



JUSTICIA

ISSN impreso 0124-7441

ISSN digital 2590-4566

Independencia procesal del investigador (análisis jurídico comparativo de la legislación de la Federación de Rusia y la República Socialista de Vietnam)

Procedural independence of the investigator (comparative legal analysis of the legislation of the Russian Federation and the Socialist Republic of Vietnam)

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Recibido: 20 de junio de 2022 / Aceptado: 28 de septiembre de 2022

<https://doi.org/10.17081/just.27.42.6167>

Resumen

El artículo aborda cuestiones relacionadas con la independencia procesal del investigador en el proceso penal, así como su relación con las facultades procesales del investigador. Al analizar las disposiciones del Código de Procedimiento Penal de la Federación de Rusia y el Código de Procedimiento Penal de la República Socialista de Vietnam, los autores llegan a la conclusión de que la independencia procesal del investigador en los procedimientos previos al juicio en un caso penal en Vietnam es significativamente limitada. Los autores están convencidos de que en su desarrollo posterior, el legislador vietnamita, dentro de los límites de lo permisible, ampliará la independencia procesal del investigador al otorgarle poderes procesales adicionales.

Palabras clave: investigación preliminar, causa penal, independencia procesal, investigador, participantes en el proceso penal, facultades procesales, diligencias previas, acción de investigación.

Abstract

The article deals with issues related to the procedural independence of the investigator in criminal proceedings, as well as its relationship with the procedural powers of the investigator. Analyzing the provisions of the Code of Criminal Procedure of the Russian Federation and the Code of Criminal Procedure of the Socialist Republic of Vietnam, the authors come to the conclusion that the procedural independence of the investigator in pre-trial proceedings in a criminal case in Vietnam is significantly limited. The authors are convinced that in its further development, the Vietnamese legislator, within the limits of what is permissible, will expand the procedural independence of the investigator by granting him additional procedural powers.

Keywords: preliminary investigation, criminal case, procedural independence, investigator, participants in criminal proceedings, procedural powers, pre-trial proceedings, investigative action.

Como Citar:

Ivanov, D., Dung, V. K., Skachko, A., Fadeev, P., & Potapov, V. (2022). Independencia procesal del investigador (análisis jurídico comparativo de la legislación de la Federación de Rusia y la República Socialista de Vietnam). *Justicia*, 27(42), 155–160. <https://doi.org/10.17081/just.27.42.6167>

I. INTRODUCCIÓN

It should be emphasized that the investigator, as the main figure in pre-trial proceedings in a criminal case, performs a special procedural function - investigation, disclosure and prevention of crimes. Its procedural status, both in Russia and in Vietnam, is clearly defined by the criminal procedure legislation (Article 38 of the Code of Criminal Procedure of the Russian Federation and Article 37 of the Code of Criminal Procedure of the Socialist Republic of Vietnam). However, the problem concerning the procedural independence of the investigator in criminal proceedings has long been highly debatable and has not yet been finally resolved.

II. METHODS

As the main method in the process of writing the study, we used the general scientific systemic method of cognition, which made it possible to comprehensively consider and fully analyze the procedural independence of the investigator in the criminal proceedings of the Russian Federation and the Socialist Republic of Vietnam.

The method of a systematic approach made it possible to consider the procedural independence of the investigator in the criminal proceedings of the Russian Federation and the Socialist Republic of Vietnam, as an independent institution of criminal procedural relations, which makes it possible to achieve the goals of criminal proceedings through the implementation of the rights and obligations of the investigator, as the most important participant in criminal proceedings on the part of the prosecution.

The historical and legal method made it possible to study the genesis and legal nature of the formation and development of the procedural status of the investigator in the criminal proceedings of the Russian Federation and the Socialist Republic of Vietnam.

The use of the comparative legal method made it possible to study in detail the Russian and Vietnamese legislation regarding the procedural independence of the investigator in criminal proceedings.

The application of methods of analysis and synthesis will make it possible to identify existing problems in law enforcement practice in the implementation of the procedural independence of the investigator in the criminal proceedings of the Russian Federation and the Socialist Republic of Vietnam.

