



## HISTORICAL SUMMARY OF THE FORMATION AND DEVELOPMENT OF THE PROCEDURAL STATUS OF THE INVESTIGATOR IN THE CRIMINAL PROCEDURE LAWS OF THE RUSSIAN FEDERATION AND THE SOCIALIST REPUBLIC OF VIETNAM

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### ABSTRACT

**Objective:** The article deals with issues related to the origin and evolution of the procedural status of the investigator in the criminal procedure laws of the Russian Federation and the Socialist Republic of Vietnam. **Results and Conclusion:** The authors argue that the legislators of both countries have a common approach to the definition of the concept of "investigator", since the investigator is an authorized person who carries out a preliminary investigation within his competence. At the same time, the elements of the criminal procedural status include: functions, rights and obligations (powers), responsibility, procedural independence and guarantees. At the same time, the functions and procedural independence of the investigator are the main links.

**Keywords:** Criminal proceedings; Procedural status; Preliminary investigation; Inquiry; Prosecutor; Procedural powers.



## RESUMO HISTÓRICO DA FORMAÇÃO E DESENVOLVIMENTO DO ESTATUTO PROCESSUAL DO INVESTIGADOR NAS LEIS PROCESSUAIS PENAS DA FEDERAÇÃO RUSSA E DA REPÚBLICA SOCIALISTA DO VIETNAME

### RESUMO

**Objetivo:** O artigo trata de questões relacionadas à origem e evolução do status processual do investigador nas leis de processo penal da Federação Russa e da República Socialista do Vietnã. **Resultados e Conclusão:** Os autores defendem que os legisladores de ambos os países têm uma abordagem comum na definição do conceito de "investigador", uma vez que o investigador é uma pessoa autorizada que realiza uma investigação preliminar no âmbito da sua competência. Ao mesmo tempo, os elementos do estatuto processual penal incluem: funções, direitos e obrigações (poderes), responsabilidade, independência processual e garantias. Ao mesmo tempo, as funções e a independência processual do investigador são os principais elos.

**Palavras-chave:** Processo penal; Estatuto processual; Investigação preliminar; Inquérito; Procurador; Poderes processuais.

### 1 INTRODUCTION

According to the provisions of the Constitution of the Russian Federation, human rights and freedoms are of the highest value, and their observance is guaranteed by the state. Likewise, Art. 14 of the 2013 Constitution of the Socialist Republic of Vietnam states that the state recognizes, respects, protects and guarantees the rights of man and citizen; realizes the goal of a rich people, a strong country, democracy, justice and civilization, where everyone has a prosperous, free and happy life and has conditions for all-round development.

In this regard, Art. 6 Code of Criminal Procedure of the Russian Federation and Art. 2 of the Code of Criminal Procedure of Vietnam simultaneously enshrines the provision on the appointment of criminal proceedings in ensuring justice, protecting human and civil rights, the legitimate rights and interests of organizations and individuals who have been victims of crimes.

However, it is criminal proceedings that involve a significant number of restrictions on the rights and freedoms of the individual, both in the manner prescribed by law and as a result of the adoption of illegal and unreasonable decisions by authorized bodies and persons, including the investigator. Thus, the issues of regulation of the criminal procedural status of the investigator are one of the main areas of ensuring the rights and freedoms of man and citizen.

On the other hand, both in Russia and Vietnam, the investigator is a participant in



criminal proceedings, making the most important procedural decisions in the course of such proceedings: initiating a criminal case; arrest of a suspect; involvement of a person as an accused; seizure of property, etc.

## 2 MATERIALS AND METHODS

The methodological basis of the study is the general scientific systemic method of cognition, which made it possible to comprehensively consider the process of origin and further evolution of the procedural status of the investigator in the criminal procedure laws of the Russian Federation and the Socialist Republic of Vietnam, and related problems of theory and practice.

