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Balance of 'Goal-Means' in the System of Criminal Procedure or Can a Good Goal Justify Evil Means?

Ceza Muhakemesi Sistemindeki 'Hedef-Araçlar' Dengesi yahut İyi Bir Hedef Kötü Araçları Haklı Çıkarabilir mi?

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Abstract: The focus of research is the eternal problem of good and evil. This time, this dichotomy is localized in the field of criminal procedure and concerns the correlation of the goal, on the one hand, and on the other – the means to achieve it. In other words, the main research question is: Can Machiavellianism be justified in the courtroom? The concept of Machiavellianism means the application of the philosophy of "the goal justifies any means", which in the context of criminal prosecution considers permissible the use of physical or psychological violence against detainees, suspects, accused of the high purpose of cognizing the truth, exposing perpetrators, saving lives, the release of hostages, etc. Although the international community is constantly working to develop safety mechanisms to prevent torture and ill-treatment within law enforcement agencies, this truth-seeking practice appears to have moved underground and is still used by special services in many countries.

Keywords: Criminal process, goal means, material justice, procedural justice, the establishment of truth.

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Introduction

Often in law enforcement practice, such questions arise, the answers to which should be sought in the interdisciplinary plane. Thus, the sphere of criminal proceedings requires a philosophical substantiation of the concepts of justice, truth, the validity of coercion, the balance of private and public, the proportionality of action and punishment. The "goal-means" dichotomy in the context of discussing the problems of ontology and axiology of criminal justice will also constantly become the conceptual epicenter of scientific debates because as the famous Ukrainian philosopher M. Popovych rightly noted, "the problem of evil for good, the problem of victim and sacrifice have worried civilization since the time of Socrates" (Popovych, 2015, p. 22).

Neither for the first nor the second component of the binary system of "goal - means" there is a single view in scientific doctrine and practice. While generally inclined to the idea that the main goal of the criminal process is to achieve justice, we must also recognize that without clarifying the truth and the correct application of substantive law, it is impossible to expect a fair trial. At the same time, the process of establishing the truth itself must also be fair, and there are problems. The criminal process has in its arsenal a number of means of repressive nature, which are extremely necessary for the implementation of tasks, but what should be the limits of such state coercion? In other words, is Machiavellianism permissible in criminal proceedings? Therefore, the purpose of scientific research is to find at least partial answers to these questions.

To achieve the research goal in the first part of the study, we will clarify the prevailing ideas about the goal of the criminal process in scientific doctrine. At the same time, we will briefly consider the conceptual positions of some Ukrainian, Polish, German and American researchers. The second part will clarify the provisions on how to achieve the goal of criminal proceedings, the necessary resources and means. In the third part, we will dwell in more detail on the discussion of the admissibility of "force" to achieve the goal of the criminal process. At first glance, the answer seems obvious, but practice shows that torture and ill-treatment as a way to achieve a good goal of saving lives, establishing the truth in the investigation process are still used by special services in many countries.

The Purpose of Criminal Proceedings in Scientific Doctrine

There is still no unambiguous answer to the question of what the goal of the criminal process in science is. There are several approaches to its definition in *Ukrainian scientific doctrine.* Some scholars believe that the goal of the criminal process is to establish the truth and on this basis to make the right decision (Lantsedova, 2021, p. 301; Simonovych, 2014, p. 268); others see the goal in ensuring the protection of the rights and legitimate interests of individuals (Shybiko, 2011, pp. 16, 19; Malyarchuk, 2009, p. 181; Virotchenko, 2015, p. 205); others give examples of determining the main purpose of combating crime, punishing criminals, resolving disputes, exposing the guilty person and establishing the degree of his guilt and responsibility (Patyuk, 2013, p. 96; Bobechko, 2017, p. 127; Kotyuk & Kotyuk, 2015, p. 163); still, others believe that it is generally inappropriate to define one goal for the criminal process, but instead to introduce the concept of appointing the criminal justice as an external factor that determines the content and structure of the relevant activities and the legal field (Zhurba, 2014, p. 250). However, the views of most scholars and practitioners have a point of intersection, which expresses the need for a clear understanding of the goal of criminal proceedings as a factor that influences the systemic functioning of criminal justice, allows you to understand the direction of criminal procedure policy in the state, provides an understanding of responsibilities of state institutions authorized to carry out criminal proceedings, expect certain concrete results of their activity, make procedural decisions, and at the same time evaluate their effectiveness. The goal of criminal proceedings reflects the strategic direction of this type of state activity, and the tasks – tactics of its achievement (Bobechko, 2017, p. 128).