The formal-logical method allowed us to analyze the procedural independence of the investigator in the criminal proceedings of the Russian Federation and the Socialist Republic of Vietnam and propose the most successfully tested provisions of the Russian criminal procedure legislation to be implemented in the criminal procedure law of Vietnam.

As a result of the application of this methodology, we have obtained new knowledge about the procedural independence of the investigator in the criminal proceedings of both the Russian Federation and the Socialist Republic of Vietnam.

III. RESULTS

In works on law there are various approaches to understanding the procedural independence of the investigator. So, S. N. Khoryakov (2006, p. 15), in his work, believes that the independence of the investigator is expressed in the totality of procedural decisions and actions that he (the investigator) has the right, without agreement with other officials of the criminal process, to carry out independently.

In turn, B. B. Stepanov (2006, p. 74) believes that there is a close relationship between the investigator's procedural independence and his procedural status, based on the investigator's inner conviction and assessment of the collected evidence, which directs to achieve the objectives of criminal proceedings. A number of other process scientists agreed with this conviction (Budnikov & Volkolupov, 2000, p. 141; Vartanov, 2012, p. 8-9).

It seems interesting in this context the opinion of V. V. Ulanov (2008), who believes that the procedural independence of the investigator is the unity of the procedural functions of this participant in the criminal process. In turn, A. N. Ogorodov (2018, p. 28) is convinced that the procedural independence of the investigator should be understood not as the right, but as his obligation to independently carry out a preliminary investigation of crimes and make the necessary procedural decisions within the framework of the powers provided for by the criminal procedural legislation.

Some Russian scientists believe that the procedural independence of the investigator must be fixed in the system of principles of the criminal process (Gavrilov, 2001). So, according to T. B. Arsenova (2009), this innovation is a real guarantee of the legality and validity of procedural decisions and actions taken by the investigator, which makes it possible to improve investigative activities.

Studying the legislation of Vietnam, let's start with the fact that before the adoption of the Criminal Procedure Code of the Socialist Republic of Vietnam in 1988, investigators were called differently, for example, as follows: commissioner of the judicial police in accordance with Resolution No. 431 of July 30, 1946 of police justice; military police officer in accordance with Decree No. 230 of August 20, 1948 "On the organization of the military police (organization of an investigation in the Ministry of National Defense)". For this period of time, the legislation did not clearly define the professional qualifications of authorized persons performing investigative actions. Consequently, any responsible persons who were assigned to the police or law enforcement agency could carry out the actions of the investigation. The term "investigator" was used when the 1988 Code of Criminal Procedure of the Socialist Republic of Vietnam entered into force.

An investigator is an authorized person appointed in accordance with the provisions of the law to perform investigative duties (Art. 45 of the Law on the Organization of Criminal Investigative Bodies No. 99/2015/QH13 of November 26, 2015). The investigator may be in different investigative bodies with different names or functions. Despite the diversity of departmental affiliation, the powers of the investigator are equal and the same. It should be noted that there is a difference in powers between the investigative bodies of the central and local levels. The current legislation does not separately address the issue of the powers of an investigator located in different departmental bodies.

It should be noted that in Vietnam the issue related to understanding the procedural independence of the investigator in the criminal process is also debatable and relevant (Pushkarev et al., 2020). The opinions of scientists on this issue are also ambiguous. For example, N. H. Quan (2016, p. 56) believes that the procedural independence of the investigator is a free choice by this official of actions and decisions within the

framework of the powers provided for by the criminal procedure legislation in order to investigate and solve crimes. Having a different point of view, N.V. Khoat (2019, p. 39) believes that the procedural independence of the investigator should be understood as a condition for the exercise of his powers, the presence of which helps the investigator to timely and effectively solve the problems that arise in investigative practice. One can only partially agree with the above opinion, since the procedural powers of the investigator provided for by law determine those actions and decisions that the investigator has the right to carry out, that is, it delimits the boundary of his procedural independence.

