

ON THE ISSUE OF THE STAGE OF INITIATING A CRIMINAL CASE: NOTION, CONTENT AND PROBLEMS OF FUNCTIONING OF THE CRIMINAL-PROCEDURAL INSTITUTION

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Abstract: topicality of the problem is due to the discussion on the issue of excluding the stage of initiating a criminal case from the criminal procedure as a separate criminal-procedural institution. This problem is not new. The article traces the history of discussions over this problem and its topicality: this procedure, “as a separate element of criminal process, is aimed at providing the rights and legal interests of its participants, both on the part of defense and on the part of prosecution”. The objective of this stage of criminal procedure is to protect an individual from groundless involvement into a criminal trial.

The article objective is to reveal the notion and content of the stage of initiating a criminal case, in order to define its meaning. The research presents an analysis of literature on the problem. Basing on the literature analysis, the

contradictions in the opinions of procedural law specialists are analyzed.

The leading research method is comparative method. The research presents the analysis of various opinions on the problem. The analyzed literature shows an unexplained feature of similarity-difference: on the one hand, the opponents of private interest in the public criminal procedure insist on rejecting the institution of a civil suit within a criminal case; on the other hand, the opponents of the stage of initiating a criminal case wish to return to the private-legal principles of the legal procedure used before the 1864 reform, when criminal prosecution was supposed to start with an allegation from a private individual.

Having studied the history and literature on the issue of the stage of initiating a criminal case, we come to a conclusion that this issue is still topical nowadays.

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The article proposes means of broadening the list of investigative actions which are feasible at the stage of initiating a criminal case.

The materials of the article may be useful both for practical and educational activities in the sphere of criminal-procedural law.

Keywords: criminal-procedural law; initiating a criminal case; information about a crime; reasons for initiating a criminal case; investigative actions; stage of a criminal procedure.

1. Introduction

The discussion over the issue of preserving the stage of initiating a criminal case or eliminating this stage as a separate criminal-procedural institution is not new. Many scholars in the sphere of criminal-procedural law (A.S. Aleksandrov, Yu.P. Borulenkov, S.E. Vitsin, L.M. Volodina, B.Ya. Gavrilov, S.I. Gir'ko, V.V. Gordienko, Yu.V. Derishev, I.S. Dikarev, A.P. Kruglikov, N.S. Manova, V.S. Ovchinskiy, A.V. Pobedkin, V.N. Yashin, I.L. Petrukhin, A.I. Trusov, A.A. Usachev, etc.), according to V.V. Kozhokhar', expressed their opinion about the necessity to exclude it from the

Russian Criminal-Procedural Code, substantiating it with various organizational-legal reasons.

This discussion is believed to be reopened due to the Conception of Judicial Reform in the Russian Federation of 1991. In particular, it was also renewed in connection with the adoption of Federal Law of 4 July 2003 No. 92-ФЗ "On changes and additions to the Criminal-Procedural Code of the Russian Federation". The novelties of this Law were the feasibility of performing document checks and inspections by specialists prior to initiating a criminal case, and prolongation of the period of inspections up to 30 days in this case. Some authors actually assumed that it is necessary not only to preserve the stage of initiating a criminal case, but also to significantly broaden the list of investigative actions feasible at the stage of checking the information about a crime (A.M. Bagmet, A.P. Gulyaev, N.I. Gazetdinov, I.V. Golovinskaya, A.A. Popov, S.F. Shumilin, etc.).

2. Materials and Methods

It is common knowledge that the supporters of the model of preliminary investigation without the stage of

initiating a criminal case are relying on the opinion of the authors of Conception of Judicial Reform that “pre-trial checking of the information about crimes is nothing but “investigation substitute” which is sometimes able to predetermine the case outcome”. For unclear reasons, this conclusion is linked to the data on crime rate, which decreased in the recent years and has almost equaled to the indicators of 1991. Incidentally, the unreliable data on the crime rate, repeatedly marked by the government, can be, on the contrary, associated to the significant rise of procedural rejections of initiating a criminal case, made by investigative bodies.

3. Results

We believe that this issue should be judged in accordance with the opinion by T.K. Ryabinina and Ya.P. Ryapolova, who noted that such data as “the ratio of the number of procedural rejections of initiating a criminal case and the further decisions on dismissal of already initiated criminal cases should be treated more cautiously”... “the substantial number of rejections of cases having no judicial prospects takes place at the stage of making a decision on initiating a criminal case”. Consequently, “the stage

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of initiating a criminal case must be preserved as an indispensable border between the preliminary checking of the presence of crime signs in the information, and the investigation with a broad application of feasible procedural actions, including the measures of procedural coercion”.

