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Problems of formation and use of non-codified sources of criminal procedural law

Abstract: Despite the existence of a specialized law - the Code of Criminal Procedure of Russian Federation (hereinafter, the CCP of RF) - public relations related to an investigation and examination of criminal cases are governed by legal norms contained in other laws. As a rule, these norms are focused on regulation of private issues; however, nevertheless, they are sources of criminal proceedings and cannot be ignored in law enforcement. Other laws are combined in different ways with the Criminal Procedure Code and, depending on this, are divided into: 1) the laws, which regulate an activity of law enforcement bodies and legal status of judges; 2) other laws containing the norms that regulate specific, private issues, which can be appeared at production on a case. We are inclined to single out another group in this classification - laws that perform an interim function in relation to criminal proceedings.

Keywords: non-codified sources; criminal procedural law; Constitution of RF; the CCP of RF; Constitutional Court; criminal proceedings; normative act; criminal and procedural relations.

Under the non-codified sources of criminal procedural law we understand those normative acts, in which are contained at least one criminal procedural norm or its element. In course of consideration of an issue on the notion of the sources of criminal procedural law there has been repeatedly paid attention to considerable amount of the normative acts (including the laws), which are covering to one

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extent or another the sphere of proceedings. In our opinion, such a dispersal of criminal procedure norms is an extremely undesirable phenomenon.

Firstly, from the standpoint of legal technique, the current situation can be assessed as a rejection of achievements in terms of drafting and expounding legislation. In addition, the dispersed norms of criminal procedural law are more difficult to link together, to infuse into a single coherent system.

Secondly, which is of no less importance, a location of the legal regulations governing criminal proceedings in a significant number of laws makes them difficult to reach for a law enforcer. Practice research has shown that, in most cases, investigators and operational workers are not oriented in non-codified criminal procedure legislation. So, a survey made by us among the investigators of the bodies of internal affairs showed that they familiar far not with all criminal procedural regulations that are contained beyond the CCP of RF. On question: "What laws (in addition of the CCP of RF) should be guided in course of investigation at?" Constitution of Russian Federation was named by 71% of surveyed persons, the Law of RF 'On militia' (existed at that time) – 66.6%, Federal Law 'Law Enforcement Operations Act' – 23.8%, Law of RF 'On Status of Judges in Russian Federation' – 5%.

In our view, representatives of the theory of criminal process are unanimous in their opinion that laws, including the Constitution of the Russian Federation, are among the sources of criminal procedural law. We have no any objections concerning that. We believe that there is no necessity to expound here the brief characteristics of these laws or criminal procedural norms that are contained in them. Therefore, let's draw attention to those problems, which appear at application of criminal procedural norms that are contained in non-codified criminal procedural legislation.

First, we have already expressed dissatisfaction with the fact that a legislator in part 1 of Article 1 of the CCP of RF did not designate the Constitution of

Russian Federation as a law establishing the judicial procedure. He indicated it only as a basic regulatory act on which the CCP of RF is based. Moreover, the current Constitution of Russian Federation is the 'most criminal procedural' Constitution in all of the Russian history [1, p. 73].V.P. Bozhyev is right in that this circumstance does not excluded indirect participation of the Basic law of Russia in regulating of criminal procedural relations. At the same time, the author makes up a number of arguments, among which the most weighty, in our opinion, are: an possibility of direct application of constitutional norms in criminal proceedings (which the Constitutional Court of Russian Federation and the Plenum of the Supreme Court have repeatedly indicated) and using of the provisions of the Basic Law at resolution of conflicts between criminal procedure law and branch regulatory acts [2, p. 6].

A legislator has unsuccessfully used the Constitution of Russian Federation and as the basis of the CCP of RF. This is evidenced by the numerous decisions of the Constitutional Court of Russian Federation on criminal proceedings, and this is not in favor of the developers of the text of the CCP of RF. We do not believe it possible to consider them all within the framework of this article. But the question of whether the decisions of the Constitutional Court of the Russian Federation are among the sources of criminal procedural law should be discussed, especially since recently such decisions have played a significant role in legal regulation of criminal procedure. In our opinion, there are weighty arguments both "pros" the inclusion of the considered acts to the sources of criminal procedural law, and "cons".

In the first place the arguments 'against' should be included the fact that the Constitutional Court of the Russian Federation is a judicial body of constitutional control and as such does not issue laws [6, p. 149]. It is also an important that the majority of decisions of the supreme body of constitutional supervising in the field of criminal proceedings were made on complaints of violation of constitutional

rights and freedoms of citizens. Wherein, according to part 1 of Article 96 of the Federal Law 'On the Constitutional Court of Russian Federation' [9] the right to apply to the Constitutional Court of RF with an individual or collective complaint in violation of the constitutional rights and freedoms has the citizens, whose rights and freedoms are violated by the law that was applied and should be applied in a specific case. Thus, considerable part of the decisions of the Constitutional Court of RF based on examination of a specific vital happening i.e. has the signs of individual legal act, which, in our opinion, does not form law's norms.