In our opinion, the procedural independence of the investigator is a form of exercising his powers in the course of criminal proceedings, which is carried out at the discretion of the investigator based on an analysis of the circumstances of the criminal case and regardless of any interference from other participants in the process. In other words, there is a relationship and interdependence between the procedural independence and the procedural powers of the investigator. These two concepts are not identical, but are closely related to each other. Thus, the analysis of the procedural powers of the investigator, in our opinion, allows us to determine the real degree of independence of the specified official in everyday law enforcement practice.

In Russia, the primary official document, which noted the need to provide the investigator with procedural independence, was the Concept of Judicial Reform in the RSFSR of 1991. According to this Concept, the independence of the investigator and his personal responsibility for conducting the investigation ensured the legality of the investigation of the case. However, despite this, during this period, the procedural independence of the investigator had only a declarative character, without real guarantees. Inheriting the above position, the Russian legislator in the Code of Criminal Procedure of the Russian Federation of 2001 singled out a separate article, which clearly defines the procedural powers that belong to the investigator in the investigation of crimes.

Nowadays, according to paragraph 41 of Art. 5 of the Code of Criminal Procedure of the Russian Federation and part 1 of Art. 38 of the Code of Criminal Procedure of the Russian Federation, an investigator is an official who is authorized to carry out a preliminary investigation in a criminal case. Based on this concept, V.A. Azarov (2008, p. 7-8) rightly notes that the investigator is a key figure in pre-trial criminal proceedings, who is endowed with broad procedural powers, with their help, is able to solve the problems of detecting and investigating crimes.

Note that the procedural powers of the investigator, on the one hand, are a set of his rights, that is, the investigator has the right to carry out actions and make decisions provided for by law, on the other hand, they are considered as his direct duty (Ogorodov, 2018, p. 29).

A review of a number of norms of the Code of Criminal Procedure of the Russian Federation shows that although the investigator is included in the group of participants in the prosecution, his activities must comply with the purpose of criminal proceedings, that is, not only to protect the rights and legitimate interests of persons and organizations victims of crimes, but also to protect individuals from illegal and unfounded accusation, condemnation, restriction of his rights and freedoms (Pushkarev et al., 2020, p. 330-335).

In Vietnam, the concept of "investigator" is not contained in the current CPC of the Vietnamese Republic, adopted in 2015. However, the Vietnamese legislator disclosed this concept in the Law "On the organization of investigative bodies". According to Part 1 of Art. 45 of this law, the investigator is an official appointed to conduct a criminal investigation. According to N. H. Quan (2018, p. 169), the investigator, in pre-trial proceedings in a criminal case, performs the tasks provided by the head of the investigative body or his deputies, aimed at collecting evidence in accordance with the requirements of the law. We cannot agree with this statement. Firstly, this understanding means that the investigator does not have any independence in the conduct of the preliminary investigation, his function is to follow the instructions of the higher authorities. Secondly, when investigating a criminal case, the investigator is not only obliged to collect evidence, but also to exercise other powers (ensuring the safety of participants in criminal proceedings, compensation for harm caused by a crime, etc.) (Nguyen et al., 2021, p. 211-220).

An analysis of the procedural powers of the investigator, defined in the criminal procedure laws of Russia and Vietnam (Art. 38 of the Code of Criminal Procedure of the Russian Federation and Art. 37 of the Code of Criminal Procedure of the Socialist Republic of Vietnam), allows us to identify the following differences that really affect the degree of independence of the investigator.

Firstly, in accordance with paragraph 1 of part 2 of Art. 38 Code of Criminal Procedure of the Russian Federation, the right to initiate a criminal case belongs to the investigator. In other words, the investigator,

if there are sufficient reasons and grounds provided for by law, has the right to make a decision to initiate a criminal case. The head of the investigative body also has this right. However, as practice shows, exercising this right, the head of the investigative body acts as an investigator. In Vietnam, the investigator is not vested with the right in question. Art. 147 of the Code of Criminal Procedure of the Socialist Republic of Vietnam determines that the decision to initiate a criminal case is made only by the head of the investigative body.