4. Discussion

This idea is not new. As early as one and a half centuries ago, the commentary to the Charter of Criminal Proceedings of 1864 stipulated the same opinion: inquiry enables to increase the quality of investigation, “the number of groundless data will substantially decrease,... and an investigator, not participating in the initial search and thus not distracted by the first, often erroneous, conclusions and guesses put forward by the guilty, will be able to impartially, without any prejudice, judge about the probability of the accusations imposed on them”.

V.M. Bykov, incidentally, a supporter of preserving the stage of initiating a criminal case, wrote that Yu.V. Derishev substantiated the elimination of this stage by the reason that the checking of facts objectively resembling crime, carried out during this

stage, is actually administrative procedure... performed before the crime appears, thus being a “procedural extravagancy”. In our opinion, information about crime, as a juridical fact, cannot generate administrative legal relationship by its very essence. In most cases, a law-enforcement agency has no difficulties in categorizing an incoming allegation (information) as that speaking about an administrative offence or a criminal act, doing so prior to registering the said information in the relevant books. If one takes a different position, then all requirements of the criminal-procedural law, regulating the activity within the initial stage of the procedure, become senseless, and “we will inevitably come to the conclusion that the stage of initiating a criminal case is, essentially, outside the frameworks of a criminal process, as the criminal-procedural activity is, allegedly, not performed within its course”.

However, the Statute “On uniform registering of crimes” stipulates that the very fact of registering information about crime is appearance of criminal-procedural legal relationship. Thus, it is at this stage that an official who acquired information must take the checking actions and make one of the

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following decisions: to initiate a criminal case; to reject initiating a criminal case; or to direct the checking materials to investigative jurisdiction (court jurisdiction – for cases of private prosecution). The applicant has the right to appeal against the decision made, and a prosecutor is obliged to timely consider the complaint, etc. All these actions take place within the frameworks of criminal-procedural legal relationships.

The fact that checking of information about a crime is carried out in this sphere of relationships, is proved by the criminal-procedural aspects stipulated in the norms of the Criminal-Procedural Code of the Russian Federation (CPC RF) and in the Order “On uniform registering of crimes” of 29 December 2005 No. 39/1070/1021/253/780/353/399 of Prosecutor General’s Office, Ministry of Internal Affairs, Ministry of Emergencies, Ministry of Justice, Federal Security Service, Ministry of Economic Development and Federal Service on Drugs Control of the Russian Federation. These aspects include: 1) procedural and other documents: information about a crime – written appeal, surrender (protocol of surrender – Art. 476 of CPC RF), report on

discovering a crime (Art. 476 of CPC RF), other documents (allegation of a victim (representative of a victim) in cases of private prosecution, protocol of oral allegation of a crime (Art. 476 of CPC RF), investigative protocol or a court record with information about a crime; 2) the legally regulated order of actions of an authorized person related to the submitted allegation (information) – its adoption and registration in the relevant book, assigning the register number (clause 16 of the Statute); 3) checking the information, i.e. executing the necessary procedural actions, stipulated in parts 1 and 2 Art. 144 and part 4 Art. 146 of CPC RF, by a qualified and (or) authorized official (inquirer, investigator or prosecutor (clause 26 of the Statute)).

Well known and widely discussed are the proposals of the authors of the so-called “Roadmap of reforming the internal bodies of the Russian Federation”. In their opinion, it is appropriate to eliminate the institution of the initiating a criminal case and transform it into the institution of starting the criminal procedure. It is relevant to remind how this issue was treated by M.S. Strogovich; he wrote that “the main procedural significance of the stage of

initiating a criminal case is the legal grounds for all further procedural actions during investigation and settlement of a criminal case”.

In the opinion of the supporters of preserving the stage of initiating a criminal case, who are a majority (V.A. Azarov, N.S. Alekseev, V.S. Balakshin, A.R. Belkin, V.M. Bykov, A.G. Volevodz, V.G. Daev, L.D. Kokorev, V.S. Shagrin, O.V. Khitrova, etc.), this procedure as a separate element of a criminal process, should ensure the rights and legal interests of its participants, both on the part of defense and on the part of prosecution. They see the objective of this stage of a criminal process in protecting an individual from groundless involvement into a criminal trial, where the mechanism of criminal-procedural coercion is actually perceptible.

