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CORRELATION OF CRIMINAL PROSECUTION AND PROTECTION OF THE RIGHTS AND FREEDOMS OF THE ACCUSED

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Abstract. The article discusses the relationship between criminal prosecution and protection of the rights and freedoms of the accused in the context of the typological characteristics of legal proceedings. Based on the comparative legal analysis, the author concludes that at present there is no explicit division of national criminal procedure systems into systems with the priority of substantive law over procedural law and systems with the priority of procedural law over substantive law.

Keywords: criminal prosecution, protection of the rights and freedoms of the accused, legal priorities, reasonable balance

The correlation between criminal prosecution and the protection of the rights and freedoms of the accused is traditionally one of the most controversial issues in the theory of criminal procedure. Many authors associate the solution of this issue with the typological characteristics of legal proceedings. It is believed that in continental European jurisdictions, the goal of criminal prosecution prevails (the priority of substantive criminal law over procedural law), in Anglo-American jurisdictions – the goal of protecting the rights and freedoms of the accused (the priority of criminal procedural law over substantive law).[1]

Are there really such explicit legal priorities? Obviously not. It is probably no accident that in modern English legal literature there are justified assertions that the

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[1] Criminologiya / Pod red. Dzh. F. Sheli. M., 2003. S. 51–52.

protection of the rights and freedoms of the accused is not the goal of the criminal process, but an important condition, under the mandatory observance of which its truly fundamental purpose must be carried out – to prevent crimes, to convict the guilty and to acquit the innocent.[2] In German, French and Russian literature, on the contrary, they are inclined to recognize such protection as a priority goal along with the protection of society and victims of crimes. In other words, there is no dispute about the predominance of substantive or procedural law. In any case, the views of scientists practically coincide when it comes to the corresponding values (no matter how they are defined – purpose, goal, task, means, condition).[3] This is natural, since at present it is impossible to imagine either total criminal law control over crime, or full (unlimited) protection of personal rights and freedoms.

Another issue is imposed by the question of how to find and who should look for a reasonable balance between the inevitability of prosecution for the commission of crimes, accompanied by the restriction of rights and freedoms and the risk of punishment of the innocent, and the need for a high standard of observance of these rights and freedoms, accompanied by the limitation of the power prerogatives of criminal prosecution and which can lead to impunity for some criminals.

In this context, one should be very critical of the position that justifies "the existence of criminal proceedings alongside criminal law" only by the need to prevent the conviction of innocent people.[4] Supporters of this position proceed from the concept of self-limitation of the state in the criminal process through the exercise of an independent judiciary in it, removed (not interfering) from the disclosure of crimes and the search for the guilty.[5] In itself, this concept (at least in the context under consideration) does not raise objections. However, the fact is that with its help (on its basis) an attempt is made to exclude the explanation of the criminal process by the need to combat crime (disclosure of crimes, exposure of guilt) or the implementation (determination, establishment) of the right of punishment available to the state. In fact, supporters of this position artificially separate the values of criminal prosecution and protection of rights and freedoms.

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[2] Ashworth A. The Criminal Process: An Evaluative Study. Oxford, 1998. P. 66.

[3] This does not mean that the distinction between these concepts is devoid of any theoretical or practical meaning.

[4] Mizulina E. B. Sovershenstvovanie ugolovno-processualnogo zakonodatelstva: Proekt UPK Rossiiskoi Federaci // Informacionniy bulleten Sledstvennogo komiteta *pri MVD Rossii*. 2001. № 1 (107). S. 146.

[5] Mikhailovskaya I. B. Nastolnaya kniga sudii po dokazivaniu v ugolovnom processe. M., 2006. S. 8-22. – For more information on the concept of self-restraint of the state in criminal proceedings, see: Mizulina E. B. Ugolovniy process: koncepciya samoogranicheniya gosudarstva. Tartu, 1991.

