

УДК 343.1

Проблемы механизма реализации принципов уголовного судопроизводства

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Аннотация

Необходимым условием реализации правовых норм в уголовном процессе является разработка и создание единого уголовно-процессуального, организационно-управленческого механизма их обеспечения. Его значение заключается в том, что он является ключевым элементом общей системы защиты прав и законных интересов участников уголовного процесса. В статье также проводится разграничение понятий «реализация права» и «реализация принципов права», описываются идеи авторов относительно данной темы.

Ключевые слова

Правовая норма, уголовное судопроизводство, реализация права, реализация принципов права.

Introduction

A legal norm without a mechanism for its implementation is a lifeless

and useless maxim of law of a declarative character. An implementation mechanism is the primary element of putting a legal norm into practice.

"While defining implementation of legal standards V.V. Lazarev points out that realization of legal norms is a kind of behavior of subjects of law wherein instructions for legal norms take shape (good behavior), practical activity of the people on implementation of rights and legal obligations. That is to say it is a kind of implementation of the demands which are altogether expressed in legal standards and in people's behavior. Realization of legal norms is the immediate result of legal regulation and its definite demonstration"¹.

While defining this idea I.P. Levchenko displaces accents to a practical, immediate aspect of realization of legal norms and says "that realization of legal norms must be considered as a real implementation of orders contained in legal norms by subjects of law".

The Latin term "realis" – realization – real – means enforcement, implementation of some plans, projects, and ideas.

"Realization of legal norms amounts to: 1) compliance with the rights of official authorities, activities of differ-

ent state agencies and administrative officials. In these terms the realization of legal norms includes: guaranteeing natural and inalienable rights and latitudes for people and citizens by the Constitution of the RF, constitutional prohibition on adoption of offending laws, exercising the human rights as a criterion of legal nature of laws; compliance with the executive branch, adoption of laws; enactment of subordinate legislation on demand of observance and defense of human rights; possibility of judicial remedy in case of their violation both by individual persons and public authorities, including legislators; 2) execution of rights in individual persons' good behavior 3) law enforcement as a commanding activity of competent authorities and administrative officials focused on establishment and realization of rights and obligations of legal standards addressees"².

As distinct from B.N. Topornin G.V. Abramkin differentiates the concepts "force of law", "realization of law" and "enforcement of law", pointing out that all of them mark the overall effect of law. At that the concept "realization of law" is far less in terms of volume than "force of law" and "enforcement of law"

1 Gavrilov, B. Ya. (2001), "Realization of Legal Norms Concerning Protection of Constitutional Rights and Liberties of an Individual and a Citizen by Preliminary Investigation Agencies", *"Chernye dyry" v rossiiskom zakonodatel'stve*, No. 1, p. 12.

2 Topornin, B. N. (2001), *Juridical Encyclopedia*, Moscow, p. 933.

and involves implementation of demands concerning the legal rules³.

V.V. Lazarev defines realization of legal standards as a kind of good behavior of the subjects of law⁴. The given approach results from the fact that a legal standard generally amounts to a formulated maxim of law which can be realized in various forms, e.g. various actions and failure to act.

According to V.S. Nersesjanc the law making is the basic form of law enforcement. Adoptions of legal acts, formulation of legal regulations in these acts are the realization of objective conditions for their existence which are contained in public relations⁵.

Formulation and realization of consolidated criminal and procedural organizational and administrative mechanism of realization of legal norms as to protection of human rights in criminal procedures is the necessary condition⁶.

3 Abramkin, G. V. (2001), *Theory of Law: study guide*, Moscow, pp. 141–142.

4 Lazarev, V. V. (1972), *Application of the Soviet Law*, Kazan, P. 42.

5 Nersesjanc, V. S. (2002), *The Problems of General Theory of the Law and the State: textbook for universities*, Moscow, P. 418.

6 Gavrilov, B. Ya. (2001), "Realization of Legal Norms Concerning Protection of Constitutional Rights and Liberties of an Individual and a Citizen by Preliminary Investigation Agencies", *"Chernye dyry" v rossiiskom zakonodatel'stve*, No. 1, P. 24.

According to B.Ya. Gavrilov such a mechanism should come with scientific and legal establishments based on the law and subordinate legislations, scientifically grounded organizational and methodological recommendations and practical measures which provide effectiveness of the correlation of constitutional rights protection and their abridgement in the work of the law-enforcement authorities concerning detection and investigation of crimes.

Their importance lies in the fact that these means and measures constitute one of the elements of the general system of protection of rights and legitimate interests of participants of criminal procedures⁷.

From the positions of instrumental theory of law realization of legal instructions forms a separate segment of the legal regulation mechanism, an individual stage of its activity determined by inherently specific legal measures⁸.

In such a way the mechanism of realization of legal norms represents a complex of legal measures and methods which help to realize the legal effect of the law.

7 Ibid.

8 Lazarev, V. V. (1972), *Application of the Soviet Law*, Kazan, 200 p.; Reshetov, Yu. S. (1980), *Mechanism of Enforcement amid Full-fledged Socialism*, Kazan, 167 p.; Sapun, V. A. (1988), "Mechanism of Realization of the Soviet Law", *Pravovedenie*, No. 1, pp. 3-11.

