Universal Decimal
Classification 343.13

Adamenko I. E.

TOWARDS THE QUESTION OF CONFLICTNESS OF THE RIGHT TO PUNISH AS A BASIS OF CRIMINAL-PROCEDURAL ACTIVITY

Igor' Evgen'evich Adamenko,
c.j.s (PhD in law), Professor of the Chair of criminal process at Krasnodar University of the RF MIA, Honored Lawyer of the Kuban, Associate professor.

Considering the criminal and criminal procedural law of Russia in the context of the analogy with the corresponding law of the United States, the author notes the copying of the norms and institutes of the American legal system, which has been conducted, in the opinion of the author, without taking into account the differences in the "spirit" of the Russian and American people. He notes a conflict between the criminal law and criminal procedure law in the legal system of the United States. Argues that the right to punish (in the United States) as a basis does not form an effective criminal procedural activity, which would be capable of achieving its objectives. Consequently, the building of the Russian legal system by copying the United States legal system leads to theoretically and practically flawed foundation of criminal procedural activity.

Keywords: criminal procedural activity, foundations of criminal procedural activity, punishment, conflictness of law.

Exploring the right to punish as a basis of criminal-procedural activity through the prism of the legal mechanism, mention should be given to some of its "programmed nature". At the level of the general theory of law A. V. Mal'ko and K. V. Shundikov describe this feature of legal mechanism as follows: "Normatively set "program", a kind of "algorithm" of action for legal mechanism, provides for what means, at what point and in what conditions they should work. In other words, legal mechanism is always based on a clear procedure" [9, 88]. Delegation the status of a normatively set "program" (a kind of "algorithm" for action) to legal mechanism means that the potential of the legal mechanism should inevitably ensure realization of the right to punish as a basis of criminal-procedural activity. This ensuring shows us the effectiveness both of the whole legal mechanism and its element (the right to punishment), as bases of criminal-procedural activity.

Consideration of the bases of criminal-procedural activity at the level of legal bond enables us to say that in this case we are dealing with the legal framing of logical thinking. However its subject matter is forms and laws, techniques and operations of thinking at the level of marginal grounds [6, 13], otherwise the logical thinking is the most abstract thinking. The genesis (life) of people, as well as the genesis of criminal-procedural activity is not subject to the laws of logical thinking. Specialists on systemic approach write: "People and events are not subject to the laws of logic, they are much less predictable and manageable than mathematical equations. Quick, methodical, logical decisions are not applicable to them" [10, 23].

The right to punish, as a basis of criminal-procedural activity, is a legal bond. Its goal is the realization of the right to punish, in accordance with the law. However, the results of research by Russian scientists show that the goal of the right to punish in many cases is not achieved, and in some situations it is simply depressing. So, S. B. Anufriev, analyzing the quality of pre-trial proceedings in criminal cases of corruption, wrote: "It is necessary to pay attention to a depressing situation connected, on the one hand, with the number of revealed crimes against state power, the interests of public service and service in local self-government bodies (20.5 thousand), and on the other, with the number of persons brought to criminal responsibility (4.3)" [2, 3-4].

The situation with the implementation of the right to punish as a basis of criminal-procedural activity is not only quite depressing, but also paradoxical. So, A. S. Kolyshnitsyn, having investigated the violations of the principle of inevitability of responsibility for crimes against personality, writes, "The paradox of

the situation is that, in some cases, the criminal law does not provide possibility to punish those perpetrators, who maliciously evade the enforcement of a sentence imposed against them, but allows to punish those who do not fulfill a court decision taken in respect of other persons" [7, 166].

The given results show that the right of punish as a basis does not form an effective criminal-procedural activity, which would be capable to achieve its objectives. This circumstance gives us reason to doubt the ability of the right to punish to serve as a backbone basis of criminal-procedural activity. Help to our doubts in this matter is the following fact. Failures in the implementation of the right to punish through criminal-procedural activity, which is structurally represented as a corresponding legal mechanism, illustrate a certain disharmony between the provisions of criminal law and criminal-procedural law. In the emotional frame of American researchers it is called as "the conflict between criminal law and criminal-procedural law" [8, 51].

In this study, we will pay the greatest attention to this conflict. Our step we explain not only by theoretical, but also by practical considerations. Because today there is no doubt that the current reform of domestic criminal court procedure is being conducted under the influence of American legal doctrine [1, 436-451]. Because of this, the main vector of judicial reform was directed to copy the provisions of law norms and legal institutes, which were assumed as a model for others to follow. The euphoria of emulation, associated with borrowing in the legal sphere of American legal formulas, unfortunately, did not walked past domestic researchers. For example, veteran legal scholar S. S. Alekseev, considering the conditions and specific features of functioning of the American legal system, wrote: "All of this has allowed the American jurisprudence on a number of positions "to spurt into the lead" in world development..." [3, 492].

