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RESPONSIBILITY**

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Abstract

The article examines the stage of initiation of criminal proceedings, as one of the very first in the system of criminal justice in Russia. The authors emphasize the significance of this stage and pay attention to its individual problems. It is concluded that most of the existing problems at this stage are generated by a general imbalance in the implementation of, first of all, the right to protection. It is pointed out that one of the key arguments of opponents of the stage of institute criminal proceedings in Russian legislation is precisely the absence of the necessary conditions for the full realization of the right to defense. The article repeatedly emphasizes the provision that the stage of initiation of criminal proceedings is a specific means of protecting citizens, a guarantor of the observance of their rights and freedoms, as well as a platform on which the question of the initiation of criminal proceedings is decided as a full-fledged procedure for refuting a presumption innocence. The circumstances highlighted as problems, according to the authors, are quite solvable, the main thing is to recognize them in time, concretize and make them compliant for normative and practical solutions.

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Keywords: Initiation of a criminal case, presumption of innocence, procedural status, right to defense, freedoms, criminal proceedings



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1. Introduction

The special position of the stage of initiation of a criminal case is due not only to the fact that it is the very first stage in the system of criminal proceedings in Russia. This provision is primarily determined by the peculiarity of its legal instruments.

According to the original concept, moreover, in the sense of the very idea of initiating a criminal case, this stage was supposed to solve its procedural tasks mainly by non-procedural means. And this was conceived not at all because of the "indecision" of the legislator in the matter of rigid formalization of the stage. It was its concept, in which only the question of whether or not to initiate a criminal process was decided as a full-fledged procedure for refuting the presumption of innocence.

The methods of this stage, by their conceptual "semi-procedural" components, were designed to protect citizens from prematurely compromising linking them with criminal proceedings. This manifested itself even at the level of terminology. Participants in the stage of initiation of a criminal case have always been named in a special way. In a normative sense, there have not yet been any victims, no suspects, no accused, there have not even been witnesses. The circle of participants included victims, eyewitnesses, suspects, in other words, people with a "virtual" procedural status and, as a consequence, their own specific attitude to the right to defence. The contradiction between the need to exercise the right to defence and the need to preserve a good name until a decision was made to initiate a criminal case was resolved mainly in favour of the good name. Moreover, they began to talk about this contradiction only in the context of the Criminal Procedure Code of the Russian Federation. The act preceding this Criminal Procedure Code in this regard was completely consistent, since the adversarial principle was not so persistently manifested in it in the pre-trial stages.

2. Problem Statement

Today, the "statusless" position of the participants in this stage, if we assess it in the context of most scientific publications, is condemned (Gavrilov, 2010, p. 9). The legislator is called upon to specify as much as possible the status of the participants in the first stage of the criminal process. It is believed that the problems of exercising the right to defence at the stage of initiating a criminal case are primarily due to the undefined status of the majority of its participants (Naumov, 2016). Science is trying to discern a paradox in this, when, in the full legal sense, there is still no participant at the stage of initiating a criminal case, and the means of law enforcement influence are directed at him and the need for protection from this influence has already formed.

This paradox, resulting in a specific problematic, pushes legal science to label the first stage of criminal proceedings as the most problematic stage. It is problematic precisely in terms of the realization of the right to defence.

Galimov (2015) points out in his works that "One of the most pressing issues is the question of exercising the right to qualified legal assistance at the stage of initiating a criminal case" (p. 96).

The particular importance of this right is confirmed by a whole system of factors:

- firstly, the criminal procedure law of Russia itself raises the idea of protecting the rights of key participants in legal proceedings to the rank of a principle of criminal procedure (Art. 16 of the Criminal Procedure Code of the Russian Federation, 2001);
- secondly, this principle has a clear "image" property, since the legality of its practical implementation often becomes a reason for proceedings in the European Court of Human Rights;
- thirdly, the issues of interpretation of this law and its uniform application are constantly under the control of the highest judicial authorities: the Constitutional and Supreme Courts of Russia;
- fourthly, the topic of protecting the rights of persons subject to criminal prosecution (in the broadest sense) invariably remains in the center of close attention of the scientific community.

Many authors deliberately focus on the above circumstances, which in fact mean a call to modernize the stage of initiation of a criminal case according to the "settings" of the preliminary investigation stage.

Perhaps one should agree with the stated reproaches and even get involved in the development of normative and practical means of overcoming the stated problems. However, it is important not to forget that the stage of initiating a criminal case is a specific stage. The limited set of its tools, including the tools of qualified legal assistance, is precisely designed to infringe on the rights of citizens as little as possible, to put citizens ahead of time in a position that has a real criminal subtext (Popov, 2014, par. 9, p 265). The state, having a limited set of means at this stage, precisely pursues the goal of maximizing the protection of the rights of citizens and their reputation.

