

CRIMINAL PROSECUTION IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA

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This article is dedicated to the issues of criminal prosecution in criminal procedure. In the current Code of Criminal Procedure, a new ideology was introduced for the implementation of criminal procedure problems in pre-trial proceedings. In the criminal proceedings, the criminal prosecution has a significant role, it determines the further course of the criminal proceedings and the boundaries of the investigation. Criminal prosecution is apparently the driving force behind criminal proceedings, which means that the further course of criminal proceedings is determined by it. Undoubtedly, it is also important for ensuring the protection of human rights within the framework of criminal proceedings.

So far, the issues of initiation and implementation of criminal prosecution have remained unresolved in the theory and practice of criminal procedure. Although the criminal procedure legislation regulates in detail the legal bases of criminal prosecution, some important issues remain unsettled. Today, the replacement of the terms of the criminal proceedings with the terms of the criminal prosecution has caused problems in the implementation of the right to defend for the persons who were actually prosecuted, in particular, the said person is deprived of the opportunity to exercise the fundamental rights of the accused. The essence of the problem lies in the fact that the body conducting the proceedings, in order to fit within the terms of criminal prosecution set by the law, strives to give a later status to the person actually prosecuted, in order to fit within the stated terms. Meanwhile, the body conducting the proceedings performs such procedural actions throughout the criminal proceedings that affect the legitimate interests of the person who is actually under criminal prosecution.

Key words: *criminal prosecution, institute of criminal prosecution, criminal proceedings, initiate criminal proceedings, actual criminal prosecution, terms of criminal prosecution*

The concepts of 'Criminal Prosecution' and the 'Institution of Criminal Prosecution' were initially legislated in the RA Constitution (1995) and later in the Code of Criminal Procedure. Criminal prosecution was sufficiently studied in domestic theory of criminal procedure law and the most recognized approach was that criminal prosecution is related to the appearance of a person in criminal proceedings. This concept has been applied in the current Code of Criminal Procedure. However, unlike the previous version, the current Code of Criminal Procedure provides only a definition for the concept of the 'Initiation of Criminal Prosecution' among its main definitions. The demarcation of the concepts of 'Criminal Prosecution,' 'Initiation of Criminal Prosecution,' and 'Accused' is crucial because the initiation of criminal prosecution is often perceived as the involvement of a person as an accused, while it is a broader concept in terms of content.

To address this issue, it is essential to consider the approaches found in legal literature, which are instrumental for the legislative definition and practical application of this concept. In judicial literature, there is no unified approach to the concept of criminal prosecution, highlighting its complexity. Similarly, in procedural literature, there are differing opinions regarding the characteristic features and practical significance of the concept. It's worth noting that these concepts were scarcely explored in Soviet criminal procedure law, as criminal prosecution was not used as a procedural category in Soviet legislation. It was only after being enshrined in the RA Constitution (1995) and the former Code of Criminal Procedure that it received attention in domestic procedural literature. Both domestic and foreign legal scholars have generally recognized that criminal prosecution relates to a person's involvement in criminal proceedings.

Soviet legal scholar M.S. Storgovich has studied the function of criminal prosecution quite deeply, we think that we should agree with his approach, emphasizing that "the concept of criminal prosecution indicates the accusatory nature of that activity, criminal prosecution is the accusation, as a procedural function, accusatory activity"¹. Of course, there are scholars who have a different approach, particularly in the procedural literature there is no unified approach to the concept of criminal prosecution. There are scholars, in particular L. Larin and V. Savitsky, who consider the criminal prosecution to be an evidentiary action at the stage of the preliminary investigation². The above-mentioned scholars expressed positions regarding the concept of "criminal prosecution" which we can say complemented each other and today the mentioned concept is presented as a combination of these approaches.

Criminal prosecution indeed serves as the driving force behind criminal proceedings, significantly influencing their course and outcomes. It plays a pivotal role in determining the trajectory of criminal cases and, unquestionably, holds paramount importance in safeguarding human rights within the framework of criminal proceedings.

