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THE PURPOSES AND CHALLENGES OF SUPPLEMENTARY HEARINGS IN THE CRIMINAL PROCEDURE CODE OF THE REPUBLIC OF ARMENIA

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Abstract. Procedure Code (CPC) of the Republic of Armenia, in force since 1 July 2022. Focusing on supplementary hearings held after a guilty verdict, it explores the legislature's aims, the mechanism's doctrinal foundations, and implementation challenges. Drawing on comparative criminal-procedure (United States, United Kingdom) and interdisciplinary findings from psychology and behavioral science, the authors argue that a bifurcated model that separates adjudication of guilt from sentencing decisions is valuable even without a jury, because it mitigates cognitive biases, particularly confirmation and hindsight bias, that can otherwise contaminate punishment. While the CPC's tripartite structure (preliminary, main, supplementary hearings) aspires to balance public and private interests, current rules permit character and sentencing-related materials to surface during the main hearing, weakening the intended procedural barrier. The article proposes targeted reforms to operationalize the separation: (i) amend Article 102 to allocate facts strictly between the main hearing (event, attribution, elements, guilt) and the supplementary hearing (aggravating/mitigating factors, character, harm, civil claims); (ii) introduce a "two-envelope" mechanism requiring the prosecution and parties to submit guilt-related and sentencing-related evidence in separate sets; and (iii) revise Article 319 to bar the submission or examination of character/sentencing evidence before the verdict. Alternatives such as different judges for verdict and sentence are noted but assessed as impracticable. Properly implemented, supplementary hearings can more effectively safeguard fundamental rights and enhance the legitimacy and accuracy of sentencing in Armenia's criminal justice system.

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Introduction

This article seeks to explore **supplementary hearings** - a newly introduced institution in the Criminal Procedure Code (CPC) of the Republic of Armenia, by examining the legislative motives, objectives, and practical challenges surrounding their adoption.

Because supplementary hearings are traditionally associated with Anglo-Saxon legal systems, the article scrutinises the underlying concept of integrating them into Armenia's CPC.

In the authors' view, codifying supplementary hearings constitutes one of the key mechanisms for realising the fundamental principle of balancing public and private interests within criminal proceedings. While the CPC's two-stage hearing structure already offers an additional safeguard for individual rights and fundamental freedoms, a combined theoretical and practical analysis reveals several issues and proposes ways to address them.

Specifically, although enshrining supplementary hearings is an important step toward reinforcing the procedural barrier between adjudicating guilt and determining punishment, ensuring that the finding of guilt does not unduly influence sentence severity, comprehensive analysis highlights further measures whose incorporation into the RA CPC would enable the full and effective implementation of this legislative reform.

Supplementary Hearings in the Criminal Procedure of the Republic of Armenia

The Criminal Procedure Code (CPC) of the Republic of Armenia, which entered into force on 1 July 2022, introduced a number of new procedural structures in both the pre-trial and trial stages, taking the balance between public and private interests as its guiding principle.

Under the current CPC, the trial (court) phase is divided into three successive sub-phases:

- Preliminary hearings
- Main hearings
- Supplementary hearings

Within this tripartite framework:

- Preliminary hearings serve a preparatory function.
- Main hearings focus on examining evidence and resolving the question of guilt.
- Supplementary hearings are devoted to clarifying issues of punishment and liability.

According to the CPC, supplementary hearings may be held after either an acquittal or a guilty verdict. The present article, however, discusses only the conduct of supplementary hearings following a guilty verdict.

When the court renders a guilty verdict, the examination of circumstances that may aggravate or mitigate the defendant's responsibility and punishment, as well as factors **characterising the defendant's personality**, becomes critically important. By their nature, these issues derive from the verdict itself, and a guilty verdict is an indispensable procedural precondition for their consideration. Absent such a verdict, for example, if only personal characteristics of the defendant were debated, the discussion would be largely devoid of substantive meaning.

Although the two-stage hearing system is new to Armenia's criminal-procedure landscape, its expediency and its constitutional and procedural underpinnings has been debated for decades in jurisdictions such as the United States and the United Kingdom.[1] One core issue is whether a defendant's prior convictions should be disclosed to the decision-maker (judge or jury) before the verdict is reached.[2] Both case-law and legal scholarship have warned that jurors may be inclined to punish the defendant not for the specific act charged, but for the mere fact that he or she has demonstrated criminal behaviour in the past.[3]

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[1] Michelson v. United States, 335 U.S. 469, 475 (1948), Seth Gurgel, Bifurcated Trials: Eligibility and Selection Decisions in Capital Cases, page 1.

