

# **ROLE OF JUDICIAL SUPERVISION OVER THE PRE-TRIAL PROCEEDINGS IN ENSURING PERSON'S RIGHTS AND FREEDOMS**

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Taking into account that during the preliminary investigation the prosecuting party is empowered by extensive authoritative powers the unfair realization of which will inevitably lead to arbitrariness, the problem of creating guarantees for ensuring rights of citizens in criminal proceedings has been urgent for a long time; guarantees which will exclude the groundless limitations of their rights and freedoms, as well as the possible obstacles during realizing their legitimate interests.

When taking over the examination of the case, the agency for inquest and the investigator become empowered by broad authorities of implementing procedural actions and making decisions, actions which are often accompanied by limitation of the rights of both the participants in the criminal procedure and the other persons who are involved in the procedural relations.

Meanwhile, the defense party is not empowered by such authorities, which would be counterweight to the rights arisen from the state and legal status of the bodies in charge of conducting the proceedings. In this regard, there arises a necessity of creating an effective system of protecting the rights, freedoms and legitimate interests of all the participants of the proceedings, including the pre-trial proceedings. This kind of system represents the judicial supervision over the pre-trial proceedings, which is regulated by Chapter 39 of the RA Criminal Procedure Code.

Judicial supervision over the pre-trial proceedings is a characteristic feature of the criminal procedure of many democratic countries. Due to it, the defense party gets the right to quite effectively protect person's rights and freedoms, as well as realize

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his or her legitimate interests already at the stage of pre-trial proceedings.

The issue of judicial supervision in the pre-trial proceedings has always been in the center<sup>2</sup> of legists' attention. The subject of their discussion has been the creation of such a system of judicial supervision which will become a reliable dam against the possible abuses by prosecutors, investigators and the bodies of inquiry, thereby creating conditions of realizing rights and freedoms for all the participants in the criminal procedure.

However, not all the participants of the mentioned discussion agree that the main issue of judicial supervision is the protection of the rights and the legal interests of all the participants in the criminal procedure.

Thus, N. A. Kolokolov supposes that the judicial supervision has two goals: 1) to support the effective realization of the preliminary investigation 2) to create optimal conditions to administer justice<sup>3</sup>.

It should not be denied that the goals indicated by N. A.

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<sup>2</sup> Ghazinyan G. Historical and Contemporary issues of Criminal Procedure in Armenia. Yerevan 2001, P. 432; Avetisyan D.Z. The Issue of Detention in the Criminal Procedure of the Republic of Armenia, Yerevan, 2006, P. 156; Hovsepyan A., Shahinyan V., Ghambaryan A., Problems of Pre-Trial Stage in Criminal Procedure of Armenia: Academic-practical manual. Yerevan, 2009, P. 286; Avetisyan H. G. Issues of Judicial Control over Pre-Trial Process. Yerevan, 2010, P. 216. [Ղազինյան Գ. Քրեական դատավարության պատմական և արդի հիմնահարցերը Հայաստանում: Եր.: Երևանի համալս. հրատ., 2001թ. 432 էջ, Ավետիսյան Դ.Զ. Կալանավորման հիմնահարցերը Հայաստանի Հանրապետության քրեական դատավարությունում, Երևան համալս. հրատ.: -Եր.: 2006, 156 էջ, Հովսեփյան Ա., Շահինյան Վ., Ղամբարյան Ա. Մինչդատական վարույթի հիմնախնդիրները Հայաստանի Հանրապետության քրեական դատավարությունում: Գիտագործնական ձեռնարկ., Եր.: ԵՊՀ հրատ., 2009, էջ 286, Ավետիսյան Հ.Գ. Մինչդատական վարույթի նկատմամբ դատական վերահսկողության հիմնահարցերը. -- Եր.: ԵՊՀ հրատ., 2010, էջ 216].

<sup>3</sup> Kolokolov N.A. Judicial Control in the Phase of Pre-Trial Investigation: Reality, Perspectives// State and Law, 1998, #11, P. 33. [Колоколов Н.А. Судебный контроль в стадии предварительного расследования: реальность, перспективы // Государство и право, 1998, - № 11, - с. 33].

