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E. Korotich

Personal Freedom Protection under Criminal Law: Current State and Enhancement Prospects

Speaking about the personal freedom's penal protection, it is necessary to note the rationality of the accepted legislative approach. The Criminal code of the Republic of Belarus has essentially expanded a list of the crimes against personal freedom that can be evidence of aspiration of the Belarusian legislator to protect of the given object maximum. The norms about crimes against personal freedom have received the descriptive dispositions that has an important practical value. In the Criminal code there were norms about liability for such crimes as trafficking in people and slave labour using, criminalization of which is a result of the international norms implementation. In spite of progressive character of the Belarusian Criminal Code in the area of the personal freedom's protection, it is necessary to recognize some defects of such protection. The most topical directions of the Criminal code development in the area of personal freedom's protection are presented in the article.

Key words: personal freedom, crimes against personal freedom, human trafficking, kidnapping, slavery, illegal deprivation of liberty, threat.

Formulation of the scientific problem and its significance. Personal freedom is one of the most significant social values which are recognized as an indispensable condition of the worthy and safe human existence, as a basis of a human legal status, necessary condition of the legal personality and the prerequisite of other constitutional rights and freedoms realization and, as consequence, progressive development of a society and the state. At present, only a deep understanding of the substance and meaning of personal freedom, understanding of the obligations (including of international) in the protection of personal freedom (liberty) would allow to protect not only personal liberty but will let to effectively exercise of other fundamental rights. The given circumstances allow to agree with opinion of those authors who assign the right to liberty (personal freedom) one of leading places in the system of the fundamental human rights and freedoms, estimating it as the most general, universal right comparable with right to life and right to health.

The presented estimation of the right to liberty (accordingly, of personal freedom) has legalization not only in the national legislation of the states, but also in the most significant international documents: according to article 3 of the Universal Declaration of Human Rights (1948) everyone has the right to life, to freedom and to security of person; article 4 of the named document separately prohibit slavery, servitude and slave trade which are traditionally considered as the heaviest infringements on personal freedom. The hierarchy of human rights is analogously built in Convention for the Protection of Human Rights and Fundamental Freedoms (1950): article 2 fixes the right to life, article 4 provides an interdiction of slavery and forced labour, and article 5 guarantees the right to liberty and security of person.

In spite of long-standing history of the outstanding thinkers (such as Plato, Aristotle, Rousseau, Montesquieu, Locke, Hegel, etc.) reference to personal freedom, only after 2nd World war the mechanism of protection of the universal human values, including personal freedom, has started to be formed at universal and regional international level. Besides institutional mechanisms (United Nations, European Union, Council of Europe, etc.), at present a whole number of international treaties serve the purpose of personal freedom

protection, first of all, documents prohibiting the different forms of criminal infringements of the given freedom (for example, Protocol to Prevent, Suppress and Punish Trafficking in Person Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000; International Convention for the Protection of all Persons from Enforced Disappearance, 2006, etc.).

In spite of the fact that international community as well as all civilized countries carry out policy directed to the personal freedom protection, number of its violations does not decrease. In present-day judicial practice the unlawful deprivation and restriction of personal freedom cases also occur; a number of people becomes as before victims of human trafficking, kidnapping, slavery, etc., that can testify about insufficiency of the political and legal measures which the countries use for ensuring of the personal freedom's safety.

Moreover, a number of crimes against personal freedom characterize activity of transnational criminal groups (first of all, the trafficking in human, kidnapping), topicality of struggle with which is constantly underlined at the international level (for example, White paper on transnational organised crime, Council of Europe, November, 2014; Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Hungary, Council of Europe, GRETA (2015)11; Programme of Council Activities Prepared by the Italian, Latvian and Luxembourg Presidencies (1 July 2014 – 31 December 2015) 10948/1/14/REV 1, etc.). These circumstances require not only the coordination of activities of the different states (especially neighboring) in order to combat the criminal infringements of personal freedom (especially in a context of the struggle against organized crime), but also presuppose necessity of the theoretical researches of the named problem.