In preparing this study, the authors used private scientific methods:

- formal-logical, consisting in the analysis of the elements of the concept of “investigator” in the criminal procedure legislation of the Russian Federation and the Socialist Republic of Vietnam;
- comparative legal method, which analyzes the features of the normative legal regulation of the procedural status of the investigator in the criminal procedure laws of the Russian Federation and the Socialist Republic of Vietnam;
- the concrete sociological method used in the sociological survey of investigators and heads of investigative bodies;
- statistical method, including the collection and analysis of the data obtained;
- the method of legal and technical analysis used in the formulation and submission of proposals for improving the provisions of the criminal procedure laws of Russia and Vietnam regarding the status of the investigator in pre-trial criminal proceedings.

## 3 RESULTS ANALYSIS

Due to its special significance, the institution of the criminal procedural status of an investigator becomes the object of scientific research and discussions by many scientists in both countries. At the same time, many issues are investigated and discussed: the concept, essence, constituent elements of the criminal procedural status of the investigator, their content and other aspects.

As noted in the science of the criminal process, in the legislations of both states that we study, there is no clear definition of “criminal procedural status”. The concept of “criminal procedural status” not only does not receive an unambiguous interpretation, but also causes different opinions regarding its content (Pushkarev, 2021, p. 149).

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To reveal the essence of the concept under study, it is necessary to turn to the etymology and analyze the term “status” that makes it up.

According to the definition offered by the Big Law Dictionary, the concept of “status” (from Latin status – state, position) is the position of its subjects established by the rules of law, the totality of their rights and obligations (Sukharev et al., 2014, p. 129), and in Vietnamese, “status” means “địa vị”, and also has a meaning as the position of the subject in accordance with his roles (Đào Duy Anh, 2005, p. 138).

Accordingly, in legal science, the majority of Vietnamese scholars agree with the definition of “status” – as based on the rules of law, the position of the subject in the legal relationship between him with other participants, reflecting the totality of rights and legal obligations, on the basis of which the boundaries of the subject's activity are established in the exercise of its functions and tasks (Bùi Thế Tĩnh, 2008, pp. 30-31). Based on the information given above, the structure of the concept of “status” includes such basic elements as rights, duties, tasks and functions.

Further, analyzing the concept of “criminal procedural status”, we can agree with the definition proposed by O. A. Zelenina (2004, p. 10), according to which the criminal procedural status of a participant in criminal proceedings is all potential connections and relations of this participant with the state represented by its law enforcement agencies, mediated by the norms of criminal procedural legislation and guaranteed by the state. In her opinion, the structure of the criminal procedural status includes elements of the general legal status of the individual, such as rights, duties and responsibilities. Here it should be emphasized that each participant has additional elements in his criminal procedural status.

At the same time, according to V. D. Darmaeva (2003, p. 7), the structure of the criminal procedural status of an investigator includes the following elements: function, tasks, powers, procedural independence, responsibility and guarantees of the legality and validity of his activities.

This conclusion is partially supported by L. G. Antonova, M. Y. Vinogradov, I. N. Kondrat, V. Yu. Rit'kova (2012, p. 152) when they write that the elements of the structure of the criminal procedural status of an investigator include: functions and tasks, rights and obligations (powers), guarantees of activity and responsibility, and according to V. M. Korkunov (2020, pp. 71-72) are signs of citizenship, legal capacity, legal capacity, legitimate interests, rights and obligations, a guarantee of the exercise of rights, as well as responsibility.

An analysis of the Vietnamese scientific literature shows that, according to most

scientists, the criminal procedural status of an investigator consists of his functions, tasks, powers, responsibilities and guarantees for the exercise of his powers (Bùi Thế Tinh, 2018, p. 104), and in some works the problems of procedural independence of the investigator have already been studied in detail (Nguyen, 2001, p. 95).

So, in addition to such elements as rights, duties (powers), responsibility, the elements of the criminal procedural status of the investigator also include his functions, procedural independence and legal guarantees of his activities (Pushkarev et al., 2021, p. 395). At the same time, the function and procedural independence of the investigator are the main components of the status, about which studies of the history of the development of the institution of the investigator in Russia and Vietnam revealed not only similarities, but also differences.