For instance, the thousands violations of the rights of victims and suspects by preliminary investigation bodies, precluded by prosecutors, takes place at this very stage of a criminal process. First, as the practice of prosecutor’ surveillance shows, concealment of crimes by law-enforcement bodies, particularly during police investigation, periodically

acquired the scale of a national problem. At the very initial stage of dealing with the citizens' (juridical persons') appeals for protection of life, health and property from criminal trespasses, police officials either do not accept applications at all (direct concealment) or reject the initiation of a criminal case on farfetched grounds. These illegal actions do not only infringe the right of a victim for protection against a crime, but deprive them of the access to justice in general, which is often forgotten by the opponents of the stage of initiating a criminal case.

The situation has a reverse side as well – there are cases when criminal suits are initiated on farfetched grounds, to be more precise – illegally. This results in violation of the human rights by direct influence on their freedom and legal interests. In this connection, it is appropriate to recall that there existed the practice prosecutor's surveillance over consent to initiate a criminal case. Unfortunately, it was admitted excessive. This should not have been done, as the pressure onto an "inconvenient" person through criminal prosecution is not so rare even today. The court-investigating practice is not yet free from illegally prosecuted

persons. The main reason for this is that the insufficiency of grounds for preliminary investigation "was not noticed" at the stage of initiating a criminal case. As for the prosecutor's authority, at this stage of investigation they apparently contradict the general principles of independence of investigation and, in particular, an investigator.

Second, concealment of crimes is the state's refusal to fight against crime.

The above facts are directly related to some conclusions of the opponents of the institution of initiating a criminal case. Defending its rejection, many refer to, as has been already stated, both historical and legal aspects, and organizational arguments. For instance, there is an opinion that eliminating the stage of initiating a criminal case has a historical precedent; that this norm was not known to either the Charter of Criminal Proceedings of 1864, or the Criminal-Procedural Codes of the RSFSR of 1922 and 1923, in which the start criminal procedure was an allegation of a crime (Art. 303 of the Charter). Allegedly, the revival of this norm would be of positive reality – will make the state serve the interests of a citizen, the latter being turned from a

powerless applicant into a person driving the mechanism of criminal prosecution.

We consider these arguments hard to agree with.

First, Russia as a legal state, declaring a human being, their rights and freedoms to be the “supreme value” (Art. 2 of the Constitution of the Russian Federation), considers their provision and protection to be its main task. The whole state apparatus, including its mechanism of criminal prosecution, is formed and exists only because the state has taken up these protective functions.

Second, the Constitution of the Russian Federation has stipulated the protection of rights of crime victims, as well as the obligation of the state to ensure their access to justice and reimbursement of damage, incurred by the crime (Art. 52 of the Constitution of the Russian Federation). This constitutional principle means that the state in the person of its bodies, performing the criminal prosecution of a criminal, at the same time takes up the obligation to ensure the access to justice, reimbursement of damage of the case participants, restoration of proprietary status and business reputation of a physical or juridical person.

Third, basing on these constitutional principles and the norms of criminal legislation, concealment of crime from registration by the police, through refusal to accept the allegation of a crime or through deliberately illegal refusal to initiate a criminal case, is most often regarded in court-investigatory practice as committing a crime stipulated by Article 285 of the Russian Criminal Code – abuse of official authority.

Fourth, as was correctly marked by V.N. Grigoryev, “for over a century, in Russia exists a system of criminal proceedings, in which the stage of initiating a criminal case is traditionally distinguished as one of the most important guarantees of protecting an individual against groundless application of criminal-procedural coercion measures”. At that, the status of a victim appeared and developed in the criminal procedure exclusively in accordance with the level of public relations development; inter alia, it used to be a person driving the mechanism of criminal prosecution, as was noted by A.P. Kruglikov. This issue, in our opinion, is rather fully disclosed, in particular, by the evolution of the institution of a civil suit within a criminal case.

Let us recall that the notion of “a victim” in the Russian practice is directly related to the notion of “a suit”, which were first defined in the *Russkaya Pravda* in connection with settling a social-legal conflict. Thus, the history of an Old-Russian criminal process “began with the prevalence of a private principle in it”.

Since implementation of this procedure was related to public activity (punishment on behalf of the authorities, approval of voluntary settlement, etc.), the private prosecution started to lose its dominance. A crime started to be viewed as infringement of the state will; the authorities are being involved into the settlement of a private conflict.