Although such a position is logical and well-grounded, it has not been embodied in terms of regulations. Ukrainian legislation does not contain a rule that would determine the goal of criminal proceedings. Art. 2 of the current Criminal Procedure Code of Ukraine gives an understanding only of the tasks of criminal proceedings, which include the protection of the individual, society and the state from criminal offense, the protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as the insurance of quick, comprehensive and impartial investigation and trial in order that everyone who committed a criminal

offense was prosecuted in proportion to his guilt, no one innocent was accused or convicted, and no one was subjected to ungrounded procedural compulsion and that an appropriate legal procedure applied to each party to criminal proceedings (Criminal Procedure Code of Ukraine, 2013, p. 6).

The Polish scientific doctrine is dominated by a focus on "material truth" or "material justice", which is considered to be both the goal and the fundamental principle of criminal proceedings. It is necessary to investigate a retrospective event, conduct comprehensive, complete and impartial clarification of all the circumstances of the case and the fair application of the criminal law in accordance with the committed criminal offense. Thus, J. Skorupka is convinced that the structure and organization of the criminal process have the primary goal of implementing the rules of substantive criminal law and are based primarily on the principles of legalism and material truth, ensuring the effective implementation of criminal and substantive law. The first of the above principles obliges law enforcement agencies to initiate criminal proceedings when there is a reasonable suspicion of committing a crime; and the second obliges the procedural authorities to seek to establish the truth in the process and based on decisions made due to true factual conclusions (Skorupka, 2010, p. 135). This interpretation of "truth" in the Polish criminal process with the attribute of "material" signals a departure from the construction of "judicial truth" (relative truth or procedural truth), which connects the truth of the conclusions of the subject of proof not with the facts but with their compliance with formal criteria based on the procedure prescribed by law (Pikh, 2020, p. 136).

The goal of "material truth" is reflected in Paragraph 2 of Art. 2 of the Criminal Procedure Code of Poland, according to which "all decisions must be based on true factual conclusions." It is therefore the duty of the procedural authorities "to make every effort, regardless of the will of the parties, and to exhaust all available means of establishing the truth" (Pikh, 2020, p. 134). Of course, in a competitive process, the defense or even the victim may not always be interested in establishing the material truth, so the implementation of this goal is common to all stages of the criminal process and addressed primarily to state institutions (police, investigation, prosecution, court, etc.).

Justitia non novit patrem nec matrem solam veritatem spectat (justice knows

neither father nor mother but concerns only the truth). At the same time, there is an understanding among Polish lawyers that material truth, and at the same time material justice, is the goal of criminal jurisdiction, but this goal must be achieved in compliance with many other principles of criminal justice. Thus, it is not a question of the absolute nature of the principle of material truth, as its achievement takes place in the course of a pre-trial investigation or trial with certain procedural limitations. For example, the exercise by the accused of the right to defense or the right to remain silent in criminal proceedings significantly impedes the discovery of material truth, but at the same time complies with the rules of fair justice (Chojniak, p. 20). Finally, there is the position of denying the expediency of such increased attention to the goal of "material justice". L. Chojniak gives examples of how some Polish lawyers consider it justified to abandon the goal of material justice, because the assumption that the court may deliberately seek to establish a false factual state, is axiologically incompatible with the basic role and function of the judiciary (Chojniak, pp. 26-27).

The results of Yu. Pikh's research shows a similar understanding of the goal of the criminal process, which dominates among *German lawyers*. The definition of the goal of the criminal process covers the triad – material truth, justice, legal stability. These three inseparable components are prerequisites for resolving criminal law disputes and restoring public order. Material truth is considered the highest goal of the criminal process (Pikh, 2019, p. 162). One of the decisions of the Federal Constitutional Court of Germany states that the obligation to investigate the truth in criminal proceedings is rooted in the rule of law and is therefore constitutionally necessary because without establishing the facts, the principle of proving the guilt cannot be implemented. Thus, the establishment of the truth is a central issue of the criminal process (Weßlau, p. 558).