In fairness, it should be noted that subsequent reflections of the domestic thinker are accompanied by critical thoughts about the ignoring by the American legal system of "juridical dogmatics", which, in his view, forms the basis of the legal culture in the global sense [3, 492]. The copying of the norms and institutes of the American legal system by the reformers of the current Russian criminal court procedure was carried out without taking into account one important circumstance: the moving of normative structures of criminal court procedure into Russia does not automatically transfer the spirit of law that is driven by the spirit of the American people [2, 79-99].

The transfer of the spirit of law is virtually impossible without the physical movement of its carriers, in our case, the members of the American community. For

our part, we would like to point out that in retrospect the transfer of the spirit of law in space was carried out by Europeans during the conquest of the indigenous people of the American continent. But with all its success it had limitations. The European spirit of law applied only to the immigrants from Europe, the indigenous people did not perceive it, what led to armed conflicts, in which the European law was generally of a secondary role.

Conflictness lies not only in the base of armed confrontation. It is also peculiar for contemporary American legal doctrine. Well-known American researcher Norbert Wiener says, "Our whole legal system has the nature of conflict. It is a conversation involving at least three parties ..." [5, 126]. In turn, Norbert Wiener sees the resolution of conflicts of the American legal system in legal precedent. Norbert Wiener notes, that "At any rate, no legal norms obtain absolutely accurate meaning until they and their limitations are determined in practice, and this determination is the work of precedent. Ignoring of a decision on an already existing case, means to argue against a uniform interpretation of legal language, and ipso facto it would be the cause of uncertainty and, very likely, of consequent injustice" [5, 122].

Conflict in the American legal system is manifested not only at the level of a whole, but also at the level of separate, namely, at the level of criminal law and criminal-procedural law. Its essence American experts explain as follows: "Substantive law is trying to ensure order (absence of crimes) through the control over population. Procedural law or legality, which in the United States is traditionally higher than the application of substantive law, impedes it to achieve total control. As a result, the total order is unreachable, and the popular phrase "law and order" should be interpreted as a "law and some mess" [8, 51].

A conflict between the criminal law and criminal-procedural law in the American legal system lets us say: bond in the legal mechanism, as a basis of criminal-procedural activity, is of conflict nature. Even say more: it is contradictory. Judging by the conclusion of the American legal scholar, its inconsistency lies in the opposite vector direction, on the one hand, criminal law, which seeks to establish an order, and, on the other hand, criminal-procedural law focused on a mess. In turn, the mess conditioned by criminal-procedural law is justified by the priority of the rights of a personality. As a consequence, we have theoretically and practically defective basis of criminal-procedural activity.

References:

1. Agutin A. V. *World Outlook Ideas in Criminal-Procedural Proving: Monograph* [Mirovozzrencheskie idei v ugolovno-protsessual'nom dokazyvanii: Monografiya]. Under edition of V. T. Tomin, Moscow: 2004.
2. Agutin A. V. *Fundamentals of Criminal-Procedural Proving in Russian Criminal Court Procedure: Monograph* [Osnovy ugolovno-protsessual'nogo dokazyvaniya v rossiiskom ugolovnom sudoproizvodstve: Monografiya]. Under edition of V. N. Grigor'ev, Moscow: 2010.
3. Alekseev S. S. *Climbing to Law. Searches and Solutions* [Voskhozhdenie k pravu. Poiski i resheniya]. 2nd revised and enlarged edition, Moscow: 2002.
4. Anufriev S. B. *Organization of Pretrial Proceedings in Criminal Cases Concerning Corruption Crimes:* thesis abstract of a candidate of legal sciences [Organizatsiya dosudebnogo proizvodstva po ugolovnym delam o prestupleniyakh korruptsionnoi napravlennosti: Avtoref. dis… kand. yurid. nauk]. Moscow: 2008.
5. Viner N. *The Creator and Future* [Tvorets i Budushchee]. Translation from English, Moscow: 2003.
6. Degtyarev M. G., Khmelevskaya S. A. *Logic: Textbook for Law Students* [Logika: Uchebnik dlya studentov yuridicheskikh vuzov]. Moscow: 2003.
7. Kolyshnitsyn A. S. About the Violation of the Principle of Inevitability of Punishment for Crimes against Personality [O narushenii printsipa neotvratimosti otvetstvennosti za sovershenie prestuplenii protiv lichnosti]. Sbornik statei Mezhdunarodnoi nauchno-prakticheskoi konferentsii «Sovremennyi chelovek i obshchestvo» – Collected papers of the International scientific-practical conference "Modern Man and Society", *Pravo – Law*, Moscow:2010, Vol. 2.
8. *Criminology* [Kriminologiya]. Under edition of J. F. Sheli, translation from English, St. Petersburg: 2003.
9. Mal'ko A. V., Shundikov K. V. *Aims and Means in Law and Legal Policy* [Tseli i sredstva v prave i pravovoi politike]. Saratov: 2003.
10. O'Konnor D. *Art of Systems Thinking: Essential Knowledge on Systems and Creative Approach to Problems Solving* [Iskusstvo sistemnogo myshleniya: Neobkhodimye znaniya o sistemakh i tvorcheskom podkhode k resheniyu problem]. Translation from English, Moscow: 2006.