

Institute for Returning of a Criminal Case by the Prosecutor to the Investigator as Implementation of the Processive Function of the Prosecutor

Lilia Ramilevna Mullagaleeva¹; Vitaliy Fedorovich Vasyukov²; Tatiana Ivanovna Bondar³;
Elena Pavlovna Lucenko⁴; Maria Alekseevna Kochkina⁵

¹Moscow State University of the Ministry of Internal Affairs of Russia named after V. Ya. Kikot; Moscow, Russia.

²Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, Russia.

³Moscow University of the Ministry of Internal Affairs of Russia named by V. Ya. Kikot; Moscow, Russia.

⁴Associate Professor of the Department of legal support of national security Russian technological University – MIREA; Moscow, Russia.

⁵Russian Presidential Academy of National Economy and Public Administration, Lipetsk branch; Lipetsk Russia.

Abstract

The article deals with issues related to the adoption of a procedural decision on the return of the criminal case by the prosecutor to the investigator for additional investigation. The analysis of the provisions of the current criminal procedure law allowed the authors to analyze the existing problems in the implementation of the procedural function of the prosecutor to return the criminal case to the investigator for additional production.

It has been proved that the return of a criminal case for additional investigation acts as a means of correcting the violations committed by the investigators in the course of their additional investigation. The meaning of this institution is formed by the powers of the prosecutor to return criminal cases for additional investigation in cases when the criminal case cannot be sent to court.

One of the main goals of the additional investigation is to establish the truth, which, as a result, contributes to the protection of the rights and freedoms of the participants in criminal proceedings, the adoption by the court of a legal and well-grounded decision.

The authors substantiated the conclusion that criminal prosecution and supervision over the execution of laws are two independently existing state-power functions of the prosecutor's office, with their own tasks, goals, content and subject of legal regulation.

Key-words: Pre-Trial Proceedings, Prosecutor, Procedural Function, Accusation, Criminal Prosecution, Investigator, Indictment, Additional Investigation.

1. Introduction

The Constitution of the Russian Federation proclaims that the highest value is a person with his rights and freedoms. For the real and effective implementation of the provisions in the field of ensuring human rights enshrined in the Constitution of the Russian Federation, a perfect system of state institutions of power is needed, one of which is criminal proceedings aimed at protecting the rights and legitimate interests of persons and organizations who have been victims of crime.

In turn, the effectiveness of solving the problem of protecting the rights and legitimate interests of participants in criminal proceedings largely depends on the quality of the preliminary investigation. The relentless urgency of the problem of the prosecutor's return of criminal cases for additional investigation to the preliminary investigation bodies is explained by its fundamental importance in the performance of the tasks of criminal proceedings.

Monitoring problematic issues of law enforcement practice proves the need for the preparation of scientific works, as a result of which theoretical and legal provisions will be developed aimed at improving the criminal procedure law regarding the functioning and improvement of this institution of criminal justice [6, p. 255-263].

2. Materials and Methods

The research methodology was based on the dialectical method. So, in the course of the study, the internal inconsistency of the institution of the prosecutor's return of the criminal case to the investigator was proved as a conflict of two functions (supervision and criminal prosecution) combined in one person.

In the course of the study, the following private scientific methods were used.

The method of analysis was used to identify and study separate parts of the object of research and reveal the existing problems of the institution of the return of a criminal case by a prosecutor to an investigator.

Using the systemic-structural method, the connections of the studied institution with a related institution, such as the return of a criminal case by the court in accordance with Art. 237 of the Criminal Procedure Code of the Russian Federation. The method of a systematic approach made it possible to consider the mechanism of the prosecutor's return of a criminal case to an investigator, as

well as to study the interaction between an investigator and a prosecutor, which is necessary to prevent the prosecutor from returning a criminal case to an investigator.

Through the application of methods of analysis and synthesis, the statistical indicators on the return of the criminal case by the prosecutor to the investigator have been studied and analyzed.

With the help of a specific sociological method of research, real results of empirical research were obtained, including a questionnaire survey of investigators and heads of investigative departments, their analysis, systematization and generalization were carried out.

As a result of the application of this methodology, methods have been developed for the subsequent modernization of the institution of the prosecutor's return of a criminal case to an investigator.

3. Results Analysis

In the science of criminal procedure, for a long time there has been a debatable issue concerning the definition of the function of the prosecutor at the stage of approval of the indictment in a criminal case. In order to understand what kind of function the prosecutor performs at this stage it is necessary to define the very concept of the criminal procedural function.

The concept of "function" has been used in jurisprudence for over a hundred years. According to A.G. Khaliulin, the concept of criminal procedural functions has not been studied in the unanimous agreement of researchers. To date, scientists in the field of criminal procedural law cannot come to a common opinion either in describing the nature of criminal procedural functions, or in the question of the quantitative composition of these functions [7, p. 18].

