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On a content of the court control on preliminary investigation

Abstract: New Criminal Procedural Code of Russian Federation determined a special place of a court in the criminal proceedings. If earlier unofficially a prosecutor was the main figure of the criminal proceedings (and a leading figure of a stage of preliminary investigation) then, today, beyond all doubt, just a court is a central figure on a stage of preliminary and court investigation.

Keywords: court control; court proceedings; court; preliminary investigation; measure of restraint.

Article 29 of the CPC of the RF determines the powers of a court. A wording "only a court is authorized" makes these powers exclusive and it means that no any other body or official person can accept any decision, exhaustive list of which is presented in this article.

Thus, in compliance with the article 29 of the CPC of the RF, only a court is authorized:

- recognize a person accused in committing of crime and assign him a punishment;

- apply to an individual coercion measures (medical nature or educational pressure);

- cancel or change a resolution of a lower-ranking court.

Only a court is authorized (including in time of pre-trial production) to make the decisions:

- about choice of separate measures of restraints and measures of procedural coercion (in form of custody, home arrest and others);

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- on performing of investigative and other actions affecting of constitutional rights of citizens (searches and seizures in dwelling and others).

In addition, a court is authorized in a process of pre-trial production to examine the complaints on the actions (inaction) and decisions of a prosecutor, investigator, inquiry body or an inquirer in the cases and an order, which are provided by the article 125 of the CPC of the RF.

At last, a court has the right to make special ruling or resolution, in which it is taken attention of appropriate organizations and officials of the circumstances that are caused committing of a crime, violating the rights and freedoms of the citizens, and also other violations of the law which are required necessary measures.

As we see, the new criminal procedural law divided the powers of a court on four groups. According to the CPC of the RSFSR of 1961, a court was authorized only two from indicated groups of powers (the first and the last). The right to a court control was included in the CPC of the RSFSR in 1992. The second group of the powers (making a decision on arrest, extension of detention, search in a dwelling and others) are the new ones for a court (though, some of these powers were applied by a court in period of effectiveness of the CPC of the RSFSR: arrest on the post-telegraph correspondences, about seizure of the items and documents having information on bank secret, on a control and recording of telephone and other talks).

Taking into accounting the foregoing, we believe the most important and necessity a considering of the issues of a court control (where in spite of ten years experience are existed a lot of discussible matters), and also a separate problems on a role and the powers of a court during making decisions that are affected on the constitutional rights of the citizens (p. 2 of the art. 29 of CPC of the RF).

Beginning from the time of appearance in the Russian criminal process the issues of a court control are caused of the excited disputes and the subject of discussions and publications. Arising (in 1992) as the right to appeal in a court of a resolution on the arrest and extension of detention, this institute had been constantly developing, and as rule, in a side of extension of possibilities of an appeal in a court the decisions of the bodies of preliminary investigation.

In the article 125 of the CPC of the RF is in details determined a court order of

the examinations of the complaints. A resolution of an inquirer, investigator, prosecutor on a refusal of initiation of a criminal case, on stopping of a criminal case, and also other their decisions and actions (inactions), which are able to violate the constitutional rights and freedoms of the participants of a court proceedings or make difficulty an access of the citizens to the justice, can be appealed in a court on a place of the preliminary investigation production.

A complaint can be submitted by an applicant, his defender, legal representative directly or through an inquirer, investigator or prosecutor.

Not later than five days from the date of submission of a complaint, a judge checks legality and substantiation of the actions (inactions) and decisions of an inquirer, investigator, prosecutor in a court session with participation of an applicant and his defender, legal representative or representative, if they take part in a criminal case, other persons whose interests are touched by appealed action (inaction) or decision, and with participation of a prosecutor. Non appearance in a court of the persons who were in time notified about examination of a complaint and not insisting on it examination with their participation are not an obstacle for consideration of a complaint by a court.

In compliance with the results of examination of a complaint a judge makes one of the following resolutions:

1) about recognition of an action (inaction) or decision of appropriate official illegal or unsubstantiated and his duty to eliminate a violation made;

2) on leaving of a complaint without satisfaction.

Today, a sphere of action of a court control is not limited. The CPC of the RF is allowed an opportunity a court appealing, practically, any decision and action of an investigator, inquirer, and prosecutor that unlikely meets a public interests. Mainly, this is a result of activity of the Supreme Court of the RF and the Constitutional Court of the RF. As in that time, it was not given decisive and negative assessment of the facts of an appeal in a court a resolution about initiation of a criminal case. After that it was the turn of appeal in a court a resolution about calling as accused. Following to logic of the some decisions of the Constitution Court of the RF, the courts of general jurisdiction accepted to consideration similar complaints and examined them the

merits.

