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Comparative Analysis of Criminal Pretrial Procedures in Anglo-Saxon and Continental Legal Systems

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Abstract

Introduction: the article is devoted to the study of foreign experience in the legal regulation of pretrial procedures in criminal cases, as well as the analysis of the possibility of implementing the most effective forms of judicial control over the legality of the preliminary investigation in the Russian criminal procedure legislation. *Purpose*: based on a comparative legal analysis of the regulation of criminal pretrial procedures, to determine ways to further reform the stage of preliminary hearing of a criminal case in the Russian criminal procedure legislation. *Methods*: dialectical method of cognition, as well as general theoretical methods based on it: analysis, synthesis, induction, deduction, ascent from the abstract to the concrete, etc. The validity of the conclusions and recommendations contained in the article is ensured by the complex application of general and private scientific methods: historical, logical, comparative legal, statistical, sociological and others. *Results*: in the continental and Anglo-Saxon systems of law, with the difference in the forms of judicial activity on committal for trial, the legislator determines judicial verification of the legality of the preliminary investigation, as well as the validity of charges against the person, as the main tasks to be solved at this stage of criminal proceedings. Legalization of these tasks is carried out through the subject and limits of the control activity of the court, which are expressed either in the procedural form of trial, or in the scope of the powers of the court at this stage. *Conclusions*: in the Anglo-American and continental legal systems, there are two models of committal for trial: 1) by criminal justice bodies at the stage of completion of pre-trial proceedings, or by an independent judicial body to whose jurisdiction this criminal case is not assigned. In this model, the legislator explicitly states that the legality and validity of charges against a person, as well as the sufficiency of evidence for consideration of the criminal case on the merits, are subject to prosecutorial or judicial control; 2) by the court authorized to resolve the criminal case on the merits. Following the principle of the court's independence when deciding on the guilt (innocence) of the defendant when making the final court decision, the legislator models the control judicial activity in a veiled manner, avoiding direct indication of the need to assess factual and procedural sides of the prosecution at the preliminary hearing stage. However, this goal can be traced in the scope of the powers granted to the court, which presuppose an assessment of the sufficiency of suspicion or materials for consideration of the case in court.

Keywords: criminal proceedings; judicial control; preliminary hearing; powers of the court; prosecution; legality; prosecutor; defense party.

5.1.4. Criminal law sciences.

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Introduction

In the countries of the Anglo-Saxon legal family, summary proceedings in criminal cases of small and medium gravity are quite popular; they imply simplification of the procedural form due to the absence of additional stages, including committal for trial. It should be emphasized that preliminary inquiry and preparatory hearings are two independent procedures with specific tasks conducted by the Magistrate's Court and the Corona Court [1]. The legislation of the United Kingdom assumes such only in the Crown Court for criminal cases related to the jurisdiction of jury, which brings us back to the practice of the Russian legislator after amendments and additions to Article 432 of the RSFSR Criminal Procedural Code (as amended by the Law of the Russian Federation of July 16, 1993). A distinctive feature of the English model of preliminary inquiry is separation of jurisdiction, which provides independent judicial control over the legality of pre-trial proceedings and the validity of charges. This issue falls within the competence of the Magistrate's Court, which does not consider the criminal case on the merits, which saves the Crown Court from assessing factual circumstances of the case before the trial begins.

The core

In accordance with Paragraph 3 (a) of Article 44 of the Criminal Procedure and Investigations Act 1996, the trial is carried out according to the rules of preliminary inquiry of the case, that is, the magistrate judge analyzes factual and formal sides of it. The relevant procedural activity is as follows.

First, the judge considers a prima facie case to exclude an unfounded accusation in court. In the specialized literature, attention is focused on the fact that in this case, accusatory evidence is subject to verification, which in their totality illustrate the quality of the prosecution's work in pre-trial proceedings [2]. A prima facie case, which is translated as "evidence at first glance" or "sufficient to establish a fact or create assumptions" [3, p. 156], at the stage of committal for trial, should represent the establishment of a legally required refutable presumption of the commission of a crime by a specific person. A prima facie case, verified by a magistrate judge, is a factual basis for a criminal claim that is sufficiently substantiated by evidence to justify the verdict in favor of one party, provided that such evidence is not refuted by the other party [4]. When investigating the actual basis of the charge, the judge is entitled to conduct investigative and judicial actions, such as, for example, examination of written documents, interrogation of witnesses, etc. It should be noted that the evidentiary activity of the magistrate's court at this stage of the process is formalized and limited to certain limits. Thus, from the point of view of subjects of evidence at the stage of preliminary inquiry, only the evidence collected by the prosecution is examined, and from the point of view of sources – written testimony of witnesses given under oath, and other documents.

