CRIMINAL PROSECUTION BODIES IN THE LIGHT OF THE RUSSIAN CRIMINAL PROCEDURE REFORM: INNOVATIONS, PROBLEMS AND PERSPECTIVES

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In 2001 a new Code of Criminal Procedure of the Russian Federation was passed, that entered into force on July 1, 2002. It is characterised by a new approach to the regulation of criminal law procedural relations, principally new as compared with the one used in the previous RSFSR Code of Criminal Procedure of 1960. Unlike the old one, the statutory norms of the new Code of Criminal Procedure contain legal guarantees of protection of personality from abuse of discretion on the part of governmental authorities pleading the criminal procedure, that were proclaimed by the Constitution of the Russian Federation of 1993; the new law reproduces the constitutional principle voicing that legal procedure is effected on the basis of adversary and equality of the parties (article 123 of the Constitution; article 15 of the Code of Criminal Procedure of the Russian Federation).

The new Code of Criminal Procedure introduced significant innovations in the legal regulation of the structure and activity of the criminal prosecution bodies. At the same time it left some of the problems in this sphere unsettled. The analysis of the mentioned novelties and problems as well as the perspectives of development of the criminal prosecution bodies is important both for the Russian legal practice and in terms of theory, including the matters of comparative jurisprudence.

Innovations. The official (legal) recognition of criminal prosecution in the criminal procedure has become a principal innovation. Paradoxically as it is, earlier the lawmakers did not recognise that the criminal prosecution was a part of the national ("Soviet") criminal procedure. The term "criminal prosecution" was not mentioned in the legislation, in particular, in the Code of Criminal Procedure of RSFSR of 1960 that was the basis of

the law of criminal procedure. Consequently, the legal notion "criminal prosecution bodies" was missing as well. The prosecutor, police, investigator and the court had one common task, to establish the truth within the framework of the criminal case. Their duty was to investigate the circumstances of the case in a comprehensive, all-round and unbiased manner, to find the circumstances both establishing the guilt and acquitting the accused person, aggravating and mitigating his fault (article 20 of the Code of Criminal Procedure of RSFSR). This approach had its specific political and ideological background. The Soviet law of criminal procedure did not recognise the adversary nature of the criminal procedure that supposes distribution of functions of criminal prosecution, defence and justice between the criminal prosecution bodies, the accused (the suspect) and the advocate, the court respectively. The principle of adversary trial was considered an attribute of the "bourgeois" process and thus unacceptable for the Soviet state. The concept according to which all the governmental authorities —the prosecutor, the police, the investigator, the court— vested with authoritative powers undertake the common task of combating crime in the criminal procedure, in fact covered up the situation when the objectively existing line of criminal procedure practice —the criminal prosecution— was the priority not only of the specially set up accusatory power bodies, but of the court also. The court had a role of crime fighter. The court took the baton from the prosecutor in exposure of the accused. The court did not solve the issue if the investigator and the prosecutor managed to prove the guilt of the accused, but instead proved his guilt by its own decision filling the gaps and lifting the contradictions in the evidential matter provided by preliminary investigation bodies. As a result the number of verdicts of not guilty was below 2%. The court trial was in fact the performance played according to some scenario, the materials collected by criminal prosecution bodies, with the outcome known before. The judge in the Russian criminal procedure interrogated actively the defendants, witnesses and victims, caught defendants by discrepancies in their evidence, tried to bring them out into the open so that the court proceedings would confirm the conclusions of the defendant's guilt made by the prosecutor in the indictment.