V. A. Dyachenko uses the concept "mechanism of protection of the rights and liberties of an individual and a citizen": "The mechanism of protection of the rights and liberties of an individual and a citizen is a system of legal measures which help to materialize the regularity of confidential relations in the sphere of human rights in accord with the objects of a law-based state. Besides, the mechanism of protection of the rights and liberties of an individual and a citizen is the whole package of legal tools which help to assure legal actions on relations in the sphere of human rights and freedoms in order to protect them"⁹.

Furthermore V. A. Dyachenko detaches the basic components, and any legal mechanism cannot exist without:

- 1) regulatory basis of a mechanism – a legal framework which regulates these relations;
- 2) immediate activity of the subjects as regards to the law;
- 3) realization acts of legal rights and responsibilities¹⁰.

9 Dyachenko, V. A. (2002), "Mechanism of Human Rights Protection in Russia", *Gap of Realization and Defense of Human Rights: Materials of the All-Russian Workshop Conference of Young Scholars and Students*, Samara State Economic Academy, Samara, P. 39.

10 Ibid.

Key concepts "implementation of law" and "implementation of the principles of law" and main differences between them

It is necessary to point out that in scientific literature the concepts "enforcement of law" and "realization of law principles" are used with equal facility.

According to T.N. Dobrovol'skaya "not only the immediate realization of the norms formulated as the process principles should be included in the term practice of operation of criminal procedure principles, but also the materialization of these general starting points through application of numerous criminal and legal procedures derived from them and of more specialty wherein the content of separate sides of corresponding principle concretizes".

According to V. N. Balandin, A. A. Pavlushina and N. S. Malein the realization of legal principles and institutes proceeds in other way than enforcement of law, i.e. the principles of law are realized by virtue of legal norms complex focused on regulation in the sphere of legal relations embraced by the legal principle¹¹.

11 Malein, N. S. (1996), "Legal Principles, Norms and Judicial practice", *Gosudarstvo i Pravo*, No. 6, p. 13.

"In general the criminal procedure principle is characterized as a certain declaration which needs ensuring more detailed norms of criminal and procedural character in procedural actions. There can be concrete and special norms which are the procedural guarantees. There can also be some complexes of norms which establish certain legal institutes related to implementation of individual criminal procedure principles"¹².

According to O. Butorova "the realization of the principle differs from the enforcement of law in that the principles are the governing ideas, which determine construction of law while the legal standard is a customary maxim of law"¹³. The ideas are realized by dint of the tools – legal standards, and their total can be determined as a mechanism for the implementation of the principle. "In criminal procedure the word "mechanism" is used in combination with the word "activity" and means the order of doing"¹⁴.

V.P. Bozh'ev points out that "in order to be embodied to the tissue of an objectively functioning criminal procedure the constitutional principles should be mediated in branch legislation. Although the direct effect of its norms is covered by the Constitution of the RF (part 1, art. 15) all the same, to a greater or lesser extent, its norms-principles are in need of the mechanism of their realization as applied to separate stages and institutes of a criminal procedure"¹⁵.

While analyzing the problem of realization of criminal procedure principles V. T. Tomin uses the concept "influence of the system of principles" and for this reason demarcates two forms of influence: out of criminal and procedural relations and by dint of criminal and procedural relations. If out of criminal and procedural relations the system of criminal procedure principles has an effect on criminal and procedural activity through legal consciousness. The author thinks that this form is more dynamic, as it has no mediators – criminal and legal procedures and therefore the principles as worldview ideas are realized from the

12 Kudryavtseva, A. V., Livshits, Yu. D. (2001), "About the Idea of Principal in Criminal Procedures", *Pravovedenie*, No. 4, p. 162.

13 Butorova, O. (1998), "Implementation of the Constitutional Principle of the Presumption of Innocence in Criminal Procedures", *Pravo i Zhizn'*, No. 18, p. 26.

14 Alekseev, V. B., Alekseeva, L. B., Bozh'ev, V. P., Boikov, A. D., Karpets, I. I. (1989),

The Course of the Soviet Criminal Procedure. General part, Yurid. lit., Moscow, P. 90.

15 Bozh'ev, V. P. *The Criminal Procedure. General part: textbook*, Spark, Moscow, P. 47.

formula "idea – behavior". In addition, this form of realization of the principles through legal consciousness extends to larger set of people.

S. S. Erashov detaches two methods of realization of criminal procedure principles: "1) not doing actions forbidden by the principles of criminal procedure; 2) committal of dynamic actions on realizing the principals of criminal procedure. The first method of realization of the criminal procedure principles lies in the fact that participants of criminal and procedural activity refrain from doing actions prohibited by the principles. The second method of realization of criminal procedure principles lies in the fact that participants of criminal procedures and other bodies mediated by criminal procedures dynamically work on realization of the given principles.

