

PARTICIPATION OF THE DEFENDER IN PRELIMINARY HEARINGS: SEVERAL ISSUES¹

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On July 1, 2022, the "Criminal Procedure Code" of the Republic of Armenia (hereinafter, the Code) entered into force. The Code contains a number of cornerstone amendments, which not only define new legal frameworks, new mechanisms for both the realization and limitation of rights and fundamental freedoms, but also significantly changed such regulations, which are an integral and important part of the criminal justice system, such as for example, the principle of adversarial proceeding and the right to defense.

Within the scope of this article, we addressed some issues of the exercising the right to defense at the stage of preliminary hearings, which is a legislative innovation, making the role of the defender in this process the subject of discussion, the main challenges that exist, as well as distinguishing a range of issues, the discussion and solution of which will be made possible complete and full practical implementation of the right to defense at the stage of preliminary hearings. It is also important to emphasize that the effective participation of the defender in the preliminary hearings stage provides an opportunity for the court to obtain a comprehensive and objective view of the case, which ultimately leads to a fair and just decision in accordance with the law. The defender's active involvement in this stage helps to eliminate potential procedural errors or violations, which in turn can contribute to the avoidance of appeal proceedings and ensure that the decision of the court is final. In conclusion, the stage of preliminary hearings, with its new legislative innovations, has the potential to greatly enhance the protection of the rights and freedoms of the accused and to provide a more efficient and effective criminal justice system. However, the full realization of these benefits depends on the active participation of the defender and the courts in ensuring the right to a fair trial is upheld and honored throughout the entire criminal proceedings.

Before proceeding to the discussion of the issues within the scope of the indicated, it is necessary to note that the trial as a legal phenomenon has or at least should have a rigid logical structure.² One of the bases of the discussed linear and rigid logical structure is the approach according to which the court should first address questions of law, secondly questions of fact. In other words, before preparing the criminal proceedings for the main trial, it is necessary to resolve all legal issues thus

¹ This article was reported in 2022 December 8 at the scientific session of graduate students and applicants at the YSU Faculty of Law.

² Ian Langford, Fair Trial: The History of an Idea, *Journal of Human Rights*, 8:1, 37-52, DOI: 10.1080/14754830902765857, 2009, Harris, D, The Right to a Fair Trial in Criminal Proceedings as a Human Right. *International and Comparative Law Quarterly*, 16(2), pages 352-378., 1967, Powell, Lewis F. "The Right to a Fair Trial." *American Bar Association Journal*, publication 51, number 6, American Bar Association, pages 534-38, 1965, P. Mahoney, Right to a fair trial in criminal matters under article 6 ECHR, *Judicial Studies Institute Journal*, pages 111-115, 2004:

ensuring full and targeted implementation of the goals of the trial stage of the criminal proceeding (in particular, examination of evidence). The basis of the mentioned is also the fact that evidence as a procedural phenomenon has a factual nature and the meaning of the trial stage (the main target of which is the examination of evidence from the perspective of their admissibility, relevancy, and certainty) cannot and should not be replaced or imply the clarification of questions of a legal nature (such as clarification of the indictment, legal qualification of actions or omissions, etc.).¹

In order to comply with the fundamental legal principle of legality as well as with branch principles of criminal procedure, it is necessary to start the judicial proceedings with the clarification and resolution of legal issues.² We emphasize the fact that the clarification and resolution of the discussed legal issues is important for both the court and the litigants.

The definition of the preliminary hearings in the Code is, as such, an innovation. We believe that this innovation will make it possible to implement the rigid logical structure of the trial in practice. The necessity of defining the preliminary hearing stage in criminal procedure has been reiterated numerous time both by national³ and international⁴ authors.

Within the framework of the "Criminal Procedure Code of the Republic of Armenia" adopted on July 1, 1998 the parties to the trial (and especially the defense side, as the defense side acts in a certain way as the "respondent") did not have the opportunity to raise the legal issues of the case. As a result, judicial practice was formed in a dichotomous manner. In the conditions of this division, the main and most common interpretation came down to the fact that if the court did not address these issues at the stage of accepting the case into proceedings and scheduling a court hearing, and there is no such direct definition or requirement in the Code, which would allow the court to address legal issues, then these issues are subject to resolution when making a judicial act resolving the case on its merits.