The first place, counterargument 'cons' should be attributed to the arguments 'pros'. Indeed, the Constitutional Court of Russian Federation does not issue laws. But in this case, we are interested in lawmaking, but not legislative activity. As it is rightly pointed out, the rules of law are contained not only in the laws [8, p. 69-72]. Supreme body of the constitutional supervision, as rule, makes a decision in the basis on examination of a specific vital case, but only 'on the basis'. On the whole it gives an assessment to a specific legal instruction in compliance with the Constitution of RF. Therefore, this decision cannot be considered as legal act (such as a sentence of court). It is universally binding. Recognizing this or that legislative determination not corresponding to the Constitution of RF, the Constitutional Court of RF blocks an application of this norm. And although, unlike a legislator, it does not recognize this provision as invalid, the essence does not change. The both a legislator and the Constitutional Court of RF have the equal right to forbid an application of a specific legal norm.

Now, we expound the arguments 'pros'.

1. With decisions of the Constitutional Court of RF can be established new rules of behaviour of participants of criminal proceedings. Striking sample of this is a reaction of supreme body of the constitutional supervision onto provisions of Article 405 of the CCP of RF (in edition before adoption of the Federal law of 14 March 2005 no. 39-FZ). According to the Decision of the Constitutional Court of

RF of 11 May 2005 no. 5-P, Article 405 of the CCP of RF in the extent in which it in the system of current criminal procedural regulation of reviewing of entering in legal force sentences, determinations and decisions of a court, not allowing turn for the worse at revising of judicial decision in an order of supervision on complaint of a victim (his representative) or on presentation of a prosecutor, does not allow eliminating made sufficient (fundamental) violations, which affect on results of a case, has recognized inconsistent with the Constitution of RF, in interlinking with Article 6 of the Convention on Protection of Human Rights and Fundamental Freedoms and cl. 2 of Article 4 to the Protocol no. 7 to it. Furthermore, the Constitutional Court of RF decided: henceforward before introduction of relevant amendments and additions to criminal procedure legislation, reviewing of an indictment in an order of supervision of complaint of a victim, his representative and on presentation of a prosecutor of an indictment, and also on determination and decision of a court due to necessity to apply a criminal law on more grave crime because of leniency of punishment or other grounds, which entail the deterioration of situation of a convicted person, and also a verdict of non-guilty or determination or decision of a court on cancellation of criminal case that is allowed only during a year on entering in a legal force.

We consider it necessary to note that by this prescription the law enforcers have been used for four years until a lawmaker did not make appropriate corrections in the CCP of RF.

2. In some cases the decisions of the Constitutional Court of RF drastically change an essence and content of the norms and institutions of criminal procedural law. Analyzing a current legal regulation of the provisions of part 3 of Article 56 of the CCP of RF, where is indicated a list of persons who are not subject to be interrogated, we should note that a prohibition that formulated in this norm has seemed not absolute. Such conclusion comes from a position of the Constitution Court of RF on this issue, which has expressed it repeatedly in its determinations.

It seems to us that a key normative act in this case is the Determination no. 108-O of the Constitutional Court of 6 March 2003.

In complaint of G.V. Tsitskishvili has disputed the constitutionality of the provision of the CCP of RF, according to which a counsel-defender of suspected or accused person should not to be interrogated as a witness about the circumstances, which became known him due to participation in production on criminal case. Having examined it, the superior body of the constitutional supervision noted that a norm containing in cl. 2 of part 3 of Article 56 of the CCP of RF (like a corresponding to it a norm of part 2 of Article 8 of the Federal Law 'On Lawyer's activity and Advocacy in Russian Federation'), directed on protection of confidentiality of information that entrusted by a client to a lawyer during performance by him his professional functions. In this case a lawmaker did not follow any other purposes except creation of the conditions for obtaining by an accused person a qualified legal aid and ensuring an advocate secret. Releasing a counsel-defender from obligation to testify about the circumstances that have become known or entrusted to him in connection with his professional activities, serves to ensure the interests of an accused person and guarantees a counsel-defender to perform his functions unhindered; this is the meaning and purpose of indicated norm.

Releasing a lawyer on obligation to testify about the circumstances that have become known him, when it caused by unwillingness to divulge a confidential information, cl. 2 of part 3 of Article 56 of the CCP of RF does not exclude also his rights to give appropriate testimonies in the cases when a lawyer and his client are interested in divulging those or other information. This norm also is not an obstacle for a lawyer in performing the right to be as a witness in a case upon condition a change later his legal status and ensuring the rights and legal interests the persons who entrusted him information.

Moreover, the Constitutional Court of RF disseminated this interpretation not only on lawyers; it has also indicated that in these cases the courts have no rights to refuse in giving witness' testimonies to persons listed in part 3 of Article 56 of the CCP of RF (including counsel-defenders of accused and suspected) upon submitting by them appropriate petition. Impossibility of interrogation of the persons indicated – upon their consent to give testimonies, and also upon consent of those, whose rights and legal interests the confidentially received information directly concerns, - would lead to violation of constitutional right to judicial protection and misrepresent an existence of this right.