In Russia, the status of an investigator for the first time received official consolidation in the regulatory legal act “Institution of judicial investigators” approved by the Decree of Emperor Alexander II of June 8, 1860 (Torbin, 2018, pp. 37-38), according to which there are judicial investigators in counties and cities to consider a criminal case to be considered in courts (Arsenova & Prokofiev, 2009, p. 53). Prior to this, the investigation of crimes in the Russian Empire was carried out by the city and zemstvo police. Together with the act “Institution of Investigators”, two more acts “Instruction to Investigators”, “Instruction of the Police on the Conduct of an Inquiry on Incidents That May Contain a Crime or Misdemeanor” were adopted.

According to these acts, the position of the judicial investigator was equated to the position of a member of the District Court and had a number of discretionary powers (Stolnikov, 2019, p. 334), such as independently initiate a criminal case if there is a legitimate reason for conducting an investigation (Art. 7); apply preventive measures (Art. 3); conduct investigative actions to collect evidence, including inspection, examination, search and seizure in houses, general search, interrogation (Art. 14), etc.

These provisions were preserved and expanded in the Charter of Criminal Proceedings of 1864 (hereinafter referred to as the CCP), according to which the judicial investigator was endowed with fairly broad powers in the direction of the investigation, and, according to A. N. Ogorodov (2018, p. 38), his procedural independence was at a high level.

At the same time, enshrined in Art. 212 of the CCP, the principle of irremovability of the judicial investigator was the most important guarantee of his procedural independence. However, it should be noted that such independence was not absolute, since the UUS also established some restrictions on the activities of the judicial



investigator on the part of the court and the prosecutor. For example, according to Art. 268 of the normative act under study, the investigator had to obtain judicial permission to seize the property of the accused, etc.

In the first Soviet years (1917-1922), despite the replacement of such a participant in judicial proceedings as a “judicial investigator” by a “people’s investigator”, the procedural independence of the investigator was preserved, and control over his activities was entrusted to the court. This situation allows us to agree with V. D. Darmaeva (2003, p. 7), who writes that the preliminary investigation in the period 1860-1922 was under the total control of the judicial authority.

Based on a comparison of the criminal procedure legislation in Vietnam before 1988 and in Russia before 1922, the following significant points were identified. Until 1988, the term “investigator” was absent in the legislation of Vietnam (as in Russia before 1860), and the control over the course of the investigation of crimes was carried out by the judiciary (as in Russia in the period 1860-1922).

Until 1945, the criminal procedure legislation of Vietnam is a system of feudal laws and customs, which include the Criminal Code of 1042 (Hinh-thu); Code of Criminal Laws of 1230 (Hinh-luat); Hongduk Codex 1483 (Kuok-chieu-hinh-luat); Dynastic Code of Judicial Rules of 1777 (Kuok-chieu-kham-tung-dieu-le); The Jalong Code of 1815 (Hoang Viet Luat Le) and others. According to these acts, the investigation of crimes was carried out by the ranks of justice (khin-kuan), subordinate to the city or county governor (kuan-huen), in whose hands both powers were united: executive and judicial (Truong Hu Quin et al., 2000, p. 303).

From 1945 to 1953, after the August Revolution of 1945 and the formation of the Democratic Republic of Vietnam on September 2, 1945, the fight against counter-revolution and crime becomes one of the important tasks, respectively, a number of regulatory legal acts related to the investigation of crimes were adopted.

During the study period, the following came into force: Decree of the President of the DRV of February 21, 1946 No. 23 / SL “On the connection of police and revolutionary organs in the Public Security Bureau of Vietnam under the Ministry of Internal Affairs”, Decree of the President of the DRV of July 20, 1946 No. 131/SL “On the structure of the judicial police under the Ministry of the Interior”, Decree of the President of the DRV of August 20, 1948 No. 230/SL “On the organization of the military police (organization of an investigation in the Ministry of National Defense)”.