Undoubtedly, an introduction of a court control, extension of a sphere of its activity on the preliminary investigation are the positive facts with point of view of ensuring of personal (private) interests those or others participants of investigation. But, during of ten years of it existence we came to the danger line when an issue is about limitation through the court control of freedom of the bodies of preliminary investigation to manage with its procedural rights on implementation of an investigation (1, p. 59), and it should be considered inadmissible phenomenon, contradicting the public interests.

In scientific works are expressed an opinion about principal inopportunity of limitation of a subject of the court control for the actions of preliminary investigation by way of fixation in the law of the list of actions and decisions of the investigative bodies which are subjected to an appeal (2, p. 9-10).

We believe that a limitation of the bounds of the court control is possible and necessary, but opposite by a way of fixation in the law of the list of actions and decisions of the investigative bodies which are not subjected to an appeal. Such approach is more preferable. Legislative fixation of the actions and decisions which are not subjected to a court appeal will be, first of all, in the interests of the investigative bodies, i.e. in the public interests. By this the investigative bodies will be obtained an opportunity for a normal performance of their functions.

In this connection, it is necessary legislatively:

1) to determine a list of specific decisions and actions which are not subjected to a court appeal;

2) to introduce some additional restrictive terms (ex. a complaint of a defender is submitted to a court with consent of an accused, and others).

In our opinion, it should not be appealed to a court the basic decisions on a case:

- a decision to initiate criminal case;
- a decision to call as an accused;
- an indictment and verdict of guilty.

It is not excluded an appeal to a court the rest decisions and actions (inactions) of an inquirer, investigator and prosecutor.

An issue on possibility of a court appeal of one of the main decisions of an investigator, inquirer, prosecutor (a decision to initiate a criminal case) is required a special discussion.

I. Petrukhin thinks that it can and need to be appealed in a court a resolution on initiation of criminal case. According to him, a resolution about initiation of criminal case "requires immediately court control in order not to allow unsubstantiated leveling of accusation (suspicion) against individuals which guilty have not established yet; "when it exists only" signs of a crime" (3, p. 49-50).

At the time the article of I. Petrukhin is said about only the cases of initiation of criminal case in respect of a specific individual because the author substantiate thinks that illegal initiation of criminal case causes the moral harm to a person against whom it initiated. It is naturally, unlikely anyone will think to appeal in a court a resolution on initiation of criminal case on the fact, for instance, non-disclosed theft. It is true, such opportunity is not excluded for a victim, when he does not agree with initiation of criminal case and asks not to perform an investigation.

The point of view of the esteemed author is presented to be a vulnerable. If to follow his logic then it is not sufficiently only a presence of the separate signs of a crime in order to initiate criminal case in respect of a specific individual. Consequently, it is necessary to have a combination of all signs of a crime, all its circumstances (an object, subject, objective and subjective sides). But, in the most part of cases it is impossible to have it.

Under this, many people prefer not to remember about principally important position of the Constitutional Court of the RF expressed in decision from 23rd March 1999, according to which it cannot appeal in a court resolution on initiation of criminal case. It was justly pointed out that an initiation of criminal case does not come to infringement of the rights and interests of the participants of a criminal process (4).

We just add that the CPC of the RF had introduced a requirement on agreement with prosecutor each resolution on initiation of criminal case. Thus, it was strengthened a supervision for legality of initiation of the criminal cases. This became a ground reduction of number of initiated criminal cases almost in one and half time.

Under such circumstances it should be legislatively fixed a rule on impossibility of a court appeal of the resolution about initiation of criminal case or limit such right determining its exact frames and bounds.

The article 125 of the CPC of the RF says about impossibility of a complaint submission in order of a court control by an applicant, his defender, legal representative or representative. A judge examines the complaint with participation of an applicant and his defender, and also other, whose interests directly affected by the appealed action (inaction) or decision.

According to the article 125 of the CPC of the RF, a complaint may be also lodged by a victim. At the same time it should be noted that CPC of the RF did not specially pointed out and emphasized an opportunity of providing the certain rights to a victim upon submission of the complaints by other participants of an investigation. It would be reasonable his participation at time of a complaint examination of an accused, suspected, if it (complaint) affects the rights and interests of a victim (for instance, upon examination of the complaints of an accused about repeal or changing of the restraint measure, about repeal of an arrest on a property etc.). As practically, any appealed by an accused, suspected and their defenders decision or action of the investigative bodies in certain extent affect the interests of a victim; therefore, it is necessary to take into account his opinion.

Consequently, it is necessary to include in the CPC of the RF a requirement to notify of a victim about all complaints lodged by the representatives of a defense in order of a court control. In his turn, let a victim decide to take part or not in their examinations.