Kolokolov are present at the stage of preliminary investigation. But limiting the judicial supervision only by these goals may not express the very essence of this institute. Herewith, the aims mentioned by N. A. Kolokolov can hardly be considered as the goals of judicial supervision.

They can be considered as goals of preliminary investigation only on condition that by saying an effective realization of the preliminary investigation it means the protection of the rights and legal interests of all the participants in the criminal procedure, and not just reaching the truth by a certain criminal case. That is why; the main goal of judicial supervision is the protection of the rights and legal interests of all the participants in the criminal procedure.

In connection with the realization of this goal, there arises the problem of hindering the arbitrary implementation of authoritative powers belonging to the investigator, the body of inquiry and other officials, which creates favorable conditions for the protection of the rights and legal interests of the participants in the criminal procedure at the preliminary investigation stage.

Through the judicial supervision, the participants in the criminal procedure get the opportunity of protecting their rights and implementing their legal interests. But, along with it, other goals are being realized. In particular, the legitimacy of the preliminary stage of investigation is ensured. In particular, with the help of judicial supervision barriers are put against arbitrariness of a prosecutor, investigator and the body of inquiry, conditions are set for them in order not to violate the rights and freedoms of the participants in the criminal procedure during the preliminary investigation.

Consequently "... every time a state body commits an illegal or not clever or unfair act"; the judicial supervision is called to regain the legitimacy of preliminary investigation of each specific criminal case.

According to Article 278(1) of the RA Criminal Procedure Code: "[t]he court shall examine motions with regard to conducting investigative, operational intelligence activity and imposing procedural coercive measures restricting constitutional rights and

freedoms of a person.”. Part 2 of the same Article states the following: “[i]n cases and as prescribed by this Code, the court shall examine appeals regarding the lawfulness of decisions and activities of inquest bodies, investigators, prosecutors and bodies carrying out operational intelligence activity.”.

Thus, it is obvious that the sphere of judicial supervision is quite comprehensive. Hence, in the theory of criminal procedure, three forms of judicial supervision during the preliminary investigation are distinguished:

1. revisory judicial supervision,
2. preliminary judicial supervision,
3. further judicial supervision...<sup>4</sup>

The essence of the revisory judicial supervision over pre-trial proceedings is that the procedural actions and decisions afterwards, during the trial, become subjects of discussion in order to find out their correspondence to the law. The mentioned form of judicial supervision has been well-known for a long time.

The very structure of criminal procedure when one stage is followed by another presupposes that the mentioned form of supervision is not always judicial. Well, during the preliminary investigation, the decisions — made at the stage of filing the criminal case — are checked. They can be checked by the investigator, sometimes even the very investigator who has made the decision of filing a criminal case. It is comprehensible that this kind of supervision may not be considered as judicial, but it does exist and is considered to be a guarantee for providing the legitimacy of criminal procedure. An example of such supervision is the check of conclusions which underlie the decision of filing a criminal case and the check of corpus delicti’s existence in the act.

The investigator checks this conclusion during the whole

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<sup>4</sup> Criminal Procedure of the Republic of Armenia: Special Part. Third Ed. Yerevan 2010, P. 246. [Հայաստանի Հանրապետության քրեական դատավարություն: Հատուկ մաս, (3-րդ հրատարակություն, լրացումներով և փոփոխություններով) - Երևանի պետ. համալս. - Եր.: Երևանի համալս. հրատ., 2010, էջ 246].

preliminary investigation through various investigative and other judicial actions. However, taking into account that the judicial procedure follows the stage of filing a criminal case and the stage of preliminary investigation, the above mentioned form of judicial supervision is implemented in connection with the activities carried out and the decisions made in that judicial stage. So, during the trial the admissibility of the evidence collected during the preliminary investigation is decided upon. That is the result of the general rule set forth in Article 106(1) of the RA Criminal Procedure Code according to which: “[i]n admissibility of using factual data as evidence, as well as the possibility of their restricted use in proceedings shall be established by the body conducting proceedings on its own initiative or upon motion of a party”.

That is to say, in all the stages, including the trial stage, the question of admissibility of specific evidence is decided. Furthermore, the court may find inadmissible specific evidence if they have been obtained by considerable violations of the rights of participants in the trial.

