

## VIOLATIONS OF THE LAW DURING THE PRELIMINARY INVESTIGATION IN THE RUSSIAN CRIMINAL PROCEDURE

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**Abstract.** This study identifies the violations committed by authorized officials in the exercise of their powers, as well as their causes and consequences for criminal process. The law enforcement practice of the preliminary investigation and its legal basis was carried out. Violation of the law during the preliminary investigation reduces its efficiency and diminishes the authority of state power in specific public relations. The study describes typical law violations in the investigator's actions in criminal procedure and concludes the priority of ensuring personal legal status in criminal procedure. The determinants of violations in the course of criminal

procedure are determined on the basis of the analyzed criminal cases. It is concluded that the demands on the investigator's actions should be raised with the simultaneous increase of their personal responsibility for compliance with the relevant procedural framework of criminal process.

**Keywords:** principle of legality; legal status of parties to the criminal process; preliminary investigation; investigative activities; return of the criminal case to the prosecutor; rights and interests of parties to the criminal process

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## 1. Introduction

It seems that is the lawful, detailed, professional investigation of the facts of committing the criminal acts that determines the efficient crossing crime along with other circumstances. This is to ensure the principle of the unavailability of punishment and the restoration of the legal status of criminal offence victims. Also, the conduct of legitimate investigations minimizes the risk of prosecution of the wrongfully convicted. This work develops recommendations for improving the preliminary investigation in criminal cases. The common goal of the international documents containing regulations of public relations in criminal procedure is to enrich national legal systems with the requirements of a fair and prompt investigation, strict provision of personal legal status in this process, and compliance with the most significant common principles of the considered actions.

## 2. Materials and methods

The study considered issues have been studied by many scientists, among which we tend to allocate Antipova I. A., Bykov V. M., Erofeev A. G.,

Kudryavtsev V. N., Kamneva E. V., Middleton W., Macdonald S., Neganov D. A., Petrov V. A., Petrukhin I. L., Pospelova J. S., Romanovsky G. B., Samochkina R. R., Sviridov M. K., Stepanov, Y. I., Tarichko I. Yu., Titov K. A., Tyunin, V. I., Shirvanova A. A. , and Florya D. F. It is reported that the preliminary investigation, along with the inquiry, allows solving the most important tasks in the criminal process. It is no coincidence that researchers [1, p. 171] note serious changes in criminal justice. The works [2, p. 41; 3, p. 225; 4, p. 225] report the inadmissibility of illegal limitation of human rights and freedoms, as well as the impossibility of substantiating such facts by any interests of law enforcement agencies. At the same time, the principle of legality is required for all stages of criminal process, as it allows to achieve the goals of criminal process and to ensure the strict observance of human and civil rights and freedoms [5, p. 4]. Attention is drawn to improving national systems of legislation by detailing and specifying the stage of preliminary investigation, strengthening the guarantees of personal legal status of the involved in social activity with the simultaneous increase

of optionality and competitiveness of the investigation activities and its simplification.

The research is based on the means of such common scientific cognition method as materialist dialectics. In this case, the study crucially needs such methods as induction and deduction, analysis and synthesis, generalization and analogy, a systematic approach and content analysis. In order to obtain reliable results, the study involved such specific scientific methods as system and structural specifically sociological and formally legal analysis. The conclusions are based on the results of empirical research, which analyzed the criminal cases tried in the form of preliminary investigation. In addition, the staff of investigative units (69 people), prosecution agencies (34 people) and judges were interviewed. In the course of direct oral communication with investigators of the internal affairs agencies and the Investigative Committee of the Russian Federation, the difficulties of direct law enforcement and the causes of law violations were emphasized. The purpose talking with representatives of the Office of the

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Prosecutor General of the Russian Federation was to determine the most typical violations detected during the implementation of the supervisory authorities. Interviews with the court staff discovered the most common reasons of the returns of criminal cases to the prosecutor according to Article 237 of the Russian Federation Code of Criminal Procedure, as well as the determinants of complaints on the actions and decisions of investigators according to the article 125 of the Code.

