DOI 10.24147/2542-1514.2019.3(1).119-137

ADVERSARIAL PROCESS: URGENT PROBLEMS OF MODERN RUSSIAN CRIMINAL PROCEEDINGS

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Article info
Received – 2019 January 31
Accepted – 2019 March 01
Available online – 2019 April 20

Keywords
Jurisprudence, criminal procedure, justice, accusatory bias, jury, verdict, sentence, evidence, appeal, investigating judge

The subject of the article is realization of adversarial process principle in Russian criminal proceedings.
The purpose of the article is to disclose the list of systemic flaws in modern criminal justice. The hypothesis of the study is the thesis that the ongoing transformation of the criminal procedure did not lead to its transformation on the basis of the principle of the adversarial process.
The authors use formal-legal and comparative-legal methods as well as legal interpretation of the text of Russian Criminal Procedure Code and Russian Constitutional Court's decisions.
The main results and scope of their application. The problem field of the research is the analysis of the latest changes in the Criminal Procedure Code of the Russian Federation and their influence on the qualitative modernization of the domestic justice. For optimal understanding of the problem field, the authors used a set of general scientific and private-scientific methods. The article provides a brief overview of the legal positions of the Constitutional Court of the Russian Federation and judicial acts reflecting the views of the law en- forcers on the motivation of the sentence. In the introduction, the authors justify the relevance of the study, also discusses possible criteria for the fairness of a judicial decision in criminal justice. The second section analyzes the main trends in overcoming the accusatory bias in criminal proceedings and determines the relationship between constitutional legal and criminal procedural parameters of justice and the validity of judicial decisions. The third section examines the main shortcomings of the elements of judicial control in pre-trial criminal proceedings and assesses the prospects for the establishment of an investigative judge. In the fourth section, the authors explore the specifics of the legalization of operative information as evidence in a criminal case, taking into account the legal positions of the Constitutional Court. The fifth section is devoted to the analysis of the latest changes in the criminal procedure law regarding the order of consideration of cases in the appellate and cassation instances. In the sixth section, the dynamics of doctrinal views on the systemic flaws of the Russian criminal process are examined.
The main proposals for the improvement of the Russian criminal procedure legislation are formulated in the conclusion. It is concluded that the principle of the adversarial process is not taken into consideration completely during the transformation of the criminal procedure in Russia.

Правоприменение
2019. Т. 3, № 1. С. 119–137

ISSN 2542-1514 (Print)

"Truth and Justice - that's the only thing what I worship on earth"
Jean-Paul Marat

1. Introduction.

In 2018 lawyers marked the 25th anniversary of the adoption of the current Constitution of the Russian Federation, according to which Russia was proclaimed a democratic state governed by the rule of law. More than twenty years the new Criminal Code and the new Code of Criminal Procedure have been established. However, unfortunately, the systemic disadvantages of criminal proceedings, as well as certain shortcomings of the existing state power, as well as the lack of proper moral guidelines in society, established in recent decades, retain their negative impact on the quality of modern Russian justice. This determines, in particular, and being in the service of the investigative and judicial bodies in the first place to improve personal material well-being in any possible way (currently, for example, no one is surprised by the facts of the charges of police officers in the sale of drugs in a particularly large amount or months of gratuitous use by the investigator expensive, arrested during the investigation as evidence, the car of the defendant, located in the detention center) and a low level of fairness of court decisions in criminal cases.

Of course, it is unlikely that anyone or ever can offer clear and objective criteria of justice (on the ratio of such with the motivation of judicial decisions below) justice (proceedings) in criminal cases (although, for example, in the criminal code justice is enshrined as a principle of criminal law and non-compliance with the provisions arising from this principle entails certain legal consequences). This may be the number of acquittals in criminal proceedings, it may be the number of overturned indictments in the appellate instance, it may be the number of overturned decisions on refusal to initiate criminal proceedings, it may be the percentage of criminal cases initiated from the total number of filed applications for the initiation of such (or all this in total). Subjective justice can be investigative, judicial, prosecutorial, lawyer. Both the victim and the defendant may also have a valid opinion about the fairness of the Russian legal proceedings against them (by the way, most of the clients of one of the authors – lawyers considered the verdict unfair, but there were defendants with a different opinion about their guilt and the punishment imposed on them). The formal criteria (indicators, requirements) of justice, for example, include the absence of appeals or cassation complaints against a court decision, the absence of changes in the appealed court decision, compliance with a reasonable period of proceedings, the mandatory participation of counsel in appropriate cases, the prohibition of conviction twice for the same crime, although the presence of such again shows the outside of the process, without determining the original quality of such.

Of course, in the modern period, our state has experienced and is experiencing essential problems in a number of other areas: public administration, social security, education, medicine, economy, but it is in criminal proceedings that they are most dangerous in terms of legal stability and the desired prospects for the legal development of our society.

The subject of the problematic discussion in this Article will be mainly the thesis about the accusatory bias in the Russian criminal proceedings and ways to overcome it, as well as the assessment of the efforts of the legislator in the reform of the entire justice system. We will proceed from the fact that since the adoption of the Concept of judicial reform in 1991, there have been a significant number of fundamental changes in the mechanism of administration of justice in criminal cases. To date, however, the judicial system has not been spared a number of major shortcomings.

It is logical to assume that the constitutional provisions that characterize the totality of procedural guarantees of the individual in the criminal process, received some embodiment in the legislation and law enforcement practice. However, many of them are not adequately implemented today.

2. On the accusatory bias in criminal proceedings.

Without taking the path of criticism of the Russian legal system, we note that 2018 was also characterized by another attempt by the Russian legislator to improve the system of current justice in criminal cases. First, we have already mentioned that the Federal law of June 23, 2016 No. 190-FZ "On amendments to the Criminal procedure code of the Russian Federation in

ISSN 2658-4050 (Online)

connection with the expansion of the use of the Institute of jurors" came into force on June 1, 2018, in accordance with which the jurisdiction of criminal cases to the court with the participation of jurors was expanded.

