko, O.Ie. (2013). Dzherela, yaki vyznachaiut poriadok kryminalnoho provadzhennia [Sources that determine the order of criminal proceedings]. *Yurydychnyi chasopys Natsionalnoi akademii vnutrishnikh sprav,* № 2. pp. 32–37. [in Ukrainian].
8. Sichinava, N.G. (2013). Slova «Zakon» v drevnosti i segodnja [The words "Law" in antiquity and today]. *Cbornik materialov konferencii «Jazyk i pravo: aktual'nye problemy vzaimodejstvija».* Gruzija: Kutaisi. URL: http://www.ling-expert.ru/conference/langlaw3/sichinava_ng.html [in Russian].
9. Shcherytsia, S.I. (2013). Chynnist kryminalno-protsesualnoho zakonu [Validity of the criminal procedure law]: avtoref. dys. ... kand. yuryd. nauk. Kyiv. 20 p. [in Ukrainian].
10. Kulesza, C. Projektowana nowelizacja trybu postępowania karnego z perspektywy niektórych zasad prawa procesowego karnego (2012). URL: http://repozytorium.uwb.edu.pl/jspui [in Poland].
11. Bradley, C. The Convergence of the Continental and the Common Law Model of Criminal Procedure. (1996) 7 (2) Criminal Law Forum 477. URL: https://criminal procedure law.repository.law.indiana.edu/facpub/2499/ [in English].