

Reconciliation in Law: Criminal Liability in a Conflictological Discourse

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ABSTRACT

The article reviews the history of criminal law and criminal liability in a conflictological discourse. Relying on the concepts of legal pluralism, the authors look at the transformation of the criminal law mechanism of resolving conflicts. They analyse still existent customs of blood feud, reconciliation of blood enemies as well as other customs of Amazonia and North America, explaining reasons for preserving such customs in a more developed society till our days. The article analyses reasons for ritualisation of reconciliatory procedures in the ancient times and reasons of disappearance of the notion ‘the injured party’ in the repentant law and reasons for borrowing a religious concept of liability not before the injured party but before the suzerain by the secular law. The authors come to the conclusion that legal pluralism is typical for the society due to a compensatory trend in the conception of criminal liability. Compensatory elements in the modern criminal law are considered as a positive, and the only possible, trend of further development of criminal law. The article has been written as part of project 18-29-14028 supported by the Russian Foundation for Basic Research (RFBR).

Keywords: *conflict, reconciliation, legal pluralism, the injured party, repentant law, criminal law, criminal liability*

1. INTRODUCTION

The present article has been written on the basis of the authors’ report made at the XVII International Conference “Kovalyov Readings”.

Existence of a person, a certain community of people, humanity on the whole, is not a somewhat soft social fabric present, like a calm river with no wind disturbing it, in time and space, but it is a treacherous path with huge obstacles and hurdles, unpredictable and risky twists and turns of fate, natural disasters and social conflicts. Therefore, it is reasonable to say that any movement of an interpersonal and social character boils down to overcoming obstacles and finding solutions to conflicts.

Thus, the social movement rate depends on the wisdom of people living at a certain historical period enabling an individual, society or state to promptly and efficiently cope with hardships and resolve conflicts of any dimension and nature. Conversely, people perceive any difficulty they have to overcome as an impossibility to come to any reasonable consensus. In such cases, it seems that there is no way out. However, if such an idea does occur, it equally means that a way does exist or, at least, there is a possibility to find a way out.

Different civilizations, one after another, with their bright academia representatives (like philosophers, educators, scholars, etc.) have elaborated and laid down some rules of worldly existence, social community life, customs of international communication among states and territories

which make people keep to a certain pace of life. These rules range from our relations with the environment to different social models of building a modern society which, as a rule, puts itself on a higher position than nature, but not subject to it or equal to it.

It seems paradoxical but human civilizations appeared, developed and ceased to exist not only because some of them replaced others by physically destroying the former, but because their whole conscious existence was interfused by numerous different relations whose nature can be described as a unity and struggle of opposites.

Each civilization – coming into the place of a previous one – not only developed unevenly (in a revolutionary way), for example, in case of the Worldwide Flood or any other natural disasters, when a civilization had to be formed anew, so to say from ‘the scratch’. Civilizations also changed each other in an evolutionary way which is based on a logical evolutionary transition from one quality state of nature and human civilization to another. Both revolutionary and evolutionary developments cannot be imagined without each other as unities fight for their existence while opposites unite to survive and protect their, very often endemic, features.

2. CONFLICTOLOGY AS A METHODOLOGICAL CONCEPT OF CRIMINAL LIABILITY ASSESSMENT

A conflictological discourse rarely serves as a foundation for assessing some forms of criminal liability in a modern and ancient society. At the same time there is no need to prove that a crime can be assessed as a conflict. Legally speaking, there is one evidence: as it follows from its definition adopted by most jurisdictions, a crime is a violation of the existing legal order. Such a crime can include damage inflicted or bodily injury, etc. Thus, any crime is a conflict both in terms of its form and its content. Considering the above, criminal law can be viewed as a means of resolving such a conflict.

There are all reasonable grounds to believe that initially a conflict is inherent, and as such necessary, to the nature and society. Non-conflict models of natural and social development are non-existent because any development in its physical form is a conflict and a means of resolving it implies beginning of a conflict. Without a conflict or struggle we can hardly imagine the birth or development of nature and society.