According to the Judicial Department of the Supreme Court of the Russian Federation, for six months activities in this part of the court were reviewed, and 91 of the criminal case against 102 persons. Against the background of the total number of cases considered by Russian courts annually, it is a drop in the sea, as well as in comparison with statistical data on the number of convicts under Art. 105, 111 of the Criminal Code. Undoubtedly, the experiment itself on the establishment of jury panels in district and equivalent courts can be assessed positively in terms of strengthening the elements of competition, the emergence of new procedural guarantees of individual rights and independence. But, based on the very small number of cases dealt with in this order, it can be concluded that the law has not introduced fundamental changes in the administration of justice and is unlikely to do so.

The fact that a huge number of criminal cases are heard according to the rules established by Chapter 40 of the Code of Criminal Procedure, i.e. in a special order that does not include the study of the evidence collected in the case, remains alarming. In 2018, it accounted for 70% of the total number of criminal cases considered by Russian courts. According to the Chairman of the Supreme Court of the Russian Federation V. M. Lebedev, this circumstance contributes to the extremely irrelevant ratio of the number of convictions and acquittals .

For comparison, during the six months activities of the jury in the district courts was justified 28% of the defendants. In relation to 0.2 per cent of acquittals handed down in cases considered by professional judges alone or collectively, this is, in the words of the classic, "a huge distance". Although taking into account the huge array of cases dealt with in a special order, in the Supreme Court of the Russian Federation believe incorrect allegations about the accusatory bias of Russian justice , but the data generally confirm its existence. According to the results of independent studies, "the chances of effective judicial protection and rehabilitation in court are practically zero" [4, p. 35].

Secondly, in 2018, a new measure of restraint in criminal proceedings against a suspect or accused in the form of a ban on certain actions was established (Article 105.1 Code of Criminal Procedure). It is applicable, in particular, in cases of serious crimes for a period of 24 months, especially serious – for 36 months. Thirdly, the efforts of the legislator have created a certain barrier to the issuance of illegal orders on the termination of the criminal case. Thus, Article 214.1 and part 1.1 of Article 214 of the criminal procedure code of the Russian Federation from November 2018. provide the judicial order of cancellation of the illegal or unreasonable resolution of the head of investigative body or the investigator on the termination of criminal case or criminal prosecution after one year after removal in the cases provided by p. 1 of Art. 214 of the criminal procedure code of the Russian Federation. First of all, these rules are aimed at protecting the legitimate interests of the victim and ensuring his access to justice, and in this regard, the creation of additional procedural guarantees remains relevant. Although, it should be noted that the rules governing the procedure for appealing to the court actions and decisions that violate the constitutional rights of citizens (Art. 125 of the Code of Criminal Procedure), do not have significant effectiveness (for example, one of the authors – lawyers about two years unsuccessfully tried to cancel in the district court of St. Petersburg a subscription not to leave the criminal case of a crime of minor gravity, terminated against the client for reconciliation with the victim almost 15 years ago). The problem is that the subject of judicial review is initially limited (obstruction of justice and violation of constitutional rights) and the limits of judicial knowledge, internal conviction, professional corporatism do not allow to seriously contribute (no more than 7 - 8 percent of such complaints are satisfied) to the elimination of violations, except for the abolition of the relevant illegal act.

Fourth, in part 2 of Art. 76.1 of the criminal code (Art. 28.1 of the criminal code), the Federal law of 27 December 2018 № 533–FZ almost doubled the number of Articles of the Special part of the criminal code, which necessarily terminates the criminal case with full compensation for damage from the crime and payment to the Federal budget of monetary compensation in the amount of twice the cost of the damage.

Fifth, the resolution of the Government of the Russian Federation No. 1169 of October 2, 2018 is also of absolute importance. in accordance with which gradually (2019, 2020 and 2021) increases the

ISSN 2542-1514 (Print)

minimum and maximum amount of remuneration of lawyers for appointment at the expense of the state in criminal proceedings. In many parts of our country, up to 90 per cent of criminal cases are handled at the expense of the state with the participation of appointed lawyers, and such a long-awaited increase should contribute to better ensuring the real right to defence, although not always the quality of defence depends on the amount of money paid by the client to the lawyer, both by agreement between them and at the expense of the state. According to one of the authors (a lawyer with many years of experience), the quality of protection is determined not so much by the professional knowledge of the lawyer and his experience, but primarily by his professional and human decency and attitude to the defendant.

A positive effect was the introduction, for example, in 2016 of part 2.1 of Article 281 of the CPC, providing as a condition for the disclosure of the testimony of victims and witnesses who did not appear in court, providing the accused (defendant) with the opportunity to challenge such testimony against themselves at the previous stages of the process (for example, by confrontation with a witness). Interestingly enough, one of the authors more than ten years ago appealed to the ECHR with a complaint about the recognition of part 2 of Article 281 of the Code of Criminal Procedure does not comply with Article 6 of the Convention on human rights and fundamental freedoms of November 4, 1950 to the extent that it limited the defendant's right to directly question prosecution witnesses in court. As a result, the complaint by the Committee of three judges of the European Court of human rights was declared inadmissible in February 2009, although the above-mentioned changes to the Code of Criminal Procedure were made, albeit much later and not quite in the required version (from the point of view of one of the authors).

The Committee of Ministers of the Council of Europe commended the activities of the Supreme Russian courts aimed at overcoming the accusatory bias and increasing the motivation of judicial acts. At the same time, he strongly recommended "even more persistent attempts to effectively change the daily practice of the authorities". Unmotivated and unconvincing judicial acts raise doubts about the justice, competence and impartiality of judges [2, p. 13]. However, in a large number of sentences in criminal cases (especially in cases considered in a special order), the motivation can be questioned.