Second, preliminary inquiry is aimed at familiarizing the parties with each other's actions, which implies not only mandatory participation of the accused at this stage, but also determination of its procedural position regarding the charge. The parties work out the tactics of defense and prosecution and consider possibilities and conditions for using the mediation mechanism. The powers of the judge in verifying the sufficiency of evidence have a vector of favoring the defense, which is manifested in the following rule: the decision to bring to trial, taking into account the sufficiency and content of the indictment evidence, and not only their quantitative characteristics, is taken if the accused does not have a defender or if the defender indi-

cates that the evidence available in the case is not enough to establish the existence of a prima facie case. That is, in fact, the existence of a legal dispute about the sufficiency of evidence for trial excludes formal adoption of the corresponding decision by the judge.

Third, as in the stage of preparing a case for judicial review in the Russian criminal process, at the stage of preliminary inquiry, the jurisdiction of the criminal case and the composition of the court are determined, which in certain cases depends on the will of the accused.

Thus, the trial procedure is sufficiently balanced from the point of view of checking the legality and validity of the charge, the sufficiency of evidence to consider the case on the merits, but in the absence of any influence on the internal conviction of the court directly making the final procedural decision.

A different situation develops during preparatory hearings in the Crown Court. This stage can also be defined as subsidiary, but the list of grounds for its conduct is open, which leaves a wide field for judicial discretion. Thus, in accordance with Article 29 of the Law on Criminal Proceedings and Investigations 1996, preparatory hearings in criminal cases considered both with the participation of jurors and in another composition of the court can be appointed if:

– the judge of the Crown Court, based on the content of the indictment, determines that this case is of particular complexity;

– it takes the jury a long time to swear;

– at least one of the crimes incriminated in the indictment to at least one of the accused is related to terrorist activities.

The powers of the judge during preparatory hearings are not limited to solving organizational issues, since he/she is entitled to make a decision on admissibility of evidence, termination of criminal prosecution against a person, as well as consolidation of charges brought against one person. In our opinion, the fact that the court gets acquainted with materials and analyzes a factual side of the case is also evidenced by the content of orders that it is entitled to give to the prosecutor, in particular: preparation of evidence for the prosecution in a form that is understandable to jurors, as well as provision of these proofs to the accused and the court with a separate list of those proofs to which the rule on witness protection applies (that is, disclosure of information is not possible), according to Chapter 4 (b, c) Article 29 of the Criminal Procedure and Investigations Act 1996

Speaking about the problem of the judge's independence in resolving criminal cases in the context of the existence of a procedure for preparatory hearings, we believe that an open list of the grounds for their conduct, as well as the powers obliging the judge to delve into a factual side of the charge, neutralize the importance of independent trial in magistrate's courts.

The specifics of the federal structure of the United States predetermines the different attitude of state legislation to preliminary hearings of a criminal case. So, in some states, they are carried out for every significant criminal case [5], in others – only on the initiative of the defense [6], and somewhere – in cases of serious crimes [7, p. 499]. Jurisdiction also differs accordingly. As a general rule, preliminary hearings are conducted by magistrate's courts, but they can also be included in the composition of courts of another levels, for example, justice or local, Supreme Court of the state, etc. The trial model is similar in its content to the English one described above. We will highlight a few features common to the legislatures of various states.

First, unlike the English model, committal begins with registration of the indictment document with the judge, entitled to call the official initiating the prosecution, request additional materials, call the defense, and decide on a measure of restraint. Second, a closed trial is held with the participation of the parties for preliminary consideration of the case and study of the sufficiency of evidence collected by the prosecution. During it, it is possible to conduct interrogations of the accused and witnesses, examine documents and, as a result, make a decision on further movement of the criminal case or its

termination. The described mechanism is characterized as a pre-accusation phenomenon, since the judge analyzes the totality of the accusatory evidence and their sufficiency for bringing a person to court. Third, committal has significant differences depending on an initiator. So, if a criminal action is initiated by a complaint of the victim or information received from the police, then the decision of the magistrate judge is final. If a criminal case with the indictment is submitted by the prosecutor, then the final decision on committal for trial is made by a grand jury. At the same time, the grand jury process rules do not imply a n adversarial core, since only the prosecutor participates in the closed meeting, and only the evidence presented by him is subject to investigation. The only question put before the grand jury is the approval of the indictment [8, p. 134]. Fourth, during preparatory hearings, the parties are familiarized with the evidence of the procedural opponent. The result of this procedural action may be a statement by the defense party of a petition for the recognition of the totality of evidence by the prosecution insufficient to consider the criminal case on the merits, as well as a petition for the recognition of inadmissible evidence that was obtained in violation of the rights of the accused.

