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LEGAL REGULATION OPTIMISATION OF PERMISSIONS IN CRIMINAL PROCEEDINGS

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Abstract

The article analyses, at a fundamental level, the range of issues related to the use of permissions in criminal jurisdiction. The fact that general theory of law uses ambiguous approach while considering the correlation between the categories of “legal regulation means” and “legal regulation method” makes application of the concept of permissions in the science of criminal procedure, industry-specific legislation and relevant law enforcement practice more problematic. Considering permissions as the form to express private principles of criminal proceedings, the authors of this work note their significant expansion with the adoption of the current Criminal Procedural Code of the Russian Federation (hereinafter referred to as CCP) in 2001. The thesis that permissions are one of effective ways of legal regulation, along with obligation and prohibition, is substantiated. The issues of application optimization of permissions are researched from moral and ethical points of view, criminal process principles as well as correlation of public and private principles during criminal investigation, consideration and adjudication being taken into account. This paper reveals the correlation of forms of permission used depending on the subject (participant) of criminal process. It claims that extensive use of dispositive (private) principles in the legal regulation mechanism applied in criminal procedural relations creates high risks of abuse of rights. The implementation of the theoretical conclusions formulated by the authors will make it possible to optimize the legal basis of permission and the effectiveness of its application as a method of regulation in the criminal procedure law of Russia.

Keywords: Dispositiveness, expediency, moral principles, permission, procedural guarantees, publicity of criminal proceedings

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1. Introduction

Currently, the legal regulation mechanism is based on procedures that guarantee social freedom and activism of citizens and protect human rights and true democracy that is based on creative efforts of people. An effective way of legal regulation mechanism that affects the behaviour of criminal proceeding subjects during criminal trial is not only prohibition, but also permission, which contributes to the consistent development of society in the criminal procedural relations at all stages.

It is known that criminal procedural law is based on a peremptory regulation method in which the key means to influence the parties' conduct are to impose obligations (injunctions) and prohibitions. It is no coincidence that criminal procedure is based on the publicity principle, which implies the obligation of authorized criminal proceeding subjects to implement their powers regardless of the will of the other participants. Meanwhile, even with the imperative regulation method, permission could be used while forming criminal procedural rules, especially in terms of regulating the rights of suspects, accused, victims, etc. This provision does not mean us to recognize the coexistence of imperative and dispositive methods of legal regulation in criminal process, so, we critically assess the statements of criminal procedure specialists who consider dispositiveness as a criminal proceeding principle (Dikarev, 2005). Joining the position of Artamonova (2004), we think that all non-publicity rules are to be properly called private principles of criminal proceedings, these rules being significantly expanded by CCP adopted in 2001 (Artamonova, 2019).

2. Problem Statement

In law books, the issue of permissions having legal nature is that of general theory. Alekseev (1999) once said that permissions were neither the rules of law, nor legal relations, nor legal facts, nor legal technique elements, but they are the part of the legal matter that play an active role in legal regulation. Starting from this statement, we can find different points of view concerning the concept of permissions. We mostly take the position of Ignatenkova (2006), according to which permission should be interpreted as legal regulation means, expressed through legal norms, providing the subject with freedom to choose the way to behave within law limits, the interests of individuals, society and state ensured. However, sometimes general law theory defines regulation means so broadly that permission could be interpreted as a legal regulation method. So, according to Kulapov and Khokhlova (2010), a legal regulation method includes a set of legal means and techniques, as well as procedures for their use, in fact, equating it with a legal regulation method involving various means and techniques.

Ambiguous is the approach to the correlation of such categories as "legal regulation means" and "legal regulation method". Their unjustified identification in general law theory results in permission being classified as a legal regulation method in industry-specific sciences as well. In particular, Kutafin (2001), theorizing about constitutional law methods, distinguished prohibition, prescription and permission. Rossinsky (2009) speaks about the methods of prescription, permission, prohibition and coercion referring to criminal-procedural regulation sphere. Astafiev (2016) interpreted permission a specific regulation method criminal procedure cannot be carried out without. Undoubtedly, the interrelation and interdependence of legal regulation means and method, even in criminal proceedings, are

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obvious. However, it is important to note that legal regulation means is studied from the point of view of its impact on the conduct of the parties in criminal proceedings within a single rule or a set of rules, while a legal regulation method serves as a criterion to distinguish criminal procedural law as a whole from other branches of law. Since 2001 the special principles have considerably expanded, which calls for substantive researches of differentiated forms of criminal proceedings.