There is another regular feature: in the chain of dependencies and interchanges a conflict comes first, because as it becomes obvious outside, any way it triggers its solution. So, if a conflict is a result of conscious or unconscious activity of a person, then a means of its resolution, being secondary, may be the product only of human conscious activity. Therefore, and only for this reason alone, it is easy to spot a conflict but quite difficult to resolve it reconciling the differences. In particular circumstances, it may be absolutely impossible.

Any conflict is substantive, packed with specific relations between parties to a conflict. These relations are characterized by different opposite elements making it possible to turn any conflict into aggression or unpredictable violence whose degree depends on many circumstances. Among their main elements are not only the content of a conflict but its structure: the subject matter of a conflict (the ‘apple of discord’); parties to a conflict; value of social costs incurred in relation to a conflict; as well as possible personal and social dividends for parties to a conflict. In fact, we have described a typical model of elements of a crime used in the doctrine of Germany, Russia and some other states. In terms of its structure and content, this model of a conflict seems universal, even in criminal law, because basically it relies on three fundamental blocks of common life: means and methods of conflict resolution; reasons for a conflict; elimination of reasons resulting in a conflict.

There are numerous conflicts existing in the society differentiated by their content (family, property, national, racial, ethnic, etc.), their dynamics (inability to understand each other; different views; rejection of an idea put forward by one party by the other party; resolution of a conflict through violence, etc.), their dimension and parameters of their extension (for example, whether a conflict is of an interpersonal, social or interstate nature).

Each of these conflicts can have an obviously criminal nature leading to a crime. Within this meaning, criminal law is not only a means of conflict resolution but a means of conflict assessment (classification).

3. RESULTS

3.1. Preliminary remarks

Using the above as a methodological basis for defining the Classifying crimes in their historical diversity, a conflictological discourse makes it possible to extend the traditional understanding of criminal law by borrowing some ideas from the concept of legal pluralism.

The said concept was formed in the 1970s. The idea of legal diversity is based on a possibility of coexistence of different legal systems and non-uniform sources of law in one territorial community or in one ethno-cultural group (mega-group). We are speaking neither about the coexistence of federal or confederal and local law nor about such notions as “one country – two systems”. We are speaking about a diversity of sources of law regulating different processes within one and the same group simultaneously. Legal pluralism is usually opposed to the very ideas of legal centralism or, in other words, the monopoly of a state as a law-making subject.

Ideas of legal pluralism appeared during the period of dissolution of colonial empires when local legal customs and traditions replaced the colonial ones. The local legal customs and traditions appeared to be useful with simultaneous preservation of law created by the centralized subject.

3.2. Ancient pre-legal means of conflict resolution

The many-century coexistence of mankind has gained rich experience (both positive and negative) of resolving conflicts and disputes of a different nature. An ancient society is not an exception in this respect. In terms of legal centralism such a society did not have laws and did not possess legal knowledge in its modern interpretation.

Many ancient legal traditions have been preserved till nowadays, in particular when opposing the application of such customs by state made law. This fact substantiates the ideas of legal diversity advocated by many. Let us consider the most “enduring” of such legal customs and traditions still present in some social groups and communities in different parts of the world.

3.2.1. Blood feud

Is one of such ancient customs well-preserved even in a developed, in the modern sense, society, South Russia, Northern Albania, South Italy, Corsica (France). Blood

feud is a relict of a pre-legal means of resolving disputes and conflicts of an obviously criminal nature. Blood feud could follow in case of a murder or rape, as well as for some severe forms of insults. In this case, retaliation was directed not only towards the offender but also towards the offender's blood kin. Vengeance was an obligatory form of response to proto-crimes (insults), in fact, predetermining the appearance of the principle that punishment is unavoidable, the one widely applied in many jurisdictions today.

Blood feud has always preserved its regulatory functions even when it was banned. Despite the fact that the Russian legislation establishes greater criminal liability for a murder based on blood feud (Article 105 (part 2, p. e1) of the RF Criminal Code), yet you can see the blood feud custom in some regions of the North Caucasus.