In this context, it is imperative to align with the perspective articulated in the guide on the RA Code of Criminal Procedure, which asserts that 'a completely new concept forms the foundation of legal relations related to criminal prosecution.' Consequently, almost all regulations pertaining to this domain have undergone fundamental revisions in the Code. The category of 'Criminal Prosecution' has assumed a more comprehensive character. It now encompasses not only the initiation of criminal prosecution, decisions of non-prosecution, and its termination but also delves into the various phases of criminal prosecution, including its suspension and subsequent renewal³. Due to this logic, in the new Code of Criminal Procedure, a new concept of pre-trial proceedings was applied, in the center of which is the person - the accused. According to Article 6, Clause 17 of the former Code of Criminal Procedure: "Criminal prosecution" means all procedural activities conducted by the prosecuting bodies, and in

¹ See **Строгович М. С.** Уголовное преследование в советском уголовном процессе, М., 1951, page 58.

² See Уголовный процесс, словарь справочник, /под ред. В.М. Савицкого, М., 1999, page 186.

³ See A practical guide to conceptual solutions, innovative approaches and key institutions of the new RA Criminal Procedure Code, Yerevan, 2022. page 287.

cases envisaged in this Code, by the injured party, with the purpose of revealing the action prohibited by criminal law, identifying the personality of its actor, determining whether he is guilty of a crime, and ensuring that the criminal is punished or subjected to other compulsory measures”. The concept of criminal prosecution is not given in the current Code of Criminal Procedure of the Republic of Armenia, which, in our opinion, causes certain problems related to the protection of the rights and legitimate interests of the persons actually subjected to criminal prosecution.

According to Article 6, Clause 42 of the current Code of Criminal Procedure of the Republic of Armenia: “Charges: a hypothesis about commission of an alleged crime by a specific person, which has factual and legal substantiation”.

The concept of charge was also defined in the Article 6, Clause 20 of the former Code of Criminal Procedure: “A statement made in the manner prescribed by this Code and claiming that a named person has committed a definite action prohibited by criminal law”.

In contrast to the previous Code of Criminal Procedure, the criminal prosecution under the new legislation begins with the decision to involve a person as an accused. This legislative regulation gives grounds for concluding that initiating a criminal prosecution is equivalent to involving a person as an accused. With the mentioned decision, the person acquires the status of the accused and fulfils his/her rights provided by the procedural law and bears the corresponding responsibilities. In relation to the mentioned issue, the European Court of Human Rights and the RA Court of Cassation interpret the concept of criminal prosecution quite widely in their case law. In the case regarding Levik Poghosyan, the RA Court of Cassation expressed the position that it considers the initiation of a criminal case against a person as the initiation of a criminal prosecution and considers the appeal of the decision to initiate a criminal case legitimate⁴.

Within the framework of the case-law of the European Court and the RA Court of Cassation, it is important to clarify the issue of whether there is criminal prosecution or not in the cases of arrest and initiation of criminal proceedings. In other words, whether the person who found himself/herself in the mentioned status can consider himself/herself to be actually criminally prosecuted and exercise the rights provided by the European Convention on the Protection of Human Rights and Fundamental Freedoms and the Code of Criminal Procedure of the Republic of Armenia. This issue, within the framework of the legal regulations of the current Code of Criminal Procedure, poses problems related to arrest and the initiation of criminal proceedings. According to the Code, criminal prosecution begins at the moment a decision to initiate criminal proceedings is made.

Arrest: restriction of the right to personal liberty without a court decision based on an immediately arisen reasonable suspicion of a commission of a crime or for bringing the accused before the Court⁵.

⁴ See The Decision No. EKD/0136/11/11 of the RA Court of Cassation, 22 December 2011 regarding Levik Poghosyan.

⁵ See Article 6, Part 1, Clause 44 of the RA Code of Criminal Procedure.

According to the previous Code of Criminal Procedure, arrest was also considered a criminal prosecution. According to the current Code of Criminal Procedure, although the arrest is not an initiation of criminal prosecution, the arrested person exercises the rights provided by the law for the accused.

According to Article 109, Clause 5 of the Code of Criminal Procedure: “Promptly, but no later than within six hours upon de-facto deprivation of liberty in a manner prescribed by this Article, a decision on arresting or releasing him, as well as the list of rights and obligations of the accused prescribed by this Code shall be served upon the Arrested Person.” According to the regulation in criminal law, in case of arrest, actual criminal prosecution is carried out against a person, because before acquiring the relevant rights of the accused, the arrested person has the following rights: to know the reason for depriving him/her of freedom, to keep silence, to inform the person of his/her choice about his/her location, to communicate and meet with a lawyer, to undergo a medical examination at his/her request (Article 110, Clause 2 of the Code of Criminal Procedure).