3. Research Questions

In current circumstances permissions become effective legal regulation means, which promotes sustainable societal development in criminal procedural relations at all stages of criminal proceedings (Kessler & Piehl, 1998). Permissions are expressed primarily in qualifying criminal procedure rules, allowing the freedom to choose a particular behavior. At the same time, such norms are constructed in such a way that unauthorized persons are allowed acting at their discretion (to commit or refrain from some actions stipulated by law), while state bodies and officials could choose one of alternative behavior patterns only (Howell, 2014). Regardless the fact whom rules are intended for, their enactment requires quite specific conditions, since unrestricted permissions carry the risk of arbitrariness and abuse of rights. The conditions for permissions to be applied in criminal proceedings are the circumstances that exist initially and/or arise during investigation and trial, or at the parties' discretion.

The conditions limiting and preventing abuse of those people who protect their own interests or represent somebody else's interests are very clearly prescribed by law. For example, according to Chapter 40 of CCP, a defendant can choose a special judicial procedure if he or she pleads guilty, and submits a motion, which is allowed only if the crime committed is minor or of medium gravity. The relevant motion shall be voluntarily filed by the accused, who consulted with his or her defense attorney and who is fully aware of nature and consequences of that motion submitted. Even these conditions being met, a special procedure may not take place if a defendant, a public or a private prosecutor or a victim have objections, or at the judge's own initiative (at the discretion of criminal process parties).

Similarly, the use of permission is framed in the case of reduced inquest, the basis of which is the suspect's request. The conditions for carrying out reduced inquest include initiating criminal proceedings against a particular person on the grounds of one or more offences stipulated by Article 150 § 3 (1) of the RF CCP; the suspect's pleading guilty and admitting the nature and extent of the harm caused by the offence, as well as having no objections to the legal assessment of the act given in the resolution instituting criminal proceedings. Moreover, there shall be no circumstances precluding reduced inquest and listed in Article 226.2 of the Code of Criminal Procedure. Being aware of the content of Article 226.2 of the RF CCP, we could see the dependence of the admissibility (inadmissibility) of reduced criminal inquest not only on objective circumstances (the minority of the suspect, inability to speak the language of the criminal proceedings, etc.), but also on the subjective discretion of the victim. Actually, later on, when the case is considered on the merits, the discretion of the parties and the judge may result in the criminal case being returned to the prosecutor for referral to investigative jurisdiction and investigation in accordance with the general procedure.

In order to induce people to commit some acts and refrain from others, according to Poznyshev (1923), it is necessary to sensitively appeal to human egoism in committing the former acts and not

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committing the latter; only law can impose a sufficient restraint on human egoism to achieve social progress. In such a compromise procedure permission is exercised through the freedom for a defendant to choose some settlement that would mitigate the sentence in the future. In connection with the above, there increases the likelihood of right abuse in case of aforesaid differentiated treatment in criminal proceedings. Thus, CCP provisions reasonably limit permissions to apply a special judgement procedure with the accused pleading guilty, seems quite justified. Similar conditions were formulated by lawmakers for proper permission application in traditional criminal trial. Hence, right abuse is prevented when an accused and his or her counsel are to examine the case file, but in case they stall, law limits permission, and an investigator and subsequently a judge can set a specific time limit at their discretion.

Apparently, for private persons, permission is rightly circumscribed by a legal framework preventing any kind of abuse. The problem lies elsewhere. Namely, those individuals who protect their own interests or represent somebody else have no guarantees that permissions will bring any result. A notable example is allowing defense attorneys to gather evidence. However, during litigation, the duty to collect testimony is vested in authorities and, therefore, it depends on them only whether the information obtained by the defense counsel will be accepted as evidence. The counsel for the defendant is allowed doing things state authorities and officials consider insignificant, and, therefore, the desired legal result is not always achieved. Accordingly, permission purpose is minimized.

The situation is similar what concerns pre-trial immunity agreements. The law does not stipulate where and how the actions of the suspect or the accused aimed at actively contributing to crime detection and investigation are fixed. Moreover, if a public prosecutor does not confirm the fact of defendant's active assistance to the detectives solving and investigating the crime, identifying and prosecuting other accomplices, and searching the property obtained by criminal means, general procedure will be held in trial, despite the fact a prosecutor could submit a criminal case to court. There is no requirement for the public prosecutor's statement to be proven at all (it is sufficient to state it without proper argumentation). Therefore, there is no doubt that in fact permissive actions aimed at satisfying legitimate interests of a suspect or an accused (having their sentence mitigated) do not guarantee any appropriate results. On the contrary, in a similar situation the prosecuting attorneys have statutory warranties that their permissive actions will come into effect. Since a suspect or an accused having pretrial immunity settlement may provide misleading information that may come true when a more lenient sentence is already passed, in order for the prosecution who made an agreement to use permission, Federal Law of July 3, 2016 No. 322-FZ amended CCP to include the provision according to which failure to comply with the conditions and obligations set out in a pre-trial immunity settlement is to be considered reasonable grounds to reject or change judgement in appeal, cassation and supervisory instance (Articles 389.15, 401.3, and 401.4 of the Code of Criminal Procedure).