Russian researchers have different points of view to the Anglo-American model of preliminary hearings. Thus, some specialists back division of jurisdiction [9; 10]; however, as we have already said, committal and preparatory hearings in both models are conducted by different judges, while in the latter case, as in the Russian model, the judge whose competence includes consideration of a criminal case on the merits does not remain neutral to the preliminary analysis of collected evidence. The undoubted advantage, in our opinion, is the absence of a voluminous and time-consuming and financially costly judicial investigation, since there is no need to collect evidence at the judicial stage and postpone the trial. Besides, as T.K. Ryabinina rightly points out, the termination of a criminal case at the trial preparation stage is not perceived as failed work by the prosecution, and judicial decisions not related to the appointment of a court session are not regarded as unreasonable, premature and indicative of judges' prejudice, since the court should not consider the essence of the accusation at this stage [11].

In the countries of the continental legal system, the legislative approach to the committal regulation is radically different from the one in the UK and the USA. We will consider the most illustrative criminal procedural forms adopted in France and Germany.

Thus, in accordance with Articles 175–179 of the 1958 Code of Criminal Procedure of France [12], committal is not an independent stage of the criminal process, but is a form of the preliminary investigation completion. Procedural actions at this stage are carried out by the investigating judge under the supervision of the prosecutor. Having recognized the investigation as over, the investigating judge notifies the defense party about it and transfers the criminal case to the prosecutor, who within one month, if the accused is in custody, or three months in other cases, studies the materials of the criminal case for the legality and validity of the charge, completeness of the investigation and makes one of the following decisions: on the termination of the criminal case, referral of the case for additional investigation, and referral of the case to the court. In 2019, Article 175.1 of the 1958 Code of Criminal Procedure of France has been amended to grant the defense the right to petition the prosecutor to send a criminal case for additional investigation, indicating procedural actions that, in its opinion, should be carried out by the investigating judge [13].

To fulfill the requirement for a reasonable period of criminal proceedings, a person who has been charged, a witness who has been assisted, or a civil plaintiff has been granted the right, after the expiration of the period established for the investigation, to apply to the investigating judge with a petition for a decision on the indictment and the transfer of the case to the court or the termination of the criminal case. A similar petition may be filed if no investigative actions are carried out in a criminal case within four months.

It should be noted that the prosecutor's instructions on the conduct of additional investigation or the termination of a criminal case are not final and can be appealed by the investigating judge at the investigative chamber of the Court of Appeal, entitled to conduct criminal proceedings and make a final decision on either committal or termination of criminal prosecution (articles 229.1 and 230 of the Code of Criminal Procedure of France).

If the decision on further movement of the criminal case is agreed, the investigating judge is entitled to refer the case to the court, if it belongs to the jurisdiction of the assize court. A distinctive feature of committal is the mandatory requirement for the investigating judge to substantiate the sufficiency of evidence of the person's guilt, if the evidence itself collected by the by the prosecution is not given in this document.

The trial preparation procedure is interesting. Thus, on the basis of the Law No. 2002-1138 of September 9, 2002, the effect of Article 268 of the Code of Criminal Procedure of France (the obligation for the judge to serve an indictment order with the criminal case being submitted to the court) was struck down, which was related to the above-mentioned procedure for completing the preliminary investigation. In 2021, Article 222.1 of the Code of Criminal Procedure of France was put into effect. It stipulated the possibility for the accused to file a petition for violation of his/her right to know what he/she is accused of (failure to inform about the initiation of a criminal case, failure to submit a decision on the indictment) to the president of the investigating chamber, which, as already noted, is the body of procedural control over the activities of the investigating judge. This petition can also be filed after the entry into force of the decision on the indictment [14]. Thus, the legislator excluded the powers of the court to monitor compliance with the rights and legitimate interests of the accused at the stage of preliminary investigation. We believe that the current committal model to the greatest extent prevents the court from participating in the investigation of factual circumstances of the criminal case before its consideration on the merits due to assignment of this function to the prosecution represented by the investigating judge and prosecutor.