[2] Old Chief v. United States, 519 U.S. 172, 180–81 (1997) (explaining that exposing the jury to a prior conviction could lead to "unfair prejudice," *id*. at 180, by suggesting to the jury that the defendant has a bad character and therefore is more likely to have committed a bad act again), United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) ("Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged — or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment — creates a prejudicial effect that outweighs ordinary relevance.".

[3] *Michelson*, 335 U.S. at 475–76 ("The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (footnote omitted)), Dennis J. Devine & David E. Caughlin, *Do They Matter? A Meta-analytic Investigation of Individual Characteristics and Guilt Judgments*, 20 Psych. Pub. Pol'y & L. 109, 122 (2014); Edith Greene & Mary Dodge, *The Influence of Prior Record Evidence on Juror Decision Making*, 19 Law & Hum. Behav. 67, 76 (1995); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum. Behav. 37, 38 (1985).

We agree with S. Herman's observation that the importance of the sentencing phase should never be underestimated, whatever legislative or precedential philosophy underlies it.

Reflecting the diversity of national legal systems, a range of solutions has been proposed, among them the formal adoption of the **two-stage trial** model.[4]

The Criminal Procedure Code of the Republic of Armenia embraces a two-stage (bifurcated) trial model, establishing a clear procedural barrier between (i) determining guilt and (ii) deciding punishment or other legal consequences.[5] As noted above, two-phase trials are most familiar in common-law jurisdictions such as the United States and the United Kingdom. This raises the question: *Does bifurcation make sense only where a jury system exists?* After all, with a professional judge, the fear that impressions formed during the guilt stage will spill over into sentencing might appear less acute.

Our view is that the structure of a two-phase trial is not causally dependent on the presence of jurors. To substantiate this claim, we conducted an interdisciplinary inquiry examining not only legal scholarship but also sociological and anthropological findings.

One frequently cited "classic study," carried out at Stanford University in the 1970s, illustrates the point. Two groups of participants were recruited: one favoured the death penalty, the other opposed it. Each group was given a packet of research papers presenting arguments both for and against capital punishment. **Participants tended to rate as "more convincing" those studies that confirmed their pre-existing views.**[6] Subsequent scholarship labelled this phenomenon *confirmation bias* - the tendency to give greater weight to information that supports one's initial position.

The same dynamic can arise when judges (or jurors) determine punishment and liability. Before the sentencing stage, a defendant's character should play no role; yet confirmation bias can lead the decision-maker to rely on early impressions inappropriately. A bifurcated procedure therefore remains valuable *even without* a

[4] Susan Herman, The Tail that Wagged the Dog: Bifurcated Factfinding Under the Federal Sentencing Guidelines and the Limits of Due Process, Brooklyn Law School BrooklynWorks, 1992, pages 292-294:

[5] Gregg v. Georgia, 428 U.S. 153, 190–92 (1976) (plurality opinion), Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to* Apprendi, 67 SMU L. REV. 586:

[6] Charles G. Lord, Lee Ross, & Mark R. Lepper, Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

jury system, because it erects a procedural safeguard that helps keep sentencing decisions insulated from earlier judgments about guilt.

In 2010, a study by Eric Rassin lent empirical support to the Stanford "classic" experiment. A cohort of legal professionals - judges, law-enforcement officers, defence counsel, and others, formed an opinion about a case after an initial review of the dossier and, in effect, ignored the evidence presented at the final stage of the study, refusing to modify their original stance.[7]

Moreover, in a separate experiment, *inadmissible* character evidence, although omitted from the formal reasoning of the judgment, nonetheless influenced both jurors and judges: under its sway they developed an internal conviction that inclined them toward imposing harsher sentences. These findings demonstrate that, while an early assessment of the defendant's character may carry no legal weight before the sentencing phase, comprehensive research confirms its potent psychological impact.[8]

Confirmation bias is **not** the only anthropological or behavioural factor that can shape procedural decisions. Equally relevant is hindsight bias: when evaluating events retrospectively, individuals, including seasoned legal professionals, tend to judge the defendant's conduct not as it appeared *in the moment* but in light of the consequences already known. [9] The heavier those consequences, the more severe the perceived liability is likely to be.[10]

The examples and their manifestations presented above are described by theorists from legal and other scientific perspectives as heuristics. In essence, heuristics are the mental shortcuts or bypass routes in cognitive activity that allow decisions to be made on the basis of incomplete information. Among the leading scholars of heuristics are Amos Tversky and Nobel laureate Daniel Kahneman,

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[7] Eric Rassin, Anieta Eerland, & Ilse Kuijpers, Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231 (2010).