Instead of searching for a criminal-political and legislative balance between the interests of the individual and society in the criminal process, they oppose them to each other. This approach is in sharp contrast with the position of the Constitutional Court of the Russian Federation, which believes that within the framework of the public law, institution of criminal prosecution, the protection of rights and freedoms is guaranteed "both to persons against whom such prosecution is carried out and to other interested persons, including victims of a crime...".[6] Moreover, the approach of the Constitutional Court not only "completely breaks the connection between criminal law and criminal procedure",[7] but also cuts and distorts the content of the court's activities.[8] The court becomes a body that ascertains the law as an outcome of the struggle between the state and the citizen, and[9] does not constitute (determine, establish) the law as a result of correlating and coordinating the values of criminal prosecution and the protection of human rights and freedoms in each specific case. This is fundamentally wrong. Of course, the court cannot be a fighter against crime (like the investigative bodies and the prosecutor's office), but it cannot be removed from the fight against it. Such are the modern criminal and political realities, behind which there is the idea of the "cultural intrinsic value" of an independent judiciary, which has long been widely shared by legal scholars and put into practice. The guiding and restraining significance of this idea for the issue discussed here was drawn to the attention of proceduralist politicians by N.N. Rozin (one of the most authoritative scholars of procedural law of the century before last, who, by the way, is a supporter of the "pure" form of adversarial proceedings as the antipode of the "pure" form of search).[10] This idea is expressed quite clearly and definitely in the current position of the US Supreme Court, which in its decisions has repeatedly emphasized that the courts, by preventing abuse of power by the police, act in the interests of honest citizens, and do not contribute to avoiding the responsibility of criminals or correcting the mistakes of the police.[11]

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[6] Postanovlenie Konstitucionnogo Syda Rossiiskoi Federaciik ot 16 maya 2007 goda «Po delu o proverke konstitucionnosti polozenii statey 237, 413 и 418 Ugolovno-processualnogo kodeksa Rossiiskoi Federatcii v svyazi s zaprosom prezidikuma Kurganskogo oblastnogo suda» // Rossiiskaya gazeta. – 2007. – 2 iyunay.

[7] Cheltsov-Bebutov M. A. Sovetskiy ugolovniy process. Vipusk 1. Kharkov, 1928. S. 4.

[8] Ibidem. S. 5.

[9] Cheltsov-Bebutov M. A. Ukaz. Soch. S. 5; Strogovich M. S. Priroda sovetskogo ugolovnogo protsessa i printsip sostyazatelnosti. M., 1939. S. 84.

[10] Rozin N. N. Ugolovnoe sudoproizvodstvo. SPb., 1914. S. 42.

[11] Stoyko N. G., Nikitin G. A. Ugolovniy process v SShA: Zatchita lichnikh prav I svobod. SPb., 2006. S. 45-54.

The first time the U.S. Supreme Court touched on the issue was in 1886. In one of its decisions, it ruled that documents seized "[illegally] in an erroneous and unconstitutional manner" could not be admitted as evidence in a case because it violated the rights of citizens stipulated in Amendments IV and V[12] to the Constitution.[13] This decision served as a kind of "impetus" for the development of the rule for the exclusion of evidence obtained in violation of the personal rights of citizens, and the doctrine of the "Fruit of the Poisoned Tree" (FPT) in the American criminal process.

The rule of exclusion of incriminating evidence officially appeared in the Supreme Court's decision of 1914[14], when the court first stood up for the ideas of the IV Amendment.

The emergence of this rule pursued two main objectives: first, to prevent abuse of power by the police, and second, to protect the independence and fairness of the courts. The subsequent introduction of the “good faith exception” by the Supreme Court confirmed these objectives and completed the evolution of the exclusionary rule.

In applying the rule of exclusion of evidence, the courts must answer four questions:

1. Will the exclusion of evidence in this situation prevent further violation of Amendment IV by the police? If so, to what extent?
2. What is social loss from such an exception??
3. How illegal was the behavior of the police?
4. Can we say that the benefits of preventing future violations outweigh the social losses in this case??