The trial preparation procedure provided for by the German Code of Criminal Procedure of 1987 is the closest to the Russian one. This stage is one of the main ones, characterized as "preparatory hearings" and is mandatory in all criminal cases, regardless of the severity of the act imputed to the person, as well as the jurisdiction of the case. In connection with the latter, the composition of the court authorized to make a decision on the appointment of preparatory hearings can be as such:

– the judge alone, if the case is referred to the jurisdiction of the local court;

– a panel of three judges, if the case is referred to the jurisdiction of the grand chamber of the land court;

– a senate consisting of five judges, if the case is referred to the jurisdiction of the Supreme Land Court (articles 24, 73, 129 of the Courts Constitution Act of 1975 [15]).

In accordance with Article 203 of the German Code of Criminal Procedure, the subject of judicial review is the validity of the charge, which is formulated as follows: "the court shall decide to open main proceedings if, in the light of the results of the preparatory proceedings, there appear to be sufficient grounds to suspect that the indicted accused has committed an offence" [16]. The German legal community criticizes the above formulation on the same grounds as in the doctrine of the Russian criminal process. Researchers point out the need for judicial preliminary assessment of the facts and evidence available in the case materials, since the court should decide whether conviction of the accused is more likely than an acquittal [17, p. 392]. It is proposed to change the subject of judicial control at the preliminary hearing stage by assigning assessment of the evidentiary material in terms of refuting the presumption of innocence to the prosecutor's office [18, p. 179], as it is done in the French model described above.

The German legislator, like the Russian counterpart, is constantly improving the committal procedure to minimize the court's

intrusion into the field of checking the charge at this stage. However, the study of the substantive side of judicial control, as well as final procedural decisions that can be taken by the court before the start of the main hearing, allows us to state that the construction of such a model is still far from completion. In particular, the court is authorized to study the contents of the indictment and evaluate key results of the investigation, and if there are doubts about their legality and the validity of the charges, to terminate the criminal case (Part 2 of Article 200 of the German Code of Criminal Procedure). Moreover, in 2021, this norm was amended to expand limits of judicial control. In case of doubts about the sufficiency of evidence or the presence of a corresponding petition from the defense, the court is entitled to decide on collecting new evidence before the start of the main trial "to better clarify the essence of the case" [19], and such a decision is not subject to appeal. In our opinion, the obligation to study and evaluate factual and legal sides of the charge is also evidenced by the requirement that the court's decision to terminate the criminal case shall be based on factual or legal grounds (Article 204 of the German Code of Criminal Procedure). However, the legislator focuses on the impartiality of the court when making decisions on opening the main hearing, terminating or suspending proceedings in the case, since in none of the above cases the court is bound by the opinion of the prosecution office (Article 206 of the German Code of Criminal Procedure).

The special literature notes that the very content of the decision to appoint the main hearing of a criminal case (Article 207 of the German Code of Criminal Procedure) characterizes the activity of judicial control as "an assessment of the sufficiency of suspicion in terms of the volume of evidentiary material, as well as its content" [20, p. 28]. Thus, the descriptive and motivational part of the procedural act should specify the amendments subject to which the court admits the charges for the main hearing: several crimes are charged and criminal prosecution is terminated for certain episodes; a person is charged with an act that differs from the one described in the indictment by qualifying features. If the court has reclassified the actions of a person at the preliminary hearing stage, then the public prosecution office shall submit a new bill of indictment corresponding to the court's decision (Part 3 of Article 207 of the German Code of Criminal Procedure).

It should be noted that the effectiveness of judicial activity at the preliminary hearing stage is subjected to well-founded criticism, which, when summarizing various scientific positions, boils down to two main problems: formalism of judicial control, as well as its impact on the judge's inner conviction in the preliminary and main judicial proceedings.

A common feature in the characterization of the control function of the court is the thesis that preliminary hearings practically do not fulfill their tasks, since a deep judicial investigation of the results of the prosecution's actions is not carried out in the vast majority of cases [21, p. 4]. The validity of this thesis is also evidenced by statistical data, according to which in German courts in 99% of the cases, decisions on the appointment of the main hearing are made based on the results of the preliminary hearing [22, p. 163]. The quality of the prosecution office' activity, which we do not question, cannot substantiate this situation; however, according to the judges themselves, there is no "filtering effect", since for the overwhelming majority of criminal cases considered, for example, in district courts, the procedure for obtaining evidence is almost never conducted, and the activity is reduced to filling out the form required for the start of the main hearing [23, p. 330]. We believe that the above can be fully attributed to the Russian courts, which is also characterized by excessive workload of the system and the need to comply with the deadlines set for the start of the trial. Besides, all the circumstances related to the study of evidence collected in the case are determined during judicial investigation. It is a time-consuming stage from a time point of view.