[8] Anthony Doob & Hershi M. Kirshenbaum, Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act Upon an Accused, 15 CRIM. L. Q. 88 (1972), Joel D. Lieberman & Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 PSYCHOL., PUB. POL'Y, & L. 677 (2000):

[9] Erin M. Harley, Hindsight Bias in Legal Decision Making, 25 SOC. COGNITION 48 (2007), for a review of hindsight bias in the courtroom.

[10] Susan J. LaBine & Gary LaBine, Determinations of Negligence and the Hindsight Bias, 20 L. & HUM. BEHAVIOR 501 (1996), Leonard Berlin, Hindsight Bias, 175 AM. J. ROENTGENOLOGY 597 (2000).

who showed that heuristic routes can yield biased approaches such as confirmation bias and hindsight bias, which in turn can underlie judicial decision-making.[11]

A 2023 study indicates that, when imposing a sentence, judges focus on the following factors:

- the defendant's upbringing and social environment,
- family and friends,
- profession and employment,
- persons dependent on the defendant's care,
- intellectual developmental issues, mental illnesses, addictions,
- the crime's impact on victims,
- the gravity of the offence,
- prior convictions or ongoing criminal proceedings,
- whether the defendant shows remorse.[12]

Although this study was not conducted in the Republic of Armenia, it makes clear that, when deciding punishment, judges are concerned less with guilt which has already been established and more with the defendant's personal characteristics. Therefore, knowing those characteristics before guilt is determined can adversely affect both public and private interests. We consider that the two-phase criminal-procedure system is not the sole effective safeguard in criminal justice, yet its inclusion in the Code may call for additional steps to ensure the system's full, genuine, and effective implementation.

Although it is practically impossible to imagine that anyone including a judge can be entirely free of bias, or of influences stemming from social environment,[13] professional experience,[14] and other external factors, we believe the impact of such

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[11] Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 SCI. 1124 (1974), DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) [hereinafter THINKING]; JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982):

[12] Nir, Esther and Liu, Siyu (2023) "The Influence of Prior Legal Background on Judicial Sentencing Considerations," International Journal on Responsibility: Vol. 6: Iss. 1, Article 5. DOI: https://doi.org/10.62365/2576-0955.1102, pages 12-20:

[13] George, T. E., & Weaver, T. G. (2017). Chapter 15: The role of personal attributes and social backgrounds on judging. In L. Epstein & S. A. Lind (Eds.), The Oxford Handbook of US Judicial Behavior (pp. 286-302). https://doi.org/10.1093/oxfordhb/9780199579891.013.3:

[14] Berryessa, C. M., Dror, I. E., & McCormack, C. J. B. (2023). Prosecuting from the bench? Examining sources of pro-prosecution bias in judges. Legal and criminological psychology, 28(1), 1-14. https://doi.org/10.1111/lcrp.12226 , Worden, A. (1995). The judge's role in plea bargaining: an analysis of judges' agreement with prosecutors' sentencing recommendations. Justice Quarterly, 12(2), 257-278. https://doi.org/10.1080/07418829500092671 , Sisk, G. C., Heise, M., & Morriss, A. P. (1998). Charting the influences on the judicial mind: An empirical study of judicial reasoning. New York University Law Review, 73(5), 1377-1500. https://doi.org/10.2139/ssrn.1898693 , Harris, A. P., & Sen, M. (2022). How judges' professional experience impacts case outcomes: An examination of

influences can be mitigated. One procedural tool for doing so is the supplementary-hearing stage, which serves as a barrier between questions of guilt and questions of punishment.

We consider that personal characteristics (for example, positive or negative testimonials, family situation, and so forth) should not carry decisive weight in reaching the verdict. Whatever a person's character may be, the inquiry and decision on guilt must not be influenced by it. To put it differently, a negative portrayal of the defendant does not in itself prove guilt in the crime under examination; conversely, a previously law-abiding record or high reputation does not by itself prove innocence.

