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INTERNATIONAL EXPERIENCE IN THE PREPARATION OF A CRIMINAL CASE FOR A COURT

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Abstract: Preparation of a criminal case in criminal proceedings in court is a traditional direction of scientific research. The interest of scientists to the problems of the stage of preparation of criminal cases for the court is long-term, there is a large volume of theoretical and practical issues that have not been resolved to this day. In addition, as a result of the study of international experience, it was concluded that there are such problems in the criminal procedural legislation of many countries in this area.

Keywords: court, trial, criminal case, preparation of a criminal case for trial.

МЕЖДУНАРОДНЫЙ ОПЫТ ПОДГОТОВКИ УГОЛОВНОГО ДЕЛА К ПЕРЕДАЧЕ В СУД

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Аннотация. Подготовка уголовного дела в уголовном судопроизводстве в суде является традиционным направлением научных исследований. Интерес ученых к проблемам стадии подготовки уголовных дел к суду носит долгосрочный характер, существует большой объем теоретических и практических вопросов, которые не решены по сей день. Кроме того, в результате изучения международного опыта был сделан вывод о наличии подобных проблем в уголовно-процессуальном законодательстве многих стран в этой области.

Ключевые слова: суд, судебное разбирательство, уголовное дело, подготовка уголовного дела к судебному разбирательству.

Comparatively, there are two legislative approaches to the preparation stage cases for litigation. The first is that it is missing. A striking example is the Code of Criminal Procedure of France. The court is obliged to consider any case that came to it from the prosecutor's office. Moreover, the latter is so powerful in this country that she fixes the date and time of the trial. The task of the judge is to appear on time and consider the case. The second approach assumes two possible models for organizing this stage: in the Anglo-Saxon countries, the issue of bringing to trial is decided by a special judicial body, for example, in the USA it is a grand jury; in most of the Romano-Germanic countries there is no special body whose only function is to participate in this stage of the process, and this task is usually solved by the main composition of the court. At the same time, bringing to court, as a rule, does not have a formalized ending and flows into litigation. An example is Germany. According to part 1 of § 199 of the Code of Criminal Procedure of the Federal Republic of Germany, the court authorized to consider the

criminal case on the merits decides whether to accept it for proceedings or to suspend the process for a while. In addition, the court at this stage has the right to terminate the criminal proceedings. In this regard, according to L. Gossner, bringing to trial in Germany performs a "filter function" (Filterfunktion). The Code of Criminal Procedure of Switzerland and the science of this country proceed from the fact that the preparation of a case for trial does not form an independent stage of the process. In the doctrine, it is considered as a special procedure, and not as a formalized stage of criminal proceedings. The legislator uses the category "Ansetzen der Hauptverhandlung" - the beginning of the consideration of the case on the merits.

During this procedure, the court checks:

1) whether the indictment and procedural documents are properly drawn up;

2) whether the process prerequisites are met;

3) whether there are any obstacles to the consideration of the case on the merits.

If, on the basis of this review or at a later date, it appears that a sentence cannot be passed at present, the court shall stay the proceedings. If necessary, he returns the prosecution to the prosecutor's office for additions or corrections. If, however, a verdict cannot be pronounced unequivocally, the court terminates the proceedings after the parties and third parties appealing the termination have been granted the right to court hearings.

Preparation of a case for trial can take place in two possible forms: 1) "kabinet" (non-formalized)3 - assumes that the court gets acquainted with the criminal case on its own, without calling the parties; 2) preliminary hearings (Vorverhandlungen). According to Art. 332 of the Code of Criminal Procedure of Switzerland, the court has the right to summon the parties to resolve organizational issues, including participation in conciliation proceedings.

After analyzing the Swiss approach to preparing a case for trial, it can be found that it is very similar to the Russian one (Articles 227-2391 of the Code of Criminal Procedure of the Russian Federation). The only difference is that the domestic doctrine considers this procedure as a stage of the criminal process, while the Swiss one does not.