### **3. Research results**

The study found that it is the violation of obligations on the part of authorized bodies that is illegal; it causes the negative consequences for society and the state due to non-compliance with the procedural order.

To achieve certainty in the understanding of the term 'law violation' in criminal process, it is recommended to take as not fulfilling the requirements of the criminal procedure legislation by the power entities of the criminal process. In this case, it possibly is the imposition of obligatory ensuring the established order and the corresponding violation of the procedure, the rights and legitimate

interests of parties by officials that entails negative legal consequences in the preliminary investigation.

The non-compliance with the established procedure for intelligence operations is probably the reason for recognizing the derived evidence unacceptable. Thus, the duties of the investigator include verification of the legality of the activity of operational while bringing the procedural status of the information obtained from intelligence operations.

According to the results, the possible consequences of violating the principle of legality may be classified into legal, non-legal and the consequences that are important for the criminal case and not related to the course of its investigation. The classification takes into account the qualitative features and legal norms.

The analysis of the provisions of the Russian Federation Code of Criminal Procedure and the Criminal Code of Russia allows talking about the system of legal consequences of violating the principle of legality in the preliminary investigation, among which the following aspects are the most significant: recognition of non-

compliance with the legal order of the conducted investigative actions and applying the rule on incompetent evidence to the results obtained during them; implementation of procedure of return of criminal case to the prosecutor and transferring it to its investigator for its extension and revision; bringing the person who violated the established order to disciplinary, administrative or criminal liability; restoration of the violated status.

The subject that has violated the established procedure of criminal process during preliminary investigation may be held liable under criminal, administrative or disciplinary branches of law. At the same time, bringing an official to the appropriate type of responsibility may not entail negative consequences for law enforcement activities in the framework of pre-trial proceedings.

Legal consequences have the most negative impact on the subjects that ensure the implementation of the principle of legality during investigation, as well as on the course and results of the investigation. Illegal consequences, which are possible in case of violating the Art. 7 of the Russian Federation Code

of Criminal Procedure (RF CCP), can not be ignored.

In most cases, the consequences of violating the principle of legality in course of investigation is of complex character. This means that unfavorable moments of non-compliance with the law of criminal process are reflected both in the successful criminal investigation (calling it into question) and directly on the identity of the official who committed the violation. Due to the serious and negative nature of violations of the principle of legality and their consequences during the investigation, the problem of their prevention becomes relevant not only for theoretical studies, but also for law enforcement agencies.

According to the analysis results of criminal cases, it is possible to consider the following violations of criminally-remedial norms in the investigator's activities:

1. Failure to comply with the requirements of RF CCP while preparing the indictment, provided that these violations prevent the further development of criminal process and would not allow the court to make an informed and legal decision on the criminal case;

2. Ignoring the requirements of the criminal process legislation on the delivery of a copy of the indictment to the accused, or not recording this fact appropriately;

3. not explaining to the accused their legal status when studying the materials of the criminal case, which does not allow them ensuring the implementation and protection of their legal status;

4. Termination of criminal process in the pre-trial stage, followed by the transfer of the preliminary investigation materials to the court in order to decide on the use of compulsory psychiatric care, with the existing grounds for an indictment;

5. Investigator's non-acceptance of the procedural decision on combining of criminal cases subject, provided that there are grounds according to Article 153 of the criminal procedure code of the RF CCP

6. Improper qualification of actions of the accused, the person against whom the proceedings on the compulsory psychiatric care is conducted.

7. Violations allowed in the preliminary examination of the report of

the crime and decision-making according to Art. 145, 146, 148 of the RF CCP, which call into question the legality of the subsequent preliminary investigation or the admissibility of certain evidence obtained in the course of an illegal investigation.