The judicial reform of 1864, approving the principles of adversary nature of the trial and broadening the access of private individuals to justice, for the first time recognized an individual as a full-fledged participant of a criminal procedure: “the adversary process appears where a certain individuality of a person is admitted”. The new procedural status of a victim in the “combined process” created more effective means of protecting their rights and legal interests. It is sufficient to note that a civil suit within a criminal case is

settled on the grounds of admitting a person guilty in committing the crime (Art. 779 of the Charter). The Russian legal tradition was interrupted in 1917. The Decree on Courts No. 2 of 22.02.1918 first excluded this right of a victim, but then it was restored by the Statute on regimental courts (Art. 95). The Bases of Criminal Procedure of 1958 stipulated that the investigation agencies must, alongside with the factual circumstances of the case, prove the character and volume of damage incurred on a victim (Art. 15 of the Bases). For the first time, a prosecutor acquired a right to bring a civil action or to support the civil action brought by the victim. Nevertheless, despite the progressive and positive development of the institution of civil suit within a criminal case, the issues of either preserving the said institution, or its complete rejection are still discussed.

5. Conclusion

In the context of the issue under study, we can see an unexplained feature of similarity-difference: on the one hand, the opponents of private interest in the public criminal procedure insist on rejecting the institution of a civil suit within a criminal case; on the other hand,

the opponents of the stage of initiating a criminal case wish to return to the private-legal principles of the legal procedure used before the 1864 reform, when criminal prosecution, allegedly, started with an allegation from a private individual.

We will return to this issue once again; however, we consider another problem to be more significant. According to the Russian Criminal-Procedural Code, an inquirer, an investigator, and a judge (the court), within the scope of their authorities, must immediately after initiating a criminal case declare the person to be a victim. However, the law does not stipulate the period within which this declaration should be made; that is why the stipulation of “immediate” declaration is rather incorrect. However, it cannot be doubted that the earlier the victim realizes their status in the criminal process, the more efficiently their right for access to justice will be implemented. We assert that, in the sphere of human rights protection, at this stage of criminal process the following legal means would be genuinely effective: a) authority of a prosecutor to give consent for initiating a criminal case, which had been the practice earlier; b) the investigative body

making decision about recognizing a person as a victim simultaneously with issuing a decree on initiating a criminal case. This inconsistency can be solved by complementing Article 146 of the Russian Criminal-Procedural Code with a provision that a person is recognized as a victim simultaneously with issuing a decree on initiating a criminal case. In other words, in the context of constitutional provisions, the stage of initiation of a criminal case should, on the contrary, be developed and enhanced with the legal guarantees of human rights protection.

Another participant of the situation studied, which should also be researched from the standpoint of historical development, is a preliminary investigation body.

The judicial charters of 1864 introduced a lot of novelties into our legal tradition; their norms are still studied with great interest. There were cases when their provisions were misinterpreted or, what is worse, were interpreted from the mercantilistic point of view. That is why we consider it to be not very correct, for example, to “use as the key argument a single phrase drawn out of the context of a norm”. This is how the reference to historical experience is

presented, concerning the procedural argumentation of a preliminary investigation without the stage of initiating a criminal case.

The studied stage of a criminal process includes the procedural activity aimed at solving numerous questions in order to make a legal and well-grounded decision about the information of a crime. According to literature on procedural issues, the modern opinion about the stage of initiating a criminal case is that of an independent stage of a criminal process, which has its own objectives, constituting the “content of such criminal-procedural activity: a) discovering the signs of the crime, statement of the crime as it is; b) creating conditions for clearance of the crime; c) ensuring implementation of the legal liability of the person committing the crime; d) providing protection of the rights of the victim; e) rehabilitation of an innocent; f) restoration of the violated regime of law and order; g) initiation of inquiry or preliminary investigation; h) creating the conditions promoting the comprehensiveness, completeness and objectivity of the investigation, disclosing the truth”, as well as preclusion of criminal activity, fixation of the signs of the crime”.

In the literature, often as the main theory of the origin of crime investigation apparatus, it is asserted that a structurally and functionally detached body of preliminary investigation first appeared in the Russian state structure when the “judicial investigators were established in 1860”. However, according to another opinion, it happened 150 years earlier. Then, Peter I first embodied the concept of an independent “investigation agency”; in the 1710s – first half of the 1720s, these agencies functioned in the form of: “major’s” investigative offices (prototype of the modern investigative committee); investigative office of the Prosecutor General’s (prototype of an investigator of a prosecutor’s office); and Inquiry Bureau of Supreme Court” (prototype of a judicial investigator). Incidentally, the 25th of July 1713 – the date of establishing the first “major’s” investigative office – is now celebrated as the Day of Investigation Agencies of the Russian Federation.