It is evident that an arrest signifies the initiation of criminal prosecution against the person, irrespective of the fact that, according to criminal procedure legislation, formal criminal prosecution and its associated timeframes commence upon the decision to initiate such prosecution. In the case of an arrest, it is clear that actual criminal prosecution has commenced, and the individual in question, as a subject of criminal prosecution, possesses the right to protect their rights.

The question of actual criminal prosecution upon initiating criminal proceedings can be problematic. Initiating criminal proceedings marks the commencement of criminal proceedings and serves as the legal foundation for carrying out procedural and evidentiary actions. The absence of this initiation can result in the termination of criminal proceedings.

According to part 2 of Article 178 of the Code of Criminal Procedure, the protocol for initiating criminal proceedings must include the investigator's name, surname, position, the reason for initiating criminal proceedings, a factual description of the apparent crime as stated in the report, and the relevant article, part, or clause of the criminal code under which the proceedings commence. The protocol may also list any attached materials. Notably, there is no requirement to identify the person allegedly responsible for the crime in the protocol for initiating criminal proceedings.

The relationship between the initiation of criminal proceedings and criminal prosecution is of practical significance. Can initiating criminal proceedings with characteristics of an apparent crime constitute actual criminal prosecution?

This issue remained relevant even under the previous Code of Criminal Procedure, where a criminal case was initiated not only based on the occurrence of a crime but also against the person allegedly responsible for it. Although Article 6 of the former Code of Criminal Procedure defined the initiation of criminal prosecution as involving the arrest of a person, making a decision to implead a person as an accused, and applying compulsory measures, the RA Court of Cassation, in its precedent decisions, interprets criminal prosecution more broadly. Specifically, the Court of Cassation emphasizes that when a deci-

sion to initiate a criminal case suggests that a specific person has committed a criminal act, it carries legal consequences equivalent to charging that person⁶.

According to the case law established by the European Court of Human Rights concerning the concept of a “Criminal charge” the term should be understood not merely in a formal (documentary) but in a substantive (practical) sense. In this context, an 'accusation' can be defined as an official notification by a competent authority to an individual, indicating a presumption that they have committed a criminal offense (*see Deweer v. Belgium, Judgement of 27 February 1980, Application No. 6903/75, paragraphs 44, 46, 75*). In simpler terms, the presence of “an accusation” against an individual can also be established through actions that imply suspicion of a crime and significantly affect the situation of the person in question (*as highlighted in the Eckle v. Germany, Judgment of 15 July 1982, Application No. 8130/78, paragraph 73, Šubinski v. Slovenia, Judgment of 18 January 2007, Application No. 19611/04, paragraph 62, and G.K. v. Poland, Judgment of 20 January 2004, Application No. 38816/97, paragraph 98*).

Since the protocol for initiating criminal proceedings is considered equivalent to the decision to institute a criminal case, it's essential to refer to the position of the Court of Cassation in cases such as V. Grigoryan and V. Manukyan. According to this position, “The decision to initiate a criminal case does not confer procedural status upon an individual allegedly involved in a crime”. The Court of Cassation asserts that the decision to initiate a criminal case doesn't require the identification of the person allegedly committing the crime. This is because the purpose of initiating a criminal case differs from granting a status or filing charges. Additionally, the law doesn't mandate a specific level of evidence for making this decision. Furthermore, during the initiation of a criminal case, the burden of proof is solely to establish the grounds for initiating a criminal case, not to assign a status to the alleged offender or press charges. In the case of initiating criminal proceedings, a specific level of proof is also not required. However, if the crime report documents an event, action, or inaction that can reasonably receive a preliminary legal assessment for compliance with any act outlined in the Criminal Code of the Republic of Armenia, it may proceed.

Criminal proceedings are initiated on the fact, but not the person, so these assessments can only refer to the facts and cannot refer to the person or his/her actions.

If the actions of the person who allegedly committed the crime are described in the record of initiation of criminal proceedings and an appropriate legal assessment is given to them, then we can say that the criminal prosecution against the person has already started with the execution of the mentioned procedural act.