3.2.2. Reconciliation of blood enemies

One of the secrets of the long standing custom of blood feud is a custom that accompanies it: it is the custom (or legal tradition) of reconciliation of blood enemies when there is a ritualized form of conditional forgiveness of the offender. Below is an example from the Ingush practice described by M.S.-G. Albogachieva and I.L. Babich:

In November 2009, X, driving his car in the dusk knocked over an old man Y, walking along the road. The driver rendered first aid to the injured man and took him to hospital. Close relatives of X, also came there and to Y's relatives to tell them what had happened. Since the very first day the driver and his relatives were at the hospital controlling the state of the injured man. When the injured man died, there appeared elders with a diplomatic mission who heard the following answer: "We are burying our man. No talks are of use", after that the body of the deceased person was taken to the cemetery. At 12 p.m., again elders of the kin came while the driver's numerous relatives stayed at a considerable distance of around 500-700 meters away from the house. The elder of the kin and members of the reconciliatory commission entered the house of the deceased man. Extending condolences to the old man's family, the mullah asked for mercy and compassion to each other and forgiveness to the blood enemy who had committed the offence due to a fatal contingency. "We, the Ingush, are very few in number", said the mullah. "We are all relatives to each other. We have gone through very many tragedies for our people together. We all had a difficult life living in the mountains, we all lost our relatives in deportation, but we could be strong when a situation demanded so. To show mercy means to be a true Muslim in your soul. The Allah will forgive those who forgive in this life". He went on speaking on a tragic coincidence that had happened late at night when the driver could not expect that there might be a person walking along the road. The mullah was sitting while speaking. But everybody stood listening. Then the floor was taken by the elder of the deceased man's kin. He spoke less. Having expressed his deepest regret, he said that in the name of Allah and in the name of the dead man

they forgave his death. Neither sons, nor the dead man's wife, nor his daughters spoke. They were silently standing in the crowd of people. Then the elder said that the driver's relatives were allowed to approach the dead man's house while the kin of the deceased person should come out of the house moving towards them and stand along the road. So they did. The group of the dead man's relatives was headed by the mullah and elders, after them there were older people and then younger ones. The group of the driver's relatives was waiting for the reconciliation procedure. Receiving a special sign, they bowed their heads, came up to the male group of the dead man and expressing condolences in a certain way went through the group of those waiting for the reconciliation procedure. Then without any emotions Y's relatives entered the yard and took their seats; the younger people remained standing. After a short while, X's relatives headed by the elders entered the yard to express condolences to all the relatives. After that, the mullah said his words of gratitude. All these procedures were taking place while the old man was buried at the cemetery. When those who buried him returned, they continued some rituals and "blood was forgiven". During all three days of funerals Y's relatives shared all the costs connected with meals".

A condition for receiving forgiveness in such a situation is the duty to render financial support for the family of the deceased or by any other means contribute to the restoration of the financial situation of the dead man's family. Therefore, reconciliation of blood enemies satisfies the interests of the injured party to a greater extent than the mechanisms developed by criminal law and criminal procedure law.

3.2.3. Other ritualized forms of reconciliation

can be found in South America. For example, the Kamaiura Indians from the Tupi-Guarani group living along the Xingu River in Brazil do not punish the offender without a possibility to forgive him if he does not promise to compensate for the damage inflicted. The offender is punished only if he fails to follow the rituals of forgiveness. Some Indians in North America used to have a special ritual pipe to prove the fact of reconciliation of conflicting parties. The Turkic peoples of Siberia and Central Asia used ritual cups.

Generally speaking, we can say that rituals were used to make an illusion that supreme forces, gods and spirits approved of their reconciliation. It was necessary to make the agreement reached binding for the parties to follow. In this sense, a ritualized form of ancient legal traditions served as a forerunner of state enforcement when imposing sanctions, which are an integral part of the content of modern criminal law.

3.3. Religious means of conflict resolution

Rituals existing in the ancient society in many respects surpassed separate forms of religious response to a conflict. Religious norms give us another example of legal pluralism, when legal and religious norms though competing coexisted in one and the same society or community.

Being combined with secular rituals, habits, traditions and customs, religious canons gave priorities to reconciliatory procedures. Such an approach was applied in many spheres of the religious life of people but especially when settling family, housing, domestic conflicts and disputes. The Holy Scripture states: “A wound can be bandaged up and a quarrel can lead to reconciliation” (The Book of the All-Virtuous Wisdom of Yeshua ben Sir 27:22). More to the point: “Be aware of Allah and settle disputes between you” (Quran, 8:1). Meanwhile the Christian religion developed repentant law, a set of rules on repentance (forgiveness) for violations related to the jurisdiction of the church. Many modern lawyers would be surprised to learn that criminal law to a great extent relies not on criminal law customs (written or unwritten) but on repentant law.