It should be noted also, that it is at that time that in the conscience of not only legislators, but a relatively wide range of top officials, an opinion was set about the necessity to form the stage of preliminary investigation. However, this

process lasted for almost a century (till the beginning of 1800s), while integrated legal proceedings dominated in Russia.

In 1808–1860s, a police-centered model of preliminary investigation dominated in Russia. In that period, two significant events took place in Russia: a) legislation was systematized, and a Complete collection of laws of the Russian Empire was formed. This served as a basis for the Code of Laws of the Russian Empire of 1832, which became the source of criminal-procedural law for the courts, investigation agencies and police. The Russian criminal process acquired the previously unknown criminal-procedural institute in the form of a pre-trial stage of criminal proceedings; b) the personal Decree of the Emperor Alexander I of 29 August 1808 established the position of an investigatory police officer – the first specialized investigative apparatus in the period after Peter I.

This was not accidental – it was a requirement of time to separate investigation from the function of police inquiry. Preliminary investigation was comprised of two parts – during the first part, police carried out inquiry, during the second part – investigation was performed. Inquiry was imposed on a

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private special police officer, who arrived at the scene, carried out preliminary search and compiled a note, specifying the presence or absence of the signs of crime. Supposedly, according to the rules of modern criminal process, it was a kind of a resolution about initiating a criminal case or rejection of such initiation. At the next stage, an investigatory police officer joined the “further investigation”.

The Charter of Criminal Proceedings of 1864 did not change this order. Moreover, its Article 253 of section 2 chapter 1 “On preliminary investigation” stipulates that if the signs of crime are questionable the police, before informing about it by the proper jurisdiction, must perform inquiry, search, verbal questioning and secret observation. I.Ya. Foyntskiy, interpreting this provision, explained that the search “implied in general all measures aimed at assuring oneself in the event under investigation”. Some of these measures were stipulated by law – “namely, verbal questioning and secret observation”; besides, there could be “inspections of the territory, of the victim, and other kinds of inspections, even with participation of experts, measures aimed at finding and

preserving such objects, to determine the guilty and their location”.

Another commentary to the above statute, published in 1914 to mark the 50th anniversary of the Charter of Criminal Proceedings, said that the Charter does not offer “a clear, formal distinction between the police proceedings (criminal investigation and inquiry) and the court investigation. However, the scholars of procedural law consider that the “police investigation” should be interpreted as nothing else but preliminary checking of the information about a crime.

In addition to everything above, the investigative function was also distinguished from the function of the prosecutor’s surveillance.

The judicial reform of 1922 strengthened the court model of investigative agencies structure. The judicial system formed the structure of investigative agencies as well: 1) district people’s investigator at the People’s Court; 2) senior investigator at the Gubernia Court; 3) investigator for the most important cases at the Supreme Court of the RSFSR, and 4) investigator for the most important cases at the People’s Commissar on Justice (Art. 32 and 33 of the Statute). Such organization

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of investigative apparatus, plus investigators of military and military-transport tribunals, was finally stipulated in clause 5 of Art. 23 of CPC RSFSR of 1923. As it was repeatedly noted in the literature, at the end of 1920s, at this stage of the criminal process the difference “between inquiry and investigation, between search and justice” was actually erased”.

However, under toughening of the administrative system, there appeared the need to change the court model of investigative apparatus organization. An active supporter of preserving the court model was the first Chairman of the RSFSR Supreme Court P.I. Stuchka. The idea of subordinating the investigation agencies to the prosecutor’s offices, in the function of a prosecutor’s assistant on investigatory actions, was first proposed in 1923; it was supported, inter alia, by the future Prosecutor of the USSR A.Ya. Vyshinskiy. Finally, the latter opinion won. In 1936, the prosecutor’s offices and the justice bodies were completely separated. The history of the Russian court investigators since 1860 was finished, and the country again got a “prosecutor’s” model of investigative agencies structure.

Further, in the process of improving the criminal-procedural legislation, the checking activity, as we have already stated, was normatively fixed, acquired procedural character and started to determine the content of the stage of initiating a criminal case.

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