

SLCMC 2021**International conference «State and law in the context of modern challenges»****TRANSPARENCY IN CRIMINAL PROCEEDINGS:
SAFEGUARDING THE INTERESTS OF SOCIETY AND STATE**

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Abstract

Russia has made considerable efforts to ensure transparency in the activities of State bodies and to establish an institution of public scrutiny. The objective is to analyze the compatibility of the concept of transparency and accessibility of criminal proceedings, which includes the right of citizens to have access to information on the public activities of competent State bodies and officials, and the interests of the State in establishing control over crime. Using such methods of cognition as dialectical, comparative law, historical and legal, logical, statistical, the authors have come to the following conclusion: transparency as a matter of accessibility of information related to the activities of the bodies concerned, as well as the availability of judicial records, should not be limited to judicial activity only. Digitalization of criminal proceedings, which is being widely implemented in recent years, makes it possible to extend transparency to the pre-trial stages of the process. At the same time, the authors accept the need to implement a reasonable balance between the confidentiality of information related to pre-trial procedural actions. Such balance is necessary to support those involved in crime detection and secures the confidentiality of information on personal data of citizens, ensures the possibility for interested parties to have access to information about the progress of the investigation. The article substantiates the inadmissibility of making the idea of full transparency in criminal proceedings absolute, as this may impede the safeguarding of the vital interests of the State and society in establishing control over crime.

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1. Introduction

In the context of the developing information society, the openness of information concerning the activities of all state bodies, and the accessibility of such information to society and citizens (transparency) is becoming an objective process pivotal for safeguarding individual rights and their protection from the arbitrariness of the authorities. In the legal doctrine, transparency is understood as the informational openness in the domain of state bodies, enhancing the public to exercise control over activities thereof (Kolosovich, 2019; Malko, 2013). Lawyers attach great importance to the transparency of government bodies, raising it to the level of the rule of law principle and emphasizing that transparency implemented explicitly is only possible if the information is clear, timely and reliable. Although these provisions have been developed in the context of political research, these characteristics give a fairly accurate picture of transparency in the legal and, specifically, criminal procedure sphere.

The modern understanding of transparency is based on a complex, multi-component right to information (“freedom to seek, receive and disseminate information by any means and regardless of State borders”), enshrined in article 19 of the Universal Declaration of Human Rights. This important provision, interpreted as a right to information, has been institutionalized in art. 29 of the Constitution of the Russian Federation and specified in the sectoral criminal procedure legislation. This lays down the rules designed to provide participants in criminal procedure relations with information on the powers of officials conducting the process, the actions they perform, and the decisions they make.

2. Problem Statement

In the domain of criminal procedure, where authorities have the power to restrict the constitutional rights of citizens, and procedural coercion permeates all its institutions, the idea of transparency takes on particular importance. The implementation of transparency in criminal proceedings is subject to the regulatory impact of general requirements of pre-trial and judicial proceedings, such as the inadmissibility of disclosing the secrets of the preliminary investigation and the publicity of the trial, which limit the right of participants in criminal proceedings to obtain such information. It is due to the existing legal rules of criminal procedure that we now customary refer to transparency only in relation to the activities of the court.

The European Court of Human Rights proceeds on the assumption that the public nature of legal proceedings (Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms) protects the parties from the secret administration of justice outside the control of the public and serves as one of the ways to ensure credibility of the courts. Transparent administration of justice contributes to achieving the objectives of fair trial. It should be noted that in the European legal understanding, the term “publicity” in the context of criminal proceedings has a different interpretation than that in the theory of Russian criminal procedure, where publicity is understood as openness, accessibility to all information related to the activities of investigative bodies and courts, as the most important guarantee of the right to a fair trial. At the same time, European standards for the conduct of public criminal procedure also stipulate that, on the one hand, information related to all the activities of the judicial system must be accessible to the public, and, on the other hand, allow for certain restrictions

to be imposed during the exercise of the element of publicity.

In fact, it is in connection with the existing regulation of criminal law that in Russian doctrine and practice of conducting criminal proceedings it has long been accepted to speak of transparency only in relation to judicial proceedings and the activities of the court.