In our view, the last judgement of the Constitutional Court of RF is not rather well-founded. So, if to disseminate an opportunity of interrogation another (than lawyer) persons listed in part 3 of Article 56 of the CCP of RF, then it can be called into question a presence, for instance, a secret of deliberation room, a seal of confession and others. However since this interpretation by supreme body of constitutional supervision has performed then it seems necessity a correction of the CCP of RF. In these purpose it would be reasonable to supplement Article 56 of the CCP with part 3^1, setting forth it as follows:

"3^1. Court has no right to refuse giving of witness testimonies to the persons who listed in part three of the present Article, upon submitting by them appropriate petition, and also upon consent those, whose rights and legal interests the confidentially received information concerns".

A legislator has not yet made this step, though the decision of the Constitutional Court of RF, undoubtedly, influenced on the content of witness immunity. Impact of the supreme body of the constitutional supervision takes place in respect of provisions of part 8 of Article 42, part 1 of Article 45 of the CCP of RF and number of other norms. In particular, based on the decision of the supreme body of the constitutional supervision the provisions of part 8 of Article 42 of the CCP of RF cannot be considered as excluding an opportunity to authorize with

procedural rights of a victim more than one close relative of a person whose death was resulted by crime (Determination of the Constitutional Court of RF of 18 January 2005 no. 131-O).

3. In some cases the Constitutional Court of RF makes alterations or corrections in criminal procedural relations conducting them in compliance with the Constitution of RF. For example, the supreme body of the constitutional supervision has indicated that provision of part 3 of Article 125 of the CCP of RF in its constitutional legal interpretation does not impede to permission of a representative to participation in examination of victim's complaint into action (inaction) and decisions of an inquiry officer, investigator and prosecutor independently whether earlier a representative took participation in a case or not (Determination of the Constitution Court of RF of 24 November 2005 no. 431-O). In other case the Court has indicated that provisions of Article 182 of the CCP of RF in their constitutional legal interpretation and in the systemic unity with provisions of part 3 of Article 8 of the Federal Law 'On lawyer activity and advocacy in Russian Federation' do not presuppose an opportunity of production of a search in a service room of a lawyer or lawyer association without adoption of special court decision (Determination of the Constitutional Court of RF of 8 November 2005 no. 439-O). Determination of the Constitutional Court of RF of 30 September 2004 no. 252-O says that part 7 of Article 236 of the CCP of RF does not exclude the right of accused to appeal in cassation order a decision that adopted by a court on the results of preliminary hearing on an issue about jurisdiction of criminal case.

There are a lot of similar samples. Moreover, analysis of the cases' state in this area causes concern. So, V.V. Kalnitsky in some cases concludes discrepancy of positions of a legislator and the Constitutional Court. Wherein, as the author notes, the Constitutional Court demonstrates, from one side, persistence and on other side – unnecessary delicacy [5, p. 89].

As we see, the arguments ‘for’ attribution of the decisions of Constitutional Court of RF (naturally, not all, and only those which contain criminal procedural norms) are more than ‘against’. Meanwhile some representatives of criminal procedural science are in doubt concerning that. So, in this connection, K.F. Gutsenko notes that “in our legal system and criminal procedural law, its sources came in something unusual. Courts began openly correct the CCP of RF that affected by many defects. This phenomenon should be paid proper attention the both the theorists and those who have to assist future and present jurists” [4, p. 20]. Scientists believe that a problem of determination of legal nature of the decisions of Constitutional Court of RF quite complicated [3, p. 81-82].

Foregoing testifies that decisions of Constitutional Court of RF play considerable role in regulating of criminal procedural relations, introduce alterations in these relations, bringing into a line with provisions of Constitution of RF, and are mandatory for execution. Based on this, we have doubts in the fact that such decisions are the sources of criminal procedural law.

Finalizing consideration of this issue we may make a number of reservations. Certainly, putting the criminal procedural legislation in compliance with Constitution of RF is a phenomenon, which might be evaluated only positively. The problem is that activity of the Constitutional Court of RF in this direction has episodic nature and predominantly is a fragmentary one. Blocking the action of one (or a few) norms of law in quite well-functioning (though imperfect) system, leaving here all other unchangeable, the Constitutional Court, in our opinion, in some cases only aggravates situation, increasing disunity, inconsistency, orderliness of criminal procedural law in general.

It is necessary here an initiative activity of a legislator, unfortunately this is not observed. We made above the sample of reacting of a legislator onto decision of the Constitutional Court of RF on Article 405 of the CCP of RF. This took place in respect of part 4 of Article 237 of the CCP of RF and some other cases [10, p.

47]. We agree with V.P. Bozhyev that such long-drawn reaction of the legislative body might not be justified [2, p. 12]. We do not object to suggestion of V.N. Larionov on establishment of responsibility of a lawmaker for non-execution of decisions of the Constitutional Court of RF [7, p. 11], we support suggestion of A.V. Mescheryakova on development and realization of the profile discussion platform at the highest legislative bodies [8, p. 69-72].

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