Understanding the truth as the goal of the criminal process follows directly from its functional focus. In particular, the general function of the criminal process is to ensure the implementation of substantive criminal law. To perform this function, criminal proceedings must be aimed at establishing the material truth. Only if the facts and circumstances are established, and the law is correctly applied, substantive law can achieve the goal (Pikh, 2019, p. 162; Stamp, p. 23).

However, not everything is so clear. One cannot ignore the certain skepticism of German lawyers because the establishment of the material truth in criminal proceedings leads to the formation of the "private truth of the judge." According to B. Schünemann, a judge in the German state no longer performs his role of a neutral observer and a fair appraiser. Over time, his position in the state grew due to legal practice and decisions, while control decreased, so we can talk about the "omnipotent position of the German judge". Thus, completely impeccable, fair justice based on material truth is a utopian concept (Schünemann, p. 27).

American scientific doctrine proposes to consider the goal of the criminal process depending on the model of the criminal process. Examining the evolution of the criminal process, H. Packer formulated the concept of two models, each of which has its teleological priority – *Crime Control Model* and *Due Process Model*. For the former, the goal of repression of criminal behavior is dominant, as the inability of law enforcement agencies to react harshly to criminal behavior leads to the destruction of public order as an important condition for the realization of human rights and freedoms. If the percentage of defeats in the criminal justice system in the form of the inability to detain and convict criminals is high, the risk of a general disregard for the law increases. Then the law-abiding citizen becomes a victim of various violations of his interests (Packer, 1964, p. 9). Instead, for the second model, the main goal is to prevent unfounded accusations. In other words, if the model of combating crime resembles a conveyor belt of convictions, then the model of due process is like a barrier to conviction (Packer, 1964, p. 13). And although this idea has been criticized in science, it has been supported and further developed by many scholars (Daly, 2003, p. 6; Roach, 1999; Sorochinsky, 2009, pp. 165-167; Chng, 2010, pp. 26-27). The model of crime control refers to yesterday's paradigm of criminal procedure, while the model of due process fights today for its existence in the future.

Taking into account the current trends in the development of criminal justice, none of these models can be absolute, so society seeks to find a balance between these two value systems, to find a bridge between the two normative models that "compete for supremacy" in the criminal process. One of the key ways to succeed in this area is to determine the binary goal

of the criminal process, that is, material and procedural justice, where the first means establishing the truth in the case, and the second means following the proper rule. The end product of this goal should be the effective fight against crime, restoration of public order, protection of values, human rights and freedoms.

The Way to the Goal of Criminal Proceedings

Achieving the goal is impossible without the proper provision of resources and means. Resource provision is constructed by various components (normative, organizational, technical, financial, methodical, informational, involvement of human resources). The means are directly those tools that allow the practice of procedural bodies to achieve the desired result. Resources and means are not static. Their selection at the level of each state is determined by certain socio-cultural conditions, the stage of civilizational development, the vector of criminal procedural policy, the prevailing paradigm in a particular historical context.

For many criminal justice systems, the need to establish the truth is a priority today, but the way to it must be consistent with regulations, which in turn must meet modern standards of respect for human dignity, respect for fundamental and inalienable human rights and freedoms. Only in this case can we talk about the achieved fairness of the procedural decision and the imposed punishment.

Justice in the criminal process cannot be achieved without truth, but the cognitive way of truth is possible without justice. The truth can be achieved through gross violations of rights and freedoms, the leveling of humanistic values. The question arises not only at the level of scientific doctrine, but in the practice of law enforcement bodies: Can a good goal of establishing the truth, restoring violated rights, resolving legal disputes, imposing punishment and combating crime, in general, be justified not always by good means (physical or mental influence, provocations, tricks and deception by the procedural authorities)? In essence, it is a question of whether Machiavellianism is permissible in criminal proceedings, for which the dominant principle is that the goal justifies any means (Vlasenko & Shoker, 2017, p. 71). Proponents of this concept are inclined to the following postulate – the statesman must do good as much as possible, and

evil – as necessary. The enemy can be fought only in two ways: first, by law, and second, by force (Kovalenko, 2018, p. 5). Extrapolating such a provision from the political plane to the plane of criminal justice provides an answer to the question: if the influence of the law is insufficient, then force is used. The enemy in this "war" on the legal front is a crime.

