КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНЕ ПРАВО ТА КРИМІНАЛІСТИКА

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SCOPE OF A TRIAL IN CRIMINAL PROCEEDINGS IN UKRAINE UNDER THE RUSSIAN EMPIRE (18th – EARLY 20th CENTURIES)

This paper explores the scope of a trial in criminal proceedings of Ukraine when it was a part of the Russian Empire. The author makes a decision about a direct inter-relation between the models of institute of scope of trial and historic forms of criminal proceedings, political regime of state at the certain stage of its development and policy pursued by the state in connection with securing the human rights.

Key words: *criminal proceedings, scope of a trial, charge, complaint, bill of indictment.*

У статті досліджуються межі судового розгляду в кримінальному судочинстві України на її території часів експансії царської влади Росії. Автор встановлює наявність прямого взаємозв'язку між тогочасними моделями меж судового розгляду й історичними формами кримінального процесу, а також залежність визначеності меж судового розгляду від політичного режиму держави на тому чи іншому етапі її розвитку та від державної політики щодо забезпечення прав людини.

Ключові слова: *кримінальне судочинство, межі судового розгляду, обвинувачення, обвинувальна скарга, обвинувальний акт.*

В статье исследуются пределы судебного разбирательства в уголовном судопроизводстве Украины на ее территории времен экспансии царской власти России. Автор делает вывод о существовании прямой взаимосвязи между моделями института границ судебного разбирательства и историческими формами уголовного процесса, а также о зависимости определенности границ судебного разбирательства от политического режима государства на том или ином этапе его развития и от государственной политики по обеспечению прав человека.

Ключевые слова: *уголовное судопроизводство, пределы судебного разбирательства, обвинение, обвинительная жалоба, обвинительный акт.*

Introduction. The scope of a trial in criminal proceedings is determined by a personality of the accused, and charges filed against him/her in accordance with the bill of indictment. The study of the institution of scope of a trial in criminal proceedings stirs a great interest, which is due to the importance of this institution to ensure a fair hearing and case resolution, objectivity of the trial itself, as well as the right to defense.

Today, the genesis of scope of a trial in criminal proceedings has not been considered in special scientific literature as a separate issue, while clarifying the nature and the value of scope of a trial in criminal proceedings in Ukraine is impossible without understanding the history of formation and development of this institution, which has predetermined the choice of the research subject.

The goal of this paper is to study the scope of a trial in criminal proceedings of Ukraine in the era of Russia's imperial power expansion on its territory, determination of dependence of clearness of the scope of a trial on certain external circumstances and conditions.

Description of basic research material. According to the 1654 Treaty between the Moscow State and Hetmanate, the latter received confirmation of inviolability of ancient rights and customs. Nevertheless, it was quite often, when the norms of local Ukrainian custom-based law contradicted the norms of the Statutes of Grand Princedom of Lithuania and, in their turn, the latter contradicted the Magdeburg Law. It resulted in abuses on the part of higher-ranking Cossacks, protraction of proceedings, lodging complaints and claims by locals. In addition to the above, preservation of Ukrainian system of administration of justice on the background of gradual assimilation by the Russian Empire in the first half of XVIII century of all branches of Ukrainian power had led to non-compliance of two different judiciary systems (that of the Russian Empire and Ukrainian), which complicated, to a considerable extent, the court activities [1, p. 416–417]. Therefore, there arose a need in codification of the effective laws in Hetmanate.

Thus, in 1743, the Code of Laws ("Laws by Which the Little Russian People Are Judged"), based on the Lithuanian Statutes of 1588 as a regulation, was adopted. The Russian government never ratified the Code of Laws, and hence it remained only a proposal, although it became the basic source of operative law in Ukraine in the 18th and 19th centuries [2, p. 7].

The draft Code "Laws by Which the Little Russian People Are Judged" provided for the written form of the statement of claims (complaint) in criminal proceedings, containing: 1) data on the accuser's identity (petitioner, claimant) and respondent's identity; 2) contents of the statement of claims: briefly, "solely on the matter itself; who and when was offended, what such offended person claims; without skipping any facts in the aforesaid matter and involving any persons who bear no relationship to the matter; the statement of claims should be written according to claims made: no claim should repeat the already stated one in vain"; 3) request regarding adopting of court decision pursuant to "orders and rights of the Little Russians" (Chapter 8, section 1 of Article 12) [3, p. 161]. Based on the statement of claims, detection of the accused party, his or her arrest and preliminary interrogation upon his or her delivery to court, were conducted.

