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The publicity of court procedure: the pre-revolutionary normative model and its corrective amendments

Alla V. Vereshchagina *

Vladivostok state university of economy and service, Vladivostok, Russian Federation

Abstract: This article analyzes the normative model of the Institute for Criminal Procedure Publicity that was contained in the judicial statutes of 1864 and its post-reform development. There created the democratic model of penal justice that had corresponded to the best European patterns, based on the Russian Judicial statues in the 19th century. Framing the judicial and criminal procedural legislation, the drafters of statues made an emphasis on publicity. They proceeded from the fact that publicity was a guaranty for the independence of the judicial power and prevention from influencing the court on the part of the executive authority in resolving criminal disputes. Publicity was also considered as a means of court control on the society's part and a means of legal consciousness formation and respect for court. The dis balance between the feudal form of the Russian state and the democratic model, created on the basis of the judicial statutes and penal justice, determined the post-reform correcting of the judicial and criminal procedure legislation that had mainly a protective character. The changes in the regulation of publicity principle, made by the post-reform legislation, created the construction for the institute that is reproduced in the Russian modern criminally-remedial legislation. This consequence predetermines the importance of the research of this kind, as it allows finding out the genesis of the normative regulation and defining the desirable directions of it being corrected.

Key words: The pre-revolutionary Russian law; Judiciary reform; Criminal procedure; Judicial statutes; Publicity principle

1. Introduction

The judiciary reform of 1864 is the most successful experience in the Russian penal justice transformation. The judicial and criminal procedure institutes of the judicial statutes, their advantages and disadvantages have been determining the construction and content of the modern legal substitutes by now. This circumstance updates the historico-legal studies of the root principles of penal justice organizing and functioning.

The history of developing the fundamental principles, the results of discussing various approaches to their regulation, the followed correction of the legislation give the richest material that is valuable not only from the historical point of view. This material allows retracing the evolution of this or that institute and finding out the possible directions of its improvement considering the expressed ideas before, which turned out to be unclaimed for some reason upon working out the final Statutes. For the normative regulation to be improved, it is also important to study the corrective amendments after adopting the Statutes, which smoothed the contradiction between the feudal form of the Russian state and the progressive one that had been the best sample of the regulation, the model of the penal justice. These corrective amendments allow establishing the most significant constructive elements of this or that judicial or criminal procedure institute whose changes deform the elemental idea of the regulation.

This publication makes an attempt to analyze the normative model of the Institute for Criminal Procedure Publicity that was contained in the judicial statutes of 1864 in order to find out its advantages and to establish the post-reform corrective amendments. It is submitted that it can be used for improving the modern regulation of the Institute being considered.

2. Research methodology

During the research the author followed the principles of the general philosophical method, which objectivity, systematicity, historism and dialectical contradiction are referred to, the formal logic techniques, the juridical and dogmatical approach (the interpretation by means of various ways and the estimation of the normative statements) and also the comparative method (the comparison of the initial and followed regulation of the publicity principle in the Judicial statutes) were used in the research.

3. Literature review

* Corresponding Author.

Despite the undoubted importance of the publicity principle and the indisputability of the need for its being consolidated in the judicial statutes, the material about this principle is not so much. All the existing sources can be divided into 1) those, which concern the principle of publicity as one of the correct arranged judicial authority institutions and 2) the monographic works which are especially devoted to the principle of publicity.

The first group of studies is rather various. The importance of publicity for the pleadings was proved by the representatives of the Russian civil society in the first quarter of the 18th century (Pososhkov, 1951). Later S.E. Desnitskiy (Desnitskiy, 1959), the first professor in the field of law, "native Russian", studied this question. D.I. Fonvizin (Vereshchagina, 2003), etc. did the same.

In the first half of the 19th century, especially in its first quarter, such representatives of the governmental authorities as N.S. Mordvinov (The development of the Russian law development, 1994), M.M. Speranskiy (Speranskiy, 1961), as well, the participants of the Decembrists' movement N.M. Muravyev, S.P. Trubetskoy, N.I. Turgenev (The development of the Russian law, 1994), the Russian lawyers, in particular, A. Kunitsyn (Giessen, 1905) and others wrote about the importance of publicity.