A principle of competitiveness and equality of the parties should assume the right to complaint in a court not only for an accused, suspected, victim, defender, citizen plaintiff, citizen defendant. Such right in certain cases should be given to the accusation party in face of an investigator, a chief of investigative department, inquirer, and prosecutor. In case of abuse by anyone of the participants of proceedings given him rights, the accusation party should have opportunity through appeal to a court to establish for this participant a certain regime of execution his right, a certain restriction of this right.

In our view, such rule is applicable first of all to an institute of the right to defense. Let's consider some cases for the possible application of this rule. Begin from the simple (as it seems) issue: how many lawyers can be allowed to defense of one accused? There are no any restrictions in the law as to this issue. Consequently, a number of the lawyers can be as much as accused wants and can be paid for.

Certainly, a participation of a few counsels in the case is created for an investigator the additional difficulties during performance of investigative actions. When each of the counsels is familiarized with criminal case in full volume then, naturally, this delays investigation with violation of the terms of its production.

In our opinion, it is necessary to fix a general rule in the law, according to which, an accused may have one counsel. This will allow efficiently provide the right to defense since the most part of investigated criminal cases have one volume, accusation includes one or few episodes therefore, one counsel can provide a defense on such cases. In addition, in case of necessity of participation a few counsels on the case an accused or his lawyer should have a chance to submit about this an appropriate petition to prosecutor (with the right to refusal of appeal in a court) or a court. It is necessary to take into account the following circumstances at time of decision of an issue about satisfaction of this petition: completeness of a criminal case, hardness of accusation, number of episodes of criminal activity, volume and investigative group) and some others.

Limitation of a number of the counsels exists in legislation of some countries. In connection with this European Court of Human Rights in a specific case was considered to be compatible to Convention on Human Right limit admissible to a court number of the counsels up to three ones.

Legislative regulating of the counsels number should take into account not only providing of the rights to defense from accusation, but also the interests of investigation, and in final - the interests of the justice. In particular, we are speaking about that to exclude in the criminal proceedings the cases of unconscientiously legal services of the lawyers and under this it were not violated the interests of an investigation from some reasons linked with behaviour of a defender.

In this connection prosecution party should also have opportunity and the right to petitioning in a court about limitation of a number of participating counsels in a case or about repeal in admission to participation in a case of the next defender.

One more a typical example, which is required an analogical approach. In compliance with the CPC of the Russian Federation, an accused and his counsel-defender cannot be limited in time that is necessary to familiarize with the materials of a criminal case.

New provision, undoubtedly, can and will be able to assist of a delaying of the familiarization process with a criminal case by an accused and his defender, especially on the cases, on which an accused is in custody. But, the right to familiarization with a case cannot have the absolute and unlimited nature; it should have the certain frames. Abuse of this right is able to delay familiarization with a case and correspondingly will be able to violate the terms of investigation and even to releasing of accused from custody. All these are able to make a harm not only the public interests, but and the interests of a victim and other participants of investigation.

In this connection we believe it necessary to suggest the following changes in the CPC of the RF:

1) If an accused is not taken into custody then the time of familiarization with a case would not be included in total time of investigation.

2) If an accused is taken into custody. Then, not less five days before ending of the time of custody, an investigator informs to an accused and his defender about completion of the investigation and presents the materials of a criminal case them for familiarization. In case of the acquaintance cannot be completed in this time then an investigator through a supervising prosecutor addresses to a court with petition about prolongation or establishing of the time of custody of an accused until ending of familiarization with the case. A court makes an appropriate decision. In addition, it should provide a court with the right to establish the exact time to familiarize with a case (ex. Seven days with total duration 56 hours etc.) or will not fix the exact time. By the way, an opportunity prolongation by a court of the time of custody until completion of acquaintance with the case is provided by the part 8 of article 109 of

the CPC of RF, but it is concerned to the only case – an expiration of the deadline (18 months) taking into custody of an accused.

We believe that indicated changes will exclude striving of an accused and his defender for various tricks directed to reach illegal aims (delay investigation, to get release from custody and others). At the time, the actions of an investigator will be taken under a strict court control.

Now, we consider some issues of application of the separate provisions of the p. 2 of the article 29 of CPC of the RF.

As it known, the powers of a court on making of decision on taking into custody was provided by the art. 22 of the Constitution of RF dated on1993. But, with reference on the Final and transitional provisions of the Constitution, its actual introduction was postponed at uncertain period, which put it mildly, delayed.

In the project of the CPC of RF and in project of the law on introduction in effect of the CPC of RF the right to arrest was handed to a court, but actual use of this power was postponed in one and half year – until 1 January 2004. Law enforcement structures insisting on such way, probably, hoped that they could keep the right of a prosecutor to sanction of arrest.