Analysis of studies of this problem. The scientific interest to the problem of the personal freedom's protection by means of criminal law began to emerge on boundary of XIX-XX centuries within the works of such criminalists, as S. Poznyshev, I. Fojnitsky, N. Nekljudov and others. In their works the named scholars tried to show the essence and forms of the personal freedom as an object of the penal protection, the development of the crimes against personal freedom as well as their possible forms.

Unfortunately, the pre-revolutionary theoretical and legal experience in sphere of the penal protection of the personal freedom hasn't been adopted by the Soviet scientists and legislative bodies. Moreover, at this time in doctrine of criminal law the interest to the given problem considerably decreased that was negatively reflected on the literary support of it. The authors addressed to the crimes against personal freedom only in context of the research of all infringements on the person.

The activation of the scientific interest to the problem of the penal protection of the personal freedom has occurred only at the turn of XX century (80-90th years). But the researches, conducted in this period, as a rule, had fragmentary character and have been devoted to the studying only of the separate crimes against the personal freedom (for example, Ph.D. thesis of N. Bojko on the problem of illegal imprisonment). The comprehensive researches of the system of crimes against personal freedom weren't carried out at this time.

At present the special attention to the penal protection of the personal freedom is given mainly by the Russian authors, the research results of which are receiving reflexion not only in the textbooks and legal publications (in articles), but also in numerous monographs and dissertations (for example, V. Pankratov, M. Snahova, E. Marahtanova, etc.).

The problem of the penal struggle with some crimes against personal freedom became the object of the research interest in the Ukrainian doctrine of criminal law too. Among the most important works in this field are the dissertations of such authors, as J. Lizogub, V. Kozak and O. Volodina.

The questions of criminalization and qualification of the separate crimes against personal freedom became a subject of the analysis within the scientific works of some Belarusian authors (for example, V. Marchuk [1; 2], A. Barkov [3], N. Retneva [4]). The special attention in the Belarusian criminal law doctrine has been given, first of all, for such crimes against the personal freedom as human trafficking, recruitment of people for exploitation, slave labour using.

Statement of the purpose and objectives of the article. Purpose of the article – scientific substantiation of limits of criminal law protection of personal freedom and development on this basis the recommendations about perfection of the content, system and place of criminal law norms, providing responsibility for crimes against personal freedom.

The presentation of the main material and the justification of the results of the study. To consider the issues of personal freedom protection under criminal law, we should start by explaining the essence of such phenomena as personal freedom, crimes against personal freedom and the system of crimes against personal freedom, which, when defined, set the limits and the main directions of the protective power of criminal law in the given area.

1. A system analysis of constitutional provisions applied in the Republic of Belarus, international documents and doctrinal research results makes it possible to define personal freedom as the independent status of a person that allows taking and implementing decisions on his / her behaviour independently or with the help of other people acting in his / her behalf, based on the respective person's needs and concerns, with regard to the existing legal and moral restrictions. Interpreted in such a way, personal freedom describes, on the one hand, a person's ability to exercise his / her physiological movement function unhampered, on the other – the state of independence from somebody else's will, the absence of illegal isolation or other use of force that suppresses a person's own will as to the purpose and form of their behaviour.

2. Crimes against personal freedom shall be regarded as antisocial deeds (actions or omissions), directed against a person's freedom, committed wilfully and knowingly, characterized with the use of methods that restrict or suppress the victim's will and prohibited by the Criminal Code as entailing criminal prosecution. The constituent elements of the above offences are as follows: public danger (the said deeds are relatively homogeneous and are characterized with a high degree of public danger), culpability (the crimes in question are committed wilfully and knowingly), illegality and liability to punishment. An essential feature of crimes against personal freedom is their being committed against or beyond the victim's will, which, practically speaking, entails the use of force against a person in some way or other except for the cases when the deeds in question are committed against minors or people with the so called «defect of volition», who do not require any special methods to be deprived of freedom (or have their freedom restricted).

3. Analysing the above crimes from the perspective of their systemic (integrative) properties defines the system of crimes against personal freedom as an integral, socially induced, organized and structurally isolated within criminal law array of homogeneous wilfully and knowingly committed crimes against personal freedom, which includes the following groups of deeds: 1) deeds against physical freedom; 2) deeds that hamper a person's freedom to make decisions concerning their behaviour; 3) deeds that restrict personal freedom as a whole (with all its manifestations taken together).