3. Research Questions

Problematic issues of the stage of initiation of a criminal case have always attracted the attention of Russian science. The following scientists have devoted their work to the consideration of these issues at different times: B.T. Bezlepkin, V.P. Bozhiev, A.G. Volevodz, B. Ya. Gavrilov, V.N. Grigoriev, V.G. Daev, O.A. Zaitsev, 3.3. Zinatullin, N.N. Kovtun, M.V. Lapatnikov, A.M. Larin, P.G. Marfitsin, I.A. Nasonova, V.V. Nikolyuk, A.V. Pobedkin, M.P. Polyakov, M.S. Strogovich, V.T. Tomin, V.S. Shadrin, S.P. Shcherba et al. Scientists are actively discussing the pros and cons of this stage, and sometimes raise the question of its elimination.

The research questions of this article are:

- 3.1. certain theoretical and practical problems of the stage of initiation of a criminal case;
- 3.2. theoretical and practical materials allowing to form an opinion about the significance of this stage for the needs of criminal proceedings.

4. Purpose of the Study

The aim of the work is to study legal relations arising at the stage of initiation of a criminal case.

5. Research Methods

The methodological basis of the study is dialectical knowledge of the surrounding reality, expressed through specific scientific methods (formal logic, induction, deduction, analysis, synthesis, analogy, hypothesis, etc.).

6. Findings

As we have already mentioned, the problems of realizing the right to defense at the stage of initiating a criminal case are primarily due to the undefined status of the majority of its participants. Science is trying to discern this paradox. In the full legal sense, there is still no participant at the stage of initiating a criminal case, and the means of law enforcement are directed at it, and the need for protection from this influence has already formed.

Every day, law enforcement agencies, the legal profession and ordinary citizens find themselves in problematic situations related to the actual use of the necessary procedural guarantees that allow them to accurately and unswervingly follow in line with the appointment of criminal proceedings. It clearly indicates that it is the protection of rights that is the main priority in this area. Criminal procedure, as a specific technology for fighting against crime, gives preference to specific prescriptions that have the property of instructions. In this case, we are dealing with a vague non-specific approach. A wide range of people appear who claim the right to protection on the basis of the slightest suspicious glance and even a hint on the part of law enforcement agencies. They have a right that is not confirmed by the procedural status.

The multidimensional nature of the principle of ensuring the right to defense inevitably manifests itself in a whole range of problems of the most varied levels. The problems of theory, rule-making and practical law enforcement are closely intertwined here.

According to our estimates, the Nizhny Novgorod school of Proceduralists came closest to understanding this specificity in the context of the right to defense (Alexandrov & Grachev, 2015; Tomin, 2007).

Here is a quote from the works of its founder, Tomin (2007):

The principle of ensuring the legitimate interests of a person who is or may be involved in a criminal process also means that - *ceterisparibus* - to achieve the goal of the criminal process, or to fulfill the immediate task of one or another stage, or, finally, for resolving any particular problem in criminal proceedings, one should choose such a method of action (*modusoperandi*) that will cause the least damage to the persons involved in it (method). At the same time, the possible method is not confined exclusively within the framework of criminal proceedings in the narrow sense of this term. (Tomin, 2007, p. 87)

With these words Tomin (2007) urged to look at ways of verifying information indicating the involvement of a citizen in a crime, extremely broadly, but at the same time with caution so as not to harm those involved.

Today, quite often at the stage of initiating a criminal case, there are cases of abuse of the specifics of its methods. We are talking, in particular, about the nuances of a preliminary check, about various ingenious ways to make its terms endless (Grachev & Chastnov, 2008).

This issue was studied in detail by one of the authors of this article in the context of the implementation of the principle of ensuring citizens' access to justice. The first thing he drew attention to was the problem of a wide information coverage of cases of crime (Ushakov, 2012). However, despite all the measures taken, concealment of crimes from registration is still not a rare exception in law enforcement practice.

It must be mentioned that not all registered reports on crimes have an unambiguous perspective for legal resolution. And those messages that reach their logical conclusion sometimes make a very intricate path that goes along the border of legality, and sometimes even crosses it (Ushakov, 2017).

Based on the foregoing, the question of the effectiveness of the methods of the stage of initiating a criminal case and the inadmissibility of their transformation into procedures inherent in the preliminary investigation becomes problematic (Amenickaâ, 2013).

Attempts to solve individual problems lead to the emergence of new ones, and all of them are mainly due to the practical implementation of the elements of the right to protection separately and in a systemic unity. Let us consider this provision on the example of the introduction to the Law of para. 1.1. art. 144 of the Criminal Procedure Code of the Russian Federation. Here is its text: "Persons participating in the production of procedural actions when checking a crime report are explained their rights and obligations provided for by this Code, and the possibility of exercising these rights is ensured in the part in which the procedural actions and the procedural decisions taken affect their interests, including the right not to testify against himself, his spouse and other close relatives, the circle of which is determined by para. 4 art. 5 of this Code, to use the services of a lawyer, and also to bring complaints...". In our opinion, the implementation of the stated in part 1.1. art. 144 of the Criminal Procedure Code of the Russian Federation provisions is a huge practical problem. Not only is the procedural status of the participants themselves not defined, the status of those whom the legislator sends them for qualified assistance is not defined either. All this leads to the fact that lawyers face significant difficulties in providing qualified legal assistance (Skorikov, 2012). In particular, there are problems of formal entry of a lawyer into a criminal case at the stage of its initiating (Appeal Resolution of the Krasnodar Regional Court..., 2015).

