

Mixed Type Procedure Model or Adversarial Law?

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Abstract

By introducing the Criminal Procedure Code, amendments were made in the criminal legislation of Georgia and the mixed type model of the Criminal Procedure Law was transformed into the Anglo-American model of the Criminal Procedure Law. It turned out that this transformation was not properly analyzed. As a result the adversarial criminal procedure law was developed which was grounded on the Anglo-American procedure rules and does not recognize any exceptions. In the modern world majority of highly cultured countries which stay within the scope of the international criminal law choose mixed type model of criminal procedure law and stand apart from inquisitorial and adversarial process. Accordingly, modernization of the Criminal Procedure Code is high on agenda for Georgian legislators. I hope that the presented article will prove the necessity of the measures that should be taken to improve the abovementioned.

Keywords: Human rights protection, conversion, criminal procedural law

Twenty-five years passed after the restoration of the state independence in Georgia, though the situation regarding human rights is far from desirable. It is clear that expectation for restoration of justice and demand on improvements of human rights still stays in the center of public attention. To solve the existing legal and practical problems the Parliament of Georgia adopted the National Strategy for the Protection of Human Rights for the years of 2014-2020. The document was elaborated by participation of the government bodies and international organizations.

The aforementioned policy document embraces almost all directions of public life. It is welcoming that achievements regarding human rights became tangible in such a short period of time. The achieved success made it obvious that our country is really aspiring to the standards of protection of human rights and freedoms of the civilized world.

However, for successful implementation of this strategy it is necessary to work out a mechanism which will be adjusted to the Georgian reality. For creating such a mechanism, it is very important to carry out

comparative analysis of the experience of other countries and international organizations. The importance of using comparative analysis as a universal method is undoubtful as it allows a researcher or a legislator to get aware of the reality in foreign countries and helps see the usefulness of the chosen approaches.

This article does not seek to analyze the situation regarding human rights in Georgia; its goal is to briefly review peculiarities of conversion of the Georgian Criminal Procedural Law from Continental-European system to Anglo-American legal space. It discusses positive and negative sides of adversarial proceedings and inquisitorial proceedings; exposes and analyzes the competitiveness of approaches of the national model of adversarial principle, compares them with the provisions and approaches of the International Criminal Code. The question occurs - why exactly International Criminal Law has been chosen for comparison? The only right answer is: International Criminal Law is primarily based on the legal systems of continental Europe and Anglo-American knowledge and experience. Paramount factor is that international criminal justice practice is formed by mutual collaboration and understanding of the judges who represent different legal systems.

Stages of development of International Criminal Law

The origin of International Criminal Law and Court is the result of evolution of the civilization of society. Development of information systems conditioned enhancement of the integration processes of different countries and states. The world wars and armed clashes between different countries revealed the necessity of peace and international order.

International criminal responsibility became topical after the First World War. After the war the Treaty of Versailles was signed; the winner countries agreed German Emperor Wilhelm II to appear before the international Tribunal together with other high-ranking German officers. At that time, this agreement could not be realized because Germany and Holland refused to extradite criminals to the Tribunal and instead gave them political asylum. Though, the idea of establishing international Tribunal and expression of common will was of paramount importance.

The agreement on establishing international military Tribunal signed in London after the Second World War appeared to be a fact of historic value that contributed to development of international criminal law. On the basis of this agreement, for committing Holocaust and other grievous crimes fascist regime leaders and criminals were tried in Nuremberg during ten months. It is noteworthy that the Nuremberg process was the first case of imposing criminal responsibility on the accused having committed international crimes.

The decision made by the UN (United Nations) Security Council in 1933 on establishing the International Court was based on former Yugoslavia affairs. A year later, the same type of court called Rwanda Tribunal was established.

These courts were created for special occasions and they do not imply permanent work (these courts are often called as ad-hoc tribunals), though, a number of cases on very important international issues have been proceeded there.

A brief overview of the formation and development of international criminal law clearly reveals that all its stages were related to world wars and hostilities. This happened after the first and second World Wars. The same happened in case of establishing former Yugoslavia and Rwanda Tribunals. The aforementioned ad hoc tribunals were created only for special purposes. But interest of the restoration of justice, punishment of the accused and prevention of wars imposed the need to establish a permanent International Criminal Court.

For this purpose, under the auspices of the United Nations in June of 1998, an international conference was held in Rome where representatives of 160 countries were invited. The aim of the conference was to draw up an international court statute. The process was completed in July of the same year and 120 countries signed the document. The court was established in 2003; it is located in the Hague and its statute is defined as Rome Statute.