A review of the concept behind Armenia's current Criminal Procedure Code shows that this very aim motivated the adoption of the two-stage hearing structure.[15] At the same time, we believe that, to make the two-stage system fully effective, certain legislative amendments are needed regarding the rules for presenting and examining evidence.

Thus, although the participants in the proceedings are not restricted from presenting evidence during the supplementary-hearing stage, evidence confirming or refuting the defendant's personal characteristics may already be found in the criminal case file or may already have been examined during the main hearing.

Under Article 319 of the RA Criminal Procedure Code, during the preliminary hearing the parties, at the court's request, submit proposals on the scope of evidence to be examined in the main hearing, substantiating which circumstance relevant to the verdict is proved or disproved by a given item of evidence. The court may refuse a party's proposal, but in that case it must issue a ruling.

In practice, the public prosecutor may petition the court during the supplementary hearing to examine all documentary evidence, including materials concerning the defendant's personal characteristics. Because the law contains no

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public defenders and criminal sentencing. https://scholar.harvard.edu/files/msen/files/harris-sen-public-defenders.pdf , Robinson, R. (2011). Does prosecutorial experience "balance out" a judge's liberal tendencies? Justice System Journal, 32(2), 143-168, Frankel, M. E. (1972). Criminal sentences: Law without order. Hill and Wang, Lefcourt, G. B. (1996). Responsibilities of criminal defense attorney. Loyola of Los Angeles Law Review, 30(1), 59-68, Trivedi, S., & Van Cleve, N. (2020). To serve and protect each other: How police-prosecutor codependence enables police misconduct. Boston University Law Review, 100(3), 895-934, Liu, S., & Nir, E. (2022). Mission impossible? Challenging police credibility in suppression motions. Criminal Justice Policy Review, 33(6), 584-607. https://doi.org/10.1177/08874034211057612:

[15] H. Ghukasyan, D. Melkonyan, A. Nikoghosyan, *A Practical Guide for Interpreting the Conceptual Solutions, Innovative Approaches, and Core Institutions of the New Criminal Procedure Code of the Republic of Armenia*, 2022, pages 492-494.

clear prohibition, the court's agreement with such a petition or with the prosecutor's suggestion would not constitute a procedural violation. In these circumstances, the defendant's character would already have been scrutinised in the main hearing, and the court would have access to personal information about the accused. Although, within the three-stage hearing structure, such information should not carry decisive weight in reaching the verdict, it can nevertheless influence the formation of the court's internal conviction. Thus, once the court knows of the defendant's established pattern of prior criminal behaviour, an internal belief is inevitably formed.

It cannot be said that forming such an internal conviction is unlawful or that the RA Criminal Procedure Code necessarily requires substantial amendment. On the contrary, the Code has already adopted a two-phase structure that clearly separates questions of guilt from questions of liability. Given this and the matters subject to proof under Article 102 of the Code, an unambiguous statutory consolidation of that separation would be the next logical step in reinforcing the two-phase trial model.

Specifically, we believe the proceedings can be truly two-phase only when the circumstances that characterise the person are presented to the court after the verdict is delivered. A person's positive or negative character has no material relevance to determining guilt, yet it is essential for individualising punishment. Therefore, within the discretionary scope that the Criminal Code grants the judge in sentencing, favourable character evidence may incline the judge toward a more lenient penalty, while unfavourable evidence may lead to a harsher one. This conclusion is supported by both legal theory and behavioural research.

Accordingly, it is necessary, within Article 102 of the RA Criminal Procedure Code, to define the facts subject to proof according to a two-phase logic, separating those to be proved in the main hearing from those to be proved in the supplementary hearing.

During the **main hearing** the following must be proved:

- the event and its circumstances (time, place, manner, etc.);
- the defendant's connection to the event;
- the legal elements of the alleged offence as defined by criminal law;
- the defendant's guilt in committing the alleged offence.

During the **supplementary hearing** the following must be proved:

- circumstances that mitigate or aggravate criminal responsibility or punishment;
- circumstances characterising the defendant's personality;
- the damage caused by the alleged offence;

- circumstances that allow the person to be released from criminal liability or punishment;
- circumstances on which the person bases pecuniary claims during the proceedings;
- circumstances on which a participant in the proceedings or another person bases his or her claims.