The question of the motivation of judicial acts naturally leads us to the problem of the acquittal of the jury. There is a negative public outcry whenever such a decision, leading to an acquittal, is made in a case that has received wide publicity and press coverage.

In our opinion, the following example is quite interesting. In November 2018, the St. Petersburg city court acquitted four citizens accused of smuggling cocaine from the Dominican Republic. Two more of their accomplices, who had concluded pre-trial cooperation agreements and admitted their guilt, were sentenced by another court to real terms of imprisonment. One of the defendants was also convicted by the district court, but the sentence was later overturned, and there was a merger of criminal cases. As a result, the jury found unproven involvement of the defendants in the Commission. There is a question of justice and motivation of the sentence passed on the allocated criminal case considered by the judge alone, and about degree of reliability of both the proofs put in its basis, and the indications condemned used on the criminal case considered with participation of jurors. An acquittal by the Prosecutor has been submitted, but the issue of its abolition has not been resolved at present.

According to the personal observations of one of the authors, acquittal or conviction in a jury trial in most cases does not depend on the personal sympathy of the jury to the defendant for reasons of his sex or age, not on how he is dressed and what, not on the honest - cheerful or darkly degenerate expression of his face, but on the significant and voluminous body of evidence presented by the investigation to the jury.

It seems that the manipulation of the jury is quite difficult, and because perceiving the totality of the evidence collected in the criminal case directly, jurors tend to pay more attention to the inconsistencies and contradictions contained in the materials of the criminal case. Professional judges, in many cases with investigative or prosecutorial experience, are more vulnerable in this respect (meaning the actual imposition on judges of a moral non-procedural "duty" to convict the defendant if the case is brought before a court).

Analyzing the consequences of expanding the jurisdiction of criminal cases to the jury, the researchers draw attention to the fact that the principles of the formation of juries in the Russian criminal process are such that they exclude the "external management" of the legal position of the

ISSN 2658-4050 (Online)

panels [3, p. 134]. Agreeing with this, we note that the reduction in the composition of jury panels operating in district courts, twice the possibility of such "manageability" significantly increase. Therefore, while welcoming the expansion of jurisdiction in principle, we note that the new procedural rules are not ideal and cannot be regarded as a substantial guarantee of overcoming the accusatory bias.

Such an expansion was preceded in recent years by a significant reduction in the jurisdiction of the jury, which proves the lack of interest of the modern Russian state in the jury and the reluctance to keep it later in this form.

The constitutional Court of the Russian Federation recognized the provisions of the criminal procedure law on the impossibility of consideration by a jury of juvenile crimes, even when the sanction of the Article of the Special part of the criminal code, on which the defendant is accused, contains an indication of the possibility of sentencing to life imprisonment or death penalty, as relevant to the Constitution of the Russian Federation. On the one hand, this is natural, since juvenile proceedings are carried out under special rules, a number of special procedural guarantees have been provided to this category of persons, and the maximum possible punishment for them is 10 years of imprisonment. On the other hand, the legal position of the constitutional Court of the Russian Federation noted such characteristics of the jury as the verdict, not subject to full verification in the appellate, cassation and Supervisory instance, as well as the unconditional discretion of the legislator to limit the jurisdiction of the jury. According to the constitutional Court of the Russian Federation, this is not a limitation of the right to judicial protection. Both of these grounds, in fact, create opportunities for further arbitrary limitation of the jurisdiction of criminal cases to the court with the participation of jurors by a legislative decision.

The right of everyone to judicial protection is recognized by the Constitutional Court of the Russian Federation as the basic inalienable human right, and one of the guarantees of its implementation is the provision of Article 47 of the Constitution of the Russian Federation on the consideration of the case by the court, to whose jurisdiction it is referred by law. In the opinion of the constitutional review body, the right to a trial by jury is not a prerequisite for the exercise of the right to judicial protection.

The constitutional Court of the Russian Federation concluded that women accused under part 4 of Article 210, part 5 of Article 228.1, part 4 of Article 229.1, Article 277, 295, 317, 357 of the criminal code of the Russian Federation have the right to a trial by a court with the participation of jurors, but only if at the time of may 11, 2017 (the date of the decision) the case is not assigned to the hearing. In all other situations, the jurisdiction and composition of the court are not subject to change.

Summarizing these legal positions, it can be noted that the signs of legal inequality and the consequences of the adoption of discriminatory laws by the Constitutional Court have not been fully eliminated: still women, the trial of which has already begun, do not have the right to trial by jury; convicts who were deprived of this right due to the two-year application of the discriminatory version of Article 31 of the Code of Criminal Procedure, have not received a special legal opportunity to review the sentence.

It seems that in the foreseeable future, the Russian legislator will come to a joint decision by the jury and a professional judge, which is not and cannot be a jury in the classical sense of this institution. Such formal improvements are caused by a latent (or intentional) desire to influence (show a positive attitude of the judicial-investigative system) public opinion, public mood, public sympathy, which is generally on the side of the jury. Moreover, there is no significant expediency in the consideration of jury cases of crimes under part 1 of Article 105 and part 4 of Article 111 of the criminal code, as they mainly characterize the conflict on household grounds after drinking alcohol together with the presence of a convincing evidence base against the accused (defendant). Although in some cases and they have interesting conflicts.