In terms of absence of such criminal procedural tool the parties to the trial were obliged to go through all the stages of the trial, including the stage of examination of the evidence (which is always and necessarily of a factual nature) and the legal issue that could be discussed and resolved even at the stage of preparation of the trial was resolved by the verdict or other act which resolves the case on its merits. In frames of the abovementioned a cornerstone nature has the fact that even if the court examining the proceedings passed a verdict of acquittal or in any other way improved the legal

¹ David C. Brody, James R. Acker, Criminal Law, Jones, and Bartlett Publishers, Sudbury, 2010., page 21:

² Council of Europe/European Court of Human Rights, Guide on Article 6 of the European Convention on Human Rights, with amendments of 31 December 2019, pages 65-92.

³ Head of author group and editor G.S. Ghazinyan, Criminal Procedure of the Republic of Armenia, Special part, textbook for universities, YSU publication, Yerevan, 2015, page 284.

⁴ American Bar Association, "The Importance of Preliminary Hearings", 2015, https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2015/spring/the-importance-of-preliminary-hearings/, National Association of Criminal Defense Lawyers, "The Importance of Preliminary Hearings", 2018, <https://www.nacdl.org/Article/The-Importance-of-Preliminary-Hearings>, Daniel W. Shuman, "The Preliminary Hearing: A Critical Stage in the Criminal Justice Process", the Journal of Criminal Law and Criminology, Vol. 105, No. 2, 2015, pages 269-296, Mark Van Hoecke & Vincenzo Ferrari, "The Right to a Preliminary Hearing: A Comparative Law and Economics Perspective", the European Journal of Law and Economics, Vol. 46, No. 2, 2018, pages. 193-220., Yale Kamisar, "The Adversary System and the Importance of the Preliminary Hearing", the Michigan Law Review, Vol. 74, No. 4, 1976, pages 519-569.

situation of the accused by taking into account the legal argument that was presented by the Defense, but was not examined, it would still lead to the violation of the right to a fair trial. In particular, the described situation would result in violation of the principle which is an element of the right to a fair trial – examination of the case in a reasonable time. The particular reason for this statement is that a procedural question that could have been resolved a long time ago is resolved at a later stage¹ of the trial, not because the "tools" needed to resolve the earlier question were not available or a precise reasoning was not presented, but because the interpretation of procedural structures and the direct exposition of the legislative text did not foresee such a possibility.

In particular, the necessity of preliminary hearings is underlined when the defendant has immunity. For example, prior to the trial, the defense claimed that the defendant who was a judge enjoyed procedural immunity and that the evidence in the case, or the only decisive evidence, was inadmissible. However, the court declined to consider these arguments on the grounds that it lacked the proper legal authority to address the matter at that stage. With reference to relevant judicial practices, in the second scenario, even if the inadmissible evidence was considered during the trial, it could not be used in the reasoning for the verdict. However, it should be noted that such evidence may have still influenced the judge's internal belief formation.

Therefore, it is our viewpoint that the inclusion of a separate and designated stage for preliminary hearings provides an added opportunity for the accused to effectively exercise their right to defense. Furthermore, this stage of the proceedings has the added benefit of being advantageous to the court as well. Taking into consideration the heavy workload and voluminous nature of cases that courts typically face, it is a practical issue when the court is not fully aware of all the case materials and potential obstacles during the first session. Typically, such procedural issues can be identified even at the early stages of the proceedings. In such circumstances, after the prosecution and defense have presented their cases during the preliminary hearings, the court can gain a better understanding of the specific complexities of the case, potential problems, and potential violations. This, in turn, allows the court to proceed to the trial phase with a more comprehensive and well-informed understanding of the particular case.

Therefore, it can be concluded that 3 main groups of questions become the subject of discussion during the preliminary hearings: **on the legality of the charges (indictment)**, regarding the legality of the text itself, and the legality of the procedure for presenting that accusation to the court, **on the legality of the process and the continuity of the process** (such as issues concerning self-recusal, jurisdiction, exclusion of criminal prosecution), and **on legality of the evidence**.

In frames of criminal procedure, the conditional starting point and the main validity condition of the judicial stage is the indictment meeting the legal requirements, which is the legal document that allows to associate a person with the act attributed to them. Arguably, an indictment is the crux of a trial. In essence, an indictment is a procedural document of both legal and factual nature.

Furthermore, it should be noted that well-conducted preliminary hearings can serve as the determining factor in ending the criminal case and termination of criminal prosecution, providing the accused with the ability to assert their right to a fair trial in a tangible and effective manner.