In legislatively entrenching the two-phase hearing system, it is also important to stipulate that, during the main hearing, the scope of evidence designated for examination in the main hearing may not include materials concerning character or circumstances that mitigate or aggravate liability or punishment, or related materials. Otherwise, the transition to two-phase hearings would remain somewhat formal: although a barrier is erected between questions of guilt and liability, it is more declarative than practical.

An alternative way to reinforce the two-phase trial would be to have one judge deliver the verdict and another impose the sentence. This would offer greater objectivity, because any internal conviction formed by the first judge would not influence the sentencing decision. However, given Armenia's limited resources, having different judges for the two phases or, for example, introducing a jury system, remains largely hypothetical, and the likelihood of practical implementation is low.

Nevertheless, a solution suited to the resources of the Republic of Armenia and today's challenges is the introduction of a "two-envelope" mechanism as a means of maintaining the procedural barrier. When the prosecutor submits the indictment to the court, the evidence is divided into two sets: evidence relevant to reaching the verdict (that is, which element of the offence each item proves) and evidence relevant to deciding punishment and liability (chiefly materials describing the defendant's character). The same approach must be mandatory for the other parties to the proceedings as well. In practice, these two sets of evidence could be presented to the court in two separate envelopes, preventing the development of inconsistent judicial practice.

The same logic applies, for example, in the United Kingdom and Scotland. There, the court may disclose evidence that portrays the defendant negatively ("bad character") to the jury only if a number of specific conditions are met. In effect, the court itself assumes the role of the "two-envelope" mechanism, taking into account criminal-procedure particularities.[16] Thus, whether it is the prosecutor, who must

[16] Criminal Justice Act 2003, հոդվածներ 101-103, Criminal Procedure (Scotland) Act 1995, article 101.

present the evidence underpinning guilt and punishment in sequence, or the court, a procedural barrier is erected. A similar approach appears in Rule 404 of the United States Federal Rules of Evidence. Under Rule 404(a)(1), evidence of a person's character, or a character trait, may not be used to prove that, on a particular occasion, the person acted in accordance with that trait.[17] This point is especially important because, despite such prohibitions, the presentation of such evidence can still occur. Common-law jurisdictions address the need for additional safeguards by, for example, having the judge review the evidence before it is shown to the jury. Notably, this measure benefits not only the defendant's procedural interests but also aligns with the public interest, marking another step toward balancing public and private concerns.

Taking the foregoing analysis into account, we consider that the supplementary-hearing mechanism can be fully integrated into the Criminal Procedure Code of the Republic of Armenia through, for example, the following legislative change designed to operationalise the "two-envelope" system. Article 206 of the Code should be amended by adding a new Part 1.1 with the following content:

"1.1. When approving the indictment or restructuring it, the supervising prosecutor shall forward the case materials to the competent court in two separate envelopes. The first envelope shall contain the materials substantiating the circumstances set out in points 1 to 4 of Part 1 of Article 102 of this Code. The second envelope shall contain the materials substantiating the circumstances set out in points 5 to 10 of Part 1 of Article 102 of this Code."

It is also noteworthy that this proposal serves not only the procedural interests of the private participant, the defendant, but also aligns with the public interest, representing another step toward balancing public and private interests.

Conclusion

The separation of preliminary, main and supplementary hearings in the Criminal Procedure Code of the Republic of Armenia has both theoretical and practical importance. The three-tier structure discussed is intended to guarantee a balance between public and private interests during the trial stage in the court of first instance, while also ensuring the implementation of criminal-procedural principles.

Although taking up questions of punishment and liability only after resolving guilt is a significant step forward because the participants in the proceedings do not have to discuss those questions before the verdict is delivered, we believe, based on

[17] Federal Rules of Evidence, Character Evidence; Other Crimes, Wrongs, or Acts, rule 404.

studies conducted among professional lawyers and on contemporary findings in anthropology, sociology, psychology and behavioural science, that it is necessary in the Armenian criminal-procedure context to make the barrier between the main and supplementary hearings more concrete, ensuring that circumstances relevant to sentencing are not addressed earlier than the supplementary hearing.