During a court trial, the accused was interrogated orally in connection with each claim stated in the statement of claims. At the same time, it was prohibited to commence interrogation on the subsequent claim of the statement of claims until "all previous claims are not clarified". If during the interrogation the parties "added" some non-relevant facts (i.e., when the claimant brought additional accusations, and the accused responded to the statement of claims), then the court had to set a hearing based on such facts only upon completion of the current proceedings (Chapter 8, sections 3 and 5 of Article 12) [3, p. 162–163]. In addition to the above, section 4 of Article 15 in Chapter 8 of the "Laws…" determined: when conducting the interrogation, the judges had to interrogate on the individual basis each of the witnesses in connection with "circumstances relevant to the case; what, where and when occurred …when certain things bore no relationship to the case, the judges asked nothing about them" [3, p. 172]. The court did not have to take into consideration various statements made by the accuser and accused party, which were irrelevant to the current case. During the court trial, the parties were prohibited from "adding other cases to the case already initiated". If that happened, then, the court, in order not to impede the current trial, set a hearing for such new disputes only upon completion of the current proceedings (Chapter 4, Article 23) [3, p. 187–188]. Thus, in consideration of the above, it is obvious that scope of a trial under the Code of Laws "Laws by Which the Little Russian People Are Judged" was clear and was established by 1) the accused party's identity and 2) that criminal act which was allegedly committed by the accused party pursuant to the claims brought by the claimant in his or her statement of claims.

Judicial administration in Ukrainian provinces of the Russian empire in early XIX century was distinguished due to local particularities. In the provinces of the Right-Bank Ukraine (Kyivska, Volynska, and Podilska provinces) and the Left-Bank Ukraine (Poltavska and Cherinihivska provinces) the Lithuanian Statute of 1588 had remained to be a basic source of law for a continuous period of time. Instead, the Russian laws were applied in Southern Ukraine (Kherson, Katerynoslavska, Tavriyska, and Slobidsko-Ukrainian provinces). The process of unification of the judicial system of all Ukrainian provinces, with the empire-wide judicial system was completed in

1840–1842, after application of the norms of the empire-wide criminal procedural law (the tenth and fifteenth volumes of the "Code of Laws of the Russian Empire") began in the territory of the Left-Bank and Right-Bank Ukraine.

Pursuant to the "Code of Laws of the Russian Empire", pre-trial investigation had two stages: preliminary (aimed at establishing corpus delicti in a committed act) and formal (aimed at establishment of the injured party's identity, object of crime, circumstances of commitment of crime and other details). The causes which initiated commencement of the preliminary investigation included a report on crime (talks and rumors were equated with the latter) as well as a report made by virtue of official duty; complaint filed by the injured party; surrender; notification to the prosecutors and solicitors-at-law; the police own actions, undertaken subject to their discretion, which could include commencement of investigation based on any information received regarding a crime. Guided by the system of formal evidence, the investigator intended to choose the evidence required by him, rather than to establish the issue. The law did not provide for the requirements regarding notifying the accused party of investigation completion and the accused party's review of the case materials; a court trial was secret not only for a wide public, but also for the parties in the proceedings and was held on the basis of written materials received during the investigation. Only in exceptional situations, the accused party's interrogation could be conducted subject to court discretion. Therefore, in fact, court decisions were based on written acts of the pre-trial investigation and rules for formal proof, binding on the court and established by the effective laws [4, p. 107–111, 134–147, 188–195; 5, p. 26; 6, p. 35].

The aforesaid provisions reflected the detection-based form of administration of justice, whereby the scope of trial was determined formally, though such scope had nothing in common with securing the accused party's rights in criminal proceedings.