From the analysis of the above normative legal acts, it follows that the investigation of crimes was carried out by the commissioner of the judicial police, a military police



officer. It should be noted that the said Decrees did not provide for the legal status (rights and obligations) of judicial police commissioners, military police officers, but in fact they had broad powers, were entitled to investigate all types of crimes, collect evidence, detain suspects without the permission of the prosecutor, and activity was subordinated only to authorized persons of the judiciary.

From 1953 to 1988, this state of affairs persisted, the persons investigating crimes were an officer of the executive police (according to Presidential Decree of February 16, 1953 No. 141/SL “On the formation of executive police bodies”), an interrogation officer Security Investigation Bodies and Police Investigation Bodies (according to Government Council Decision No. 250/NĐCP of June 12, 1981 “On the Establishment of Security Investigation Bodies and Police Investigation Bodies”).

The first Code of Criminal Procedure of the Socialist Republic of Vietnam was adopted by the National Assembly on June 18, 1988. For the first time, the position of an investigator was fixed in it. According to Art. 94 of the CCP SRV, the investigator had the right to carry out investigative actions provided for by the CCP SRV, and had to be responsible for his actions, however, his powers, tasks, duties were not specified.

In subsequent years, despite the adoption by the National Assembly of the Socialist Republic of Vietnam of the Law No. 5-L/CTN of December 22, 1992, the Law No. 20/2000/QH10, the position of the investigator remained unchanged. According to scientists, in the criminal procedure legislation in the period from 1998 to 2003, the norms that fix the position of the investigator are inconsistent and do not even correspond to practice (Nguyen et al., 2021).

Speaking about this, Nguyen Dak Hoan writes that the investigator is endowed not only with the function of criminal prosecution, but also with the protection of the rights and legitimate interests of persons involved in criminal proceedings, his activities are both under the control of the prosecutor and subordinate to the head of the investigative department, the latter, according to in fact, made all decisions in a criminal case (Nguyen et al., 2021).

At the same time, the analysis of the criminal procedural legislation of Russia, containing norms affecting the investigator from 1923 until the adoption of the Code of Criminal Procedure of the Russian Federation (including the Code of Criminal Procedure of the RSFSR of 1923, the Code of Criminal Procedure of the RSFSR of 1960) allows us to identify similarities with the criminal procedure legislation of Vietnam in the same time period.

Art. 109 of the Code of Criminal Procedure of the RSFSR of 1923 established the

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criminal procedural status of the investigator as follows: investigators had the right to conduct a preliminary investigation independently, and were also authorized to carry out certain investigative actions at their own discretion. So, the investigator simultaneously carried out the functions of accusation, defense and resolution of the criminal case by evaluating the collected and verified evidence, preparing an indictment under the supervision of the prosecutor.

V. D. Darmaeva (2003, p. 8) comes to the same conclusion when she writes that from 1923 to June 2002, the investigator combined the functions of prosecution and defense, and resolving a criminal case under the supervision of a prosecutor.

Further, in connection with the introduction of the Code of Criminal Procedure of the Russian Federation, the Code of Criminal Procedure of the SRV of 2003, the Code of Criminal Procedure of the SRV of 2015, the criminal procedural status of the investigator in both countries has undergone some changes.

According to Part 1 of Art. 38 of the Code of Criminal Procedure of the Russian Federation, an investigator is an official authorized, within his competence, to carry out a preliminary investigation in a criminal case. The Code of Criminal Procedure of Vietnam does not give such a specific concept, and in Part 1 of Art. 45 of the SRV Law No. 99/2015/QH13 "On the Organization of Criminal Investigation Bodies" of November 26, 2015, an investigator is a person appointed to conduct a criminal investigation.

It should be noted here that the term "criminal investigation" in Vietnam and the term "preliminary investigation" in Russia are equivalent, and in Vietnam the criminal investigation is not divided into two forms as preliminary investigation and inquiry in Russia. Accordingly, the legislators of both countries have a common approach to the definition of the concept of "investigator", which cannot be said about the procedural status.