Scientists note that judicial practice and the criminal procedure doctrine of criteria of motivation and validity of judicial acts is not developed [4, p. 61-64]. The proposal to use the definition of motive as an internal motive in this capacity, although consistent with the principle of evaluating evidence on the basis of internal conviction, cannot, in our view, be implemented. In particular, it is unacceptable to give subjective rather than objective coloring to the motivation of a judicial act. Naturally, the judicial act is passed by the judge, whose activity is in the sphere of presumption of impartiality. However, impartiality cannot be considered as a subjective category; it contradicts its content.

ISSN 2542-1514 (Print)

It should also be noted that in the decisions of the European Court of human rights, the right to a fair trial is interpreted in conjunction with the judge's examination of all the materials of the case without prejudice and on the condition that the reasons for the decision are stated . At the same time, it is stated that domestic law must necessarily establish rules for the evaluation of evidence.

Proceeding from it, we will specify that motivation of the sentence or other judicial act issued on criminal case should be understood as justification of conclusions of court by the circumstances established objectively by means of set of reliable and sufficient proofs. The criteria of motivation in this case are the presence of irrefutable arguments about the defendant's involvement in the Commission of the crime, indisputable evidence indicating the presence of all signs of a crime in his actions and the judge's lack of doubt about the correctness of the decision.

It should also be noted that the proposal for the legislative consolidation of such procedural qualities of the sentence as legality, validity, motivation and justice has already been made in dissertations [5, p. 12]. However, a detailed substantive terminological lighting they received. From this it can be concluded that the issue of the motivation of judicial acts remains relevant. Including, in our opinion, in the context of overcoming the accusatory bias in the proceedings.

The essence and limits of judicial discretion in the context of a fair verdict in a criminal case have already been the subject of scientific research [6, p. 9]. However, the lack of author's judgments can be called as excessive attention to the philosophical aspects of the category of "justice", and the inevitable establishment of the relationship of justice and objective truth, the establishment of which in criminal proceedings to date attracts scientific thought. The establishment of the truth is considered as a way to prevent judicial errors [7, p. 5], but in this case it is necessary to pay attention first of all to the fact that not all the rules of criminal procedure are designed for this. In particular, the special procedure for making a court decision with the consent of the accused with the charge against him as a simplified procedure is not aimed at establishing the truth, but at the presence of a formally fixed confession of a crime. The procedure does not provide for judicial investigation; the limits of appeal against the sentence are rather limited. If we proceed from the data of the Judicial Department of the Supreme Court of the Russian Federation, we can conclude that in two cases of the three cases before the court it is impossible to establish the truth. Taking into account the relevance of the provisions of Chapter 40 of the Code of Criminal Procedure in law enforcement practice, long-term lobbying for a return to the establishment of objective truth in each case [8] will not have a positive result.

It seems necessary to draw an intermediate conclusion (on the cardinal proposals of the authors below) that the expansion of elements of the people's representation, as well as the formalization of the criteria for the motivation of judicial acts will help to overcome the accusatory bias in criminal proceedings.

3. Judicial control in the mechanism of modern criminal proceedings.

By virtue of Art. 29 of the Code of Criminal Procedure the courts are vested with exclusive powers in part, including the consideration of complaints against the actions (inaction) of officials of the preliminary investigation. The procedure for consideration of complaints is set out in Article 125 of the Code of Criminal Procedure, but it does not include detailed regulation of the subject of production, subject composition, procedure for presenting evidence substantiating the complaint. Addition of judicial control procedures to the rules established in Art. 125.1 of the Code of Criminal Procedure, as mentioned, did not significantly improve the legal protection of participants from decisions that violate their rights and legitimate interests.

It was said above that the definition in part 1 of Article 125 of the Code of Criminal Procedure of the range of the appealed decisions as capable to cause damage to constitutional rights and to complicate access of citizens to justice is initially vicious. The key parameter here is the phrase "capable of causing". Such capacity must be determined when the complaint is accepted for consideration, and if it is established by a judge, there are no obstacles to the consideration of the complaint. However, the criminal procedure law does not establish the criteria of probable damage to the constitutional rights and freedoms of citizens, and therefore their presence (absence) is determined directly by the judge who received the complaint. In definition about refusal in acceptance of the complaint indicated unmotivated by anything argument literally consists of "constitutional rights and freedoms of the applicant is not broken", and this procedure ends. In

ISSN 2658-4050 (Online)

particular, in the above-mentioned case, in which the illegal application of a measure of criminal procedural coercion in a terminated criminal case was appealed, the judge of the district court issued such a ruling. In the text of the complaint, it was clearly stated that the applicant had difficulties in obtaining a foreign passport due to his / her non-cancelled non-departure, i.e. his / her constitutional right to freedom of movement was arbitrarily restricted.

Further, certain flaws contain part 7 of Art. 125 of the Code of Criminal Procedure, by virtue of which the bringing of a complaint does not suspend the appealed decision, if it does not consider it necessary to make one of the officials of the bodies of inquiry and preliminary investigation, Prosecutor or judge. Taking into account that the complaint is brought against actions and decisions of officials of bodies of preliminary investigation, hardly they will be initiative to suspend execution of those. The Prosecutor, who performs the function of supervising procedural activities during the preliminary investigation, is authorized to consider similar complaints. Therefore, in fact, the only entity that does not participate in the preliminary investigation stage on the prosecution side is the judge. In view of these circumstances, it would be correct to state part 7 of Article 125 of the Code of Criminal Procedure in the wording giving the judge considering the complaint the right to suspend the execution of the appealed decision.