Material changes in the legal position of the accused party in criminal proceedings were introduced after the reform of the criminal justice in 60-s of XIX century, when the detection-based process was replaced with the mixed form, based on continental law. In particular, pursuant to the Statutes of Criminal Justice of 1864 (Ustav ugalovnago sudoproizvodstva), a trial in criminal case was based on bill of indictment or victim's complaint which precisely identified the accused party and act of which such accused party was accused. In other words, a subject-matter of the trial consisted in the issue of the criminal defendant's guilt in commitment of the criminal act that he or she "was alleged to have committed" pursuant to the bill of indictment or complaint filed by the victim [7, p. 28; 8, p. 414]. A problematic issue remained to be the issue of possibility to change the charges in court and of a scope of such changes, since the legislator was not unambiguous on such issues, which caused the necessity to provide additional explanations regarding the Statutes and resulted in different interpretation of the same in the theory of procedural rules.

The reply to the question, whether the 1864 Statutes of Criminal Justice allowed amendment of charges in court, may be found in Chapter 9 of the Statutes, which governed the process of statement of questions before the court when resolving the case on the merits. In particular, pursuant to Article 751 of the aforesaid chapter, it was specified as follows: the conclusions of the state's bill of indictment shall not constitute the only basis of the essential issues in the case. Of equal importance shall be the judicial (pre-trial) investigation, and, in as much as they develop, supplement, or alter the conclusions in the bill of indictment, the final courtroom pleadings [9, p. 1247–1248].

However, the right of the court to be guided not only by the scope determined by the bill of indictment when delivering decision in the case, could violate the principle of competitiveness and deprive the accused party of the right to defense. For this very reason, the legislator determined in the subsequent two articles of the Statutes (Articles 752 and 753): the issue of criminal act which is not covered by the bill of indictment, though established according to the results of examination shall not be considered for the purpose of resolving the case if the aforesaid act leads to more severe penalty than that stipulated by the bill of indictment [9, p. 1247–1248]. It should be pointed out that in the above situation, the case had to be sent for re-investigation and, should the need arise, a new bill of indictment had to be compiled with respect to other criminal acts committed by the criminal defendant.

Thus, amendment of charges in court according to the 1864 Statutes of Criminal Justice had two consequences. The first consequence: the case had to be sent for re-investigation and a new bill

of indictment had to be compiled in the instances when elements essential to another offence which was not stipulated by the bill of indictment, were established during examination (in other words, when during examination initial charges had changed in terms of their essential elements to such extent that they began to comprise another criminal act). The Senate explained the meaning of such provision in the following manner: court may not deliver its decision, based on the charges which were not brought against the criminal defendant. Thus, resolving the case should be postponed, in order not to deprive the accuser of the possibility to think over, and state, respective charges and not to deprive the accused party of the possibility to prepare for defense. Amendment of the initial charges, based on type of crime, change of the method of crime resulting in change of legal components of a crime etc., were referred by the Senate to the instances when the respective case should be sent for re-investigation. It should be pointed out that the Senate presumed that re-investigation is required only provided that: 1) charges become more severe, from the perspective of punishment for the criminal defendant, and 2) changes in charges are caused by establishment (during examination) of new circumstances in the case, rather than those already known to the indictment division [10, p. 497–498].

Another consequence of amendment of charges according to the 1864 Statutes of Criminal Justice consists in postponement of the court hearing, which was aimed at affording the defendant with the possibility to prepare for defense. The court should have announced such postponement in all instances, when amendment of the initial charges did provide for more severe punishment for the accused party, though the aforesaid amendment was not as essential as in the first instance. For example, that could include amendment of the nature of the criminal defendant's participation in the criminal act. In connection with such issue, S.I. Victorsky emphasized as follows: when during examination new circumstances in the case were established and despite the fact that such new circumstances resulted in more severe punishment for the accused party, they did not amend the kind and type of the crime, for which the accused party was held liable, such case did not have to be sent for re-investigation and no new bill of indictment had to be compiled [11, p. 366]. Such postponement of court hearing was made in the criminal defendant's interests; thus, it was unreasonable to resort to the postponement if the criminal defendant could do without it.

In other instances, except for the two specified herein, the court was entitled (without postponement of case hearings) to amend in its judgment the charges brought against the criminal defendant pursuant to the bill of indictment. In particular, when amendment of charges did not result in more severe punishment for the defendant or charges were only supplemented with factual circumstances (for instance, with the circumstances pertaining to the time, venue of commitment of a crime, required in order to remove inaccuracies contained in the initial charges, provided that such circumstances did not change legal components of the crime defined by the initial charges) [9, p. 1250; 12, p. 384].