The current Criminal Code of the Republic of Belarus covers crimes against personal freedom under Chapter 22 entitled «Crimes against Personal Freedom, Honour and Dignity». This chapter regulates liability for the following offences against personal freedom: human trafficking, slave labour, kidnapping, arbitrary detention, unlawful psychiatric hospitalization, duress, murder threat, grievous bodily harm threat or property destruction threat as well as illegal foreign employment assistance. We admit that the existing legal approach to criminalization and arrangement of this offence category is quite reasonable, but at the same time believe that there are a number of drawbacks that predetermine the need to further reform the said area of criminal legislation. In view of this, we regard the following Criminal Code modifications as most urgent.

To begin with, it is the systemic and structural enhancement of criminal legislation. This modification is based on changing the legislation that regulates personal freedom protection in view of the systemic approach to crime listing. Practically speaking, the above approach involves, first and foremost, revising the range of deeds that form the crime system in question; secondly, it requires singling out crimes against personal freedom as a separate chapter entitled «Crimes against Personal Freedom» as well as streamlining their inner structure by considering the peculiarities of the main personal freedom manifestations. Note, however, that the implementation of the above Criminal Code modification trends has certain circumstances: whereas the former may be based on and stay within the current criminal legislation (i.e. in the short term), the latter modification is a long-term one that requires creating a new model for the Criminal Code chapter «Crimes against Personal Freedom». Regardless of this fact, we find it reasonable to pay attention to the latter modification.

Conclusions. Thus, prospective modification of the legal approach to personal freedom protection provided by the criminal law requires elimination of the fragmentary consideration tendency characteristic of the current Criminal Code with regard to the unity of crimes against personal freedom, which is illustrated by their combination with infringement upon a person's honour and dignity within the same chapter of the Criminal Code (Chapter 22). Even if we do not analyse in detail the existing definitions of such notions as personal freedom, honour and dignity, we may state that they denote different phenomena, which makes it impossible to declare the generic object unity in respect of the crimes classified in Chapter 22.

We believe that to secure structural and functional uniformity of the criminal law in the area of personal freedom protection the offences in question should be assigned to a separate chapter entitled «Crimes against Personal Freedom», with the title and contents of Chapter 22 of the Criminal Code being modified in accordance with the above. Moreover, taking into consideration the appreciation of personal freedom by the Constitution and the international legal community, we find it practical to change its place in the system of objects protected by the criminal legislation by locating the said chapter after the system of provisions that regulate crimes against human life and health.

The need to constantly regard the essence and nature of personal freedom as an object protected by the criminal legislation also forms the basis for modifying the list of crimes viewed by the current Criminal Code as infringement upon personal freedom. This draws our attention to the following prospective changes in the criminal legislation:

1) removing such deeds as murder threat, grievous bodily harm threat or property destruction threat as well as illegal foreign employment assistance from the system in question and including the provisions that impose liability for their violation in other chapters of the Criminal Code;

2) adding the provision that regulates liability for kidnapping to the Criminal Code Chapter that contains crimes against personal freedom, which better reflects the constituent elements of the offence and is more practical from the legal methodology perspective.

Another direction of the criminal law development in the area in question is enhancing regulatory descriptions of constituent elements of offences regarded by the current Belarusian Criminal Code as infringement upon personal freedom as well as criminalization of the deeds not covered by the existing system of penal prohibition. This modification involves, among others, the following amendments to the criminal law of Belarus:

1) using alternative deeds balanced by the nature and degree of public danger to describe the constituent elements of certain offences within the system in question. First and foremost, this refers to the main constituent elements of human trafficking (Criminal Code Article 181 Part 1). To prevent the classification problems that might arise in the future, we consider it reasonable to return to the traditional for Belarusian criminal legislation wording of the respective crime, namely: «sale, purchase or undertaking other types of activities regarding a person», as well as assign the illegality of recruiting people for exploitation to a separate article;

2) defining the crime provided for by Article 181-1 of the Criminal Code as follows: «the use of forced labour or another form of slavery or servitude exploitation, as well as enslavement or turning a person into servitude with no constituent elements of human trafficking or kidnapping»;

3) removal and (or) clarification of evaluative properties in dispositions of the corresponding criminal law provisions (e.g. the negative property of arbitrary detention (Criminal Code Article 183 Part 1); the «mentally sane person» notion in the system of constituent elements that criminalize unlawful psychiatric hospitalization (Criminal Code Article 184 Part 1), that can be clarified by the following wording: «a person whose health, as the culprit knows, does not require any psychiatric hospitalisation or in-patient treatment» etc.).