A positive effect would be the introduction of the post of investigative judge, the prospect of which is quite vigorously discussed in recent years (especially against the background of the fact that some post-Soviet countries have taken such a step: Ukraine, Kazakhstan, Kyrgyz Republic). Expressing our own position and not entering into a dispute with the supporters and opponents of such a legislative decision, we note that, undoubtedly, this would increase the legal protection of the participants in the process, would enhance the quality of the investigation, would limit the arbitrary decision-making affecting the rights and freedoms of citizens. However, this would be possible only if the investigating judge independently assessed the materials submitted by the preliminary investigation bodies, as well as if he / she was not interested in achieving a specific result in each case (the end of the investigation by sending the case to the court with an indictment or indictment). Otherwise, nothing would have changed. In addition, the body of investigating judges should be separated from the judiciary, which deals with criminal cases on the merits. The transfer of investigative judges, in addition to grievance in the manner prescribed by Article 125 of the Code of Criminal Procedure, the powers regarding the authorization of certain decisions of bodies of preliminary investigation and operational – search units (including the resolution on initiation of criminal case, as is actually done in the American criminal process), as well as depositing evidence (including in terms of their initial verification of compliance with the requirements of admissibility and relevance), would contribute to better preparation of pre-trial materials in the criminal case, if informal contacts between the judiciary and officials of the preliminary investigation bodies were excluded.

4. Use in proving the results of operational investigative activities.

This issue is also very controversial. On the one hand, the procedure of legalization of information obtained by search operations, established in the Code of Criminal Procedure, generally meets democratic standards. On the other hand, since the information itself is obtained in a non-procedural manner, and according to the rules regulated by the Federal law "On operational investigative activities", it is difficult to maintain a balance in its legalization.

As in a number of other cases, the activities of the constitutional Court of the Russian Federation should be positively evaluated. Back in 1998, they issued a definition, which explained that the task of operational investigative measures is to establish criminal ties of the audited entity. 4 special opinions of judges of the constitutional Court of the Russian Federation were formulated. In particular, A. L. Kononov pointed out that interference in the private life of citizens in the conduct of operational investigative measures cannot be total; Morshchakova – uncertainty of operational-investigative activity creates the conditions for tyranny; V. I. Oliynyk drew attention to the fact that when deciding on the need for operational-investigative measures requires reliable information about imminent or committed crime; G. A. Gadzhiev, the law "About operatively-search activity" open to different interpretations. Unfortunately, in the 20 years since these events, there has been no increase in the transparency of the law in this area.

Consideration by the court of the question of carrying out operational investigative measures before the criminal proceedings are recognized by the

ISSN 2542-1514 (Print)

Constitutional Court of the Russian Federation as a form of preliminary judicial control . Thus the body of the constitutional control specified that by means of quickly-search actions information can be checked, by results of what the question of initiation of criminal case will be resolved. In other words, operational investigative measures are correct as verification actions preceding the initiation of criminal proceedings. At the same time, taking into account the procedure established in Article 144 of the Code of Criminal Procedure, this position seems to be unnecessarily expanding the limits of information collection, which can later be used as evidence.

It is natural that carrying out quickly-search actions means invasion of privacy of the person. In this regard, there is another legal position of the Constitutional Court of the Russian Federation. In December 2017 the Court noted that the use of technical means of fixing the observed events does not predetermine the need for a special court decision, since this type of operational investigative measures does not limit the constitutional rights of man and citizen . Meanwhile, if you refer to the provisions of the Federal law "On personal data", such is any information that allows you to identify directly or indirectly a particular individual. The image and speech of a person belong to the sphere of his private life, arbitrary interference in which the Constitution of the Russian Federation prohibits. Based on this, the scope of judicial control in the field of operational investigative activities should be repeatedly strengthened, and each operational investigative activity associated with the secret receipt of information about the private life of a person and its fixation, must necessarily be the subject of judicial review.

It is no secret that the illegal manipulation of information obtained by search operations, can be closely associated with the falsification of evidence in a criminal case. Expose unscrupulous law enforcement officers, and even more so, to bring them to justice, it is difficult.

Summing up stated, we will specify that procedure of recognition of the information received quickly-search way, the proof on criminal case, corresponds to purpose of criminal proceedings. However, the procedure for obtaining this information needs to be improved, since at the moment it is devoid of the parameters of necessity and proportionality, as well as elements of judicial control, adequate to the degree of invasion of privacy (including covert audio and video surveillance, obviously, are such an intrusion). In a number of cases, the provisions of the law "On operational investigative activities" were the subject of complaints to the European Court of human rights, which has already drawn attention to the lack of a clear and predictable procedure of verification purchases in Russian legislation, recognizing this as a "structural problem" of Russian justice.

5. Development of appeal and cassation proceedings.

On July 29, 2018, the Federal constitutional law "On amendments to the Federal constitutional law "On the judicial system of the Russian Federation" and certain Federal constitutional laws in connection with the creation of cassation courts of General jurisdiction and appellate courts of General jurisdiction" were adopted , in accordance with which and appellate courts of General jurisdiction are introduced to consider cassation and appeal complaints against decisions of lower courts in order to more independent position of these instances from the General judicial system of the Russian Federation. The intention of the legislator, nine of cassation courts and the five courts of appeal of General jurisdiction will be more effective to eliminate the consideration of criminal cases of a miscarriage of justice because of its interregional location.

The right to appeal is an important safeguard against unlawful conviction, and the strengthening of the independence of the appellate and cassation instance is welcome. Despite the fact that the question of guilt/innocence in the alleged act is no longer the main issue in these instances [9, p. 25-27], the focus is on the arguments of the complaint (submission) and their connection with the evidence collected in the case. Verification of the "solvency of claims" of the participant of the process is not based, as a General rule, on the basis of repeated detailed court hearings [10, p. 53].

Some scholars make a proposal to establish an appeal review on General grounds and sentences decided according to the rules provided by Chapter 40 of the Code of Criminal Procedure, and sentences in criminal cases considered with the participation of jurors [11, p. 19-21]. However, there are several objections to this.

First, the existing restrictions in the current Code of Criminal Procedure are due to the nature of these legal proceedings, and their changes seem untimely.