In our opinion, this is one of the reasons why, traditionally in the studies of foreign authors, Russia is characterized as a country with an express legal nihilism (Huskey, 1991; Solomon, 1992). According to Russian authors, public confidence in the judiciary and the bodies of criminal prosecution is dramatically declining; citizens are losing confidence in the fairness of criminal proceedings. And they are unwilling to promote justice in any way (unwillingness to be a witness, to perform the duties of a juror, to give testimony, etc.) (Smirnova, 2014).

It can be assumed that the lack of respect for law among Russians and their disbelief in justice are largely due to the lack of information about the activities of investigative bodies, such as the progress of the investigation, the decisions taken by the investigator, etc. Another reason of mistrust is the fact that information about the activities of law enforcement agencies becomes known only from the official management reports.

To improve the situation, and in order for the population of the country to obtain objective data on the activities of law enforcement agencies, various legal information websites have been created in the Russian Federation. Decisions of public importance are posted in anonymized format on the Internet and reported in TV news broadcasts and other media. However, due to the closed nature of the law enforcement system, on the one hand, and legal nihilism entrenched in the Russian population, on the other hand, the reported decisions of investigative bodies still trigger a negative response resulting from the lack of trust in the legitimacy of these bodies' activities and common beliefs in double standards of justice.

3. Research Questions

More than 25 years ago, the Concept of Judicial Reform noted that the desire for secrecy had been “a disease” of the Russian law enforcement agencies, incurable for many decades. Indeed, domestic pre-trial proceedings have been inquisitorial in nature for more than a century, and, according to the legislator, the successful implementation of such proceedings requires the secrecy of their information environment to be ensured, which is incompatible with the full publicity of data on the activities of investigative bodies. Of course, there are interests of preliminary investigation, and for solving the crime, certain information obtained at the initial stages of criminal proceedings should not be given publicity. In addition, investigative secrecy secures the information related to participants in the process against the disclosure which may infringe their legitimate interests. Furthermore, the decisions and conclusions of the investigator, preliminary by nature, may be perceived by public opinion as undeniable, established facts, thus, causing significant damage to the reputation of the participants in the process. Accordingly, the secrecy regime of pre-trial proceedings is, to a certain extent, due to the need to follow the moral principles of criminal procedure and to prevent disclosing information about certain circumstances of the criminal case, which should not be revealed to a wide range of persons (Manova & Baranova, 2019). At

the same time, Russian criminal procedure is based on the adversarial principle, according to which the preliminary investigation bodies are obliged to provide persons against whom criminal proceedings are being brought (the accused and suspects), the right to defence, including the right to be informed what incriminating evidence is provided in support of the charge.

4. Purpose of the Study

When forming the concept of openness and accessibility of criminal proceedings, it is necessary to find the right balance of interests of its participants, the interests of the state in establishing control over crime, as well as the interests of society and the right of citizens to access information about public activities of law enforcement agencies. The difficulty in finding such a balance is that the idea of transparency in criminal proceedings and the task of establishing control over crime, solved by the state, contradict each other to a certain extent. The precise establishment of such a balance will allow synchronizing the interests of the society with the interests of the state, its competent authorities carrying out criminal proceedings.

5. Research Methods

Some scholars, without being mindful of the consequences of general accessibility of information on criminal cases that are being investigated or prosecuted, have proposed that the provisions of art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms on ensuring the availability of information on all criminal procedure activities should be implemented in criminal procedure legislation of the Russian Federation (Tarasov, 2013). At the same time, the transparency of criminal proceedings is not interpreted simply as the openness of the judiciary, but as guaranteed access to all information about the procedural actions undertaken in the course of resolving the case (Gunin, 2008). Only such a perspective on transparency of proceedings would ensure the priority of civil society over the State in this area (Smirnov, 2005). And its effect should extend to all stages of the criminal process, since all government structures must function transparently for citizens who have the right to be fully informed of the activities of relevant State bodies and to dispose of the obtained information without hindrance (Svezhintsev, 2017).