As to legal qualification of the criminal act, it was a generally acknowledged rule that the court was responsible for the qualification. For this very reason, it was allowed not to specify in the bill of indictment all norms of the criminal law, which governed the criminal act committed by the accused party. Due to reference to Article 612 of the Statutes, whereby the court hearing chairman was obliged to provide the criminal defendant with all means for absolution, the case-law of courts acknowledged that it was necessary to provide the defendant with the possibility to prepare for defense in the instances when qualification of the criminal act was changed (when court changed qualification of the crime, whereas set of facts in the crime remained unchanged) during hearings in the case, if such change resulted in more severe punishment for the criminal defendant. The criminal defendant was notified by the chairman (with statement of such fact in minutes of the court) of change in charges and more severe punishment. At such criminal defendant's request, the court hearings were postponed for a period of time required by the criminal defendant to prepare for defense. Such procedure was not stipulated by the effective laws, though was widely applied in practice [8, p. 436; 12, p. 363].

In addition to the above, it was not allowed to fail to observe the scope of trial in the case by the scope of persons. The Statutes of Criminal Justice did not contain direct norms which would prohibit during examination to extend the charges to the persons not specified in the bill of indictment or complaint by the private prosecutor. Nevertheless, according to scientists, such provision

was derived from the contents of the procedural criminal law. Thus, Articles 534 and 535 of the Statutes provided for the following: once the "judicial chamber" (sudebnaia palata) acknowledged the investigation to have been conducted in full and without material violations of the norms of law, it should deliver a ruling whereby a case is to be referred to court or closed. At the same time, such ruling is applicable only with respect to those persons "who are held liable and those crimes for which they are persecuted" [13, p. 890]. This provision was also applicable with respect to trials in the case. As it was emphasized by I.Ya. Foynitsky, court trials could never be extended to the persons not listed in the bill of indictment or complaint; for such purpose, a new investigation should have been conducted or at least, the court should have been provided with a new bill of indictment (or complaint by private prosecutor) [8, p. 432].

However, it should be pointed out that there was an exception to the aforesaid rule. In the cases based on public charges, which were referred to jurisdiction of the justice of the peace, a judge was entitled to make anyone liable under the criminal laws, at his discretion. It was possible pursuant to Article 42 of the 1864 Statutes of Criminal Justice, whereby cases based on public charges could be heard by the justice of the peace even when a judge, acting independently, established constituent elements of offence during administration of justice in any other case [14, p. 207; 15, p. 92]. It was caused by the justice administered summarily in the cases falling within such category. The elements of preliminary investigation were characteristic of trials in such cases. Correspondingly, no availability of bill of indictment or tentatively stated charges was required. Thus, there was no scope of a trial (both in terms of scope of charges and persons) established for the judge who in reality also acted as an investigator in the case. That issue was emphasized by I.Ya. Foynitsky, who specified that in such category of cases, even at the final stage "the set of accused parties could be supplemented with new persons, at the discretion of justice of the peace.

It should be pointed out that in the private prosecution cases, which were allowed to be closed due to conciliation of parties, the prosecuting party was the master of proceedings: it was he who decided, whether to bring any new charges; he established a scope of court trial by statement of charges in his complaint; he could refuse to press charges or come to conciliation with the accused party. In such instances, the court's actions were limited only to examination of the evidence which was provided by the parties (Article 104 of the Statutes) [16, p. 50].

Thus, analysis of the provisions contained in the 1864 Statutes of Criminal Justice, explanations provided by the Senate and relevant science research attest to the following facts: criminal proceedings of the late XIX century – early XX century did include the institute of scope of trial. According to a general rule, the criminal procedure laws did not allow extending (during examination) charges to the persons not listed in the bill of indictment, though they allowed amending charges during trials in the case. At the same time, no clear boundaries, rules and criteria for amendment of charges were elaborated. Thus, in each specific case, the court decided at its discretion, what consequences of amendment of charges during trials in the case had to be. Certain typical instances of admissibility or inadmissibility of amendment of charges in court with respect to specific constituent elements of crime were determined by the case-law of courts. Despite the fact that charges in the meaning according to the 1864 Statutes of Criminal Justice meant only factual circumstances of the committed crime, the lawyers arrived at the conclusion: the criminal defendant's right to defense is violated not only in the instances when factual circumstances in the case are amended, but also when qualification of the criminal act is changed and factual circumstances remain unchanged and when charges are supplemented with qualifying elements. However, these conclusions pertained only to the instances, when a criminal defendant could be subject to more severe punishment than that stipulated by the initial charges; in addition, such instances were defined on the basis of the case-law of courts and had no binding nature.