I must say that the idea of establishing an international court had opponents. A number of states who participated in the Rome conference demanded⁴⁷ that the UN Security Council establish political control on the prosecution service. This idea was not shared by the majority as ICC prosecutor would fall under the subordination of the 5 permanent members the three out of which (the United States, Russia and China) were not the participants of the Rome Statute. Thus, international prosecution service was established as a politically and legally independent body. The International Criminal Court's independence is reflected in the 4th Article of the Rome Statute which states that the International Criminal Court is the subject of international law. Each State that accedes to it recognizes its statute. Its competence extends over Georgia as well.

Brief Description of the Continental European and Anglo-American Legal Systems

Before discussing the issues regarding conversion of the Georgian Criminal Procedural Law from continental-European system to Anglo-American legal space, I think it is appropriate to review continental-

⁴⁷ M. Turava. Collection of Articles. P. 81.

European and Anglo-American Criminal systems. The first is characterized by an adversarial principle - a process that implies oral and public dispute between two equal parties. During adversarial proceedings judges cannot expose their initiatives. They rely only on the evidences and perform as neutral arbitrators.

As for the inquisitorial system, which is based on the investigation, i.e. on the principle of the official investigation led by judges, gives judges much wider powers than they have during the adversarial proceedings.

During the last decades approximation of these two different legal systems became vivid. As a result, submitting evidences to the main court hearing and dispute between parties is no longer typical only for the Anglo-American legal system; it is also used in continental Europe and in many other countries. Most of these countries formed not the American model of the procedural system but a mixed type models.

Asian countries such as Japan and Taiwan use such types of procedural models. Italy, Spain and Russia, where the pretrial investigation is inquisitorial, the hearing is proceeded according to the adversarial principle. For example, Spain uses the adversarial principle of the criminal process. In addition, the court has the right to conduct further investigation which is reflected in the Criminal Procedure Law of Spain, Articles 728 - 729.

Criminal Procedure Law of Italy, Articles 496- 498 consider the right of initial interrogation of the witness by the party who invited the witness. In Russian Federation, on the basis of the Articles 273, 275, 278 of the Criminal Procedure Code, the judge, for the purposes of establishing the truth, is authorized to provide extra interrogation. I feel appropriate to briefly describe how they view the truth in Anglo-American and Continental European systems as this was the issue that distinguished these two legal systems. The issues of establishing the truth cause even more approximation of these systems. In the recent past, supporters of the Anglo-American system considered that only Continental European countries searched for the truth and Anglo-American model focused on winning a case rather than assisting the court in establishing the facts.

There were other considerations opposite to this approach. For instance, one of the outstanding representatives of Yale Law School, Professor Damška believed that if the trial judge considered that his absence at the trial (abiding his ideal role) may cause irreparable harm to the public interest, he can be actively involved in the process. Professor Damška considers this admissible because of the flaw of the adversarial system. He

believes that that such deviation is permitted in the interests of an adversarial system.⁴⁸

Nowadays, it can be stated without any exaggeration that the Anglo-American system is also interested in establishing the truth but only within the scope of legal procedural truth. It is considered that the truth shall be established in full compliance with the rules.

Because of the active ongoing process of proximation of the mentioned legal systems, it can be stated without any exaggeration that the selection of legal approaches and positions is being carried out in reality. This is due to the fact that Anglo-American and Continental European systems have positive and negative sides. Scientists and practitioner lawyers consider that the advantage of the adversarial process is obtaining and presenting evidences as the parties participating in the process become more motivated to obtain evidences themselves and present them in the court. Inquisitorial procedural model is entirely based on the trial judge's obligation to obtain all the necessary evidences that are essential to establish the truth. The advantage of the Anglo-American legal system is considered the approach according to which, the Court's judgment should rely only on the evidence presented at the main court session and which was the result of direct and cross hearing.

The flaw of the Anglo-American system is that a defendant's right of defense is directly proportional to his/her solvency. This prevents a defendant from obtaining and presenting evidences in the court. Inquisitorial system of justice has different approach. It allows a judge to conduct to a full judicial investigation, unlike a neutral judge who does not have such a right.

A lot of examples can be taken to characterize these two different legal systems; but as mentioned above, more important is proximation of their positions and approaches that was reflected as mixed type legal models in the national legislations of the world's leading states.

The international criminal procedure proves the advantage of the mixed type model which evolved in this direction. The Rome "statute" and the work of the Hague International Court clearly confirmed the progressive nature of the model.

