Grinenko A.V.♦

DOI: 10.25108/2304-1730-1749.iolr.2018.56.124-136

Relation of normative expression of the principles and their content

Abstract: In criminal process like in especial form of the state activity to the normative sources of appropriate branch of law (in its static component) should be attributed not only normative legal acts adopted in established order not low than in a level of federal legislation. All the rest factors, which impact anyway to criminal procedural law enforcement, should be attributed to the category of informational sources.

Of particular value for scientific research presents the classification of sources that expressed in form of laws, depending on their legal force. This will allow, in an event of a conflict of norms in different acts of hierarchy, correctly determining the priority and proposing appropriate changes.

Keywords: criminal procedural principles; sources of law; normative sources; informational sources; Constitutional Court of RF; criminal process; lawmaking activity.

Normative nature is a main feature of criminal procedural principles. Only being expressed in the form of legal norms of the highest juridical force, the principles have an opportunity to exert an appropriate regulatory and protective influence on the legal relations arising in the proceedings for each specific criminal case.

Current system of law has been generated by a big quantity of various normative acts. Main difficultness in establishment of a content of the principles is

♦ **Grinenko Aleksandr Viktorovich** – Doctor of Law, Professor, Department for Criminal Law, Criminal Procedure and Criminalistics of MGIMO, Moscow, Russia. E-mail: a.grinenko@inno.mgimo.ru

that this can be dome only through selection of the rules, which enter in a content of every principle, from the sources that are differentiated in their juridical force and legal nature.

However, even at the very beginning, we will be able to face difficulties in identifying the sources of law in general and in criminal procedure law in particular.

There is no unity in theory of law concerning understanding of an essence and legal nature of the sources of law [7, p. 138; 8, p. 254; 14, p. 184-187; 4, p. 284-291; 3, p. 145-148; 9, p. 149; 5, p. 164-175]. There is also no unity of views when determining the sources of criminal procedural law. One group of scientists categorically attributed to them only law [11, p. 28-45; 12, p. 15-19; 2, p. 36-43]. Other authors directly recognize an opportunity of existence the both the law and other sources of criminal law – by-law normative legal acts, investigatory and judicial practice, legal customs, traditions, precedents etc. So, in addition to the laws V.G. Daev relates also acts of interpretations of the current legislation to the category of sources [6, p. 14]. More wider list of the sources of criminal procedural law is suggested by K.F. Gutsenko, who adds to them the both the current laws, international legal acts and decisions of Constitution Court of RF, which concern of criminal proceedings, explanation of the Plenum of the Supreme Court of RF and appropriate normative acts of the ministries and departments [13, p. 26-27].

All aforementioned points of view deserve the most careful attention, because they clearly demonstrate a depth and ambiguity of the problem of selecting sources of law. In our opinion, at its resolving as a basic it should be applied the thesis that it is impossible to unequivocally assess law in view of its special social purpose and determination by a set of specific factors.

In one case, law is represented as a static phenomenon existing at a certain time point in a ‘frozen’ form. Naturally, knowing this law, it’s the only source we

can recognize is only a normative legal act, since only it acts as an external bearer of a content of law.

In other side, law might be assessed in its dynamics, development and improvement. Undoubtedly, any public product together development of a society also undergoes significant changes. Being interconnected and interdependent, the law and the state are constantly adapting to the needs of society, 'absorb' any useful innovations. Therefore, defining a law as a dynamic category, we should agree that not only the newly adopted legislation exerts influence on its development, but also those external information carriers that have an incentive effect on the legislative power.

This division, certainly, is somewhat conditionally as a law in a regime of 'real time' has simultaneously the both the static and dynamic components. In accordance with this all sources of law might be also divided into the two closely interlinked, but different in their legal nature groups: normative and information sources. To the first group should be attributed only documents that have normative nature, to the second one – all the rest, including those which have no documental expression (for example, legal customs).

As the next criterion for determining that allows determining the set of sources of law, one should introduce such a characteristic as the attribution of the right that inherent in a particular state to one of the varieties of world legal systems. In the scientific and educational literature of the Soviet period, the socialist and bourgeois types of law were often contrasted [10, p. 130-132]. In our opinion, significant differences do take place; however, they are rooted, first of all, in the peculiarities of emergence and establishment of a particular state with its inherent system of law.

As history shows, an emergence of various legal systems occurred simultaneously with the emergence of the state. However, due to various reasons (the micro-social environment, climatic conditions, differences in the methods of

cultivating the land and obtaining food, the availability of specific tools of labor and armament, the specifics of customs, traditions, etc.), the process of formation of states went in two main directions. The root of their difference lies in the way they acquire and retain power.

When emerging a civilized society in place of modern Britain, a state that was formed included many small settlements in its structure. The main power belonged to elected representatives. Centralization of the state took place extremely slowly; some settlements gradually 'pulled' to the center and lost their independence. Even now, such states are characterized by relatively large independence of its constituent territories.