Giving answers to these questions is not so easy. First, it is quite difficult for the courts to determine the amount of benefit from preventing future violations, while the public losses from the non-use of part of the collected evidence are quite easy to determine. In addition, the difficulty is caused by the fact that the rule of exclusion of evidence and the Fourth Amendment itself is not intended to protect criminals from fair punishment, but to protect the privacy of honest citizens from police attacks.

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[12] These amendments guarantee American citizens, in particular, the rights to inviolability of the person, home, papers and property, due process of law. For a description of these and other constitutional guarantees in the sphere of criminal procedure, see for more details: Bernam V. Pravovaya sistema Soedinennich Shtatov. Tretie izdanie. M., 2006. Pp. 469–517.

[13] Boyd v. United States 116 U.S. 616 (1886).

[14] Weeks v. United States 232 U.S. 383, 58 L Ed 652, 34 S Ct 341 (1914).

Because of these difficulties, for almost twenty years, the rule of exclusion of incriminating evidence was practically not applied by American courts. The situation changed dramatically only in 1984, when the Supreme Court, by its decision, formulated the concept of "exclusion of good will".[15] Its essence boils down to the fact that the courts should exclude only evidence obtained in violation of the law (intentionally or through negligence), which entailed the restriction of any personal constitutional right of the person concerned.

Under the influence of the above-mentioned decision of the Supreme Court, the rule of exclusion of evidence ceased to apply in practice to "technical" violations of Amendments IV and V.

For example, in one case where police officers arrested and searched a citizen on a warrant that was later declared illegal, the court concluded that there were no grounds for excluding evidence because the police had acted "in good faith," and the court does not intend to complicate the criminal case, excluding evidence proving criminal guilt.[16]

In another case, the court held that evidence obtained during a search resulting from a sufficiently substantiated but unsubstantiated accusation and leading to a charge of another crime should be considered lawful and accepted by the courts.[17]

The rule of exclusion of incriminating evidence was finally formed in the following two precedents.

United *States v. Leon.*[18] The police officers gathered evidence that drugs were being trafficked at three addresses in Los Angeles. Having presented this evidence to the prosecutor's office, they obtained a search warrant for all three addresses. During the search, a large amount of cocaine was found. The District Court ruled that the search was unlawful because there was no sufficient basis for conducting it. However, the Supreme Court returned the case for a new trial. indicating that the cocaine found during the search should be considered as one of the types of evidence.

Massachusetts *v. Sheppard.*[19] A disfigured charred female body was found in a car park. An autopsy found that death was the result of multiple blows to the head. The boyfriend of the murdered girl, Shepard, could not provide a convincing alibi, and during the inspection of his car, particles of substances like those found on the body and near the murdered girl were found. The investigator tried to obtain a

[15] United States v. Leon 468 U.S. 897, 82 L Ed 2d 667, 104 S Ct 3405 (1984).
[16] Michigan v. Tucker 417 U.S. 433, 41 L Ed 2d 182, 94 S Ct 2357 (1974).
[17] Michigan v. De Fillippo 443 31, Ed 2d 343, 99 S Ct 2627 (1979). U.S.61 L
[18] United States v. 468 897, Ed 2d 667, 104 S Ct 3405 (1984). LeonU.S.82 L
[19] Massachusetts v. Sheppard 468 981, Ed 2d 737, 104 S Ct 3424 (1984). U.S.82 L

search warrant for the apartment of the person he suspected but could not find the necessary form (it was Sunday). Then he used a search warrant form in drug cases. After explaining the situation to the magistrate, who also could not find the necessary form, the investigator (together with the magistrate) made the necessary corrections, and the magistrate signed the search warrant. During the search, evidence was found confirming Shepard's involvement in the murder of his girlfriend. The district court found Shepard guilty in murder. A Massachusetts court remanded the case for a new trial, saying the search was unconstitutional because the search warrant expressly authorized only the search for narcotic substances. The Supreme Court overturned this opinion, ruling that it was only a "technical error" that should not stand in the way of justice.