#### **4. Discussion**

Preliminary investigation acts as the most important part of the pre-trial proceedings, which forms the evidence base of the criminal case [6, p. 131] and implements a set of measures aimed at solving the crime. As a matter of fact, transition of the criminal proceedings in further stages is possible only after the successful investigator's activities, the establishment of identity of people involved in crime [7, p. 135], bringing charges against them with a further indictment, transferring the criminal case to the prosecutor and to the court.

Russian criminal process is based on international standards of protection of human rights and freedoms, the provisions of national legislation based on the Constitution of the Russian Federation and regulating specific public relations, and it requires rejecting the priority of sending a criminal case to the

court, but not to solve this problem to the detriment of the personal legal status and the procedure of the considered activities. It is unacceptable to excuse the law violations in criminal process with the need to solve the problem of combating crime, since the diminution of the personal legal status can not be justified by this goal.

Indeed, the principle of legality in criminal process according to article 7 of the RF CCP, requires authorized officials to strictly comply with the procedure established by criminal process legislation. Actions of investigation officials within the investigation that violate the procedural framework, cause the negative legal and organizational consequences [8, p. 77] that in turn minimize the efficiency of the preliminary investigation.

Law violation remain a controversial concept and is understood as a violation of the regulatory procedure of criminal process [9, p. 102], failure of the authorized entities to comply with the requirements of the legislation regardless of the expression of the illegal act [10, p. 53], deviation from the requirements of criminally-remedial norms [11, p. 219], guilty wrongful act

committed by a delictual subject of remedial relations, for which the procedural reliability measures are applied [12, p. 39], various variations in investigative and judicial practice, which are manifested in actions that do not comply with the procedural rules or act as an unlawful result of the act of cognition [13, p. 301]. The definition of law violation, which says that it is the outlawry of the legal norms, provided that the result is harm to the process of law enforcement, committed by the subject of legal relations at any stage of the criminal process, being either action or inaction, is quite successful.

When considering this problem, such category of procedural offense as breach of procedural obligation provided for by the RF CCP to commit certain actions in the interest of others, which has a normative procedural consolidation and provides for the possibility of enforcement, should be emphasized. Despite the classification into authorizing and mandatory provisions, which is common for the scientific literature, the authorized subjects of criminal process (including investigators) lose this differentiation due to the fact that their rights granted by

the legislator are actually their liabilities, from the execution of which they can not refuse.

The activities of officials of preliminary investigation carried out within the criminally-remedial procedure that ensure the achievement of their objectives (protecting the rights and legitimate interests of individuals and organizations aggrieved of crimes) and also allows protecting a person from illegal and unwarranted accusation, conviction and limitation of rights and freedoms.

Based on the provisions of the RF CCP, it is possible to assert the extension of the requirements of the principle of legality to the results of other areas of activity that are used in proving a criminal case. Here it is about the results of intelligence operations, as well as security procedures carried out in correctional facilities of the penitentiary system. This conclusion is based on the article 89 of the RF CCP that prohibits the use of the results of investigative activities in proving case is they do not comply with the requirements for evidence.

The loss of legal effect of the evidence collected during the

preliminary investigation is a significant negative circumstance that complicates or excludes the final decision-making on the criminal case. The complexity is getting even worse with the inability to eliminate the consequences of the law violation. Indeed, violations of the criminally-remedial law are more likely to occur during preliminary investigation [14, p. 73], and the issue of excluding evidence is most often resolved after a certain time during the trial. Such time interval is intentional, since in this case the possibility of eliminating violations is almost lost.

A negative consequence of the requirements of the RF CCP to preliminary investigation is the return of the criminal case for additional proceedings. This is possible both on the initiative of the prosecutor following on from studying the materials of criminal case submitted with the indictment, and by the decision of the judicial body made during the preparation of the case for trial in accordance with article 237 of the RF CCP.