2. The cornerstone of any procedural system is the question of the composition of the court of first instance. From the point of view of comparative law, there are three main legislative approaches to its solution. In the first case, only professional judges take part in the case (Russia until 1864), in the second case, judges and (or) jurors (Russia, Great Britain, USA, etc.), in the third case, judges and non-professional lay assessors (Scheffens) who are not jurors (Belarus4 and others). The third approach, however, should not be confused with the second. The most important feature of a jury trial is the separate decision by jurors and judges, respectively, of issues of fact and law. If they participate in the consideration of the case and decision-making jointly, as, for example, in Germany, then we are talking about a court with the participation of people's assessors, or sheffens (the name in this case is not so significant), and not about a jury trial. This position also corresponds to the Western European scientific tradition.

Neither the Swiss federal Code of Criminal Procedure nor cantonal statutes currently provide for trial by jury. P. Guidon explains the final rejection of it in 2011 by the fact that "in Switzerland there is no barrier between the authorities and the people, in connection with which the judges are the jury". The trend towards the rejection of jury trials was outlined in this country in the second half of the 19th century. V. K. Sluchevsky wrote during this period: "Recently, legislative attempts have been made to destroy the isolation that exists between the jury and crown sudey. Thus, in the Tessin and Geneva cantons of Switzerland, a merger of these colleges is allowed, although not on the same grounds. He continues: "In Geneva, the law on the transformation of the jury of October

10, 1890 introduced a new organization of this court, obliging the chairman to be present at the meeting with the right to give their explanations and involving the jury to participate in the decision of the verdict"7.As we can see, from the point of view of classical European procedural logic, this is no longer a trial of jurors, but of sheffens.

An essential feature of the current Code of Criminal Procedure of Switzerland is that the question of the composition of the court is entirely within the jurisdiction of cantonal legislation and provides only general (framework) rules. According to Art. 335, the court sits during the entire consideration of the case on the merits in the composition provided for by law and with the participation of the court secretary.If the judge can no longer participate in the process, then all procedural actions are repeated, except for the case when the parties refuse to do so.The presiding judge has the right to order the participation in the hearing from the very beginning of a substitute member of the court, so that, if necessary, he can replace the retired one (this rule would also be useful for Russian legislation).

The Swiss approach to the issue of protecting the interests of the victim when considering the case on the merits is interesting: according to Part 4 of Art. 335 of the Code of Criminal Procedure, if the court needs to consider a case of criminal acts against sexual integrity, then, at the request of the victim, at least one judge must be of the same gender as the victim. In individual courts, this rule can be derogated from if victims of both sexes are involved in the case. This norm seems to be quite progressive and can be taken into account by the Russian legislator in the course of further reforms of the criminal process.

The legislation of the cantons of St. Gallen and Zurich provides that the consideration of a case at first instance is possible both by a single and collegial composition of the court. There is currently no trial by jury and sheffen in these cantons. Cases are considered only by professional judges.

From a comparative point of view, the question of whether judges have robes is of interest. The first approach assumes that wearing it is a direct requirement of the law. An example is the Russian Federation (Part 2, Article 34 of the Federal Constitutional Law of December 31, 1996 No. 1-FKZ "On the Judicial System of the Russian Federation", Order of the Judicial Department under the Supreme Court of the Russian Federation of December 4, 2014 No. 271 "On Approval Instructions on the procedure for issuing man to judges of federal courts of general jurisdiction and federal arbitration courts and the Instruction on the procedure for issuing service uniforms to judges and employees of federal courts of general jurisdiction and federal arbitration courts with class ranks). Another example is Germany. In the state of Baden-W?rttemberg, the Act of 16 December 1975 (Gesetzes zur Ausf?hrung des Gerichtsverfassungsgesetzes und von Verfahrensgesetzen der ordentlichen Gerichtsbarkeit), which provides for in Art. 21 that judges, prosecutors, lawyers, judicial officers use the gown when participating in the administration of justice. The second approach considers wearing it as a historically established legal custom and a special element of the professional culture (subculture) of judges. For example, in the legislation of Switzerland and in the by-laws, we have not found anywhere any indication of the need to put on it. The term Robe eines Richters (judicial robe) does not appear in legal documents. In the German-speaking cantons, the wearing of a robe is generally not customary.