So, according to Article 105(1) of the RA Criminal Procedure Code: “[m]aterials may not serve as a basis for charges in criminal proceedings and may not be used as evidence if they have been obtained:

1) (1) through violence, threat, deception, by ridiculing a person, as well as through other unlawful actions;

2) (2) through significant violation of the right of the suspect and the accused to defense, and of supplementary guarantees provided for by this Code with regard to the rights of persons with no knowledge of the language of proceedings”.

This requirement also relates to the trial stage when the court examines how the mentioned evidence have been obtained and, based thereon, makes a conclusion on admissibility and inadmissibility of specific evidence. That is the essence of the judicial supervision which is implemented over the preliminary investigation.

As the principle of competition is mostly implemented during

the trial, the revisory judicial supervision becomes one of the ways of introducing the mentioned principle in pre-trial proceedings. After having discussed the stances of the parties, the court makes conclusions regarding legitimacy and justification of particular judicial activities which could afterwards have great influence on returning the verdict. That is to say, the competition of the parties serves as the basis for the revisory judicial supervision upon which its effectiveness is conditioned.

The judicial supervision is a prerequisite for administration of justice since without it, it is impossible to conduct such trial as a result of which a justified verdict will be delivered. First of all, one must be sure that the court presents the materials which have been obtained according to the law without any violation of the rights and legitimate interests of the persons participating in the criminal procedure.

That is to say, before administration of justice it is necessary to revise the materials of already existing criminal case and only based on that revision decide which of the mentioned materials may be used during the trial. Due to it, some conditions are set for the comprehensive, complete and objective examination of the case circumstances.

The next form of judicial supervision is the preliminary judicial supervision. It is based on the necessity of preventing the violation of rights and legitimate interests of participants in the criminal procedure. Its essence is that it is called to prevent the unjustified limitations of person's rights, freedoms and legitimate interests during criminal procedure. In order to carry out judicial actions towards the above mentioned limitations, it is required to have the court decision which will allow to carry out the mentioned actions. So, according to Article 279 of the RA Criminal Procedure Code: “[s]earch of an apartment, as well as investigative activities relating to restriction of confidentiality of correspondence, telephone conversations, postal, telegram and other communications shall be conducted upon a court decision.”

In Article 280 of the RA Criminal Procedure Code the following

requirements are envisaged: “[t]he following criminal procedural coercive measures shall be imposed exclusively on the basis of a court decision: imposing detention as a measure of restraint, putting the suspects, the accused and persons whose mental state does not allow for them to be involved as an accused in medical institutions for conducting forensic psychological, forensic psychiatric or forensic medical examination.”.

It may be assumed from the above mentioned criminal procedural norms that the preliminary judicial supervision is called to prevent the possibility of violating the rights and legitimate interests of the participants in the criminal procedure. It should be mentioned that by choosing detention as a measure of restraint, the court examines the question of justification of that measure of restraint. So, according to Article 137(4) of the RA Criminal Procedure Code: “[s]imultaneously with taking a decision on detention the court shall decide on the possibility of releasing the accused from detention on bail and, by recognizing the possibility of such release, shall set the amount of bail.” That is to say, the court may decide upon the question by considering it appropriate to apply another measure of restraint: the bail. It is clear that by this the court tends not to let that unjustified violations of the rights and legitimate interests of the accused happen. Moreover, it is necessary to take into account that the same paragraph of Article 137 of the Criminal Procedure Code of RA states: “[l]ater on the court may review the decision on inadmissibility of bail or on the amount of bail”.

That is to say, in this case, the court decision is not yet definitive as it presupposes the possibility of change of the circumstances which have served as a basis for the choice of measure of restraint, hence it is also possible to return once again to the discussion of the question of choosing a measure of restraint.

It should be mentioned that the criminal procedure legislation gives the opportunity to appeal the court decision on applying judicial measures of restraint, which limits the rights and legitimate interests of participants in the criminal procedure. Thus, Article 137(5) of the RA Criminal Procedure Code of states: “[t]he decision

of the court on imposing detention as a measure of restraint may be appealed against to a higher court.”