In terms of legal centralism, repentant law was not developed by the state since it came from the church and was part of ecclesiastical law. But the specific nature of repentant law of the Middle Ages was accounted for by the fact that it governed everyday life of believers, institutionalized such rules of behavior which were acceptable in the view of the church and established a penalty – penance – for disobeying such rules. In this meaning repentant law, unlike secular law of that time, had a wider subject of legal regulation.

Of interest is the process how elements of ecclesiastical law penetrated into the Old Russian law. The Old Russian law was based on the concept of private vengeance for a crime committed. When the secular Old Russian law was formed, the importance of canon sources borrowed from Byzantine, a state with an extremely well-developed legal system, was very high.

Describing the penetration of Byzantine law into the Old Russian criminal law, V.I. Sergeevich wrote: “Initially, the Russian folk system proved to be stronger and even church constitutions and provisions introduced by Greek and Roman rules related to crimes contained the notion of buying-out [the Old Russian punishment – noted by I.K., D.S.]. Crimes are taken from Greek and Roman rules while punishments are Russian... But step by step, the new system paves its way to a full triumph”.

Repentant law triggered the total change of a paradigm of criminal policy which led to transforming a crime from a private insult into a public offence. This process was also accompanied by one more important process – by the virtual disappearance of the injured person from the system of legal liability. In ancient law, the injured person was both a plaintiff and a judge and an executor, but in repentant law he had no place for. The repentant person admitted his sins not before the injured party, but before

God in the face of the Church, canon institutions and clerics.

Similar processes we can see in the Sharia law with the appearance of Qadis delivering justice under religious rules. But it should be noted that the Muslim legal system proved to be more flexible; it preserved an active participation of the injured party both in doing justice and compensating for the damage. So, the Muslim law has preserved compensation in favour of the injured and partly retaliation on the part of the injured.

3.4. Monopolization of criminal law by the state

An example of ecclesiastical law was quickly borrowed by the state and instead of liability before God and the church, liability was transformed into liability before the suzerain. Certainly, ecclesiastical courts and institutions were preserved, but their importance was limited by the state will interference in the jurisdiction traditional for the church. The importance of ecclesiastical law was restricted to specific corporate rules regulating the life of a religious community. Legislative constructions and legal rules were changed with time, contributing to the replacement of individual vengeance by public punishments. This process can hardly be called positive as it inevitably implied criminal liability before the state (what is allogical in itself) but not before the injured (what is quite logical). As a result, the right of the injured to receive compensation was long ignored and is still ignored by criminal courts at present. In our view, the existing practice is unacceptable: a man who becomes a victim of a crime (the injured), not without a fault on the part of the state, is deprived of a possibility to receive compensation that he is entitled to under the law, by conscience and logic. This position has not been yet stipulated in criminal law (with the exception of, for example, Article 76 of the RF Criminal Code which contains provisions concerning release from criminal liability due to reconciliation with the injured party).

The many-centuries dominance of the state law multiplied by its extensive application literally in all spheres of human life has led to the situation when the importance of the injured and reconciliation with him has been significantly decreased; its place has been occupied by law blessed to become a standard of justice. Lack of a balance between a legal regulatory component and realities of the social life has led to the situation when the law in the social sphere is becoming less efficient year by year.

Since legislative regulation fails because it offers no space for reconciliation, we are more often and more willingly praying looking for alternatives to law. Since jurisprudence is far from social means of conflict and dispute resolution, we blindly look for alternatives. The analysis of crises in different states is especially illustrative in this respect. For example, in Abkhazia, when there was no centralized government, the main role was taken by Adats – legal traditions which were inactive for a long time. In the 1990s, people in post-Soviet and post-

socialistic states (especially, in Hungary, Russia, Ukraine) often went to criminal leaders to resolve their conflicts and reconcile conflicting parties.