The definition of the stage of preliminary hearings fundamentally opened new

¹ Council of Europe, I. Roagna, The right to a fair trial within reasonable time under Article 6 ECHR, a practical handbook, pages 7-9, 15, 18-22, 23-26.

procedural horizons for the work and involvement of the defense attorney in which conditions the defenders can expand their participation in the proceedings, as well as take another step closer to the standards attributed to the defenders in the theoretical literature.¹

From a legal perspective, the participation of the defense counsel in preliminary hearings is crucial to the outcome of the criminal proceedings. Through active engagement in these hearings, the defense can bring forth information or arguments that could lead to the termination of the criminal case. For instance, if the defendant has immunity that was not properly addressed in earlier stages, the defense attorney can inform the court and resolve the issue of prosecution during the preliminary hearings. The defense counsel's participation is also important in regards to evidence, as it can result in some evidence being deemed inadmissible, reducing the workload for both the court and the defense in later stages of the proceedings. In conclusion, properly conducted preliminary hearings, with the full participation of the defense counsel, are essential in securing the defendant's right to a fair trial and ensuring a more efficient and effective resolution of the criminal case.

We believe that other issues related to this positive innovation are subject to clarification during judicial practice, as the interpretation which will be given in frames of the judicial practice (precedents) has very high importance.

Additionally, the establishment of the preliminary hearing stage provides a clearer platform for the practical application of the individual's right to defense, enhancing the adversarial nature of proceedings and allowing for a more transparent exercise of the right to defense. It is not limited to mere reactions to the prosecution's stance. It is also important to note that the definition of this stage enables greater collaboration between the parties involved in the proceedings and the court, allowing the court to have a more proactive and impactful role prior to the main trial and to identify any potential issues in the proceedings at an early stage.

Although the definition of the stage of preliminary hearings is progressive from the point of view of the exercise of the right to defense and makes it possible to guarantee a more comprehensive and targeted participation of the defender in that stage of the proceedings, it is necessary to refer to those regulations, the stipulation of which in the framework of the mentioned legislative regulation would be considered purposeful and would allow the existing procedural regulations and the precedent practice formed on their basis to conform to the principles of criminal procedure.

In essence, the phase of preliminary court hearings serves to ensure the orderly conduct of proceedings and adherence to the relevant principles of the main trial and any subsequent proceedings. This stage provides the defense with an opportunity to clarify the indictment through questioning the prosecution. The indictment serves as a cornerstone procedural document and, in some sense, outlines the scope of the legal process. Therefore, to ensure the fairness and efficiency of the legal process, the defense must be given the chance to seek clarification of the indictment at some point in the proceedings. This will allow the main trial to proceed only when the indictment is fully understood and unambiguous, ensuring the legitimacy and legality of the trial process. Moreover, the defense's active participation in this stage also includes receiving a clear and comprehensive explanation of the indictment, not just a mere recitation of its contents. This approach seeks to uphold the predictability, legal

¹ Торяников А. Г. Адвокат в уголовном процессе, publication ВЮЗИ, Moscow, 1987, pages 45, Гаврилов С. А., Лупинская П. А. Адвокат в уголовном процессе. Учебное пособие, Moscow, 1997 г., Лаптеакру В. Д., Мартынич Е. Г. Адвокат в кассационном и надзорном производстве по уголовным делам, Kishinev, 199., page 240:

certainty, and legitimacy of the main trial proceedings. Additionally, the defendant's participation in the preliminary hearings enables them to identify any potential errors, inaccuracies or ambiguities in the indictment, and to challenge them in a timely manner, which can prevent any potential violations of the defendant's rights during the main proceedings. It is also crucial for the defendant to understand the nature of the charges against them, as well as the underlying facts and legal reasoning that support those charges. The clarification of the indictment through questions from the defense counsel helps to ensure that the trial proceedings are fair and transparent, and that the defendant is able to effectively prepare their defense. Moreover, the involvement of the defense counsel in the preliminary hearings helps to foster a cooperative relationship between the parties, and to foster a spirit of collaboration between the court and the parties, aimed at resolving any procedural issues that may arise during the trial. By having the opportunity to ask questions and clarify any uncertainties related to the indictment, the defense counsel can help to mitigate the potential risks of prejudice or bias during the main proceedings, and to ensure that the proceedings are conducted in accordance with the highest standards of fairness, impartiality, and justice. In conclusion, the stage of preliminary hearings plays a vital role in the overall fairness and transparency of the criminal trial process, and the active participation of the defense counsel in these proceedings helps to safeguard the rights of the defendant and to ensure that the trial proceedings are conducted in a manner that is consistent with the principles of the rule of law.