An independent problem for both Russian and German criminal proceedings is formed by the fact that the preliminary hearing is conducted by the same judge who will consider the criminal case on its merits. Such procedural rules, despite their practical validity, cannot protect the judicial community from accusations of bias, which is based on the opinion already formed by the judge at the time of the preliminary hearing, both about the identity of the accused and the validity of the claimed criminal claim. In this regard, the results of empirical studies conducted using the method of computer procedural modeling are interesting, which showed that the judges overwhelmingly sought to confirm the hypotheses previously put forward on the basis of the indictment, limiting themselves in the main trial to the statement of already established facts [24, p. 297]. As a counterargument, it can be mentioned that neither in accordance with the provisions of Article 204 of the German Code of Criminal Procedure, nor in accordance with the rules provided for in Article 229 and Chapter 34 of the Criminal Procedural Code of the Russian Federation, the judge is not charged with a thorough study, analysis and evaluation of the indictment. Hence, a certain dualism arises in assessing the significance of preliminary hearings, since the scope and totality of the judge's powers, as well as their actual implementation, on the one hand, reduce procedural guarantees of the right to defense and level the regime of "protecting" the accused from unfair involvement in the trial as a defendant and, on the other hand, prevent emotional fixation of the judge on the hypotheses of the prosecution, the presence of which, as we have already noted, is established empirically. So, following the logic of the German legislator, by appointing the main hearing, the judge publicly expresses consent with the presence of reasonable and sufficient suspicion in the materials received from the prosecutor, which implies a high probability of the verdict of guilty, as required by the prescriptions of Article 203 of the German Code of Criminal Procedure. This circumstance devalues the human rights significance of the preliminary hearing mechanism [25, p. 211].

Both in Western and Russian legal science, there is an opinion on the need to abolish the institution of preliminary hearing, that is, in fact, to eliminate judicial control over preliminary investigation results. It seems that this position is too peremptory. For example, in the German criminal process, general preparatory actions are woven into the structure of preliminary hearings, during which procedural issues necessary for the consideration of the case on the merits are resolved (for example, jurisdiction, subject of the trial). The judge also solves a whole range of organizational issues related directly to the preparation of future hearings, which cannot be transferred, say, to the preparatory part of the main trial. Taking into account the fact that the vast majority of criminal cases are investigated by the police, the abolition of the intermediate stage of proceedings implies that the quality of their work will determine the possibility of trial. Historically, in those periods when the state wants to raise the importance of the prosecutor's office (or the prosecutorial power as a whole, as it was in Russia in the last century), or the trend to simplify (accelerate) judicial proceedings prevails, the legislator abolishes the stage of preliminary hearing or minimizes the powers within the function of judicial control [26, p. 40; 27, p. 911].

Conclusion

Comparative legal analysis of the committal mechanism in legislation of individual countries allows us to state that, with the exception of some nuances due to established legal traditions, there are two models in the Anglo-American and continental legal systems:

– by the criminal justice authorities at the end of pre-trial proceedings or by an independent judicial body to whose jurisdiction this criminal case has not been assigned;

– by the court authorized to resolve this criminal case on the merits.

When regulating the first of these models, the legislator directly indicates that the legality and validity of the charges brought against

the person, as well as the sufficiency of evidence for consideration of the criminal case on the merits, are subject to prosecutorial or judicial control. In the second case, following the principle of independence of the court when deciding on the guilt (innocence) of the defendant when making the final court decision, the legislator models the control judicial activity in a veiled manner, avoiding direct reference to the need to assess factual and procedural sides of the accusation at the preliminary hearing stage. However, this goal can be traced in the scope of the powers granted to the court, in particular, assessment of the sufficiency of suspicion or materials for the case consideration in court. If in the first of these models, legally and psychologically, the court remains independent when making a decision on a criminal case, then in the second it is bound by its own decision on committal, based on a preliminary assessment of the received materials of the criminal case.

The search for the optimal model of the preliminary hearing at the legislative level has not been completed. The analysis of the changes and additions made, for example, to the German legislation reveal the following trends:

– the preliminary hearing stage is maintained in district and supreme courts in criminal cases of serious and especially serious crimes; in courts of the first link of the judicial system, proceedings are simplified and accelerated, including through the use of conciliation procedures;

– the forms of judicial control over the quality of preliminary investigation are detailed, among which it is particularly necessary to mention the invitation of the accused to the court for interrogation and hearing of the indictment, giving them the opportunity to petition for the inclusion of new evidence in the case;

– at the level of legislative initiative, the issue of amendments concerning the rules of jurisdiction is being actively discussed, in accordance with which the judge who has conducted the preliminary hearing is not able to participate in the main hearing of the criminal case.

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