The translated works of the famous European scientists, in particular, the works of I. Bentham (Bentham, 1860) influenced the formation of views on the fundamental principles of penal justice, including publicity. In the course of making out the drafts of Statutes and preparing them for implementation, K.P. Pobedonostsev (Pobedonostsev, 1996) and B.N. Chicherin (Chicherin, 1998) were writing about the social importance of publicity and one of the compulsory attributes of the judicial power.

Such authors of the pre-revolutionary educational publications as S.V. Viktorskiy (Viktorskiy, 1912), I.Ya. Foinitsky (Foinitsky, 1912) and others studied the principle of publicity in the system of the fundamental principles of the court procedure.

The article, written by S. Barshev (Barshev, 1857), was the only pre-revolutionary work that was devoted to the principle of publicity.

Modern authors consider the principle of publicity in their works, as this question is their research subject. For instance, stating the corrective amendments of the post-reform judicial and criminal procedure legislation, M.V. Nemytina (Nemytina, 1999) mentioned some changes in the principle of publicity. A number of authors such as S.V. Ignatenko (Ignatenko, 2014), V.A. Larionova (Larionova, 2013), A.F. Rekhovskiy (Rekhovskiy, 2014) and others consider the modern formulation of the publicity principle. However, the modern monographic studies of the normative regulation of the publicity principle and its development in the pre-revolutionary period have not practically existed up to the present day.

4. Research

The need for consolidating the principle of publicity for the authors of the judicial statutes, as the above-mentioned, was axiomatic. They proceeded from the fact that publicity was the best guarantee for the correctness of judicial procedure (Foinitskiy, 1912). According to the State Council that voted for the introduction of this fundamental principle unanimously: "Publicity in criminal procedure promotes explaining the truth, protecting defendants and motivating judges to study cases carefully and to decide them legally that there can be no doubt about its usefulness" (the Case of the court system transformation in Russia, 1862). In some sense, the publicity of judicial procedure bears a judicial charge. The public control over the activity of judges is exercised through it. Simultaneously, it is the guarantee from the baseless claims to judges concerning decisions, made by them.

The original version of the publicity principle in the judicial statutes contained just two definite types of crimes, which were removed from it. The first type included the crime against the sexual immunity and the sexual freedom of an identity, the crime against the belief and defiant and offensive words pronunciation against the Imperator and the Members of the Imperial House. The second type included the crimes, in hearing the cases of which, the information about the intimacies of the parties to a criminal proceeding or the information that humiliated their honour and dignity could be disclosed. As it is seen from the given list of the reasons for hearing criminal proceedings in the closed court session, an emphasis was made on the private life of a person protection.

The minimization of the reasons for closing the judicial session turned out to be undesirable for the authorities. They were being expanded while the independence of the judicial power was being restricted. The formation of the judicial power was the main purpose of the judiciary reform of 1864 (Vereshchagina, 2006; Vereshchagina, 2014).

The cases of the state crimes, which were heard in the presence of the Directing Senate, were added to the Acts of June 7, 1872 (The opinion, consolidated by the Imperial Court, 1875). In this regard, the cases of "defiant and offensive words pronunciation against the Imperator and the Members of the Imperial House were particularly heard in the "closed court sessions". The cases of other crimes were solved either in public or in the closed court session at the court's sole discretion. In the last case, the pleading could be closed either entirely before the judicial pleadings ended or during the single legal actions procedure (Article 27 of the Act of June 7, 1872) (The new version, consolidated by the Imperial Court, 1875).

According to the Act of August 9, 1878 (Edict of His Imperial Majesty, 1880), the Act of April 5, 1879 (Edict of His Imperial Majesty issued to the Directing Senate, 1881) and the Provision of September 4, 1881 (Edict of His Imperial Majesty issued to the

Directing Senate, 1885), the governor-generals and the Minister of the Interior were vested with authority to close a court session in hearing any criminal case if they come to the conclusion that its public consideration can influence the state of mind and public order. From the strict defined system of the grounds for hearing cases in the closed court session, the law-maker went over to their open list that allows him to consider any criminal case in private.