The following practical proposals could help achieve that goal:

- Introduce a differentiation in Article 102 of the RA Criminal Procedure Code for the trial stage, separating the elements that must be proved in the main hearing from those that must be proved in the supplementary hearing. For this to work, information describing the person or related circumstances should not be available to the court before the question of guilt is resolved. To that end, Article 102 could enshrine a "two-envelope" mechanism that requires evidence establishing the elements of the offence and evidence describing the person to be submitted separately.
- Reword Article 319 of the RA Criminal Procedure Code to create a clear rule that any evidence aimed not at proving guilt but at clarifying the defendant's character may not be submitted at the preliminary hearing or examined during the main hearing.

Conflict of Interests

The authors declare no ethical issues or conflicts of interest in this research.

Ethical Standards

The authors affirm this research did not involve human subjects.

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CORRELATION OF CRIMINAL PROSECUTION AND PROTECTION OF THE RIGHTS AND FREEDOMS OF THE ACCUSED

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Abstract. The article discusses the relationship between criminal prosecution and protection of the rights and freedoms of the accused in the context of the typological characteristics of legal proceedings. Based on the comparative legal analysis, the author concludes that at present there is no explicit division of national criminal procedure systems into systems with the priority of substantive law over procedural law and systems with the priority of procedural law over substantive law.

Keywords: criminal prosecution, protection of the rights and freedoms of the accused, legal priorities, reasonable balance

The correlation between criminal prosecution and the protection of the rights and freedoms of the accused is traditionally one of the most controversial issues in the theory of criminal procedure. Many authors associate the solution of this issue with the typological characteristics of legal proceedings. It is believed that in continental European jurisdictions, the goal of criminal prosecution prevails (the priority of substantive criminal law over procedural law), in Anglo-American jurisdictions – the goal of protecting the rights and freedoms of the accused (the priority of criminal procedural law over substantive law).[1]

Are there really such explicit legal priorities? Obviously not. It is probably no accident that in modern English legal literature there are justified assertions that the

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[1] Criminologiya / Pod red. Dzh. F. Sheli. M., 2003. S. 51–52.

protection of the rights and freedoms of the accused is not the goal of the criminal process, but an important condition, under the mandatory observance of which its truly fundamental purpose must be carried out – to prevent crimes, to convict the guilty and to acquit the innocent.[2] In German, French and Russian literature, on the contrary, they are inclined to recognize such protection as a priority goal along with the protection of society and victims of crimes. In other words, there is no dispute about the predominance of substantive or procedural law. In any case, the views of scientists practically coincide when it comes to the corresponding values (no matter how they are defined – purpose, goal, task, means, condition).[3] This is natural, since at present it is impossible to imagine either total criminal law control over crime, or full (unlimited) protection of personal rights and freedoms.

Another issue is imposed by the question of how to find and who should look for a reasonable balance between the inevitability of prosecution for the commission of crimes, accompanied by the restriction of rights and freedoms and the risk of punishment of the innocent, and the need for a high standard of observance of these rights and freedoms, accompanied by the limitation of the power prerogatives of criminal prosecution and which can lead to impunity for some criminals.

In this context, one should be very critical of the position that justifies "the existence of criminal proceedings alongside criminal law" only by the need to prevent the conviction of innocent people.[4] Supporters of this position proceed from the concept of self-limitation of the state in the criminal process through the exercise of an independent judiciary in it, removed (not interfering) from the disclosure of crimes and the search for the guilty.[5] In itself, this concept (at least in the context under consideration) does not raise objections. However, the fact is that with its help (on its basis) an attempt is made to exclude the explanation of the criminal process by the need to combat crime (disclosure of crimes, exposure of guilt) or the implementation (determination, establishment) of the right of punishment available to the state. In fact, supporters of this position artificially separate the values of criminal prosecution and protection of rights and freedoms.

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[2] Ashworth A. The Criminal Process: An Evaluative Study. Oxford, 1998. P. 66.

[3] This does not mean that the distinction between these concepts is devoid of any theoretical or practical meaning.

[4] Mizulina E. B. Sovershenstvovanie ugolovno-processualnogo zakonodatelstva: Proekt UPK Rossiiskoi Federaci // Informacionniy bulleten Sledstvennogo komiteta *pri MVD Rossii*. 2001. № 1 (107). S. 146.