Conclusions. The conducted research into particularities of the institute of scope of trial in of criminal proceedings in Ukraine under the Russian Empire enables us to define the following models of such institute: model of invariable (strict), model of variable (flexible) and model of conditionally variable (flexible) scopes of trials.

The model of invariable scope of trial was characteristic of criminal proceedings under the Code of Laws "Laws by Which the Little Russian People Are Judged". Such model provided for the following: charges were stated by the claimant in the statement of claims (complaint) pursuant

to clear rules and could not be changed during trial in the case; the court had to deliver a judgment in the case only within the scope of such charges. Unfortunately, the Russian government never ratified the Code of Laws, and hence it remained only a proposal.

The model of variable (flexible) scope of trial was mainly characteristic of criminal proceedings under the Code of Laws of the Russian Empire, dated to 1832. Such model provided for extension of trial to all activities of the accused party and even to other persons. Thus, the court acted as an active party in proceedings and lack of restrictions on the due-process rights vested with the judge enabled the latter to determine a scope of trial in criminal proceedings at the judge's discretion.

The model of conditionally variable (flexible) scope of trial provides for the possibility of amendment of the subject of trial, though only within the scope determined by the effective laws and upon fulfillment of certain conditions. In particular, the model of conditionally flexible scope of trial was characteristic of the criminal proceedings under the Statutes of Criminal Justice dated to 1864.

Thus, there is a direct inter-relation between the models of institute of scope of trial and historic forms of criminal proceedings. Determination of scope of trial has always depended upon political regime of state at the certain stage of its development, upon policy pursued by the state in connection with securing the human rights, in particular, the rights granted to the accused party in criminal proceedings and upon the task set by the criminal justice as its priority at various periods of time and during various epochs: complete detection of crime, identification and punishment of the guilty, establishment of truth in any manner and by any method whatsoever, or protection of the person, society and state from criminal offences, and safeguarding of rights, freedoms and lawful interests of the parties in criminal proceedings.

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ПРИЙНЯТТЯ СЛІДЧИМ СУДДЕЮ РІШЕННЯ ПРО ТИМЧАСОВЕ ОБМЕЖЕННЯ В КОРИСТУВАННІ СПЕЦІАЛЬНИМ ПРАВОМ

У статті розглянуто деякі проблемні питання прийняття слідчим суддею рішення про тимчасове обмеження підозрюваного в користуванні спеціальним правом. Сформульовано й обґрунтовано пропозиції стосовно вдосконалення норм Кримінального процесуального кодексу України в контексті предмета дослідження.

Ключові слова: *тимчасове обмеження, підозрюваний, спеціальне право, користування, слідчий суддя.*

В статье рассмотрены некоторые проблемные вопросы принятия следственным судьей решения о временном ограничении подозреваемого в пользовании специальным правом. Сформулированы и обоснованы предложения по усовершенствованию норм Уголовного процессуального кодекса Украины в контексте предмета исследования.

Ключевые слова: *временное ограничение, подозреваемый, специальное право, пользование, следственный судья.*

Certain problematic issues of the adoption of the decision by the investigating judge on the temporary restriction of the suspect in the use of the special law. Offers pertaining improvement of the Criminal Procedure Code provisions within the context of the research subject have been defined and substantiated.

Key words: *time limit, suspect, special law, use, investigating judge.*

Вступ. Відповідно до п. 3 ч. 2 ст. 131 Кримінального процесуального кодексу України (далі – КПК України), тимчасове обмеження в користуванні спеціальним правом є одним із заходів забезпечення кримінального провадження, застосування якого регламентовано главою 13 цього Кодексу.

Такий захід передбачає 1) тимчасове вилучення документів, які посвідчують користування підозрюваним спеціальним правом (право керування транспортним засобом або