It is necessary for avoiding any error or judicial arbitrariness while deciding the question of applying measures that essentially limit the rights and freedoms of the citizens. By setting forth the mentioned provision, the legislator tends to minimize illegal and unjustified decisions, while choosing the detention as a measure of restraint for the accused in question.

Such approach corresponds to the requirements of democracy which present the modern society and the state to the justice and which consider the humanitarian values as their goals.

Moreover, courts decisions on the detention should be based on both the RA domestic legislation and the requirements of international and legal acts of the RA. First of all, this judgment arises from the requirements of the case law of the European Court of Human Rights. In particular, the Court has mentioned that the task of judicial supervision is to check the correspondence of person’s detention both to the domestic law and requirements of the Convention (*CHAHAL v. THE UNITED KINGDOM*, 15 November 1996, point 128).

The regulation of the order of discussion on applying the detention as a measure of restraint is undoubtedly one of the merits of RA current criminal procedure legislation. But it is necessary that the mentioned procedure be defined afterwards. So, it would be fairer if the accused be present during the discussion of the motion, irrespective whether he or she is free or not. Hence, it would be right to read paragraph Article 285(3) as follows: “[t]he accused — against whom the motion on choosing detention as a measure of restraint has been filed — must be present in the court session”.

The provision of the principle of competition is also important during examinations of the appeals brought against the court decision on choosing detention as a measure of restraint or on prolongation of person’s detention deadlines. In this regard, the European Court of Human Rights has expressed certain position. In particular, in the case *Nikolova v. Bulgaria*, the Court mentioned: “[a] court examining

an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention ...” (NIKOLOVA V. BULGARY, 25 March 1999, point 58).

The European Court has expressed similar position also in the decision of *Wloch* against Poland: “[i]n proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured” (WLOCH v. POLAND 19 October, 2000, point 126).

Along with the above mentioned, the European Court has also mentioned that “[i]n the regard of the examination of appeals, the totally written and adversarial procedure would be one of the primary reasons of tardiness, which should be avoided in the case.” (NEUMEISTER v. the Netherlands, 7 May 1974, point 24).

According to Article 281(1) of the RA Criminal Procedure Code: “[o]perational intelligence measures in relation to restricting the right of citizens to confidentiality of correspondence, telephone conversations, postal, telegram and other communications shall be carried out upon a court decision.”

According to paragraph 2 of the same Article: “[t]ypes of operational intelligence measures carried out upon a court decision shall be specified in the Law “On operational intelligence activity”.”

That is to say, according to the RA criminal procedure legislation, the operational and intelligence activities which limit the rights and legitimate interests of citizens are conducted only by a court authorization. This law protects the participants of criminal proceedings from unjustified limitations of their rights and freedoms.

Such supervision over operational and intelligence bodies is an effective mechanism through which manifestations of their arbitrariness are prevented. Creation of such guarantees for the protection of the rights and legitimate interests of the participants in

criminal procedure is a significant achievement in modern Armenia.

The mentioned grounds for carrying out operational and intelligence activities which limit the rights and freedoms of citizens are envisaged by law. So, according to Article 284(3) of the RA Criminal Procedure Code: “[t]he permission to carry out operational intelligence measures provided for by this Article shall be based on the reasoned decision of the head of the body carrying out operational intelligence activity which shall contain a motion for receiving permission to carry out operational intelligence measures. The decision shall specify the grounds for carrying out operational intelligence measures, the data to be received as a result thereof, the place and timeframes for carrying out the measures, as well as all the information necessary for the court to take a decision. All the materials justifying the necessity of carrying out operational intelligence measures shall be attached to the decision. The decision and materials attached to it shall be submitted to the court by the head of body carrying out operational intelligence activity or the deputy thereof.” In the mentioned Article the grounds for the possibility of applying to court with a motion on conducting the above mentioned operational intelligence measures only in case of emergency have been clearly set forth. That is to say, serious obstacles are created against the possible violation of the rights and legitimate interests of the participants in criminal procedure. Thus, a preliminary judicial supervision is carried out, which hinders the implementation of such measures which unjustifiably breach the rights and freedoms of citizens.