[5] Mikhailovskaya I. B. Nastolnaya kniga sudii po dokazivaniu v ugolovnom processe. M., 2006. S. 8-22. – For more information on the concept of self-restraint of the state in criminal proceedings, see: Mizulina E. B. Ugolovniy process: koncepciya samoogranicheniya gosudarstva. Tartu, 1991.

Instead of searching for a criminal-political and legislative balance between the interests of the individual and society in the criminal process, they oppose them to each other. This approach is in sharp contrast with the position of the Constitutional Court of the Russian Federation, which believes that within the framework of the public law, institution of criminal prosecution, the protection of rights and freedoms is guaranteed "both to persons against whom such prosecution is carried out and to other interested persons, including victims of a crime...".[6] Moreover, the approach of the Constitutional Court not only "completely breaks the connection between criminal law and criminal procedure",[7] but also cuts and distorts the content of the court's activities.[8] The court becomes a body that ascertains the law as an outcome of the struggle between the state and the citizen, and[9] does not constitute (determine, establish) the law as a result of correlating and coordinating the values of criminal prosecution and the protection of human rights and freedoms in each specific case. This is fundamentally wrong. Of course, the court cannot be a fighter against crime (like the investigative bodies and the prosecutor's office), but it cannot be removed from the fight against it. Such are the modern criminal and political realities, behind which there is the idea of the "cultural intrinsic value" of an independent judiciary, which has long been widely shared by legal scholars and put into practice. The guiding and restraining significance of this idea for the issue discussed here was drawn to the attention of proceduralist politicians by N.N. Rozin (one of the most authoritative scholars of procedural law of the century before last, who, by the way, is a supporter of the "pure" form of adversarial proceedings as the antipode of the "pure" form of search).[10] This idea is expressed quite clearly and definitely in the current position of the US Supreme Court, which in its decisions has repeatedly emphasized that the courts, by preventing abuse of power by the police, act in the interests of honest citizens, and do not contribute to avoiding the responsibility of criminals or correcting the mistakes of the police.[11]

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[6] Postanovlenie Konstitucionnogo Syda Rossiiskoi Federaciik ot 16 maya 2007 goda «Po delu o proverke konstitucionnosti polozenii statey 237, 413 и 418 Ugolovno-processualnogo kodeksa Rossiiskoi Federatcii v svyazi s zaprosom prezidikuma Kurganskogo oblastnogo suda» // Rossiiskaya gazeta. – 2007. – 2 iyunay.

[7] Cheltsov-Bebutov M. A. Sovetskiy ugolovniy process. Vipusk 1. Kharkov, 1928. S. 4.

[8] Ibidem. S. 5.

[9] Cheltsov-Bebutov M. A. Ukaz. Soch. S. 5; Strogovich M. S. Priroda sovetskogo ugolovnogo protsessa i printsip sostyazatelnosti. M., 1939. S. 84.

[10] Rozin N. N. Ugolovnoe sudoproizvodstvo. SPb., 1914. S. 42.

[11] Stoyko N. G., Nikitin G. A. Ugolovniy process v SShA: Zatchita lichnikh prav I svobod. SPb., 2006. S. 45-54.

The first time the U.S. Supreme Court touched on the issue was in 1886. In one of its decisions, it ruled that documents seized "[illegally] in an erroneous and unconstitutional manner" could not be admitted as evidence in a case because it violated the rights of citizens stipulated in Amendments IV and V[12] to the Constitution.[13] This decision served as a kind of "impetus" for the development of the rule for the exclusion of evidence obtained in violation of the personal rights of citizens, and the doctrine of the "Fruit of the Poisoned Tree" (FPT) in the American criminal process.

The rule of exclusion of incriminating evidence officially appeared in the Supreme Court's decision of 1914[14], when the court first stood up for the ideas of the IV Amendment.

The emergence of this rule pursued two main objectives: first, to prevent abuse of power by the police, and second, to protect the independence and fairness of the courts. The subsequent introduction of the “good faith exception” by the Supreme Court confirmed these objectives and completed the evolution of the exclusionary rule.

In applying the rule of exclusion of evidence, the courts must answer four questions:

1. Will the exclusion of evidence in this situation prevent further violation of Amendment IV by the police? If so, to what extent?
2. What is social loss from such an exception??
3. How illegal was the behavior of the police?
4. Can we say that the benefits of preventing future violations outweigh the social losses in this case??