It was considered with respect to the preliminary investigation that the investigator performs not the prosecutorial function, but the investigative function.[1] In fact the investigative function was nothing but confusion of

[1] See, for example, Vydrya M. M., Criminal Case Investigation as a Function of Criminal Procedure; Soviet State and Law. 1980, núm. 9, p. 79 (Russledovanie ugolovnogo

functions of criminal prosecution, defence and justice. The prosecutor was responsible for the so-called public supervision of lawfulness. For a long time the procedural leadership of investigation (giving instructions to the investigator and investigation bodies on investigative action, on suing people in the capacity of the accused, that were mandatory for execution) was considered to be the form or the way of exercising the function of control of lawfulness.[2] In fact the prosecutor in his turn combined the function of criminal prosecution and justice, giving warrants for the arrest, search and other procedural actions restricting the rights and liberties of people. Though nominally the prosecutor was called "public prosecutor" in the court proceedings (article 248 of the Code of Criminal Procedure of RSFSR), the prosecutor's actions at court proceedings was also officially deemed to be not accusation, but the way of exercising the public supervision of lawfulness before the Federal Law of the Russian Federation "On Prosecution Bodies of the Russian Federation" was taken in 1995.[3]

In the new Code of Criminal Procedure the prosecutor, investigator, police are officially called the participants of the criminal legal procedure supporting the prosecution (chapter 6). They have a responsibility to exercise criminal prosecution which is defined as a procedural actions carried out with a view of exposure of the suspect accused of committing a crime (par. 55, article 5). The principle of adversary trial has been affirmed (article 15), the court does not have a duty to investigate the circumstances of the case comprehensively and entirely, that is, fill the gaps in the evidential matter committed by the criminal prosecution bodies. It is emphasised that the court is not a criminal prosecution body: it just provides necessary conditions for the parties' performance of procedural duties and exercising their rights. The court is not obliged to prove the

dela foonktsiya ygolovnogo protsessa, Sovetskoe gosudarstvo i pravo, 1980, núm. 9, S. 79); Pechnikov, G. A., Pavlenko, A. V., Objective Truth and the Adversary Character of the Preliminary Investigation; Topical Issues of Preliminary Investigation, Volgograd, 1991, pp. 42, 46 (Obyektivnaya istina i printsip sostyazatelnosti na predvaritelnom sledstvii. Aktualnie voprosi predvaritel'nogo rassledovaniya, Volgograd, 1991, S. 42, 46).

[2] Savitsky, V. M., Public Prosecution in Trial, Moscow, 1978. p. 110 (Gosudarstvennoe obvinenie v soode, Moscow, S. 110); Tchekanov, V. Ya., Public Prosecution Supervision in Criminal Proceedings, p. 180 (Procurorskiy nadzor v ugolovnom sudoproizvodstve, S. 180).

[3] Savitsky, V. M., Public Prosecution in Trial, 1978, p. 117; Kudryavtsev P. Prosecutor at Court of Original Jurisdiction, Socialist law, 1970, núm. 7, pp. 4-5 (Procuror v soode pervoi instantsii, Sotsialisticheskaya zakonnost, núm. 1970, S. 4-5).

defendant's guilt, its responsibility is just to answer the question whether his guilt was proved by the criminal prosecution bodies.

So the radical reformation of the type of Russian criminal procedure resulted naturally in the change in procedural status and principles of work of the criminal prosecution bodies. The development of adversary nature has changed the inquisitorial criminal procedure of the totalitarian state into the criminal procedure of mixed type with the functioning mechanism of restriction of arbitrary rule of the criminal prosecution bodies. This undoubtedly has become a significant step ahead on the path of securing more reliable guarantees against unlawful intervention of the governmental authorities in the sphere of the personality's rights and interests. At the same time, there is still a number of problems related with criminal prosecution bodies.

The problems. The key problems of legal regulation of the structure and work of the Russian criminal prosecution bodies are the following, in our opinion:

- parallel existence of public supervision of lawfulness carried out by prosecutor control and judicial control;
- leftovers of the Soviet inquisitorial procedure in the distribution of procedural roles between the prosecutor, investigator and police;
- significant advantages of the criminal prosecution bodies compared with those of the defendant, the accused or their advocate in the establishment procedure. Below follows more detailed description of each of these problems.