If Machiavelli's followers believed that any violence could be justified if it helped to achieve the goal as quickly as possible, their humanist opponents recognized violence as an "absolute evil" that could not be tolerated under any circumstances. Humanists appeal to the axiological postulate: depending on the means chosen, such a goal is formed. Therefore, noble means determine a noble goal, immoral means lead to the achievement of immoral goals. Thus, it is not the goal that justifies the means, but the means that determine the morality of the goal (Pohribnyi, 2006, p. 9).

Undoubtedly, the entire system of criminal proceedings applies a certain degree of permissible repression within the limits set by law (interference in private communication, restriction of the right to privacy, freedom of movement, etc.). But what should these boundaries be? It seems that this is a mobile runner, which can sometimes expand the sphere of influence of state institutions or narrow it. In recent decades, the international community has been actively developing standards of such limits to develop universal rules for a civilized world regarding fair justice, based on the view that fairness should appear not only in the application of substantive law but also in the procedural aspect. This is the factor that will distinguish the inquisitorial process from the competitive one. The procedure itself should guarantee such an organization of obtaining information, exchanging arguments and making decisions so that its result can be considered fair (Skorupka, 2010, p. 138).

As a result, due process of criminal proceedings refuses to recognize admissible evidence obtained with significant violations of the law, and recognize the confession in the committed offense as the main proof; requires a careful examination of the validity of the grounds for carrying out procedural actions that violate the rights of the person; requires a response to defendants' complaints of physical or psychological violence by the police, prosecutors or other special services.

The introduced doctrine of *"fruit of the poisonous tree",* when not only

the primary evidence (tree) obtained with significant violations of the law is inadmissible, but also derivative evidence (fruits), which could not be obtained without the primary, is designed to encourage procedural authorities not to violate the law in carrying out procedural actions (searches, inspections, seizures, illegal arrests, recordings of telephone conversations, etc.) and making procedural decisions, as their result will not have the force of evidence in the courtroom (Geyer, 2007, p. 1). Introduced into the Anglo-Saxon legal system, this doctrine has been successfully implemented in the continental legal system and the judicial practice of international institutions, such as the European Court of Human Rights, in numerous decisions of which ("Gefgen v. Germany", "Yalloch v. Germany", "Balytskyi v. Ukraine", "Teixeira de Castro v. Portugal", "Shabelnyk v. Ukraine", etc.) there is a reference to its main principle (Blikhar, Dufeniuk & Blikhar, 2020, p. 362).

According to J. Skorupka, the requirements of procedural justice relate to the method of proceedings, which should follow certain rules necessary to ensure that the proceedings are fair. That is, the process should be organized in such a way that neither party can accuse it of being a victim of dishonest play (Skorupka, 2010, p. 140).

Therefore, the truth must be established "not at any cost". Sometimes it may recede into the background, particularly when it comes to protecting higher priority interests. Conversely, procedural justice may also recede into the background, provided that its violation is insignificant, and the interest in truth as a condition of material justice prevails (Pikh, 2019, p. 163). This demonstrates the limitations of the utilitarian approach in the field of criminal procedure, according to which the supremacy of general happiness for the majority can justify the negative consequences for the individual.

The Way to the Truth through Force: The Shadow of the Past or Reality Today

Of course, when formulating the goal of criminal proceedings through the categories of "truth", "justice", "due process", one should keep in mind the "eternal imperfections" of procedural justice, as it is impossible to develop such rules of procedure so that they always lead to the right result

(Wróbel, 2019, p. 42). At the same time, it is possible to introduce strict mechanisms to counteract gross and outright violations, which, although potentially can bring procedural bodies closer to the truth, do so in a way that stimulates the arbitrariness of the state. It is about torture and ill-treatment to obtain information valuable to criminal justice.