Lastly, the third direction of the Criminal Code modification concerns elimination of technical legal drawbacks that not only compromise the overall quality of the criminal law provisions, but in many cases also impede the understanding and practical application of the prohibitions they contain. With regard to the system of crimes in question the main remarks of this type cover the following issues:

1) using the crime name to describe the corresponding deed. The Criminal Code employs this approach in the disposition of Article 185. To eliminate this drawback, we suggest defining the deed elements within duress by using the term «order»;

2) disregarding certain constituent elements of crimes against personal freedom, specified directly by their names, when describing a deed in the disposition of the corresponding Criminal Code provision. In particular, while the name of the crime stipulated by Article 183 of the Criminal Code stresses the illegality of the deed, the code provision disregards this element;

3) discrepancy between the name of the crime and the penal prohibition coverage. Thus, prohibiting slave labour as one of the possible ways of human exploitation, the legislator criminalizes all manifestations of the latter in the disposition of the Criminal Code Article 181-1 Part 1. To remove the said logical inconsistency, we consider it reasonable to mention other human exploitation forms in the name of the crime provided for by the Criminal Code Article 181-1.

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Коротич Е. Кримінально-правова охорона особистої свободи: сучасний стан і перспективи розвитку. У статті представлена характеристика кримінально-правової охорони особистої свободи людини в Республіці Білорусь. Аналіз норм кримінального закону Білорусі в даній сфері дозволив зробити висновок про раціональність прийнятого законодавчого підходу: по-перше, Кримінальний кодекс Республіки Білорусь розширив коло посягань на особисту свободу, що свідчить про прагнення законодавця забезпечити її всебічну охорону; по-друге, в Кримінальному кодексі отримали закріплення описові диспозиції норм про злочини проти особистої свободи, що має важливе практичне значення; по-третє, в Кримінальному кодексі з'явилися норми про відповідальність за такі діяння, як торгівля людьми, використання рабської праці, криміналізація яких, крім іншого, є наслідком реалізації відповідних міжнародних зобов'язань на національному рівні. Відзначаючи прогресивний характер названих та інших законодавчих заходів у зазначеній галузі, слід, проте, визнати наявність і ряду недоліків, які зумовлюють необхідність подальшого вдосконалення КК. У зв'язку з цим в статті представлені найбільш актуальні напрями реформування кримінального закону Білорусі в галузі охорони особистої свободи.

Ключові слова: особиста свобода, злочини проти особистої свободи, торгівля людьми, викрадення, рабство, незаконне позбавлення волі, погроза.

Коротич Е. Уголовно-правовая охрана личной свободы: современное состояние и перспективы развития. В статье представлены характеристики уголовно-правовой охраны личной свободы человека в Республике Беларусь. Анализ норм уголовного закона Беларуси в данной области позволил сделать вывод о рациональности принятого законодательного подхода: во-первых, Уголовный кодекс Республики Беларусь расширил круг посягательств на личную свободу, что свидетельствует о стремлении законодателя обеспечить ее всестороннюю охрану; во-вторых, в УК получили закрепление описательные диспозиции норм о преступлениях против личной свободы, что имеет важное практическое значение; в-третьих, в УК появились нормы об ответственности за такие деяния, как торговля людьми, использование рабского труда, криминализация которых, помимо прочего, является следствием реализации соответствующих международных обязательств на национальном уровне. Отмечая прогрессивный характер названных и иных законодательных мер в указанной области, следует, тем не менее, признать наличие и ряда недостатков, предопределяющих необходимость дальнейшего совершенствования УК. В этой связи в статье представлены наиболее актуальные направления реформирования уголовного закона Беларуси в области охраны личной свободы.

Ключевые слова: личная свобода, преступления против личной свободы, торговля людьми, похищение, рабство, незаконное лишение свободы, угроза.