Article 284(4) of the RA Criminal Procedure Code of reads as follows: “[t]he motion shall be examined by a single judge in a closed court session with the participation of the official who has filed the motion or his or her representative. The motion shall be examined and decided on within 12 hours upon its receipt.”

As we can see, unlike the discussion of the motion on choosing detention as a measure of restraint, while examining the question of authorizing the implementation of such operational intelligence activities which limit rights and freedoms, the court discusses the

motion in the absence of other participants in the procedure. This is conditioned by the very nature of the operational intelligence activities which may succeed only in case of providing the secrecy of their implementation. However, also in this case, the court has the possibility of preventing the unjustified limitation of citizens' rights and freedoms.

While deciding on the authorization of conducting such operational intelligence activities which limit rights and freedoms of citizens, the court checks the validity of the motion. According to Article 284(5) of the RA Criminal Procedure Code: “[a]t the request of the judge other materials justifying the necessity of carrying out operational intelligence measures shall be submitted to him or her except for cases of danger of disclosure of a state or official secret, or when regular undercover agents of bodies carrying out operational intelligence activity and persons secretly collaborating with those bodies, sources of relevant information and means of receiving it may be disclosed thereby. The judge may request explanations and additional materials from the respective officials for the purpose of verifying the sufficiency of grounds for carrying out operational intelligence measures.”

As we can see, while deciding upon the question of authorizing the implementation of such operational intelligence activities which limit rights and freedoms, the court is entitled to require the materials. That is to say, the justification of limiting rights and freedoms is thereby guaranteed, which is inevitable while conducting operational intelligence activities.

It should be mentioned that the above mentioned authorization is given for a specific period.

So, according to Article 284(7) of the RA Criminal Procedure Code: “[t]he validity period of a court decision shall be calculated from the day it was arrived at and may not exceed six months unless otherwise provided for in the decision. Timeframes for carrying out operational intelligence measures may be extended on the basis of a reasoned decision of the head of the body carrying out operational intelligence activity that contains a relevant motion, as prescribed by

this Article.”

Such requirement of the law is totally justified by the fact that the unlimited period can give an opportunity to the operational intelligence bodies to carry out arbitrary actions. Hence, by setting certain deadlines, the legislator sought to prevent the limitations of the rights and freedoms of citizens, conditioned by unjustified uncertainty of deadlines.

The preliminary judicial supervision is also encountered during the implementation of investigatory actions which limit the rights and legitimate interests of citizens.

Such investigatory actions are the search of an apartment, as well as investigative activities relating to restriction of confidentiality of correspondence, telephone conversations, postal, telegram and other communications (see Article 279 of the RA Criminal Procedure Code).

While deciding upon the question of authorization of investigatory actions of apartment search, as well as actions concerning the confidentiality of correspondence, telephone conversations, postal, telegram and other communications, the court should not solely rely on procedural matters, but should be entitled to examine the evidence which justify the necessity of implementing the above mentioned investigatory actions.

The third form of judiciary supervision is the further judiciary supervision. Its essence is that the court discusses all the complaints which have been received in connection with the already violated rights and legal interests. That is why; the mentioned form of judiciary supervision is called further. Unlike the preceding form, this one, in terms of time, follows the already implemented unjustified restrictions of citizens' rights and freedoms.

The further judiciary supervision is envisaged in Article 290(1) of the RA Criminal Procedure Code: “[a]ppeals against unlawfulness and groundlessness of decisions and actions of officers of inquest bodies, investigators, prosecutors, bodies carrying out operational intelligence activity, provided for by this Code, may be lodged to the court by the suspect, accused, counsel, victim, participants in the

criminal procedure, other persons, whose rights and lawful interests have been violated by those decisions and actions, and where their appeals have not been upheld by a prosecutor.”

Furthermore, paragraph 2 of the same Article reads as follows: “[t]he persons specified in part 1 of this Article shall also have a right to appeal to the court against refusal of an inquest body, an investigator and a prosecutor to accept crime incident reports, to initiate a criminal case, as well as against decisions on suspending, terminating the criminal case or discontinuing criminal prosecution, in cases provided for by this Code.”