I. L. Trunov connects the realization of criminal procedure principles with a kind of guarantee of their fulfillment: "While turning into it the principles of the most efficient procedure the form of action represents one of the legal guarantees of individual rights. The criminal and procedural law provides a network of guarantees for rights and freedoms including the principles of criminal procedures, duties of agencies of inquiry, crime investigators, public prosecutors,

all people who are particularly dependant in view of protection of human rights".

V. N. Balandin and A. A. Pavlushina are of the same opinion and express the necessity for security of the principles of the criminal procedure as a mechanism of their realization: "If we look at the principles of the process as at autonomous subject of research we can find out that the principle itself needs some guarantee for its realization. Such guarantees can be contracted in a normative assignment of the principle in home-base and international legislation as its securing with procedural sanctions and its implementation into public consciousness, administrative officials".

In this manner in scientific literature there is no common approach in understanding the mechanism for the implementation of the principles of criminal procedure. Many authors, among them V. P. Bozh'ev, V. N. Balandin, A. A. Pavlushina, O. Butorova, A. V. Kudryavtseva use the concept "mechanism for the implementation" while examining the problem of realization of the principles of criminal procedures.

This is aligned with the fact that the criminal procedure principle represents the concept as well as an executive position and one of its characteristics lies in its appliance at all stages of crimi-

nal procedures. The similar situation is possible only as late as the given principle penetrates all norms and institutions of the Criminal Procedure code of the RF.

An additional point is that the principle essentially is not a maxim of law which dictates a proper behavior to participants of legal relations as it may be lack of normative quality, i.e. it does not have a clear formulation.

"The principles which are undefined in constitutional and other laws as well as the principles which are in the picture in legislative acts but not representing distinct principles and not laying down the concrete rules of conduct are not standard¹⁶.

In turn, I. V. Tyrichev denotes the possibility of direct realization of criminal procedure principles: "The principles of the process, apart from terms, should not be declarations which all in all exert the certain control response at the law enforcement over procedural provisions. These are the norms of direct effect and can be implemented beyond the concretizing norms¹⁷.

Thus and so the mechanism for the implementation of the criminal procedure principles can be considered as a system of legal measures and methods aimed at consummation of the idea which is put in the principle of criminal procedures.

V. T. Tomin separates three methods of materialization of criminal procedure principles:

- 1) through denotation of the name of the principle in the law;
- 2) through revelation of the content of the principle in the law;
- 3) through realization of the outlook concept across the variety of private norms which regulate the process of criminal and procedural activity.

The mechanism for the implementation of the principle of protection of rights and liberties of an individual and a citizen through the direct effect does not seem to be effective, as the principle itself represents not a rule of behavior itself but the basic idea of possible actions and does not include the concrete instructions for various subjects of criminal and procedural legal relationships. By exception, wherein the direct realization of a possible criminal procedure principle is a deficiency of law as in such a situation a legislator talks of the need of overcoming the problem is in the ac-

16 Malein, N. S. (1996), "Legal Principles, Norms and Judicial practice", *Gosudarstvo i Pravo*, No. 6, p. 13.

17 Tyrichev, I. V. (1983), *The Principles of the Soviet Criminal Procedure*, VYuZI, Moscow, P. 6.

cord with the equity of the statute, which is taking shape in the principles of criminal procedures.

An additional point is that a violation of a criminal procedure principle while a criminal case is under consideration is a foundation for revoking a solution accepted with regard to the case, but only in default of distinct implementation arrangements. Even if the real set up principal exists it is very difficult to prove in practice wherein the principal was violated.

Conclusion

The mechanism for the implementation of the given legal principle differs from the mechanism for the implementa-

tion of the rule of law as the rule of law already includes a maxim of law whereby the participants of legal relations exist. While constructing the mechanism for the implementation of the principle one ought to bear in mind that one named thing in the law is not enough for its effective materializing, as the principles consolidate general principles and reference points only, whereby the entire system of law is being built. Therefore for creation of an effectively operating mechanism of realization of a criminal procedure principle not only the modification of the norm-principal itself, but the modification of individual principles and norms which are the constituent components of the mechanism for the implementation of the principle are needed.

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Problems of the mechanism for implementation of criminal procedure principles

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Abstract

A legal norm is lifeless and useless rule of conduct without an implementation mechanism that constitutes only declarative. Implementation mechanism is an essential element in the realization of the legal standard. The prerequisite of the realization of legal norms on the protection of individual rights in the criminal process is the development and creation of common criminal procedure, organizational and administrative mechanisms to their securing.

From the standpoint of the instrumental theory of law the implementation of legal regulations forms a special sub-system of the mechanism of legal regulation, the independent stage of its functioning, determined by the specific nature and functions of legal means. Thus, the mechanism of the right exercising is a set of legal tools and ways in which provided the legal effect of the law.

We need not only the modification of rules and principles to create an effective mechanism for the implementation of the principle of criminal justice, but even more specific principles, institutions and norms that make up the elements of the mechanism for the implementation of this principle.

Keywords

Legal norm, criminal justice, law implementation, implementation of principles of law.