Another vital problem is vague language used to describe restrictive conditions when permissions could be applied by authorities or no description at all. Investigators’ and judges’ discretion in assessing evidence is limited by law, criminal record available and such a moral and ethical category as "conscience". Moreover, courts are obliged to follow morals-based fairness principle which application could give rise to various sentences. But unreasonable incorporation of moral and ethical components into criminal process could result in arbitrariness and abuse. Even considering the fact that legislators presume

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high qualification of law enforcement officers, their fair dealing with criminal cases (Astafiev, 2016) and permissions are often interpreted without reference to criminal procedure basics. The ability of an investigator to determine the order to conduct inquiries and choose optimal investigative steps, stemming from the permissive way of legal regulation, makes his or her activity one-sided and accusatory by nature, as the requirement of factual investigation comprehensiveness, completeness and objectivity is often ignored.

Sometimes, having no definitions (restrictive conditions), state authorities and officials do not clearly understand what criteria they should be guided with to apply permission, for example, in case they have to terminate criminal procedure due to parties' reconciliation. Some scientists offer to introduce the principle of expediency into criminal process (Savelyev & Ivanov, 2019), that could oblige the authorities to argue in favor of this or that decision, in our opinion. In the meantime, permissions given to professional participants in criminal proceedings are ambiguous and abstract, thus, keeping potential risks of arbitrariness.

4. Purpose of the Study

The purpose of the study is to identify permission forms in criminal proceedings, finding out optimization ways for existing legal regulation mechanism (permissions applied), on the basis of systematic analysis of criminal procedural legislation and scientific ideas concerning permission.

5. Research Methods

To solve research problems general scientific and private scientific cognition methods were used. Dialectical, logical, systematic, structural-functional, and formal-legal methods are applied, as well as analysis of current legislation and scientific literature.

6. Findings

Based on the results of the study some problems associated with the use of permissions in criminal procedural regulation were found out:

- No proper guarantees for the parties to have the results of permissive actions applied in order to protect their own or represented interests;
- Regulation imbalance what concerns above-mentioned guarantees and permission guarantees given to authorities promoting public interests in criminal proceedings;
- Groundless penetration of moral and ethical principles into criminal proceedings, which give rise to right abuse by court officials;
- No wording aimed at creating reasonable conditions to limit discretionary powers of state authorities and officials in Russian criminal proceedings.

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7. Conclusion

The effectiveness of such legal regulation methods as permission, prohibition and obligation is conditioned not by isolated actions or their consolidation, but by active interaction that is the result of the dialectical unity of their mutual reliance. The right (permission in this case) of some criminal proceeding subjects could be exercised due to the fact that some other subjects have special obligations, which entail the legal responsibility of the authorized persons to protect the rights and freedoms of a man and a citizen in this legal area, if such obligations are not fulfilled. Permission is not arbitrary, but it is based on the obligation to respect the rights and interests of others, as each of the freedoms complies with some duty to respect the interests of the state and society. The freedom of one party is limited where it encroaches on the freedom of another party.

Legal framework optimization of permission shall cover two directions:

1) In the case of private persons, it is necessary to broaden the guarantees so that individuals could use permission and its consequences properly for their own or represented interests;

2) As far as the authorities are concerned, the conditions limiting the use of permissions need to be specified, because the current legislative approach and the amorphous wording of permissions entail a risk of arbitrariness of public authorities and officials who defend public interests.

Using the principle of expediency in criminal proceedings is proposed to be one of such restrictive conditions. Being enshrined in the text of the Criminal Procedural Code, it would oblige authorized criminal proceeding subjects to use of permissions during the trial reasonably. As long as it is not stipulated in the current legislation, state bodies and officials are able to manipulate permissions. For example, reconciliation of the parties and active repentance, subject to certain conditions, entitle an investigator to terminate the criminal proceeding (criminal prosecution), with the consent of the criminal investigation unit head and the prosecutor. However, not using expediency as the basic criminal proceeding principle does not require proving whether a permissive right was exercised in a particular case or not.

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