Based on the study of the essence of criminally-remedial violations [15, p. 15], it is permissible to identify measures to restore law and order and negative

legal sanctions among the consequences of violations of the principle of legality during the investigation.

The most significant violations related to the restriction of human rights and freedoms entail criminal liability. It is potentially possible to apply sanctions of articles 286, 290, 292, 299, 300, 301, 302, and 303 of the RF CCP to the officials.

Exceeding official authority in the preliminary investigation is usually unreasonably commission of certain actions, as well as going beyond the provided boundaries of legal status. The subject of official forgery during the preliminary investigation as a rule are official documents that are able to establish or change elements of the legal status of the involved in the considered activities. What for bribery, it should be noted that this corruption is the most common type of crime by far. It should be noted that bribetaking is conditioned by some interest from a person transferring it and entails the further criminal acts in a bribe-giver's benefit. Violation of the principle of legality, committed to create the necessary conditions for bringing the known to be innocent to criminal responsibility,



entails the sanctions to the involved official conducting the investigation contained in Article 299 of the Criminal Code of the RF. At the same time, illegal detention, confinement or custodial detention carried out by an official of the investigative unit is an independent part of the criminal act that harms the constitutional right of a person and a citizen to freedom and personal integrity. If there is evidence tampering in a criminal case, the perpetrator may be punished according to part 2 of Article 303 of the Criminal Code of the RF. Forgery, invention of material evidence, protocols of investigative actions and evidence inconsistent with reality can cause significant harm to human rights and freedoms due to distortion of the actual picture of what happened in the criminal case.

Punishment by warning or fine of preliminary investigation bodies officials has certain specifics. It is due to the fact that these entities consist of people with special ranks. According to Article 2.5 of the Code of the Russian Federation on Administrative Offenses, law-enforcement officers, bodies and organizations of the penal system, Russian State Fire Service and customs

authorities having special ranks bear disciplinary responsibility for administrative offenses. The subjects violating the principle of legality who ensure its implementation in criminal process, are administratively responsible according to Art. 17.7 of the AOC RF, which establishes that the deliberate noncompliance with the requirements of the prosecutor arising from his powers established by federal law entails the imposition of an administrative fine on officials.

The peculiarity of criminal and disciplinary liabilities is that their application requires the presence of a proven criminally-remedial offense. Disciplinary measures are a universal means of responding to violations of the principle of legality in the preliminary investigation carried out by the relevant official. Their application is carried out by the heads of investigative units on the basis of the results of the internal audit.

In case of violations of the principle of legality committed within the framework of the preliminary investigation, the restoration measures are applied to diminishing the legal status of the participant in the criminal process and non-compliance with the

procedural requirements for the production of the preliminary investigation. Such measures consider it reasonable to include the repeal or amendment of illegal acts, the enforcement of an obligation, and compensation of the caused harm (rehabilitation). As a rule, restoration measure are used together with some punishment of the guilty in violating of the principle of legality during inquiry.

Non-compliance with the principle of legality during the investigation entails a certain reaction of the supervisory authorities. Taking into account the law enforcement practice, one needs to highlight the following non-legal consequences of violations of the principle of legality: lack of time in the work of the investigating authorities; the occurrence of the uneven burden on the investigators; the complexity of certain proceedings; the complexity of interactions with other services. The specified negative factors of law enforcement activity arise when the prosecutor returns the criminal case for production of additional investigation or recalculation of the final document.

The complexity of individual investigation is related to the time passed

from the commission of the criminal assault. For example, many investigative activities are aimed at restoring the accident picture on the basis of available visual memories of the participants (examination of witnesses, investigative experiment, etc.). Over time, the accuracy and reliability of information that is reflected in the memory of the perceiving subject is lost.

Despite the various legal guarantees to ensure the rule of law in criminal process (internal control [16, p. 17], prosecutor's supervision [17, p. 6], and judicial control [18, p. 88]) in the activities of investigative units, there are cases of non-compliance with the established remedial order and the requirements of departmental legal acts.