In Russia, the current criminal procedural legislation determines that the position of "investigator" is available in various departments of the public service in accordance with Art. 151 of the Criminal Procedure Code of the Russian Federation, for example, in the Investigative Committee, internal affairs bodies, the Federal Security Service. At the same time, the status of the investigator remains unchanged, that is, the scope of the rights and obligations of the investigator in different departments are the same and equal.

In Vietnam, however, investigators also serve in various investigative bodies with different names and functions. So, according to Art. 4 of SRV Law No. 99/2015/QH13, there is an investigator position in the investigative agency of the Ministry of Public





Security, the investigative agency of the Ministry of Defense, and the investigative agency of the Supreme People's Procuratorate. According to part 2 of Art. 45 of the law under study, the positions of junior investigator, senior investigator and senior investigator are provided.

Despite the diversity of departmental affiliation, the powers of an investigator in Vietnam are equal and the same, since the current legislation of Vietnam does not separately address the issue of the powers of an investigator located in different departments.

Unlike Vietnam, in Russia there is no general regulatory legal act on the requirements for investigators and guarantees for their activities. At the level of the law, so far only Law No. 403-FZ "On the Investigative Committee of the Russian Federation" of December 28, 2010 has been adopted, in accordance with paragraph 2 of Art. 16 of which, the requirements for candidates for the position of investigator in the Investigative Committee of the Russian Federation are as follows:

- 1) he must be a citizen of the Russian Federation;
- 2) have a higher education in the specialty "Jurisprudence".

At the same time, in Vietnam, Law No. 99/2015/QH13 establishes a voluminous list of requirements for candidates for the position of an investigator, namely, they must:

- 1) be citizens of Vietnam, believe in the Motherland and the Constitution of the Socialist Republic of Vietnam, possess ethical qualities, be incorruptible and honest;
- 2) have a university degree from one of three specialized universities: a security university, a police university or a law university;
- 3) have a certificate of investigative skills;
- 4) undergo practical work established by law;
- 5) be in good health, able to perform assigned tasks under difficult and dangerous conditions.

Persons with higher education in other specialties (outside the three listed above) and who meet other relevant requirements may also be appointed as investigators.

This article examined the theoretical aspects relating to the origin and evolution of the procedural status of the investigator in the criminal procedure laws of the Russian Federation and the Socialist Republic of Vietnam.

#### **4 CONCLUSIONS**

Thus, based on a comparison of the criminal procedure laws of Russia and Vietnam,



the history of the development of the institution of the investigator in Vietnam is divided into three periods:

- until 1988: the term “investigator” is absent in the legislation of Vietnam (as in Russia before 1860), and the control over the investigation of crimes was carried out by the judiciary (as in Russia in the period: 1860 – 1922);
- from 1988 to 2003: the powers, tasks, duties of the investigator were not specified, the investigator is endowed with mixed functions, his activities are under the control of the prosecutor, and are subordinate to the head of the investigative department (as in Russia in the period: 1923 – 2002);
- from 2003 to the present: CPC SRV 2003, CPC SRV 2015 defines the duties, powers and responsibilities of investigators, while there are a number of differences from the CPC RF.

It is proven that the investigator, both in Russia and in Vietnam, is an authorized official who plays an important role in the process of investigating a criminal case. At present, the criminal procedural status and powers of the investigator in each country are enshrined in both the Code of Criminal Procedure of the Russian Federation and the Code of Criminal Procedure of the Socialist Republic of Vietnam, which consists of questions relating to the totality of rights, obligations, powers, guarantees, responsibility, and procedural independence.

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**HISTORICAL SUMMARY OF THE FORMATION AND DEVELOPMENT OF THE PROCEDURE STATUS OF THE INVESTIGATOR IN THE CRIMINAL PROCEDURE LAWS OF THE RUSSIAN FEDERATION AND THE SOCIALIST REPUBLIC OF VIETNAM**

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HISTORICAL SUMMARY OF THE FORMATION AND DEVELOPMENT OF THE PROCEDURE STATUS OF THE INVESTIGATOR IN THE CRIMINAL PROCEDURE LAWS OF THE RUSSIAN FEDERATION AND THE SOCIALIST REPUBLIC OF VIETNAM

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