Another key issue to be resolved at the preliminary hearings stage is the definition of the subject of proof and the possibility of raising questions about the subject of proof. It is known that in the Armenian criminal justice system, the subject of proof, as such, is defined by the indictment. It is also not disputed that the subject of proof is determined by the prosecution. By defining the preliminary hearings, it is possible to make the exercise of the right to defense more effective by assigning to it the function of clear identification of the object of proof.

Moreover, the above is directly related to the clarification of the indictment. In particular, before proceeding to the main hearings, the defense has a complete understanding of not only the legal and factual aspects of the accusation, but also the circumstances that must be proven by the prosecution at the trial stage. The solution of these issues during the preliminary hearings will definitely allow to ensure a trial process in line with the fundamental principles of legality and fair trial, where both the legal and factual aspects of the indictment will be qualified as equally important. The role of the defender is highly important in guaranteeing the practical and effective implementation of the actions described above.

In addition, the participation of the defense counsel in the preliminary hearings also helps to ensure that the evidence collected and presented in the case is relevant and admissible, and that the defendant's rights to a fair trial are respected. The preliminary hearings provide an opportunity for the defense counsel to challenge any evidence that may be inadmissible, or to request additional evidence that may be needed to support the defendant's case. By doing so, the defense counsel can play a key role in ensuring the integrity of the criminal justice system and protecting the rights of the accused. Furthermore, the inclusion of the defender in the preliminary hearings also allows for a more collaborative approach between the parties involved in the proceedings, which can lead to a more efficient and effective resolution of the case. This, in turn, can help to promote public confidence in the criminal justice system and contribute to the goal of ensuring that justice is served in every case. Based on the above, we conclude that the regulation provided for in Article 311 of the Code would be beneficial if it enabled the following:

- The clarification of the indictment by the prosecution in response to the questions asked by the defense counsel. This is crucial in order to guarantee the predictability, legal certainty, and legality of the main hearings. Provision of a legislative possibility at the stage of preliminary hearings, according to which the defense will have the right to ask questions and receive answers from the prosecution in order to clarify the indictment. These questions can refer both to the legal assessment of the indictment and to the facts thereof. It should be specifically mentioned that the said question-and-answer has definitely a positive application for the court as well.

- The provision of a clear and accessible explanation of the text of the accusation, which goes beyond mechanical re-reading or reiteration. This is essential for ensuring that the defense counsel has a full understanding of the charges against their client and can provide effective representation.

- The opportunity for the defense counsel to raise and address any procedural or evidentiary issues, such as the admissibility of certain evidence, that may arise during the preliminary hearings. This can potentially lead to the dismissal of the case or the exclusion of certain evidence from the proceedings, ultimately ensuring a fair trial for the defendant.

- Provision of definition of the subject of proof within the framework of the issues to be discussed at the stage of preliminary hearings. The implementation of the mentioned proposal will allow the entire judicial process to be more consistent with the fundamental right to a fair trial.

УЧАСТИЕ ЗАЩИТНИКА В ПРЕДВАРИТЕЛЬНЫХ СЛУШАНИЯХ: НЕКОТОРЫЕ ПРОБЛЕМЫ¹

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В статье обсуждаются вопросы участия защитника в этапе предварительных судебных слушаний, что является нововведением в Уголовно-процессуальном кодексе Республики Армения.

В частности, в рамках статьи была обсуждена важность этапа предварительных слушаний, круг основных вопросов, подлежащих обсуждению в ходе слушаний, их подразделы.

В ходе проведенного исследования автор пришел к выводу, что процессуальный этап предварительных слушаний предусматривает новые горизонты для деятельности защитника, давая возможность исключить дальнейшее течение уголовного производства в случае наличия необходимых реквизитов в результате первичного обсуждения правовых вопросов, а также применять ряд основополагающих правовых, отраслевых и уголовно-процессуальных принципов.

В рамках статьи было проанализировано также то обстоятельство, что планирование этапа предварительных слушаний положительно влияет не только на деятельность защитника и гарантирование права на защиту, но и дает возможность провести целевое обсуждение между сторонами судопроизводства в усло-

¹ Статья было представлена 8 декабря 2022г. на научной конференции аспирантов и соискателей юридического факультета Ереванского государственного университета.

виях более активного участия суда.