Secondly, if, for example, the grounds for setting aside an acquittal based on the acquittal of a jury are

ISSN 2658-4050 (Online)

expanded, there may be a situation in which the very idea of popular participation in the administration of justice will be levelled out.

Thirdly, given the fact that a modification or reversal on appeal is subjected to the minimum number of convictions (and the court of cassation – still less), the expansion of opportunities for the abolition of sentences of acquittal would adversely affect the status of protection of the rights and legitimate interests of convicts, and in turn the court of first instance in "preliminary", and the appeal and cassation – in the "final" that will not contribute to strengthening the independence of judges. Scientific characteristic of appeal and cassation as "verification" stages [12, p. 9] in this regard, it seems more correct, and the maintenance of the current balance is more reasonable.

Adversarial proceedings in the appellate instance have already been the subject of scientific interest [13, p. 3-5], however, taking into account the actual limitation of such in the study of new evidence (and this is the main drawback of the current appeal proceedings, which essentially amounts to a formal study of the arguments of the appeal or submission), it seems to need further strengthening.

Being limited by the scope of this publication, we can not dwell on all the above points, but, in particular, once again say that the allocation of cassation and appeal courts (instances) in separate parts of the judicial system of the Russian Federation for their greater independence does not mean their separation from the General judicial system, which lives, exists, operates, develops according to certain official and informal, public and secret, generally accepted and private rules.

The main unofficial rule of our courts, according to the authors, is the acquittal of the defendant in the most extreme case, when it is impossible not to justify (for example, because of obviously visible, deliberate falsification of evidence) or when the criminal case has acquired a huge public response (for example, the termination of the criminal case against an entrepreneur from the Tula region, deprived of life in the state of self-defense and close several armed attackers) or a wide national and international fame (for example, acquittal by the Bryansk regional court on the basis of the acquittal of the jury of thirteen defendants, six of them were in custody before the decision, accused of smuggling drugs in the form of confectionery poppy in a particularly large size).

Allocation of cassation and appeal instances from the structure of court of the subject of Federation in separate and more independent nine cassation and five appellate courts means also their considerable remoteness from the place of residence or stay of the persons submitting cassation or the appeal if they do not live or are not in the place of permanent stay of one of nine cassation or five appellate courts of General jurisdiction. Part 3 of Articles 23.1 and 23.9 of chapters 2.1 and 2.2 of the Federal constitutional law "On the judicial system of the Russian Federation" offers to solve such problems of remoteness the possibility of establishing permanent court presences (separate divisions of the court) outside the place of permanent residence of the cassation or appellate court of General jurisdiction.

It should be noted once again that the absence of separate (from the point of view of organizational structure) cassation and appellate courts to appeal decisions of lower courts is hardly one of the main shortcomings of the Russian criminal proceedings or its main problem, as it is the main problem of the Russian criminal procedure. the main principle of the activity of our courts, according to the authors, is the stability and stability (irremovability) of court decisions and the introduction of more independent instances of the essence of modern Russian justice cannot change, although from the point of view of modernization of appeal and cassation proceedings, without a doubt, it is useful and probably. necessary innovations.

6. The evolution of scientific ideas about the systemic shortcomings (urgent problems) of criminal proceedings.

At the beginning of the XXI century in significant scientific publications to the main problems of Russian justice was taken to include violation of a reasonable period of civil and criminal proceedings in all regions where human rights violations were monitored; the existence of mass and widespread obstacles in the field of access to justice; violation of transparency and openness of the trial: violation of the principle of equality of the parties (pronounced accusatory bias in criminal proceedings, refusal to familiarize with the materials of the case and obtain copies of documents).); violation of the right to protection (consideration of the case without a lawyer even when his participation was obligatory); violation of the principle of independence and impartiality of judges (for example, financing of courts from the local

ISSN 2542-1514 (Print)

budget); violation of the right to appeal (delay in issuing court decisions); failure to execute court decisions (violation of the terms of initiation of enforcement proceedings) [14, pp. 270-275]. Most of these problems have been successfully solved (art. 51 the Code of Criminal Procedure of the Russian Federation established, in fact, compulsory participation of the defender in criminal proceedings, special regulation of reasonable terms of criminal proceedings was made in 2010, the question of financing of courts received a firm legislative basis). However, in their place, new conflicts have emerged that make it impossible to assess the administration of justice as free from systemic deficiencies.

According to the Chairman Of the constitutional Court of the Russian Federation V. D. Zorkin, the problems (shortcomings) of criminal proceedings are the absence of the Institute of investigative judges in the Russian criminal process, violation of reasonable terms of proceedings at the stage of preliminary investigation, excessive duration of detention, inefficiency of consideration of complaints by the court in accordance with art. 125 Code of Criminal Procedure, violation of the right of the victim to access to justice and protection of his interests, abuse of criminal prosecution secret preliminary investigation, poor regulation of the return of the case to the Prosecutor in accordance with Art. 237 of the Code of Criminal Procedure, limiting the right of the accused to protection at the pre-trial stages of the criminal process, poor regulation of the use of such operational investigative measures as operational experiment (operational provocation). This publication also notes a marked increase in complaints challenging the constitutionality of the norms establishing a new procedure for appeal, cassation and Supervisory proceedings in chapters 45.1, 47.1 and 48.1 of the Code of Criminal Procedure [15]. It should be noted that the constitutional review body made a significant contribution to the elimination of these shortcomings. In particular, the legal positions of the constitutional Court of the Russian Federation contribute to the prevention of threats to the objectivity and impartiality of justice in criminal cases . The entire period of activity of the constitutional Court of the Russian Federation successfully proves the fact that it can identify and promptly correct the legislative error. And in the sphere of criminal procedural relations, this can be observed quite often.