Thus, the modern application of the exclusion rule is fully consistent both with the purpose of criminal prosecution of people guilty of crimes and with the purpose of protecting the rights and freedoms of citizens from arbitrariness.

The FPT doctrine complements and clarifies the rule of exclusion of evidence. It was first formulated under this name in a 1939 Supreme Court decision.[20] Under this doctrine, the use of any incriminating evidence obtained because of unlawful police actions (even in the past) may be prohibited by a court.

Initially, the FPT doctrine was applied quite straightforwardly: if the police (even indirectly) committed at least some illegal actions when obtaining evidence, the evidence obtained was not used by the courts. However, even before 1939, the Supreme Court determined that the rule of exclusion of evidence incriminating an accused person on the commission of a crime could be declared inapplicable if there was an independent source of evidence.[21]

The following two cases can serve as examples of such recognition.

Silverhorne Lumber Co. v. United States. The owners of the wood processing company were arrested without a warrant, and all the company's documents were seized by the police. Subsequently, the owners were released, and the documents were returned by court order. However, the police remained with copies of all the documents. After examining the information obtained in copies, the police officers obtained a warrant for the seizure of certain company documents and the arrest of the owners of the enterprise. Although the documents for the prosecution were directly obtained by lawful means, the initial information that served as the basis for the lawful actions of the police was collected in violation of legal provisions,

[20] Nardone v. United States 308 U.S. 338, 341, 84 L Ed 307, 605 S Ct 266 (1939).
[21] Silverhorne Lumber Co. v. United States 251 385, Ed 319, 40 S Ct 182 (1920). US64 L

particularly the Fourth Amendment to the Constitution. Therefore, the court prohibited the use of these documents as evidence.

The case *of Nardone v. United States* (in which the court officially defined the ODF doctrine). The Nardone's telephone line and office were tapped by the police without the necessary warrant, which allowed the police officers to collect the necessary evidence of fraud. The Supreme Court returned the case for a new trial, ruling that the evidence obtained by wiretapping the defendant's office and phone could not be used, since the method of obtaining it violated the rights of citizens, defined by the Fourth Amendment to the Constitution.

Thus, the essence of the FPT doctrine arising from the above decisions is the recognition of the inadmissibility of the use of evidence that has been obtained in violation of the law and is subject to the rule of exclusion of evidence. However, it was not until 1975 that the Supreme Court began to consider the FPT doctrine strictly in terms of the exclusion rule.

As one of the "watershed" precedents, after which the courts began to check whether the exclusion of the collected evidence serves the purposes of justice and the purposes of the exclusion rule, we can cite the case *of United States v. Ceccolini.*[22] His decision is based on the right not to incriminate himself, guaranteed by the Fifth Amendment to the Constitution, and the right to be free from unreasonable searches (seizures), guaranteed by the Fourth Amendment to the Constitution.

A local police officer went to the store where his friend worked and picked up an envelope addressed to the owner of the store (his friend's employer). The police officer looked inside the envelope and found evidence that the employer had violated the gambling law. Thus, it constitutionally unjustifiably restricted the right of this citizen to freedom from unjustified searches (seizures). However, at the same time, the police officer did not actually (physically) seize anything, that is, the restriction of the said right was a "technical error". He only showed what he saw in the envelope to his friend (a store employee) and passed on the information about what he found to his superiors, who in turn forwarded it to the FBI. It turned out that the FBI is already aware of this violation of the law, and they are monitoring the said citizen for evidence of his illegal behavior.