Have done judicial functions, the councils of settlements used the so-called 'right of common sense', i.e. resolved specific disputes, based on their own life experience. Gradually this experience was transferred from generation to generation in the beginning in the form of customs, and later on their basis the so-called 'customary law' was formed. The process of grinding the rules went along the path of their most concretization. Initially a force that was equal to the laws, became the legal precedents, which present court's decisions on specific cases that are generally binding for all subsequent courts considering similar cases [1, 8-15].

At the same historical period in continental Europe the number of state was generated with the use of force by armed group in head of bright leader. In such type of the states are formed a firm power that prone to authoritarianism. Law became formed by state leadership. Source of continental law became legislation, and activity of the state structure mainly had been directed in ensuring of unquestioning execution of the relevant rules. Lawmaking activity was in this case was led not to the greatest concretization of law, but to its formalization in conjunction with strict control.

Thus, a precedent is a main normative source of Anglo-Saxon system, and in continental system – normative legal act.

However in the ‘continental’ cut a law might not be evaluated uniquely as in each of its branches unequal is a sphere of coercion and level of impact in guarded social relations that provided by state power. So, in labour law to the sources among others are uniquely added local normative legal agreements, including the collective and even individual labour agreements (provided that they meet the current legislation).

In criminal process like in especial form of the state activity to the normative sources of appropriate branch of law (in its static component) should be attributed not only normative legal acts adopted in established order not low than in a level of federal legislation. All the rest factors, which impact anyway to criminal procedural law enforcement, should be attributed to the category of informational sources.

Of particular value for scientific research presents the classification of sources that expressed in form of laws, depending on their legal force. This will allow, in an event of a conflict of norms in different acts of hierarchy, correctly determining the priority and proposing appropriate changes

Thus, to the category of normative sources, in which concentrated a content of criminal procedural principles are attributed:

1. International normative legal acts, ratified by Russian Federation at the level of legislation.

2. Constitution of Russian Federation of 12 December 1993.

3. Code of Criminal Procedure of Russian Federation.

4. Other federal law in part concerning regulation of criminal procedural activity.

References

1. Aparova T.V. Sudy i sudebnyi protsess v Velikobritanii [Courts and criminal process in Great Britain]. Moscow, 1996, 157 p.

2. Gromov N.A. Ugolovnyi protsess Rossii. Uchebnoe posobie [Criminal process of Russia. Teaching aid]. Moscow, 1998, 552 p.

3. Komarov S.A. Obschaya teoriya gosudarstva i prava. Kurs lektsiyi [General theory of state and law. Course of lectures]. Saransk, 1994, 303 p.

4. Marchenko M.N. Teoriya gosudarstva i prava. Uchebnik [Theory of state and law. Textbook]. Moscow, 1996, 656 p.

5. Obschaya teoriya prava. Uchebnik [General theory of law. Textbook]. Pod red. prof. N.S. Pigolkina [Ed. by Prof. N.S. Pigolkin]. Moscow, 1995, 384 p.

6. Sovetskyi ugolovnyi protsess [Soviet criminal process]. Pod red. N.S. Alekseeva [Ed. by N.S. Alekseev]. Leningrad, 1989, 472 p.

7. Spiridonov L.I. Teoriya gosudarstva i prava. Uchebnik [Theory of state and law. Textbook]. Moscow, 1996, 301 p.

8. Teoriya gosudarstva i prava. Kurs lektsiyi [General theory of state and law. Course of lectures]. Pod red. prof. N.A. Kataeva i prof. V.V. Lazareva [Ed. by N.A. Kataev and Prof. V.V. Lazarev]. Ufa, 1994, 480 p.

9. Teoriya gosudarstva i prava. Uchebnik [Theory of state and law. Textbook]. Pod red. prof. Manova [Ed. by Prof. Manov]. Moscow, 1996, 308 p.

10. Teoriya gosudarstva i prava. Uchebnik [Theory of state and law. Textbook]. Moscow, 1968, 640 p.

11. Ugolovnyi protsess. Uchebnik [Criminal process. Textbook]. Pod red. prof. V.P. Bozhyeva [Ed. by Prof. V.P. Bozhyev]. Moscow, 1998, 704 p.

12. Ugolovnyi protsess. Uchebnik dlya vuzov [Criminal process. Textbookfor Universities]. Pod red. prof. P.A. Lupinskoyi Bozhyeva [Ed. by Prof. V. A. Lupinskaya]. Moscow, 1995, 544 p.

13. Ugolovnyi protsess. Uchebnik [Criminal process. Textbook]. Pod red. prof. K.F. Gutsenko [Ed. by Prof. K.F. Gutsenko]. Moscow, 1998, 509 p.

14. Khropanyuk V.N. Teoriya gosudarstva i prava. Uchebnoe posobie [Theory of state and law. Teaching aid]. Moscow, 1998, 944 p.