A number of procedural scholars believe that it is not the direction of criminal procedural activity that acts as procedural functions. In their opinion, the procedural functions are the roles of the participants in this activity and what purpose is determined for each participant [3, p. 72].

According to I.V. Maslov. "The procedural function is not only the main direction of the procedural activity of a participant in criminal proceedings, carried out to achieve the judicial goal, but the only direction of activity due to this goal arising from a procedural interest or obligation" [8, p. 44].

M.S. Strogovich pointed out the presence of three procedural functions: accusation, defense and resolution of the case [14, p. 188]. We believe that this point of view is still relevant today and deserves special attention.

D.M. Berova classifies criminal procedural functions according to the criteria of end-to-end action in legal proceedings, main, secondary and auxiliary. A cross-cutting integrated function is the protection of human and civil rights and freedoms (it should be noted that this function is fully consistent with the purpose of criminal proceedings). The main ones: the accusation, which includes not only the actual accusatory activity, but also the establishment of all the circumstances of the case (the innocence of the person, etc.), the defense and resolution of the case. Auxiliary: functions of other participants in criminal proceedings. Side: educational and preventive function, ensuring compensation for damage and confiscation of property [2, p. 14-15].

Regarding the problems associated with compensation for harm caused by a crime, a number of authors (D. A. Ivanov, A. S. Esina, P. V. Fadeev, O. G. Chasovnikova, E. A. Zorina) reasonably argue that in the Russian legal doctrine this fact is essential, indisputable and requires a rethinking of approaches to creating a single mechanism regulation of this area of activity both at the state level in general and at the level of preliminary investigation in particular) [5, p. 753-759].

Based on the above mentioned, we can state that the classification of procedural functions was based on the recognition of three fundamental functions: accusation, defense, and resolution of the case [10, p. 281-287].

Arguing about the function of the accusation, allocated by the legislator, it is impossible to leave the issue of the function of criminal prosecution without consideration. Moreover, the contradictory legislative prescriptions on the relationship between the concepts of the functions of “accusation” and “criminal prosecution” is a wide field for scientific discussions, and, often, entail difficulties in law enforcement when interpreting the norms of law.

An accusation is a statement about the commission by a certain person of an act prohibited by criminal law [11, p. 245]. We agree with the opinion of I.V. Maslov is that this legislative definition is not only incomplete, but also does not accurately reveal the essence of this procedural function. The reason is that the procedural function is the activity of the subject, that is, a set of actions carried out by him and united by the unity of goal-setting, and not just a statement [8, p. 96].

According to I.V. Maslov, “any” statement “can have certain varieties. A verbatim statement – both based on assumption and without any basis. Reasoned, but leaving room for doubts and counter-arguments, and based on a set of established facts that do not allow to assert the opposite” [8, p. 97]. He believes that “the concept of the function of accusation is more correctly and precisely defined not in the article of the Criminal Procedure Code of the Russian Federation, which reveals the basic concepts used in the Code, but in the Ozhegov-Shvedova dictionary”. An indictment is not just

a statement that a person has committed a crime, it is an action aimed at proving the guilt of the person who is being prosecuted.

In accordance with paragraph 55 of Art. 5 of the Code of Criminal Procedure of the Russian Federation, criminal prosecution is an activity to expose the suspect, the accused. Omitting the consideration of activities to expose the suspect, we can conclude that “accusation” and “criminal prosecution”, based on the position of the legislator, enshrined in paragraphs. 22, 55 Art. 5 of the Code of Criminal Procedure of the Russian Federation, it is permissible to use as synonyms: “accusation is an assertion that a certain person has committed an act prohibited by criminal law”; “Criminal prosecution is a procedural activity carried out by the prosecution in order to expose the accused”. The synonymy of these terms is confirmed by paragraph 45 of Art. 5 of the Code of Criminal Procedure of the Russian Federation, which discloses the concept of “parties”, where the function of one of the parties is indicated as “accusation (criminal prosecution)”.

O. V. Volynskaya rightly notes that the definition contained in paragraph 55 of part 1 of Art. 5 of the Code of Criminal Procedure of the Russian Federation cannot be called perfect, since it does not allow one to unambiguously delimit criminal prosecution from related concepts and institutions, in particular from the prosecution. These concepts are inextricably linked, but they cannot be completely identified [15, p. 87].