Indeed, the demonstration of force is one of the important factors of influence. For many years, science has convinced us that destruction and violence are part of our natural inner motives and that society and civilization calm these destructive impulses. However, it is rational to note that the destructiveness of the human being far exceeds the necessary need that exists among other beings in nature. Therefore, it is worth considering the assumption that in fact, destructiveness is not so much a part of human nature as human self-organization, the political apparatus designed to maintain the social structure (Kahraman, 2018). That is why it is so difficult to determine the permissible limits of repression of offenders because too weak law enforcement agencies will not be able to perform their tasks of protecting human rights and interests, as well as to ensure security. Instead, too strong can monopolize and abuse all power.

The origins of the practice of torture and ill-treatment in law enforcement agencies dating back to ancient times, and it became most widespread during the Middle Ages. Today there is a new round of their evolution in the form of the use of so-called "special interrogation techniques", "psychological techniques", "enhanced interviewing methods" or other similar euphemisms, which according to the criteria developed by the international community are physical or psychological violence, torture and ill-treatment. Such types of special techniques of influencing a person are exposing the person, sleep deprivation, dietary manipulations, the use of light and sound, placement in a tightly closed room (box), keeping detainees in certain poses, etc.

The survey data, according to which almost half of the 2,000 Ukrainians surveyed justify the use of illegal violence in some cases or against certain groups and categories of detainees, is alarming (Pogribnyi, 2006, p. 10). Moreover, the urgency of the issue confirms the fact that many countries still not only covertly use torture in criminal proceedings as a means of obtaining confessions or other information about a criminal offense, but

also firmly believe in the need for such action.

According to D. Yahunov's research, despite the UN Convention against Torture (1984), torture and ill-treatment continue to be practiced for various reasons. Although the special services of democratic states use torture and inhuman treatment of their own citizens and foreigners much less frequently than other states, democracy does not in itself preclude the arbitrary use of torture against certain categories of persons, which is usually hidden behind the slogans of "fight against terrorism", "protection from future terrorist attacks" and "fight against organized crime" (Yahunov, 2020, p. 60). Moreover, new forms of disguise for such activities are being devised in countries where torture and ill-treatment are officially prohibited, but special services send detainees (suspects) to countries where such violent practices are tolerated. In this way, information important for criminal proceedings is obtained. The so-called "torture flights" with tacit consent also take place using the airports of democratic European countries, which gives some researchers reasons to talk about the involvement of these countries in the practice of torture (Eski & Eski, 2017).

In his thorough study "Malleus Maleficarum" of modern society: the preconditions and prevalence of torture in the XXI century and the policy of combating torture" D. Yahunov proves that the practical possibility of torture to "terrorists" opens a "Pandora's box", and therefore there is a broad prospect of using torture against other "dangerous criminals", such as collaborators, sex offenders, members of organized crime groups, etc. Moreover, this list is not permanent and may expand further. As a result, the researcher concludes that the "fight against torture" in the XXI century is a reflection of a dualistic process: an attempt to further "secure society" with a simultaneous fiasco of such "security" (Yahunov, 2020, p. 60).

Scientists from around the world are signaling the existence of such practices and the problems associated with them. In particular, the question is whether a civil service agent can escape punishment through the use of violence against a suspect for the altruistic purpose of saving a hostage's life (Jessberger, 2005); there is a problem of lack of proper judicial and prosecutorial control and inadmissibility of "illegal" methods of criminal

investigation (González-Núñez, 2018); there is the problem of cases of admissibility of official disobedience, when, despite the absolute prohibition of torture, such "catastrophic cases" may occur, within which a special services agent is ready to take this step and suffer legal consequences (Gross, 2007); as well as issues of implementation of the Istanbul Protocol (Furtmayr & Frewer, 2010) and other problems.

And while in the practice of the ECtHR such techniques are undoubtedly strongly condemned, in the practice of the U.S. special services they become the subject of discussion, the subject of international and national debate. U.S. lawyers appeal to five factors that are important in determining the appropriateness and extent of such an impact on a suspect: 1) the number of lives at real risk; 2) the immediacy and reality of the damage; 3) the availability of other means to obtain information; 4) the level of illegal activity of the subject; 5) the probability that the subject has the relevant information (Yahunov, 2020, pp. 66-70). Utilitarian justifications for torture do not work in the long run, but rather undermine the legitimacy of the state itself (Morgan, 2000).