1). On the one hand, the new Code of Criminal Procedure confirmed the legal norm, not present in the old Code of Criminal Procedure, stating that the arrest, housing search, withdrawal and reading of mail or other correspondence, control of phone talks and other procedural actions that confine the citizens' constitutional rights and liberties are permitted only by warrant issued by court (article 29). In accordance with the old Code of Criminal Procedure such warrants were issued by the prosecutor. On the other hand, the new Code of Criminal Procedure retained the prosecutor's powers to consider the claims against unlawful actions of the criminal prosecution bodies, envisaging the right of appeal in court with respect to some, but not all unlawful actions of the latter (articles 123-125). As a result the

prosecutor still combines two functions: procedural leadership of the criminal prosecution and control of lawfulness of its exercise, which contradicts to the adversary construction of the procedure. One can hardly accept as well the parallel coexistence of judicial control —the attribute of adversary trial— and public supervision carried out by prosecution, the attribute of inquisitorial leftovers.

2. The new Code of Criminal Procedure has unfortunately retained the distribution of procedural powers between the prosecutor, investigator and police that has been existing in the Russian criminal procedure since 1929.

In 1929 the investigatory mechanism was transferred from judicial authority to the subordination of prosecution, the powers of investigator and police were practically made equal.[4] These powers of investigator, prosecutor and police were carried over to the Code of Criminal Procedure of RSFSR of 1960 and the Code of Criminal Procedure of the Russian Federation of 2001. According to the functioning law of criminal procedure the prosecutor, investigator and police are responsible for the criminal prosecution. The police investigates the minor crime cases in full and refer them to the court through the prosecutor, at the same time they carryout urgent investigative actions on grave crime cases that are principally considered by the investigator who also sends them to the court through the prosecutor. The prosecutor has powers to cancel unlawful decisions of investigator and police, give instructions to them obligatory for execution, approve indictments made by investigator and police and refer cased to the court. There are investigator jobs at the prosecution, Federal Security Service and Ministry of Interior.[5] In relation to the investigators of the prosecution office the prosecutor enjoys not only the control powers and criminal prosecution control powers, but also the administrative powers, he has a

[4] See in more detail Smirnov, A. V., Evolution of Historical Form of the Soviet Criminal Procedure and Preliminary Investigation, Soviet State and Law, 1990. num. 12, pp. 57-63 (Evolutsia istoricheskoi formi ugolovnogo protsessa i predvaritelnoe rassledovanie, Sovetskoe gosudarstvo i pravo, 1990, num. 12. S. 57-63).

[5] By Decree of President of the Russian Federation 306, dated 11 March, 2003, "Perfection of governmental control in the Russian Federation" (Ukaz Prezidenta Rossiyskoy Federatsii ot 11.03.2003, "Voprosi sovershenstvovaniya gosudarstvennogo upravleniya v Rossiyskoy Federatsii") the investigators of the Tax Police Federal Service are formally transferred in subordination of Ministry of Internal Affairs, while the Service as such was abolished from 1 July, 2003.

right to impose disciplinary punishment on them. The departmental affiliation of investigators conditions the accusatory bias of their work as the performance and efficiency of work of a relevant department is judged by the number of criminal cases referred to the court.