For the modernization of the Criminal Procedure Code

A lot of questions arise towards the Criminal Procedure Code of Georgia enacted on October 9, 1999. The new code did not accept the mixed type procedure code and the adversarial type model was introduced. Professor Merab Turava in his work on convergence of different legal

⁴⁸ Mirjan R. Damaska. Structures of Authority and Comparative Criminal Procedure, 1975.

systems in international criminal procedure says that even Anglo-American procedure rules are not as adversarial as the Criminal Procedure Code of Georgia.

The Article 25, paragraph 2 of the **Criminal Procedure Code** of Georgia does not give grounds to cast doubt on the rightness of this conclusion. The article indicates that the court is prohibited to obtain evidences supporting prosecution or defense; even more, the court is not authorized to put direct questions except cases when questions are previously agreed with the parties and contribute to ensure fair trial.

It is well known that the adversarial court understands the essence of truth differently and accepts only its procedural-legal meaning. At international criminal proceedings a judge is allowed to ask questions and, if necessary, obtain evidences, i.e. a judge, unlike Georgian judges, is not a passive spectator of the process and has the full right to contribute to the process of determining the truth and ensuring a fair trial. Development of International Justice shows that the introduction of adversarial court, may, because of its procedural costs, create serious problems for the accused. If the defense lawyers cannot present necessary evidence on time, an innocent person can be considered guilty.

To follow the interest of development of fair Justice in Georgia we consider that it is necessary to change such a strict norm and allow judges to question parties before or after the interrogation of the parties as it is described in the international criminal rules.

Georgian procedural law does not accept the initiative of the court to obtain and present evidences. Such approach is characteristic only for strict adversarial proceedings and is preserved in jury trials in some states in the US. I think that such an approach to the mentioned issue is completely unjustifiable and does not match the interest of justice. The abolished Criminal Procedure Code was the mixed model and considered the independent right of the court to obtain and present evidences. International Rules of Criminal Procedure, unlike the Georgian rules, provides the possibility (Article 64 of the Rome Statute, paragraphs 4-9) of obtaining and presenting additional evidences by the judge if he/she considers it necessary.

Based on the above, we believe that the approach of the Rome Statute should become an example for our legislation and amendments to the Article 25, part 2 of the Criminal Procedure Code should be made. The Amendments should provide possibility of obtaining and presenting additional evidences by the judge in exceptional cases. It is noteworthy to admit that a completely passive judge in today's court is not even considered by the procedural rules of the countries whose legislation served as the grounds for establishing the adversarial procedural rules.

Although one article is not enough to discuss the issues related to the improvements of our country's criminal procedure law, I think that some of the topics still need to be emphasized. This especially applies to the prosecutor's full monopoly while proceeding investigation, absence of the state control, strengthening cooperation between the participants of the process for the purposes of establishing the truth, perfection of the procedural agreement institution, issues related to the lack of rights of the injured parties.

I want to put special emphases to the issue of jury trial. True, this is not new for the History of Georgian legislation but its establishment is linked to the introduction of the new procedure code which, on its turn, brought much uncertainty to the Georgian procedural law. It will not be surprising if I say that its introduction and establishment is legal anachronism and backwardness.

In England and America, countries considered as the cradle of this institution, jurists do not know how to say no to it, and only the respect of traditions make them keep jury trial. None of the courts out of all courts within the scope of international law uses this institution. It is ambiguous why, for what reasons was Jury trial envisaged in the current Criminal Procedure Code. However, this probably will not be surprising if we mind the fact that during Saakashvili's presidency, even the so-called "sentencing guidelines" were copied from the American legislation and introduced to the Georgian legislation. Though, exactly these sentencing guidelines were deemed inappropriate to the American Constitution by the United States Supreme Court decision of January 13, 2005.

Conclusion

We can conclude that by introducing the Criminal Procedure Code, the Georgian Criminal Law became adversarial and stricter than the Anglo-American procedural rules. I think that adoption of the Criminal Procedure Code in this form is conditioned by the power-hungry President Saakashvili's political desire to weaken judicial power and strengthen the prosecutor's office in order the dictatorship oriented government to have proper conditions for achieving this goal.

Although the new government has not carried out the modernization of the Criminal Procedure Code, a number of measures were taken to improve the legislation. I think this is just the beginning and there are all suitable conditions for future improvement.

I have tried to briefly review the problems of Georgian Procedure Law initially grounded on the Continental European legal system and later transformed into Anglo-American legal system; expose the experience of

leading countries within the scope of international law. Thus, my intention was to contribute to further perfection of the Georgian Procedure Law.

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