In different countries of the world, the color of the robes of judges is not the same. In addition, it may vary depending on the level of the court. An analysis of Internet sources shows that in the UK the referee's robe is black with a blue sleeve, in New Zealand and India it is red, and in Japan it is white8. In Germany, we observed judges both in red (for example, in the Constitutional Court of Bavaria) and in black robes (in

the Supreme Court of the same land). Professor E. A. Borisova explains the traditionally dark (black) color of the robes of European judges by the fact that in the Middle Ages, the judge, when interrogating the defendant, often got dirty with flying splashes of his blood9, and on a black background they were less noticeable. Another explanation is that the dark mantle of the judge hides everything human in him, thereby symbolizing that he should not be subject to his human passions and emotions.

3. Of fundamental importance is the question of the limits of proceedings in a case when it is considered on the merits (in rem and in personam)10. It consists of two sub-questions.

First: can the prosecutor's office change or expand the accusation for the worse for the defendant when considering the case on the merits? In Germany, the prosecutor has the right to change the indictment conclusion, however, in this case, the consideration of the case will begin with the interlocutory proceedings. According to Part 1 of Art. 265 of the Code of Criminal Procedure of this country, the defendant cannot be convicted on the basis of a criminal law other than that indicated in the indictment admitted by the court. In this case, the key word is "accepted". If the court does not allow the prosecutor's office to change the indictment, then the limits of the proceedings remain the same. It is impossible to involve new accomplices directly in the consideration of the case in court without conducting pre-trial proceedings against them. The Liechtenstein approach is more lenient: if the defendant, when considering the case on the merits, is also accused of committing an act other than that indicated in the indictment, then the court, since the act is subject to prosecution ex officio11, at the request of the prosecutor or at the initiative of the victim, and in other cases only at the request of a private prosecutor, is authorized to extend the hearings to these actions as well. The consent of the defendant is required only if, when qualifying this act, a criminal law more stringent than the one indicated in the indictment for this criminally punishable act is subject to application (part 1 of article 210). In contrast to the German approach, not only the prosecutor has the right to demand a change in qualifications, but also other subjects specified in the Code of Criminal Procedure. At the same time, the Liechtenstein legislator does not provide for a mandatory return to intermediate proceedings. The Russian model, let's conditionally call it that, proceeds from the fact that the trial is conducted only in relation to the accused and only on the charge brought against him; a change in the charge in the trial is allowed if this does not worsen the position of the defendant and does not violate his right to defense (part 2 of article 252 of the Code of Criminal Procedure of the Russian Federation). It is also impossible to involve a new person as a defendant in the consideration of the case on the merits without pre-trial proceedings against him. The domestic approach is much tougher than the German and Liechtenstein ones.

The Swiss legislator has chosen his own model, which differs from those discussed above. By virtue of Art. 333 of the Code of Criminal Procedure, the court provides the prosecutor's office with the opportunity to change the charge if, in its opinion, the circumstances of the case described in the indictment may indicate the fulfillment of another element of the criminal act or if the indictment does not meet legal requirements. As a general rule, changing the indictment is possible only during the preliminary hearing, since, according to Art. 340 of the Code of Criminal

Procedure, if all possible preliminary certain matters are discussed, the result of this may be an injunction that the accusation can no longer be withdrawn or changed with the reservation specified in Art. 333). If, during the consideration of the case on the merits, it becomes known about new criminal acts of the accused, the court has the right to allow the prosecutor's office to expand the charge (within the meaning of the law,

changing the qualification to a stricter one is quite possible). An extension is excluded if, as a result of this, the process is unduly difficult, or the jurisdiction changes, or if there is co-execution or complicity. In these cases, the prosecutor's office opens preliminary proceedings. The court is entitled to pass judgment on the basis of an amended or expanded charge only if the procedural rights of the accused and the private prosecutor are respected. In necessary cases, this can interrupt the consideration of the case on the merits.