Some procedural experts see the root of the problems of the judicial system in the unsatisfactory organization of pre-trial proceedings and promote the concept of "criminal action" [16, p. 4-18]. Indeed, the initial stage of pre-trial criminal proceedings is currently over-archaic: it retains the mechanism of initiation of criminal proceedings in the Soviet period after the procedural inspection. The verification itself, in fact, is a quasi-investigation, in which the bulk of the evidence necessary for the further resolution of the criminal case on the merits can be collected. In addition, every year the Prosecutor's office identifies millions of violations of the rights and legitimate interests of citizens associated with the issuance of illegal orders to refuse to initiate criminal proceedings. However, the abolition of the stage of initiation of criminal proceedings does not seem to be of independent importance for overcoming the systemic shortcomings of criminal proceedings. A number of post-Soviet countries (Ukraine, Kazakhstan, Kyrgyz Republic) adopted legislative decisions related to the "automation" of criminal proceedings (the production of the entire set of investigative actions from the moment of registration of information about the crime in a special register), established the Institute of investigative judges, defined the procedure for depositing evidence. However, with the remaining difficulties in the administration of justice within a reasonable time, the General accusatory bias and other problems in the administration of justice, these decisions have not brought too many changes to the law enforcement practices of these countries.

To other systemic problems, according to the authors, we can add the lack of protection of the right of parallel investigation, and the paramount importance of the recognition (even partial) of his guilt, and the practical absence of acquittal in the court of first instance and appeal (except for the trial by jury), and, as already mentioned, the predominant use of a special order of judicial decision in full recognition of his guilt, which is almost always beneficial to justice, but not always useful (necessary) defendant. With regard to the special adoption of a court decision, an interesting conclusion can be made that if in the coming years the legislator does not exclude it from the current Code of Criminal Procedure, it would be more logical to extend its application to particularly serious crimes, perhaps, except for those that are punishable by imprisonment for life.

In the Russian criminal process, it is unlikely that the right of a parallel investigation of a lawyer by analogy with the American criminal process, but today's right of

ISSN 2658-4050 (Online)

a Russian lawyer (defender) to collect evidence in three procedural ways (part 3 of Art. 86 of the Code of Criminal Procedure), in fact, is a deliberate fiction due to the lack of the duty of the investigator (investigator) or judge to attach to the criminal case, subject to the procedural form of obtaining evidence independently collected and executed by the defense. Such a duty should be fixed in the Code of Criminal Procedure to ensure the principle of competition and equality of the parties, including at the stage of preliminary investigation, although this is likely to entail a significant increase in acquittals, to which Russian justice is not ready and will not be ready in the coming years or even the coming decades.

7. Conclusions.

According to the results of the analysis it is possible to formulate the following conclusions.

1. For essential transformations in the Russian criminal process, it is necessary to exclude indications of the suspect or the accused given by them during the preliminary investigation (regardless of the presence or absence in those of the lawyer) from the list of available evidence in the Criminal Procedural Code of the Russian Federation. Of course, this will significantly complicate the work of the prosecution and lead to an outflow of poor-quality investigative apparatus, but objectively significantly improve the quality of the investigation and the court, at least due to the fact that the investigator will not be forced to seek a guilty plea in any possible and impossible (not necessarily illegal) way. In fact, this excludes from the criminal process the institution of a special order of legal proceedings under the Chapter 40 the Code of Criminal Procedure, but the defendant can plead guilty at the stage of the preliminary hearing (of course, in the presence of a lawyer – defender) and it is at this stage he can agree to the application of this Chapter of the Code of Criminal Procedure. In fact, this should lead to a significant increase in the number of acquittals, but the examples of countries with a higher level of democracy, human rights and freedoms, real protection of the individual convince that this is not the worst danger for justice, the individual, society, the existing state power.

2. It seems that from the Articles 401.6 and Article 412.9 Code of Criminal Procedure must be ruled out is the basis of cancellation or change of enforceable judicial decisions in the cassation and supervision in the direction of deterioration of the convict, as revealing circumstances of the breach of the pre-judicial cooperation agreement, in order to prevent, for example, the possibility of unlawful influence on a person serving a sentence or on a person who has served such a sentence, in order to compel him to further unspoken cooperation against his will (maybe leaving the possibility of such cancellation in the appeal proceedings). While part of the high-profile crimes of the past years has been miraculously disclosed in the modern period due to the fact that a convict serving a long term of imprisonment, suddenly "remembered" the circumstances of 10-15 years ago and successfully gave evidence exposing a particular person,

3. Today, the appeal on the Code of Criminal Procedure, in fact, is a kind of cassation, because in fact, the entire appeal review is not limited to the reconsideration of the criminal case from the beginning to the end, but to the announcement of the arguments of the appeal or presentation, brief statements of the participants in the process, the immediate removal of judges to make a lightning decision, which is facilitated by the mentioned factual prohibition of the submission of new evidence to the appeal (or the actual prohibition of the study of already investigated evidence in the court of first instance, if the party, the applicant, does not prove the need for it). This is extremely convenient for the existing justice system in Russia, but it is unlikely to help overcome the accusatory bias in the appeal review.

4. The Code of Criminal Procedure shall be supplemented by the duty of the investigator, prosecutor and court to attach (and investigate) to the criminal case the evidence obtained independently by the defense, subject to compliance with the procedural order of their receipt (similar to the order of their receipt by the state bodies), and, perhaps, in the presence, at a subsequent hearing of the case, the procedural possibility provided by the defense of the evidence to verify.