The purpose of the broad interpretation of criminal prosecution is to preserve to the person who is actually prosecuted with the rights within the criminal proceedings, in particular with the right to dispute the legality of the criminal proceedings initiated against him/her. It is not excluded that criminal proceedings are initiated against a person before the decision to

⁶ See The Decision No. EKD/0136/11/11 of the RA Court of Cassation, 22 December 2011 regarding Levik Poghosyan.

institute criminal prosecution is made, in particular, procedural and evidentiary actions may be carried out.

In fact, a person who is actually being prosecuted, but does not have the status of a private participant in the proceedings, is deprived of the opportunity to actively participate in the proceedings. Of course, one should agree with the approach found in the procedural literature that criminal prosecution should consider all those actions that contain suspicions that a person has apparently committed a crime⁷.

Today, the replacement of the terms of the criminal proceedings with the terms of the criminal prosecution has caused problems in the implementation of the right to defense for the persons who were actually prosecuted, in particular, the said person is deprived of the opportunity to exercise the fundamental rights of the accused. The essence of the problem lies in the fact that the body conducting the proceedings, in order to fit within the criminal prosecution terms, set by the law, seeks to give a status to the actual criminal prosecution person later, in order to fit within the stated terms. Meanwhile, the body conducting the proceedings performs such procedural actions throughout the criminal proceedings that affect the legitimate interests of the person who is actually under criminal prosecution. Thus, there are evidentiary actions defined by the Code, in connection with the execution of which the accused exercises certain rights. The private participant in the proceedings, to the legitimate interest of whom the expert examination concerns prima facie, shall have the following rights in relation to the performance of an expert examination: 1) Prior to the performance of the expert examination, to become familiarized with the decision of the Investigator on ordering an expert examination and to obtain clarification of his rights under this Article; 2) To seek a recusal to the Expert in three days after receiving the Investigator's decision on performance expert examination, to submit a motion to have a person specified by him invited as an Expert, substantiating that such person is professionally competent as well as to submit a motion to have posed additional questions to the Expert; 3) Upon the permission of the Investigator and the consent of the Expert, to be present during the performance of the expert examination; 4) To provide explanations to the Expert; 5) To obtain a copy of the Expert's conclusion within 3 days of transferring such conclusion to the Investigator; 6) To submit a motion on questioning the Expert or ordering an additional expert examination or a repeat expert examination; 7) To take part in the questioning of the Expert performed on his motion⁸. In fact, this is a very crucial evidentiary action, and sufficient rights have been fairly reserved to the interested person by the legislation, therefore, the realization of the above-mentioned rights is of essential importance for the person who has actually been prosecuted.

According to the Part 41 of the Article 6 of the Code of Criminal Procedure: "Institution of criminal prosecution: rendering of a decision by the Prosecutor which contains description and legal assessment of the alleged criminal offence of a person, or submission of a criminal claim to the Court by an alleged

⁷ See **Кальницкий В. В.** Право свидетеля на защиту // Законодательство и практика, 2000, № 2(5) - pages 11-13:

⁸ See Part 1 of Article 255 of the RA Criminal Procedure Code.

Victim". In the current Code of Criminal Procedure, the concept of "initiation of criminal prosecution" is given, and not the "criminal prosecution". The content of initiating a criminal prosecution is the description of the apparent crime committed by a person and the legal assessment given to it.

The concept of criminal prosecution is not a theoretical category, but a concept of practical importance, which is related to the implementation of the right to protection of a person during the execution of procedural actions. For a person, the possibility of exercising the rights provided by the law should be very clear and certain in practice. For this, the person must have a clear and practical opportunity to perform actions. It is more important in case of actual criminal prosecution, when actual criminal prosecution is carried out against a person, and the latter is not a formally prosecuted person, because no criminal prosecution has been initiated yet. The practical significance of the concept of criminal prosecution lies in the fact that a person should take advantage of a clear and specific opportunity to challenge an action that is an interference with his rights.

The actual criminal prosecution is all the procedural and evidentiary actions carried out by the investigator, which are of an accusatory nature, suspecting the person of the alleged crime.