As we see, a sequence of appeals concerning the actions and decisions which limit the rights and freedoms of citizens is set forth by the law. First, it is necessary to appeal the mentioned decisions and actions to the prosecutor and only after that, if his or her decision is not satisfactory, appeal to the court. It is necessary to mention that such legislative regulation does not arise from the constitutional legal contents of Articles 18 and 19 of the RA Constitution.

We think that envisaging an alternative opportunity of appealing would allow the persons whose rights have been violated, to personally decide upon the way of appealing which they would be consider the most effective one in a certain case and in certain conditions. It is obvious that the judicial supervision and prosecutorial control are different by nature, aren't they? They have different capabilities and different methods of implementation. That is the reason why their effectiveness will be different in different conditions. Hence, giving the opportunity of choosing among them to those whose rights have been violated, the law gives those persons the opportunity to personally, by analyzing the certain situation, decide which of them will be more effective.

About the necessity of providing effectiveness of means of protection of rights (both by law and in practice) is mentioned also in the decisions of the European Court of Human Rights (for example, the case of IATRIDIS v. GREECE, 25 March, 1999, paragraph 66).

The order of discussing the complaints of the participants in the criminal procedure is quite thoroughly regulated in the RA criminal

judicial legislation

So, according to Article 290(4) of the RA Criminal Procedure Code: “[t]he appeal shall be examined by a single judge within ten days upon its receipt, informing thereof the applicant and the body conducting proceedings. Failure of the applicant or the body conducting proceedings to appear shall not preclude the examination of the appeal, however, the judge may consider the presence of the mentioned persons mandatory. The body conducting proceedings shall be obliged to submit to the court materials relating to the appeal. The body conducting proceedings and the applicants shall have the right to give explanations.”

As we can see, in order to discuss the received appeal, the judge has to examine quite thoroughly the limiting circumstances of rights and legitimate interests of a certain person who thinks that his rights have been violated. Due to this order, it is possible to provide a comprehensive, complete and objective discussion of the appeal.

According to Article 290(5) of the RA Criminal Procedure Code: “[w]hen considering the appeal substantiated, the judge shall decide on the obligation of the body conducting proceedings to eliminate the violation of rights and freedoms of the person. The court shall take a decision on rejecting the appeal when it finds that the actions appealed against have been carried out in line with the law, and rights or freedoms of the person have not been violated. The carbon copy of the decision of the judge shall be sent to the applicant and the body conducting proceedings.”

That is to say, if the court decides that violations of person’s rights and freedoms have occurred, it obliges the body conducting proceedings to eliminate the violations: thus, through judiciary supervision, protects the rights and legitimate interests of the participants in criminal procedure at the stage of preliminary investigation.

The fairness of the decision which will be delivered afterwards while examining the criminal case during the trial, depends, to the great extent, on the effective implementation of judicial supervision over the preliminary investigation.

Protection of rights and legitimate interests of the participants in the criminal procedure is an incontestable condition of the unfairness of trial, isn't it? The significance of such type of activity is so great that the effectiveness of examining the criminal cases on merits largely depends on the quality of its implementation.

In order to implement that activity effectively and with quality, some authors<sup>5</sup> suggest to introduce the institute of an investigator-judge. It will give the possibility to make the judicial supervision more independent and self-determined, as the judge in charge for the supervision would carry out only that function. Nowadays, judges consider the judicial supervision as a deviation from the main form of activity; that is to say from examination of criminal and civil cases on merits.

That is why appeals are not examined in a proper thoroughness which often discredits the very idea of judicial supervision. Furthermore, a judge's decision made upon a criminal case at the preliminary investigation stage may have a negative influence on the final decision of the same case at the end of the trial.

This issue has arisen in the literature on domestic procedure and the following option of its solution has been suggested: “[t]o divide the courts of first instance into two branches. The bottom branch, say, will examine the cases of not very grave crimes and will carry out the authorities of judicial supervision over the pre-trial proceedings”. Of course, the mentioned suggestion is the most optimal form of effective activities of the judicial supervision institute over pre-trial proceedings, but taking into account the financial, organizational and other issues, currently its implementation is difficult for our state. In our opinion, the solution of the mentioned issue can be made by introducing the institute of *a judge who implements judicial supervision* in the criminal procedure.