5. It seems that the period of large-scale judicial reforms is unlikely to come in the near future. However, point corrections of the criminal procedure law require scientific justification and assessment of the actual need for law enforcement practice in making such decisions. Criminal proceedings – not the scope for legislative experiments, detached from the objective reality, and the people who violated the law – not pariah, lost legal status (in an informal

ISSN 2542-1514 (Print)

conversation, one of the part-time students of one of the authors of this publication, an operative with a long experience, expressed the shocking idea that the requirements of the law can not apply to persons who absolutely do not deserve; by such he understood previously convicted, homeless people, parasites, alcoholics, drug addicts and other extremely undesirable element of society). One of the main problems of our justice is that such an internal belief today is almost impossible to change. In connection with the latter, the authors Express a utopian idea that the main direction of the desired changes should be a change in the psychology and moral guidelines of a law school student, investigators and investigators, prosecutors, judges of any level and at any level, both with a great experience and without it.

Another debatable idea of the authors is the creation of procedural "framework" (limits, boundaries), acting in which the judge will be forced to take a fair, legitimate, reasonable, reasoned decision (for example, mandatory sentencing below the lowest limit with full recognition of the defendant's guilt, regardless of his consent to a special procedure or pre-trial agreement on cooperation, for crimes where the lower limit is specified in the sanctions of the Article of the special part of the criminal Code and except for crimes punishable by imprisonment for life).

ISSN 2658-4050 (Online)

REFERENCES

1. Bocharov T., Volkov V., Dmitrieva A., Titaev K., Chetverikova I., Shklyaruk M. *Diagnostics of the work of the judicial system in the field of criminal justice and proposals for its reform*, Pt. 1. St. Petersburg, The Institute for the Rule of Law of European University Publ., 2016. 110 p. (In Russ.).

2. Belyaev M.V. *Properties of court decisions in criminal proceedings*. Moscow, Yurlitinform Publ., 2018. 184 p. (In Russ.).

3. Vedishchev N.P. *Selection of jurors in the criminal process in Russia*, Monograph. Moscow, Yurlitinform Publ., 2019. 192 p. (In Russ.).

4. Kudryavtseva A.V. Justification of a court decision as a component of a fair trial. *Ugolovnaya yustitsiya = Russian Journal of Criminal Law*, 2018, no. 11, pp. 61–64. DOI: 10.17223/23088451/11/12. (In Russ.).

5. Sukhanova N.N. *Resolution of acquittal in Russian criminal proceedings*, Cand. Diss. Irkutsk, 2008. 204 p. (In Russ.).

6. Kornakova S.V., Shcherbakov V.A. *Problems of implementation of the principle of justice in the Russian criminal proceedings*. Moscow, Yurlitinform Publ., 2019. 144 p. (In Russ.).

7. Azarov V.A., Bekker T.A. *The identification of truth as a basis for preventing judicial errors in criminal proceedings*. Moscow, Yurlitinform Publ., 2019. 208 p. (In Russ.).

8. Ashirbekova M.T., Stus N.V. On the nature of the proceedings for the revision of the sentence in a higher court. *Rossiiskii sud'ya = Russian Judge*, 2007, no. 10, pp. 25–27. (In Russ.).

9. Gaivoronskaya L.V. *Features of proof in the court of appeal*, Cand. Diss. Moscow, 2018. 239 p. (In Russ.).

10. Romanova A.A. *Modern appeal proceedings in the criminal process in Russia*. Moscow, Yurlitinform Publ., 2018. 176 p. (In Russ.).

11. Kolokolov N.I. (ed.). *Appeal, cassation, supervision: application of the norms of the Code of Criminal Procedure of the Russian Federation*. Moscow, Yurlitinform Publ., 2018. 464 p. (In Russ.).

12. Altynnikova L.I. *Features of the implementation of the principle of competitiveness of the parties in the appeal proceedings in criminal cases*. Moscow, Yurlitinform Publ., 2018. 184 p. (In Russ.).

13. Rabtsevich O.I. *The right to a fair trial: international and domestic legal regulation*. Moscow, Leks-Kniga Publ., 2005. 318 p. (In Russ.).

14. Aleksandrov A.S., Aleksandrova I.A. Criminal Code + Criminal Procedure = Criminal Law, in: Tarasov A.A. (ed.)., *Aktual'nye problemy vzaimosvyazi ugolovnogo prava i protsessa*, collection of materials of the All-Russian scientific-practical conference with international participation. Ufa, Bashkir State University Publ., 2016, pp. 4–18. (In Russ.).

15. Stoiko N.G. Strategies of the criminal process and their compatibility. *Rossiiskii sledovatel' = Russian Investigator*, 2006, no. 4, pp. 12–15. (In Russ.).

16. Tsvetkov Yu.A. Formation of investigation power on the post-Soviet territory. *Rossiiskii sledovatel' = Russian Investigator*, 2015, no. 11, pp. 9–12. (In Russ.).

17. Sychev D.A. *Content and implementation by the prosecutor of the functions of supervision and prosecution in the pre-trial stages of the criminal process*, Cand. Diss. Thesis. Moscow, 2016. 36 p. (In Russ.).

18. Lazareva V.A. Indictment authority: concept, subjects, forms of realization. *Ugolovnoe sudoproizvodstvo = Criminal Judicial Proceeding*, 2012, no. 1, pp. 14–18. (In Russ.).

19. Shadrin V.S. Modern Condition and Prospects of the Reform of Pre-Trial Proceeding in the Russian Criminal Process. *Rossiiskii zhurnal pravovykh issledovanii = Russian journal of legal studies*, 2014, no. 4, pp. 133–137. (In Russ.).

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ISSN 2542-1514 (Print)

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BIBLIOGRAPHIC DESCRIPTION

Koryakovtsev V.V. Adversarial process: urgent problems of modern Russian criminal proceedings. *Pravoprimenenie = Law Enforcement Review*, 2019, vol. 3, no. 1, pp. 119–137. DOI: 10.24147/2542-1514.2019.3(1).119-137. (In Russ.).