Of course, there is another side in the analyzed problem, which must be taken into account when resolving the problems of the first stage generated by the imbalance in the implementation of the right to protection (Sidorov, 2015). In our opinion, it is necessary to look at the analyzed problems through the special position of the stage of initiation of a criminal case, taking into account that the existing specificity does not mean that this stage is a "rudiment" of the modern criminal process or a collection of procedural remnants, but that its specificity is an integral and expedient part of the criminal procedural technology.

7. Conclusion

Recently, the stage of initiation of a criminal case has been in a "controversial" state, arguments for liquidating it are more and more popular. This is reinforced by the corresponding changes in the criminal procedural legislation of some CIS countries, where the project of abandoning the stage of initiating a

criminal case is being actively implemented. One of the key arguments of opponents of the stage of initiation of a criminal case in Russian legislation is precisely the absence of the necessary conditions for the full realization of the right to defense. Such reasoning is not devoid of empirical grounds, but at the same time, they are not a reason for rejecting the stage of initiating a criminal case. This stage is a specific means of protecting citizens, a guarantor of the observance of their rights and freedoms, as well as a platform on which the question of whether or not to be a criminal process is decided as a full-fledged procedure for refuting the presumption of innocence.

It is by the act of initiating a criminal case that public criminal prosecution begins on behalf of the state in connection with the committed criminal act, which ensures the subsequent procedural actions of the bodies of inquiry, preliminary investigation and the court, and at the same time entails the need to ensure the right to defense of the person against whom the prosecution is carried out. Also, the act of initiating a criminal case ensures the rights of interested parties: the applicant and the future victim.

Of course, there are enough problems in terms of the implementation of this stage but these problems are quite solvable. The main thing is to recognize them in time, to concretize them and to make them malleable for normative and practical decisions.

An analysis of scientific achievements and law enforcement practice shows that the stage of initiating a criminal case is and will be a field for eternal problems in this field of law science. However, eliminating it will not resolve the problem: these problems will simply migrate to other stages of pre-trial proceedings.

And nevertheless, criminal procedural science should not give up ambitious tasks to eliminate these problems.

References

- Alexandrov, A. S., & Grachev, S. A. (2015). Draft of a new procedure for opening a criminal investigation on a report of a crime. *Criminal process*, 7, 14-21.
- Amenickaã, N. A. (2013). Bodies of inquiry and operatively-search activity: historical perspective and current status of the problem. *Russian justice*, 7, 50-51.
- Appeal Resolution of the Krasnodar Regional Court No. 22K-564/2015 dated February 5, 2015 in case No. 22K-564/2015. (2015). <https://sudact.ru/regular/doc/2vMQByhqNXxv/>
- Art. 16 of the Criminal Procedure Code of the Russian Federation. (2001). <https://www.legislationline.org/documents/id/21464>
- Gavrilov, B. Ya. (2010). Realities and myths of initiating a criminal case. *Criminal proceedings*, 2, 7-10.
- Galimov, E. R. (2015). On ensuring the constitutional right to receive qualified legal assistance at the stage of initiating a criminal case. *Bulletin of the Udmurt University*, 25(4), 96.
- Grachev, S. A., & Chastnov, K. S. (2008). On the "reasonable terms" of preliminary verification of a report on an economic crime. *Investigator*, 4, 30-31.
- Naumov, A. M. (2016). Procedural status of participants in the pre-investigation check. *A Russian investigator*, 8, 8-12.
- Popov, I. A. (2014). On the need to preserve the stage of initiating a criminal case in the Russian criminal procedure legislation. *Criminal process: from the past to the future: materials of the International Scientific and Practical Conference (Moscow, March 21, 2014). In 2 parts. Part 1*, (pp. 263-266). Akad. Follow-up. Committee of the Russian Federation.
- Sidorov, V. V. (2015). The stage of initiating a criminal case: atavism or a necessary reality? *III Baltic Legal Forum "Law and Order in the Third Millennium": Materials of the international scientific and practical conference*, 208-209.

- Skorikov, D. G. (2012). Features of initiating a criminal case on extremist crimes. *Bulletin of the Volgograd Academy of the Ministry of Internal Affairs of Russia*, 4(23), 131-137.
- Tomin, V. T. (2007). *Principles of Russian criminal proceedings as a branch of state activity: concept, meaning and system; doctrinal approaches and legislation*. Nizhny Novgorod University.
- Ushakov, A. Yu. (2012). About the situation restricting the right to participate in pre-trial proceedings. *Lawyer's practice*, 2, 6-8.
- Ushakov, A. Yu. (2017). Access to justice at the stage of initiation of a criminal case. *Russian Justice*, 9, 30-33.