Publicity was limited not only to laws, but also bylaws. The confidential circular note of January 18, 1879, the Minister of the Interior L.S. Makov informed all the governors about the Imperator's will "... to prohibit printing the independent verbatim records on the cases of the state crimes for the future …", having limited the information about them only to the reprints from the official publications (The official and provincial gazette) (Troitskiy, 1976). It took the press some time to obey the circular note. Therefore, in his special attitude towards the chief of gendarmes A.R. Drenteln, L.S. Makov complained about the continuing publication of the detailed judicial reports and suggested obliging the provincial authorities to be limited "to print only the crime bill and the sentence full-scale", and to state the evidence and the speech of the parties "in brief" on the 17th of October in 1879 (Troitskiy, 1976). A.R. Drenteln and L.S. Makov brought their general consensus to the governor-generals' notice by telegraph on the 20th of October this year. After that the newspaper reports on the political processes became much shorter and more tendentious before they had been generally cancelled at all.

The Act of February 12, 1887 stroke at publicity highly (The opinion, consolidated by the Imperial Court, 1889). It radically changed the formulation of the question about the publicity of criminal procedure. We shall remind that the original citation of the Article 620 of the Criminal Procedure Statute (CPS) contained the absolute list of the arguments allowing the court to make a decision on the closed mode of hearing the case: 1) sacrilege, the violation of a sacred place and faith censure; 2) crimes against the family rights; 3) crimes against honour and chastity of women; 4) lascivious behaviour, unnatural blemishes and pandering. The Article 621 of CPS emphasized that "closing the doors of the court session for the public as an emergency measure was admitted if it is just obviously necessary with the exact instruction: what kind of actions must happen behind the closed doors and for what reasons?".

According to the Act of February 12, 1887, the Minister of Justice was given the right to make a decision on the closing of the court session on a par with the Court. The closing of the court session could happen on such uncertain arguments, introduced by the considered law as the fear to offend religious feelings, to violate morality requirements, to lose the government's dignity, to make a negative influence on the protection of the public order or on the procedure of legal actions (Article 620^3 of CPS) (The opinion, consolidated by the Imperial Court, 1889). The court could expel some categories of persons from the hall of the court session: students, minors and women if it was demanded by the features of the considered criminal case or single legal actions (Article 620^1 of CPS) (The opinion, consolidated by the Imperial Court, 1889). The Minister of Justice estimated the arguments about closing the court session individually and made a decision on its closing either in full or with regard to the single procedural actions. The decision of the Minister of Justice on this matter was told to the chairman of the court who was obliged to execute it. This decision was not subject to be disputed. Besides, the Act reduced the list of the procedural actions, which were necessarily carried out avowedly, irrespective of the pleadings mode. The announcement of a sentence was the only action. In fact, the consolidation of the grounds, given above, allowed hearing any criminal case in the closed court session.

The motive of the stated corrective amendments was the desire to draw the interest of the state in hearing cases of the state crimes. "… sometimes the criminal action that is subject to the judicial examination is so closely connected with the circumstances, concerning the state crimes or the judicial decrees of the highest officials of the state or the objects of the highest government agencies' activities. So, the consideration of these circumstances is inevitable. Meanwhile, if they are considered in public, data disclosure can follow before the public that turns out to be bad for the state crimes to be successfully investigated" (The Ministry of Justice in hundred years, 1902).

The adoption of the Act of February 12, 1887, analyzed above, was initiated by the Minister of Justice. Arguing about the need for it being adopted, he insisted on giving him the exclusive right to make a decision on closing the court session and to strip the local court of such powers, as it does not possess all the information that allows making this decision. Most of the members of the State Council took this idea watchfully, having regarded it as an invasion into the prerogative of the judicial power. Contrary to the opinion of the majorities, this Act contained the opinion of the minorities with only that difference that the both parties (the Court and the Minister of Justice) had the right to make a decision on the closing of the court session.

According to the Act of June 2, 1897 that consolidated the features of pleadings on the criminal cases concerning minors, the court was given the right to close the doors of the court session on the criminal cases concerning this category of defendants (Article 620 of CPS) (The opinion, consolidated by the Imperial Court, 1900).

5. Conclusions

The regulation of the publicity principle, stated in the judicial statues of 1864 and the hindsight of its corrective amendments, allows us to draw the following conclusions:

1. The principle of publicity was considered as a certain need for the beginning of the court functioning by the Fathers of the judiciary reform.

2. The elementary regulation of the publicity principle contained a small number of grounds for hearing criminal cases in the closed court session.

3. The correction of the publicity principle was made in the protective interests of the government and determined by the undesirability to consider some circumstances in public, which could make a negative influence on the population's state of mind.

4. The elementary regulation of the publicity principle was being mispresented against the statutory restriction in the independence of the judicial power, regulated by the judicial statutes.

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