But, the Constitutional Court of the RF its unexpected decision made on 14 March, 2002 demanded: from 1 July 2002 to hand over the powers on arrest to a court.

In spite of unpromising predictions of some scholars and practitioners, it was nothing happened. The first of months of application of the new CPC had shown: the number of applying in a court for sanction to arrest reduced twice and more times. It is understandable: since it is necessary to provide a court with the evidences and grounds sufficient to arrest. But, before one could convince of a prosecutor with so name operative information, which sometimes were unsubstantiated or indicated a criminal personality of suspected or accused.

These and others ideas are explained the reasons why a transmission of the powers to arrest to a court implemented quietly and painlessly. The courts have taken themselves a new amount of work, which, at the same time, considerably reduced on indicated by us reasons.

A list of the decisions is made by a court in compliance with the part 2 of art. 29 of the CPC of RF are rather extensive and it includes 11 items. It seems that basing on practice this list should be reduced.

For instance, obviously that unlikely will work and be applied p. 6 – on making by a court the decision about production of a personal search (except the cases provided by the art. 93 of CPC of RF). The detailed analysis of the article 93 of CPC of RF and the referenced articles 182, 184 of CPC of RF is allowed to conclude about possibility performance of a personal search without court resolution in the following cases:

- under detention of a person and his custody;

- upon presence of sufficient grounds to suppose that a person (being in the room or other place where executed searching) hiding the items or documents, which can have significance for the criminal case.

Thus, the bodies of investigation have quite extensive possibilities to carry out a personal search without court decision. In other cases it is unlikely can be hoped on the results upon necessity of a personal search of a certain individual with taking into account of the time that need to get a court decision. Since the personal search requires operative performance and only under this approach can be obtained the results; otherwise, it is difficult to be sure that one can be found any interesting for investigation items and documents.

By the way, generalization of the first experience of application of the new CPC of RF is shown that applying to a court decision to produce of a personal search are practically absence.

Further, in our view, it is necessary a new edition of p. 9 – about the court right to make a decision on property arrest. Ii seems that a court order in this case belittles a principle of procedural independency of an investigator. The cases of the property arrest of suspected persons are the only in the investigative practice. As rule, property arrest in the most part of the cases is carried out after bringing of an accusation. Since a decision about bringing of accusation an investigator makes himself, therefore in our view, in the cases of a property arrest of an accused after bringing him accusation, it is not necessity to obtain a court decision of this action. In other cases it

is necessary to have a court decision. Appropriate changes should include in the CPC of RF. In our opinion, such practice does not restrict the rights of an individual a property of which is arrested. The more so he has the right to appeal an investigator decision to a court.

Let us consider in the details such powers of a court as election of new measure of restraint – home arrest.

Until now two measures of restraint have prevailed in criminal proceedings: custody and a written undertaking not to leave. Obviously, that a new measure of restraint should change situation in the detention centers, i.e. reduce the number of persons taking into custody.

In compliance with article 107 of CPC of RF a home arrest is the restrictions linked with freedom of movement of a suspected, accused, and also in ban:

1) to associate with certain persons;

2) to receive and send correspondence;

3) to have the talks with use of any means of communication.

If we make analysis of the articles of CPC of RF about the measures of restraint then we can note that for violation of undertaking obligations in some cases are stipulated the responsibility in form of money fines or other form. For example, money fine in sum of hundred minimal wages is stipulated for the guarantors (for non performance their obligations on personal guarantee). The law is provided opportunity to take to the state income a guaranty of suspected or accused in case of non-performance or violation of the undertaken obligations.

Thus, for violation of these measures of restraint are applied a punishment in form of a property nature (if it needs no grounds to apply to the strict measures).

But, a lawmaker did not provide such provision for home arrest. In our view, it should be provided in the article 107 of CPC of RF the right to money fine for violation of established by a court restrictions.

It should note that the law did not define the duration of home arrest, did not determine period of validity of restrictions established by a court for an accused, suspected. It remains unclear whether should prolong the duration of home arrest in

case of prolongation of duration of investigation on the criminal case. It should be included the appropriate supplements in the article 107 of the CPC of RF.

In compliance with part 4 of article 110 of CPC of RF, a measure of restraint elected on the base of a court decision can be repealed or changed only by a court. Due to volume limitation of the article it is not opportunity to the detailed consideration of each court powers that provided by the article 29 of CPC of RF. An author tried to take attention only on some and more significant or not regulated by the law episodes. Their discussion in the legal press will be contributed of successful realization of new model of the Russian criminal proceedings.

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