At the same time, in clauses 34, 35 of Art. 5 of the Code of Criminal Procedure of the Russian Federation refers to the rehabilitation of a person subjected to illegal or unjustified criminal prosecution. From this we can conclude that criminal prosecution is a category and broader than accusation, and may include the latter. This conclusion also follows from Part 1 of Art. 20 of the Code of Criminal Procedure of the Russian Federation, which states that criminal prosecution includes an accusation in court. It follows from the above that the accusatory activity is subdivided into accusation in court and in the course of pre-trial proceedings, but the question of the correlation of these types of activity with criminal prosecution is not resolved.

Determining the purpose of criminal proceedings (Article 6 of the Code of Criminal Procedure of the Russian Federation), the legislator operates with the definition of “criminal prosecution” and not “accusation”, it seems precisely because this term is universal, and accusation is only a particular manifestation of criminal prosecution.

Considering the problem of procedural functions in criminal proceedings, I would also like to note that it is advisable to consider criminal prosecution and prosecutorial supervision as equivalent directions, and, accordingly, the function of the prosecutor is called human rights, that is, a symbiosis

of supervision and criminal prosecution. To substantiate what has been said, it is enough to turn, in particular, to a scientific analysis of the problems of criminal prosecution of persons who do not speak the language of criminal proceedings [9, p. 121-125].

Criminal prosecution and supervision of the implementation of laws are two state-power functions of the prosecutor's office that exist independently. The prosecutor carries out criminal prosecution both at the pre-trial stage of criminal proceedings and at the judicial stage. At the judicial stage, the prosecutor carries out the criminal prosecution, supporting the state prosecution, thereby striving for the court to deliver a fair conviction. At the same time, the position of the prosecutor at the pre-trial stage on the implementation of criminal prosecution is not quite specifically defined by the legislator.

As the main function of the prosecutor's office, prosecutorial supervision is carried out in specific areas of its activities, these areas in the scientific literature are called branches of prosecutor's supervision. Branches of prosecutorial supervision are listed in Part 2 of Art. 1 of the Federal Law "On the Prosecutor's Office of the Russian Federation" [4].

The scale of the prosecutor's activity is evidenced, first of all, by statistical data. So, for the period January-November 2020 in the field of supervision over the implementation of laws, including supervision over the observance of human and civil rights and freedoms during the investigation and inquiry, prosecutors identified 1,435,695 violations. To resolve the issue of criminal prosecution, prosecutors sent 4,899 inspection materials to the preliminary investigation bodies, of which 4,427 were made decisions to initiate a criminal case [1].

The actions and decisions of the prosecutor in the case received with the indictment represent the final stage of pre-trial proceedings, at which the issue of confirming the final charge and sending the criminal case to court is decided. This stage is characterized by a certain independence, since it has its own tasks, deadlines and final decisions [12].

The content of this stage is that the prosecutor or his deputy, within 10 days, check the quality of the preliminary investigation and the availability of sufficient evidence for the consideration of the case in court by studying the case materials, considering the petitions, statements made by the participants in the process, and demanding explanations from the investigator about the admitted them violations.

The attorney of a criminal case with an indictment is admitted to him only to verify the violations committed during the preliminary investigation, but on his own without the participation of the investigator, cannot take any measures to fix them.

The fact that the quality of the preliminary investigation and the subsequent adoption by the court of the final decision on the case depends on how the prosecutor assesses the full during the investigation of evidence. The prosecutor, approving the indictment, actually already determines the scope of the forthcoming judicial proceeding. Y. Y. Chaika, who was the General Procurator of Russia on March 23, 2016 at an expanded meeting of the Board of the General Procurators of the Russian Federation, indicated that “the highest degree of responsibility A fumigation is the study of a completed investigation. The approval of the indictment in the presence of doubts about the guilt of the accused, even if he agreed to a special procedure for the examination of the case, I consider to be a purely professional insolvency” [13].

4. Conclusions

In our opinion, in conclusion, it is advisable to substantiate the conclusion about the bipolarity of the procedural functions of the prosecutor, which makes it possible to assert that the modern functions of the prosecutor largely reflect the essence of the idea historically laid down in the Charter of criminal proceedings, when the supervisory function of the prosecutor in the pre-trial criminal process was consolidated in combination with its accusatory function at the trial stages. The authors consider it logical that the powers of the prosecutor to return the criminal case to the investigator with their written instructions to conduct an additional investigation, or to reconstruct the indictment, should be considered bipolar, that is, refer to the implementation of the supervisory function of the prosecutor and the function of criminal prosecution. On the one hand, the prosecutor thoroughly examines the materials of the criminal case within the framework of the supervisory function. On the other hand, after the approval of the indictment, the prosecutor begins to carry out the function of criminal prosecution. Consequently, the prosecutor studies the materials of the criminal case from the standpoint of assessing the sufficiency of evidence and the subsequent implementation of criminal prosecution by him in court.

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