After assessing the above circumstances of the case, the court held that an employee who had seen written evidence against their employer (a suspect in the case) and therefore fell under the protection of Amendment V could nevertheless be recognized as a witness in the case. The basis for this conclusion, according to

[22] United States v. Ceccolini 435 268, Ed 2d 268, 98 S Ct 1054 (1978). U.S.55 L

the court, is that, firstly, the price of silence of an important witness is too high for society, and secondly, this or similar evidence would have been obtained later in any case. The inevitability of obtaining evidence in the future has thus become another circumstance in the absence of which the ODD doctrine becomes applicable.[23] Moreover, the court noted that the police officer who accidentally found evidence and thereby violated Amendment IV, acted "of his own good will."

It should be emphasized that the limitations of these rules and doctrines related to "acting in good faith", "technical error", the inevitability of obtaining evidence in the future and, most importantly, the amount of public losses and benefits from the exclusion of evidence, are an important addition to the idea of the inadmissibility of the use of illegally obtained evidence. The introduction of these restrictions is aimed at correcting the mistakes of the police that led to the violation of the rights of suspects, as well as at achieving the main goal of the legislator: to ensure the triumph of justice.

This is exactly what famous Russian (pre-revolutionary) lawyers were talking about, whose scientific disputes are surprisingly reminiscent of modern theoretical discussions. Thus, according to the apt expression of the great Russian scholar and proceduralist I.V. Mikhailovsky, the court "must remain a dispassionate, calm, reasonable and powerful controller(...) the fight (against crime – N.S.) – moderating its extremes(...)".[24] “Of course, it is better to release 10 and 100 guilty than to convict one innocent person, but if the legislation, without in the least reducing the guarantees of judicial protection enjoyed by innocence, will only reduce the chances of impunity for real villains, then one cannot but wish that it will change its system in this direction”.[25]

This issue is resolved in a similar way in modern Russian legal doctrine[26] and practice[27], which proceed from the fact that:

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[23] This rule can be dangerous if its frequent application gives free rein to police officers to use illegal methods of work, violating the constitutional rights of citizens when collecting evidence, which can be obtained without violating rights, but in a more complex way.

[24] Mikhailovskiy I. V. Osnovnie principy organizacii ugolovnogo suda. Tomsk, 1905. S. 94.

[25] Spasovich V. D. O teorii sudebno-ugolovnikh dokazatelstv v svyazi s sudoujstroistvom i sudoproizvodstvom. M., 2001. S. 24.

[26] Stoyko N. G. Sostyazatelnost v rossiyskom ugolovnom protcesse. State and Law N 2 (96) 2023. S. 41–46.

[27] Opredelenie Konstitutcionnogo Suda Rossiiskoi Federatcii ot 18 iyunya 2004 g. № 204-O «Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Budaeva Tcota Natcagdorzhevicha na narushenie ego konstitutcionnich prav chastiyu vtoroi statii 283 Ugolovno-protcessualnogo kodeksa Rossiiskoi Federatcii. URL: https://www.garant.ru/products/ipo/prime/doc/1253594/; Opredelenie Konstitutcionnogo Suda Rossiiskoi Federatcii ot 6 marta 2003 g. № 104-O " Ob otkaze v prinyatii k rassmotreniyu zaprosa Boksitogorskogo gorodskogo suda Leningradskoi oblsti o proverke

1. Criminal prosecution bodies (prosecution) are obliged to ensure at their disposal the fulfillment by the state of its obligation to recognize, observe and protect human and civil rights and freedoms.
2. The prosecution and the defense have equal procedural opportunities to defend their rights and interests in court (participation in evidence, filing motions, appealing against actions and decisions of the court).
3. The court may not substitute for the parties, assuming their procedural powers.
4. The court is not exempt from the obligation to use the powers to examine evidence for the purpose of administering justice.
5. Proving the circumstances incriminating and/or acquitting the defendant is among the powers of the court exercised in accordance with the procedure established by the criminal procedure legislation for the purpose of a fair and impartial resolution of the criminal case on the merits.

That is why the tasks of justice (and, more broadly, the goals of the criminal procedure), regardless of the type of legal proceedings, correctly understood, are, on the one hand, to guarantee the effectiveness of the fight against crime, and, on the other hand, to ensure the rights of the individual.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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