ՍԱՍՎԵԼ ԴԻԼԲԱՆԴՅԱՆ – Քրեական հետապնդումը Հայաստանի Հանրապետության քրեական դատավարությունում – Հոդվածը նվիրված է քրեական դատավարությունում քրեական հետապնդման հիմնահարցերին: Քրեական դատավարության գործող օրենսգրքում դրվեց նոր գաղափարախոսություն մինչդատական վարություն քրեական վարույթի խնդիրների իրականացման համար: Քրեական վարություն քրեական հետապնդումը նշանակալի տեղ է զբաղեցնում. դրանով պայմանավորվում են քրեական վարույթի հետագա ընթացքը և քննության սահմանները: Քրեական հետապնդումը առերևույթ հանցագործության վերաբերյալ իրականացվող քրեական վարույթի շարժիչ ուժն է, իսկ դա նշանակում է, որ դրանով է պայմանավորված քրեական վարույթի հետագա ընթացքը: Անկասկած, այն կարևոր է նաև քրեական վարույթի շրջանակներում անձի իրավունքների պաշտպանության ապահովման համար:

Մինչ այսօր քրեական հետապնդման հարուցման և իրականացման հարցերը քրեական դատավարության իրավունքի տեսության մեջ և պրակտիկայում մնացել են չլուծված: Թեև քրեական դատավարության օրենսդրությունը մանրամասն կարգավորում է քրեական հետապնդման իրավական հիմքերը, բայց որոշ կարևոր հարցեր մնացել են չկարգավորված: Այսօր քրեական վարույթի ժամկետների փոխարինումը քրեական հետապնդման ժամկետների փաստացի քրեական հետապնդման ենթարկված անձանց համար առաջացրել է պաշտպանության իրավունքի իրականացման խնդիրներ. մասնավորապես՝ նշված անձը գրկված է մեղադրյալի հիմնարար իրավունքներն իրականացնելու հնարավորությունից: Խնդրի էությունն այն է, որ վարույթն իրականացնող մարմինը օրենքով սահմանված քրեական հետապնդման ժամկետների մեջ տեղավորվելու համար ձգտում է փաստացի քրեական հետապնդման

ենթարկված անձին ավելի ուշ կարգավիճակ տալ: Մինչդեռ վարույթն իրականացնող մարմինը քրեական վարույթի ողջ ընթացքում կատարում է վարույթային այնպիսի գործողություններ, որոնք շոշափում են փաստացի քրեական հետապնդման ենթարկված անձի իրավաչափ շահերը:

Բանալի բառեր – *քրեական հետապնդում, քրեական հետապնդում հարուցել, քրեական վարույթ, քրեական վարույթ նախաձեռնել, փաստացի քրեական հետապնդում, քրեական հետապնդման ժամկետներ*

САМБЕЛ ДИЛБАНДЯН – Уголовное преследование в уголовном судопроизводстве Республики Армения. – Данная статья посвящена вопросам уголовного преследования в уголовном судопроизводстве. В действующем УПК введена новая идеология реализации уголовно-процессуальных задач в досудебном производстве. В уголовном судопроизводстве уголовное преследование занимает значительное место, оно определяет дальнейший ход уголовного процесса и границы расследования. Уголовное преследование, очевидно, является движущей силой уголовного судопроизводства, а значит, дальнейший ход уголовного судопроизводства определяется им. Несомненно, это важно и для обеспечения защиты прав человека в рамках уголовного судопроизводства.

До сегодняшнего дня вопросы возбуждения и осуществления уголовного преследования остаются нерешенными в теории и практике уголовно-процессуального права. Хотя уголовно-процессуальное законодательство детально регламентирует правовые основы уголовного преследования, некоторые важные вопросы остаются неурегулированными. На сегодняшний день замена условий уголовного судопроизводства условиями уголовного преследования вызвала проблемы в реализации права на защиту для лиц, фактически привлеченных к уголовной ответственности, в частности, указанное лицо лишается возможности осуществлять основные права обвиняемого. Суть проблемы заключается в том, что орган, ведущий производство, чтобы уложиться в установленные законом сроки уголовного преследования, стремится придать более поздний статус фактическому лицу, осуществляющему уголовное преследование, чтобы уложиться в установленные законом сроки. При этом орган, ведущий производство, в ходе уголовного судопроизводства совершает такие процессуальные действия, которые затрагивают законные интересы лица, фактически подвергающегося уголовному преследованию.

Ключевые слова - *уголовное преследование, возбуждение уголовного преследования, уголовно производство, инициирование возбуждение уголовного делопроизводства, фактическое уголовное преследование, сроки уголовного преследования*