3. In accordance with the law of criminal procedure in force, the criminal prosecution bodies have a right to collect the evidence at the stage of preliminary investigation. They have the rights of withdrawal and registration of factual data which following these procedural actions serve as judicial evidence on formal legal grounds. The defence does not have similar rights. The law of criminal procedure (articles 38 and 86 of the Code of Criminal Procedure of the Russian Federation) provides for a set of investigative actions to the investigator and other criminal prosecution bodies that he might use for collecting proofs, as well as the methods of their retrieval like reclamation and acceptance of the submitted evidence from citizens, officials and organisations. The rights of the advocate to take part in the investigative action involving his client, to promote to formation of evidence justifying his client by submitting comments that are to be included in the minutes of the investigative action and posing questions to participants of the action, as envisaged by the law of criminal procedure (article 53 of the Code of Criminal Procedure of the Russian Federation; part 6 of article 166 of the Code of Criminal Procedure of the Russian Federation), do not equate advocate's chances in collection of proofs with those of investigator's procedural opportunities, as the latter, not the former, has the right to demur the questions asked (part 2 of article 190). The advocate and his client have a right to lodge a petition to the investigator (supporting the prosecution) to start investigative actions aimed at collection of justifying accused proofs, however, the investigator may decline it or meet it late, when the factual data related to the case are irrelevant or lost.

It should be noted that the Code of Criminal Procedure of the Russian Federation in comparison with the Code of Criminal Procedure of RSFSR expands the adversary principles of the averment procedure. According to the new Code of Criminal Procedure, the prejudicial evidence of the victim and witnesses provided at the preliminary investigation[6] may be voiced

[6] In accordance with RSFSR Code of Criminal Procedure of 1960, voicing at trial and the use as admissible proofs the evidence of the defendant, the witnesses and the victims

in the trial and used as an admissible evidence only with consent of the both parties (article 281), and the defendant's prejudicial evidence may be used following the petition of any of the parties (article 276 of the Code of Criminal Procedure). Besides, it is prohibited now to voice in trial and use as an admissible evidence the defendant's prejudicial evidence obtained in the course of preliminary investigation in the absence of advocate, even if the accused denied the advocate's services (article 75 of the Code of Criminal Procedure).

The perspectives. The character of evolution of the structure and procedures used by the criminal prosecution bodies depends on the way taken by the further development of the Russian system of criminal procedure. The idea adversary construction of the criminal procedure may be realised in two ways. The first one orientates at return to the type of criminal procedure fixed in Russian Judicial Regulations of 1864. The second one is orientated at formation of criminal procedure close to Anglo-Saxon type. In both cases the public supervision of lawfulness carried out by prosecutor is fully replaced by judicial control: the prosecutor's role with respect to procedure is limited to exercising the function of criminal prosecution; the powers to consider the claims against unlawful actions of the criminal prosecution bodies, and those with respect to issue warrants for procedural actions confining the citizens' constitutional rights and liberties are granted exclusively by court. The first way presupposes distribution of procedural functions between the investigator and police. The police bodies under the guidance of prosecutor exercises the function of criminal prosecution: it look for information exposing the person who committed the crime and for the proofs. The investigator who is a part of judicial authority and is independent of police and the prosecutor, carries out investigative action (interrogation, search) following their solicitation, with the purpose to achieve evidential significance on the basis of information retrieved by the criminal prosecution bodies. In other words, the investigator has a task of legalisation of evidence and represents the function of justice, not of criminal prosecution.

The second way principally does not take the figure of investigator into consideration in the aspect of procedure. The evidence is formed in court

obtained in the course of interrogation made by investigator at the preliminary investigation was allowed irrespective of the opinions of the parties.

in the presence of both parties: in the course of cross-questioning of witnesses of the crime; of policemen who made search and seizure of facts which resulted in disclosure and withdrawal of material evidence; of experts who made investigation in connection with the criminal case requiring specialised knowledge.

It is important that both the first and the second options offered for the structure of criminal prosecution bodies favour certain equalisation of procedure-related opportunities of the prosecution and the defence, as concerns collection of evidence. This fits the system of criminal procedure based on adversary principles. The prosecution as well as the defence may not independently attach the strength of legal evidence to the information retrieved.

So, only one of the two schemes of construction and legal regulation of activity of the criminal prosecution bodies described above is adequate to the principle of formation of the Russian criminal procedure based on adversary trial proclaimed in the Constitution of the Russian Federation and formalised in the Code of Criminal Procedure of the Russian Federation of 2001.