Thus, the transparency in criminal proceedings in recent years is considered not only as publicity, openness of judicial proceedings, providing participants in the process with the opportunity to get acquainted with all the materials of the criminal case, but, more importantly, as openness of all criminal procedural activities, the possibility of extensive public scrutiny of the preliminary investigation bodies' and the court's activities, the legality and effectiveness of legal proceedings in general. It is obvious that openness and accessibility of information about the activities of bodies conducting criminal proceedings is necessary for an objective assessment of the results of such activities and for building public confidence in them. The possibility of public scrutiny of law enforcement agencies imposes serious moral obligations on those who are involved in carrying out law enforcement, makes

unacceptable such types of abuse as degrading treatment, the use of violence, and obvious disrespect for the participants in the process, as well as immoral behavior of investigative and judicial bodies' officials.

The Plenum of the Supreme Court of the Russian Federation in its decision of December 13, 2012 "On the openness and transparency of judicial proceedings and on access to information about the activities of courts", with regard to the availability of information on judicial activities, rightly points out that the exercise of public control over the judiciary does not merely increase the legal literacy of the population. But also it acts as a guarantee of exercising judicial protection by the parties concerned, promotes the fairness of the proceedings themselves and the confidence of the population in the results of the investigations and the judiciary.

6. Findings

A consistent introduction of transparency in criminal proceedings will make it possible to solve a number of tasks acute in the Russian criminal process: establishing public control over the independence and fairness of judicial proceedings; harmonizing enforcement; creating prerequisites for procedural economy to allow participants in the process to reach and operate all procedural materials (Strebkova, 2018). Provided that criminal procedure activities are transparent and open to objective and fair evaluation, their participants could be protected from cruel and degrading treatment, the use of violence and other immoral behavior on the part of officials conducting legal proceedings.

Under the Code of Criminal Procedure of the Russian Federation in force (art. 161), preliminary investigations can be given publicity, provided that they are neither contrary to the interests of the preliminary investigation nor involve a violation of the rights and legitimate interests of participants in criminal proceedings. However, the law does not set limits to such permissible disclosure, leaving this matter to the discretion of the investigator. In this regard, the publicity of pre-trial proceedings is often artificially blocked by the officials who are carrying it out, and whose efforts are not necessarily aimed at the crime resolution, but rather to covering up mistakes, omissions and procrastination. Therefore, transparency could and should exist in pre-trial criminal proceedings. It can be assumed that the digitalization of the preliminary investigation and the introduction of an electronic criminal file can provide real opportunities to this end. This will ensure that every pre-trial participant whose rights and legitimate interests are affected during the preliminary investigation has a real opportunity to be aware of all decisions taken in the case and to appeal them in a timely manner. The law still provides for this right, but in practice its effectiveness is significantly diminished by a lack of regulation, excessive formality and formal handling of complaints by officials.

Procedural actions and decisions of the investigator (inquirer) that might affect the rights and freedoms of participants in the process should be available to all interested parties. Furthermore, the opportunity to obtain such information in a timely manner will enable the latter to exercise a guaranteed right to appeal.

7. Conclusion

Thus, the notion of transparency in criminal proceedings should include a system of statutory rules designed to enable all interested persons to obtain information on criminal proceedings to the extent. In this form, on the one hand, it enables them to exercise their constitutional rights and freedoms, and, on the other hand, it does not permit unreasonable infringement or restriction of the rights and legitimate interests of others. The transparency of criminal proceedings should imply the openness and accessibility of information related to both the results of the activities of the judicial bodies and those of the officials conducting pre-trial proceedings, within the clearly defined boundaries of the investigative secrecy institution. The latter is a kind of a buffer that guarantees the protection of information against the disclosure which may be disruptive not only to the process of crime investigation, but also to the rights and legitimate interests of participants in criminal proceedings. Making the idea of full transparency at all stages of criminal proceedings absolute might hinder the vital interests of the state and those of the society as a whole in their efforts to establish control over crime, failing which will impede real protection of individual rights and freedoms and interfere with individual security.

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