The most significant are the facts of non-compliance with the procedure of finishing the preliminary investigation by preparing the indictment. Law enforcement practice of investigative bodies and analysis of criminal cases returned for additional investigation allows identifying the most typical violations committed during the preparation of investigator's indictments that form the basis for the return of the criminal case to the prosecutor in the

framework of the judicial control function [17, p. 7]:

1. Inconsistency of the description from the prepared indictment with the circumstances listed in the resolution on the arraignment, or in other materials of criminal case, inconsistent statement of those or other circumstances established during preliminary investigation (for example, the indication of various places of the commission of crime, omitting the circumstances mitigating or aggravating punishment, etc.).

2. Obvious mistake of the person responsible for the investigation when classifying crimes according to RF CCP, the incorrect use of the norms of other branches of law, the breach of which was committed during actions of the guilty (for example, criminal cases on road accidents [19, p. 57], violation of safety rules, etc.).

3. Incomplete description of modus operandi, which does not allow to describe the case.

4. Investigator's disregard of requirements to the establishment of the caused damage by a crime with the description of its type and scale.

5. The lack of complete characteristics of the personality of the guilty, for example, non-indicating the past and outstanding conviction.

6. Failure to comply with the requirement to summarize the content of the evidence in the final documents.

7. The lack of indication of motives and consequences of the accused actions.

8. Contradictory description of the accused's actions in case of copartnership, which does not allow determining the role and the degree of responsibility of each of the accused.

9. Mistaken identity of the object of the criminal attack (for example, mentioning the organization as the object of the attack in case of robbery).

The study of this aspect allows concluding that in these cases violations of the law are due to the elementary inattention of the person conducting the investigation.

Particular attention should be paid to the violations committed at the stage of initiating the criminal process [20, p. 226], which lays the conditions for the subsequent efficient investigation [21], allowing to achieve the goals of the

criminal process. Indeed, these violations reduce the efficiency of activities at the pre-trial stages and call into question the legality of the subsequent remedial activity of the investigator. One of the reasons for the decrease in the efficiency of preliminary investigation is the lack of flexibility of response and its timeliness to the crime [22, p. 201] due to making illegal decisions during the preliminary inspection in accordance with Article 144 of the RF CCP. Violations at this stage of criminal process stipulate that more than 35% of criminal cases are initiated on the basis of materials, which were refused to initiate criminal process, but later the relevant decisions were found illegal and canceled by the prosecutor's office. The result of this approach is quite expected: 15% of criminal cases were initiated about 2 months after the detection of the crime. It does not allow reacting quickly to the commission of crime, which considerably reduces the potential of its solving.

Pre-investigation check in these cases was not complete, and the decisions about refusal in initiating of the criminal case did not meet the

requirements of part 4 of Article 7 of the RF CCP; in other words, they were unjustified and illegal. This circumstance is supposed to be a consequence of the internal affairs bodies struggling for positive indicators of crime solving.

There are also cases of unjustified initiation of criminal cases [23, p. 255], although their share is insignificant: it is about 5% of the total. These violations are most typical upon the drug, psychotropic substances and their analogues trafficking, as well as fraud. In case of illegal initiation of criminal cases there were no objective data on sale of drugs, psychotropic substances or their analogues. People, from whom the drugs were withdrawn, usually explained that they had accidentally found and kept them. The specified approach to investigation of crimes does not allow receiving objective data on the sale of drugs. These violations at the stage of initiation of criminal process also take place upon the identification of the committed fraud. Therefore, when making remedial decisions under clauses 1 and 2, part 1 of Article 145 of the RF CCP, the actors do not take into account the provisions of