В результате анализа, проведенного в рамках статьи, автор пришел к выводу, что этап предварительных судебных слушаний можно усовершенствовать, предусмотрев в нем выполнение таких действий, как, например, определение функции разъяснения обвинения, что позволит задать вопросы стороне обвинения относительно обвинительного заключения. В результате этого станет возможным обеспечение плавного и правомерного течения этапа основных слушаний более эффективным образом.

Предложение, направленное на совершенствование этапа предварительных слушаний, заключается также в увеличении функции определения предмета доказательства в списке вопросов, подлежащих обсуждению в ходе предварительных слушаний, что позволит обеспечить принципы правовой определенности и предсказуемости.

ՊԱՇՏՊԱՆԻ ՄԱՍՆԱԿՑՈՒԹՅՈՒՆԸ ՆԱԽՆԱԿԱՆ ԴԱՏԱԼՍՈՒՄՆԵՐԻՆ. ՈՐՈՇ ՀԻՄՆԱԽՆԴԻՐՆԵՐ¹

Լուսինե Հովհաննիսյան

ԵՊՀ քրեական դատավարության և կրիմինալիստիկայի ամբիոնի ասպիրանտ

Հոդվածը վերաբերում է Հայաստանի Հանրապետության քրեական դատավարության օրենսգրքում նորամուծություն հանդիսացող նախնական դատալսումների փուլին պաշտպանի մասնակցությանը:

Մասնավորապես, հոդվածի շրջանակում քննարկվել են նախնական դատալսումների փուլի կարևորությունը, դրա ընթացքում քննարկման ենթակա հիմնական հարցերի շրջանակը, դրանց ենթաբաժինները:

Կատարված հետազոտության ընթացքում հեղինակը եզրահանգել է, որ նախնական դատալսումների դատավարական փուլը պաշտպանի գործունեության համար նոր հորիզոններ է նախատեսում՝ հնարավորություն տալով իրավական հարցերը առաջնային քննարկման ենթարկելու արդյունքում անհրաժեշտ վավերապայմանների առկայության դեպքում բացառել քրեական վարույթի հետագա ընթացքը, ինչպես նաև կյանքի կոչել թե՛ հիմնարար-իրավական, թե՛ ճյուղային-քրեադատավարական մի շարք սկզբունքներ: Հոդվածի շրջանակում վերլուծության է ենթարկվել նաև այն հանգամանքը, որ նախնական դատալսումների փուլի նախատեսումը դրական ազդեցություն ունի ոչ միայն պաշտպանի գործունեության և պաշտպանության իրավունքի երաշխավորման տեսանկյունից, այլև հնարավորություն է տալիս ծավալել նպատակային քննարկում դատավարության կողմերի միջև՝ Ռատարանի առավել ակտիվ մասնակցության պայմաններում:

Հոդվածի շրջանակում կատարված վերլուծության արդյունքում հեղինակը եզրահանգել է, որ նախնական դատալսումների փուլը կարելի է կատարելագործել՝ դրանում նախատեսելով այնպիսի գործողությունների կատարում, ինչպիսիք է օրինակ՝ մեղադրանքի պարզաբանման գործառույթի սահմանումը, ինչը հնարավորություն կտա հարցեր ուղղել մեղադրանքի կողմին մեղադրական եզրակացության վերաբերյալ: Դրա արդյունքում հիմնական դատալսումների փուլի սահուն և իրավաչափ ընթացքը հնարավոր կլինի ապահովել առավել արդյունավետ կերպով:

¹ Սույն հոդվածը գեկուցվել է 2022թ. դեկտեմբերի 8-ի ԵՊՀ իրավագիտության ֆակուլտետի ասպիրանտների և հայցորդների գիտական նստաշրջանին:

Նախնական դատախոսների փուլի կատարելագործմանը միտված առաջարկ է նաև նախնական դատախոսների փուլի ընթացքում քննարկման ենթակա հարցերի ցանկում ապացուցման առարկայի սահմանման գործառույթի ավելացումը, ինչը թույլ կտա ապահովել իրավական որոշակիության և կանխատեսելիության սկզբունքները:

Key words: *preliminary hearings, defender, right to a defense, adversarial proceeding, subject of proof, clarification of the indictment, right to a fair trial.*

Ключевые слова: *предварительные слушания, защитник, право на защиту, принцип состязательности, предмет доказывания, уточнение обвинения, справедливое судебное разбирательство.*

Բանալի բառեր– *նախնական դատախոսներ, պաշտպան, պաշտպանության իրավունք, մրցակցության սկզբունք, ապացուցման առարկա, մեղադրանքի պարզաբանում, արդար դատական քննություն*