Secondly, according to paragraph 3 of part 2 of Art. 38 of the Criminal Procedure Code of the Russian Federation, the investigator, with the exception of cases provided for by law, is authorized to independently direct the course of the investigation and make procedural decisions. From the point of view of S. N. Khoryakov (2006, p. 176), the course of the investigation means the movement of pre-trial proceedings in a criminal case, in which investigative versions are put forward and checked, the procedure for performing the necessary investigative and other procedural actions is determined. It is during the investigation that the investigator collects evidence, on the basis of which he makes subsequent procedural decisions regarding the prospects for the preliminary investigation. It is important to note that, together with other officials, the investigator has the right to evaluate the collected evidence according to his inner conviction. This provision was defined by the Russian legislator as one of the principles of criminal proceedings. Evaluating the evidence, the investigator is guided only by the law and conscience.

Considering this problem in Vietnam, I would like to note that the Criminal Procedure Code of Vietnam does not give the investigator the right to independently direct the course of the investigation. A review of the provisions of the Code of Criminal Procedure of the SRV concerning the procedural powers of the investigator allows us to conclude that the activity of investigating crimes is highly dependent on control by the leadership of the investigative body. The investigator does not actually have the right to independently direct the course of the investigation, but only follows the instructions of his superior. So, part 2 of Art. 37 of the Code of Criminal Procedure of the Socialist Republic of Vietnam determines that the investigator is obliged to bear responsibility for his actions and decisions before the law and the head of the investigative body.

This provision, according to D. Thang (2019, p. 23-24), is strengthened by departmental control over the progress and results of the investigation of crimes, violations (or errors) are not allowed during pre-trial proceedings in a criminal case. However, in our opinion, this significantly limits the independence and initiative of the investigator in the exercise of his powers, as a result of which this fact negatively affects the efficiency and effectiveness of the investigation process. The correctness of our judgment is also evidenced by the results of a survey conducted by L.V. Trinh. In particular, more than 89% of the interviewed investigators believe that the procedural independence of the investigator is not properly ensured by law, and is not actually implemented (Trinh, 2017, p. 165).

The powers of the investigator to investigate crimes, as a rule, are carried out in the following forms: the production of investigative and other procedural actions; adoption of procedural decisions provided for by law. It is supposed to consider the aforementioned aspect through the prism of a number of norms of the Code of Criminal Procedure of Vietnam. So, in accordance with paragraph "d", paragraph "g" of part 2 of Art. 37 of the Code of Criminal Procedure of the Socialist Republic of Vietnam, the investigator is authorized to inspect the scene, exhume, examine the corpse, examination, confrontation, presentation for knowledge, investigative experiment, interrogation. That is, the Vietnamese legislator does not give the investigator the right to independently conduct some investigative actions, for example: search, seizure, appointment of a forensic examination. Explaining this limitation, L.Q. Tien notes that the conduct of a search (seizure) significantly restricts the rights and freedoms of a person and a citizen, and the appointment of a forensic examination is related to financial issues. In this regard, the decision to conduct these investigative actions is made not by the investigator, but by the head of the investigative body (Tien, 2016, p. 69-70). We can agree with this statement only partially. In our opinion, the restriction of the investigator to independently conduct a search (seizure) and appoint a forensic examination is an obstacle to his procedural independence, the result of which naturally negatively affects the progress and efficiency of crime investigation.

IV. CONCLUSION

In conclusion, the authors see it as a logical and reasonable conclusion that the procedural independence of the investigator in pre-trial proceedings in criminal cases occupies an important place, and is closely related to the procedural powers of the investigator. Procedural independence is a form of implementation by the investigator of his procedural powers provided for by law. An analysis of the provisions

of the Code of Criminal Procedure of the Russian Federation and the Code of Criminal Procedure of the Socialist Republic of Vietnam shows that the procedural powers of the investigator in Vietnam are more limited than in Russia. It seems logical that in its further development, the Vietnamese legislator, within the limits of what is permissible, will expand the procedural independence of the investigator by granting him additional procedural powers. At the same time, it seems appropriate to study the Russian experience in resolving this issue and implement the most successfully tested provisions in the criminal procedure law of Vietnam.

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