clauses 3 of part 2 and part 5 of Article 151 of the RF CCP, which enshrine the competence of the considered officials. As a result, a number of criminal cases are initiated by investigators of the Ministry of Internal Affairs of the Russian Federation, despite the fact that the crimes are under the competence of the investigators of the Investigative Committee of the Russian Federation. The reason for the illegal initiation of criminal process upon fraud is also the incorrect establishment of the location of the crime and as a consequence – the erroneous definition of competence. Besides, there exist the violations of clause 7.4.7 of the Order of the Ministry of Internal Affairs of the Russian Federation of January 04, 1999 No. 1 "On the measures for implementing the Decree of the RF No. 1422", according to which it is necessary to efficiently use the working time of investigators, excluding the inspection of the crime scene, which are beyond their investigative competence.

These violations reduce the efficiency of the preliminary investigation and cause a significant number of unsolved crimes (about 75%).

In some cases, it is necessary to draw attention to the untimely initiation of criminal process. The study found that when initiating a criminal case, the investigators are usually guided by the requirements of Article 146 of the RF CCP. At the same time, on a number of criminal cases it is established that their initiation on duty days was early. For example, in cases upon crimes under paragraph "C" of part 2 of Article 158 of the Criminal Code of the RF, at the time of their initiation there were no materials confirming the significance of damage. With the proper preliminary investigation in the manner prescribed by Article 144 of the RF CCP, it is possible to establish the significance of damage. In addition, the operational services officials can identify the perpetrators of the crime. However, as practice shows, after the initiation of a criminal case upon a non-obvious crime, the field agents lose interest in it and the case receives no operational escorting. Assume that the investigator, being the head of investigation, is responsible for its lawful and efficient solving and has to provide the activity of operational escorting of the case, particularly of the unsolved crimes, using the powers

granted by clause 4, part 2 of Article 38 of the RF CCP. According to it, the investigator is authorized to give the body of inquiry obligatory written instructions on criminal intelligence, specific investigative activities, resolutions on detention, compulsory attendance, arrest, or other remedial actions, and also to receive assistance in their implementation in the known and established cases and obligatory for execution.

The organizational violations in the investigators' activities are considered separately. It seems that planning the pre-trial investigation in a particular criminal case is due to objective circumstances, namely the complexity and diversity of the activities of the investigator, presence of several cases under solving at a time, and the need to organize interaction with various law enforcement agencies. However, contrary to the instructions set out in departmental regulations, 62% of criminal cases lack the planned investigation. Such situations can entail unsystematic character of pre-trial criminal process and does not allow for effective interaction with the bodies of

inquiry and, in particular, with their criminal intelligence units.

Depending on the nature and the severity of consequences for criminal process and its participants, the violations of the criminal process law can be significant and insignificant. At the same time, within this legislation, there is no clear distinction between the violations committed in criminal process. This method of regulating public relations involves the formal approaches to changing or canceling the remedial decision made within the criminal process. In particular, even minor deviations from the established procedure and technical errors allow questioning the admissibility of the results of the investigator's remedial activities. This position is supported by E. V. Kameneva and A. A. Shirvanov, who point out that only compliance with the criminal process is important, which allowed the court to decide on the abolition or change of the sentence solely on a formal basis without appropriate assessment [13, p. 302].

#### **4. Conclusion**

Justifying violations of the law in criminal process with the need to solve

the problem of combating crime is impossible since the diminution of the personal legal status cannot be justified by the achievement of any goal.

The study made it possible to draw the following significant conclusions:

1. Pre-trial investigation acts as an important part of the pre-trial process, which forms the evidence base of the criminal case and takes a set of measures aimed at solving the crime.

2. A large number of violations of regulatory legal provisions during the pre-trial investigation is due to subjective factors directly related to the investigator's personal features.

3. Violations of law at the stage of initiating the criminal process entail the adverse consequences for the pre-trial investigation, cause the inability to use the formed evidence, cause the inability to complete the investigation and terminate the relevant process with the person brought to criminal responsibility being able to use the right to rehabilitation.

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