Particular attention should be paid to the fact that the Code of Criminal Procedure of Switzerland does not say anything about the consent of the defendant to change his charge to a more severe one. The prosecutor's office, with the consent of the court, makes this decision independently.

The institution of returning the case to the prosecutor, which has Soviet roots, is not known to the Swiss criminal procedure.

The second question: is the court bound by the qualification of the crime, which was made by the public prosecutor, when pronouncing the verdict in the deliberation room? In a comparative context, several options for its legislative solution can be distinguished. In Germany, the defendant cannot be convicted on the basis of a criminal law other than that indicated in the indictment admitted by the court, but if the defendant himself, during the consideration of the case, agreed to a possible change in the legal qualification of the act committed by him, then it becomes admissible. 1 § 265 of the Code of Criminal Procedure). If the defendant objects, the court should postpone the consideration of the case in order to give him the opportunity to prepare for the defense. The reclassification of a crime to a more serious one is possible only with his consent. It follows from this that the court is imperatively bound by the indictment (its change is possible, but not by the court, but by the prosecutor's office with the consent of the court and at the same time only until the verdict is passed). In France, when qualifying a criminal act, the court is bound only by the event of the crime that the person is charged with guilt, but not by its legal assessment made by the prosecutor's office (for example, theft can be reclassified as a more serious crime against property if the use of violence or an open method of theft is established). This, in particular, expresses the independence of the court from the prosecution. The Russian approach, as noted above, suggests that this is not possible, since the proceedings are carried out only in relation to but in no way by its legal assessment made by the prosecutor's office (for example, theft can be reclassified as a more serious crime against property if the use of violence or an open method of theft is established). This, in particular, expresses the independence of the court from the prosecution. The Russian approach, as noted above, suggests that this is not possible, since the proceedings are carried out only in relation to but in no way by its legal assessment made by the prosecutor's office (for example, theft can be reclassified as a more serious crime against property if the use of violence or an open method of theft is established). This, in particular, expresses the independence of the court from the prosecution. The Russian approach, as noted above, suggests that this is not possible, since the proceedings are carried out only in relation to of the charge brought, and its reclassification for the worse for the defendant is not allowed.

The Code of Criminal Procedure of Switzerland establishes that if the court assesses the circumstances of the case differently than the prosecutor's office in the indictment, then it informs the parties present and gives them the opportunity to express their position on this issue (Article 344). After that, the prosecutor's office can either change the charge (the procedure and conditions are discussed above), or insist on its previous position. In turn, when sentencing, according to Part 1 of Art. 350, the court is bound by the circumstances of the case indicated in the indictment, but not by their legal

assessment. Here we see a distinctly French approach.

4. Significant enough for any procedural system is the question of whether the prosecutor, on his own initiative, can exercise discretionary discretion and refuse to support public prosecution12. To date, there have been two main legislative approaches to its solution.

In Anglo-Saxon countries, as a rule, the public prosecutor can freely exercise this power, and this unambiguously entails the termination of the criminal process. It is believed that if there is no accusation, then there is no dispute, and if there is no dispute, then there is no need for further consideration of the case. This approach directly follows from the principle of competition and is historically rooted in the civil procedural idea of discretion. In most Romano-Germanic countries, the issue is resolved differently. In France, the prosecutor does not have the right to refuse to support the prosecution at all. As L.V. Golovko writes, according to the traditional and universally recognized French theory, the prosecutor is nothing more than a representative of society in the criminal process, but not the "owner" of a public claim. The society trusts the prosecutor with the right to file a public claim, but does not give him the right to refuse it. In Russia, the prosecutor has the right to drop charges (part 7 of article 246 of the Code of Criminal Procedure of the Russian Federation), however, at the level of the order of the Prosecutor General, certain technical barriers are provided for the implementation of this possibility.

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