4. DISCUSSION

4.1. Balance of the private and public in criminal liability

We see that despite the controversial nature of criminal liability, a trend to reconcile the injured and the offender and take into account the interests of the injured has existed throughout the centuries. This fact underlines the unnatural character of the existing systems where the injured and mechanisms of reconciliation are either minimized or absolutely absent. The bigger the sphere of reconciliation in criminal law, the bigger the compensatory component of criminal liability. This is the principle non-existent in our criminal law and criminal legislation. It should be remembered that reconciliation and the law, including criminal law, are not antipodes; they must operate simultaneously but within their own formats. Priority should be given to reconciliation. Where there is a hope to reconcile the differences between the parties, criminal law should step aside to let reconciliation come first.

Abolitionist ideas must dramatically change the ideology of criminal liability, our vision of its importance and role in the system of social, legal and criminal law regulators. Naturally, restorative justice cannot and must not fully substitute the social module of criminal liability in its traditional (common for us) meaning. Though the other extreme is also inadmissible: the state should not have a temptation to preserve the public nature of all criminal cases.

4.2. The idea of a reasonable balance

Searching for a reasonable balance, it is important to find the golden middle which will enable us to find an appropriate answer to the question: is reconciliation in law

5. CONCLUSION

The professional consciousness of many generations of lawyers has been formed under the impact of an undisputed official position: the guilty person shall be criminally liable for the crime committed not before the one who has inflicted damage (harm), but before the state, which is to a great extent responsible for its own failure to provide the injured safe living conditions. In the past, few people would doubt whether this statement is true. But there is a reasonable question: who has given the right to the state to punish or not to punish the one who has

a compromise or concession? In our view, it is more of a compromise. Concession does not make criminal law better. Therefore, now criminal law is in a difficult situation.

On the one hand, criminal law tries to justify a role often prescribed to it as of a super-imperative branch of law which is reflected in over-criminalization, emergence of non-obvious crimes and different types of quasi-crimes. An excessively imperative character of criminal law can hardly be justified as it leads to the situations when the process of criminalization goes too fast and appears ineffective, thus failing to build a healthy balance of interests of the injured and the state.

On the other hand, we cannot but mention that mediative models are becoming increasingly popular with criminal law scholars as well as with legislators and there are telling grounds for that. The last decade has obviously seen mediative changes taking place in the world and domestic criminal procedure and penal enforcement spheres.

The Criminal Code of the Russian Federation has gradually adopted such rules which nature seems obviously mediative. For example, apart from traditional reconciliation with the injured, now the Code contains provisions to treat drug-addicted people as an alternative to the traditional punishment or it contains new mechanisms of dismissal of criminal proceedings for crimes in the business sphere provided the damage is compensated for. In the sphere of penal enforcement, the interests of the injured now are taken into account when assessing a possibility or impossibility of parole.

The world practice conclusively proves that current mediative procedures applied in criminal law, criminal procedure and penal enforcement spheres are rather efficient. The findings illustrate that the introduction of the mediative potential in public and protective fields of law has been useful. Naturally, it does not mean that the state should leave such important institutions (reconciliation and mediation) unattended, though it must not all the time interfere with a rather difficult and fragile system of relationship “the criminal – the injured”. There must be a reasonable consensus.

committed the crime? And it is even more difficult to answer the question: who has taken away the right of the injured party to punish the offender or, if necessary, have mercy on (forgive) him?

The above cited example of ancient criminal law customs, still alive today, proves that the society is looking for alternative means of resolving criminal law conflicts. Naturally, we cannot prohibit or even restrict such customs. It is good that nowadays different states and communities are searching for alternatives to the criminal, criminal-procedural and penal enforcement monster with an iron heart.

Speaking on the problem of reconciliation in its different forms and in different spheres, we should underline that

success or failure of a specific model of reconciliation depends on the level of legal awareness of the society and the state, legal culture and, what is rather important, legal education. While interacting, the said vectors are creating (and should create) a unified approach to the training of lawyers who are expected to promptly and efficiently solve the most difficult issues. Only highly professional lawyers complying with international standards of doctrinal, law-making and law-enforcement nature are able not only to face up to destructive challenges but are able to become a protective shield for each and every person, any group of people, community and state from moral deafness, legal bigotry, moral ignorance and intellectual deviousness corrupting the soul.

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