This means that the success of Machiavellianism in the criminal process is questionable. Achieving material justice without procedural justice through erroneous procedures will not give the desired result of respect and trust in the law enforcement system, the rule of law, guaranteeing the right to a fair trial, and therefore the community of scholars and practitioners must continue to search for conceptual foundations for new paradigm activities that can repel torture and ill-treatment in the walls of offices or prisons in the XXI century behind the scenes of history.

Conclusion

The study showed that science has not yet developed a single approach to determining the goal of criminal justice. The significance of such a definition is even debated, as some scholars consider a clear definition of the goal as a fundamental basis for the functioning of the entire criminal justice system, while others deny the expediency of such a multiplication of theoretical abstractions.

For lawyers who still consider it valuable from a methodological and praxeological point of view to determine the goal of the criminal process,

there is also a place for debate. Some see such a goal in establishing the truth, others – in the protection of human rights and freedoms, the restoration of public order, still others – in combating crime and punishing criminals. In this context, the position of H. Packer seems appropriate, who proposed the concept of two models of criminal procedure: the model of combating crime and the model of due legal procedure. This approach allows you to systematize the idea of the goal because its value constants will follow depending on the choice of a particular model. For the first model, it is important to effectively combat crime, including force means. For the second, the priority is the proper procedural order, which resembles a "strip of obstacles" of a legal nature for pre-trial investigation bodies, operational units, the prosecutor's office, so as not to apply repressive measures to an innocent person. Here, the importance of establishing the truth may give way to the importance of following procedures and rules that are created as legal barriers for the prosecution and opportunities for the other party (suspect/accused) to defend themselves against the unfounded accusation.

Taking into account the idea of the need to introduce a model of due process of criminal proceedings, we define the goal of criminal proceedings through binary construction – material and procedural justice, where the first means establishing the truth in the case and the correct application of substantive law, and the second means compliance with the proper rule, that is, correct application of procedural law. The final product of this goal should be trust in the criminal justice system and law enforcement agencies, effective fight against crime, restoration of public order, protection of values, human rights and freedoms.

The means used to achieve the goal can be legal or non-legal. In most democratic states, it is not acceptable for the criminal justice system to establish the truth at any cost. The proper procedure of the criminal process refuses to recognize admissible evidence obtained with significant violations of the law, and to recognize the confession in the committed offense as the main proof; requires a careful examination of the validity of the grounds for carrying out procedural actions that violate the rights of the person; requires a response to defendants' complaints of physical or psychological violence by the police, prosecutors or other special services.

However, the study showed that in the XXI century the tendencies of the evolution of tortures and ill-treatment known from ancient times, intensified in the walls of law enforcement agencies, though today disguised as special interview techniques.

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Öz: Araştırmanın odak noktası, ebedi iyilik ve kötülük sorunudur. Bu kez, bu ikilik ceza muhakemesi alanında lokalizedir ve bir yanda hedefin, diğer yanda onu gerçekleştirmenin araçlarının korelasyonuyla ilgilidir. Başka bir deyişle, ana araştırma sorusu şudur: Makyavelizm mahkeme salonunda haklı çıkarılabilir mi? Makyavelizm kavramı, cezai kovuşturma bağlamında, tutuklulara, şüphelilere, gerçeği bilme, failleri açığa çıkarma, hayat kurtarma, rehinelerin serbest bırakılması, vb. kimselere karşı fiziksel veya psikolojik şiddetin kullanılmasına izin verildiğini düşünen "amaç herhangi bir aracı haklı çıkarır" felsefesinin uygulanması anlamına gelir. Uluslararası toplum, kolluk kuvvetleri bünyesinde işkence ve kötü muameleyi önlemek için güvenlik mekanizmaları geliştirmek için sürekli olarak çalışıyor olsa da, bu hakikat arayışı uygulamasının yeraltına taşındığı ve birçok ülkede hala özel servisler tarafından kullanıldığı görülüyor.

Anahtar Kelimeler: Ceza süreci, amaç araçları, maddi adalet, usul adaleti, gerçeğin tesisi.