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<sup>5</sup> Demidov I.F. The Role of the Judicial Power in Guaranteeing the Legality of Criminal Investigation// Lawfulness in the Russian Federation. Moscow, 1998, P. 166. [Демидов И.Ф. Роль судебной власти в обеспечении законности уголовного преследования // Законность в Российской Федерации, - М.: Спарк, 1998, - С. 166].

It should be mentioned that the institute of the judge who implements judicial supervision and the investigator-judge whose activity is envisaged by the criminal-judicial legislation of France should not be assimilated. The investigator-judge carries out preliminary investigation and collects evidence. He does not carry out judicial supervisory functions.

Hence, there is no need to establish a similar institute as it is the institute of an investigator-judge in the RA criminal procedure. But it is necessary to discuss the idea of establishing the institute of the judge who carries out supervision over pre-trial proceedings more attentively. The mentioned institute will allow to more attentively examine the grounds and conditions of implementing judicial actions during preliminary investigation which essentially limit the rights and freedoms of persons.

In this case we may hope that common practice in both questions will be ensured: in the realization of procedural means restricting the rights and legitimate interests of participants in the criminal procedure and in the realization of judicial supervision over their application. The extraction of the function of judicial supervision will allow the judge who examines the case on merits, to be independent and impartial as he or she has not carried out,<sup>6</sup> during the preliminary investigation, supervision over the procedural activities of the same criminal case before.

In this regard, the elimination of the provision should be criticized, which was in the Criminal Procedure Code prior to its amendments and according to which in pre-trial proceedings, the judge who has participated in the examination of the case in the court of first instance and court of appeals, may not participate in further examination of the case.

That is to say, it follows from this provision that the judge who has carried out judicial supervision over the implementation of

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<sup>6</sup> Kashepov V.P. The Concept of Judicial Protection of Rights and Freedoms of Citizen and the means of its Realization.// State and Law, 1998, #2, P. 71. [Кашепов В.П. Институт судебной защиты прав и свобод граждан и средства её реализации // Государство и право, – 1998, - № 2, – С. 71].

certain investigatory actions during preliminary investigation, is not entitled to examine afterwards the same criminal case on merits. This kind of requirement has been a guarantee for the protection of rights and legitimate interests of the participants in the criminal procedure.

Envisaging this provision in the Criminal Procedure Code is a serious step for ensuring the impartiality of the court while examining criminal cases and making decisions. The elimination of this rule is not justified from the perspective of impartiality of judges in the current RA Criminal Procedure Code, hence it should be set forth in the criminal procedure legislation again.

We think that the next step towards radical solution of this issue should be the one which will envisage the institute of a judge who carries out judicial supervision over pre-trial proceedings. In this case, it will just be impossible to breach the above-mentioned provision as the judge who has carried out judicial supervision over pre-trial proceedings will examine only cases concerning those of private charges over which no preliminary investigation will be carried out according to the new criminal procedure code. Through this, the impartial attitude of the court in the trial stage will be guaranteed, thus ensuring the protection of the rights and legitimate interests of the persons participating in the criminal procedure.

As we see, the above mentioned arguments indicate the necessity of presence of a judge in the criminal procedure, who will carry out judiciary supervision over procedural actions which the prosecutor, the investigator, the chief of investigation department, and the agency for inquest carry out in pre-trial proceedings. The existence of that institute on criminal procedure will become an additional guarantee for the protection of rights, freedoms and legitimate interests of citizens. Herewith, a guarantee against arbitrariness of the officials, who are empowered by authoritative powers in pre-trial proceedings, will be created.

The aforesaid allows us to conclude that one of the main issues of judicial supervision is the protection of rights and legitimate interests of the participants in criminal procedure in pre-trial proceedings. Its organization and implementation is the procedural

guarantee for the mentioned rights and legitimate interests as due to it, while examining each criminal case, it is possible to hinder the arbitrariness of the officials who are empowered by authoritative powers in preliminary investigation.

However, we think that it is necessary to make several more steps towards enhancement of the mentioned mechanism which will allow to introduce some elements of competition in the preliminary investigation stage.