Giving answers to these questions is not so easy. First, it is quite difficult for the courts to determine the amount of benefit from preventing future violations, while the public losses from the non-use of part of the collected evidence are quite easy to determine. In addition, the difficulty is caused by the fact that the rule of exclusion of evidence and the Fourth Amendment itself is not intended to protect criminals from fair punishment, but to protect the privacy of honest citizens from police attacks.

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[12] These amendments guarantee American citizens, in particular, the rights to inviolability of the person, home, papers and property, due process of law. For a description of these and other constitutional guarantees in the sphere of criminal procedure, see for more details: Bernam V. Pravovaya sistema Soedinennich Shtatov. Tretie izdanie. M., 2006. Pp. 469–517.

[13] Boyd v. United States 116 U.S. 616 (1886).

[14] Weeks v. United States 232 U.S. 383, 58 L Ed 652, 34 S Ct 341 (1914).

Because of these difficulties, for almost twenty years, the rule of exclusion of incriminating evidence was practically not applied by American courts. The situation changed dramatically only in 1984, when the Supreme Court, by its decision, formulated the concept of "exclusion of good will".[15] Its essence boils down to the fact that the courts should exclude only evidence obtained in violation of the law (intentionally or through negligence), which entailed the restriction of any personal constitutional right of the person concerned.

Under the influence of the above-mentioned decision of the Supreme Court, the rule of exclusion of evidence ceased to apply in practice to "technical" violations of Amendments IV and V.

For example, in one case where police officers arrested and searched a citizen on a warrant that was later declared illegal, the court concluded that there were no grounds for excluding evidence because the police had acted "in good faith," and the court does not intend to complicate the criminal case, excluding evidence proving criminal guilt.[16]

In another case, the court held that evidence obtained during a search resulting from a sufficiently substantiated but unsubstantiated accusation and leading to a charge of another crime should be considered lawful and accepted by the courts.[17]

The rule of exclusion of incriminating evidence was finally formed in the following two precedents.

United *States v. Leon.*[18] The police officers gathered evidence that drugs were being trafficked at three addresses in Los Angeles. Having presented this evidence to the prosecutor's office, they obtained a search warrant for all three addresses. During the search, a large amount of cocaine was found. The District Court ruled that the search was unlawful because there was no sufficient basis for conducting it. However, the Supreme Court returned the case for a new trial. indicating that the cocaine found during the search should be considered as one of the types of evidence.

Massachusetts *v. Sheppard.*[19] A disfigured charred female body was found in a car park. An autopsy found that death was the result of multiple blows to the head. The boyfriend of the murdered girl, Shepard, could not provide a convincing alibi, and during the inspection of his car, particles of substances like those found on the body and near the murdered girl were found. The investigator tried to obtain a

[15] United States v. Leon 468 U.S. 897, 82 L Ed 2d 667, 104 S Ct 3405 (1984).
[16] Michigan v. Tucker 417 U.S. 433, 41 L Ed 2d 182, 94 S Ct 2357 (1974).
[17] Michigan v. De Fillippo 443 31, Ed 2d 343, 99 S Ct 2627 (1979). U.S.61 L
[18] United States v. 468 897, Ed 2d 667, 104 S Ct 3405 (1984). LeonU.S.82 L
[19] Massachusetts v. Sheppard 468 981, Ed 2d 737, 104 S Ct 3424 (1984). U.S.82 L

search warrant for the apartment of the person he suspected but could not find the necessary form (it was Sunday). Then he used a search warrant form in drug cases. After explaining the situation to the magistrate, who also could not find the necessary form, the investigator (together with the magistrate) made the necessary corrections, and the magistrate signed the search warrant. During the search, evidence was found confirming Shepard's involvement in the murder of his girlfriend. The district court found Shepard guilty in murder. A Massachusetts court remanded the case for a new trial, saying the search was unconstitutional because the search warrant expressly authorized only the search for narcotic substances. The Supreme Court overturned this opinion, ruling that it was only a "technical error" that should not stand in the way of justice.

Thus, the modern application of the exclusion rule is fully consistent both with the purpose of criminal prosecution of people guilty of crimes and with the purpose of protecting the rights and freedoms of citizens from arbitrariness.

The FPT doctrine complements and clarifies the rule of exclusion of evidence. It was first formulated under this name in a 1939 Supreme Court decision.[20] Under this doctrine, the use of any incriminating evidence obtained because of unlawful police actions (even in the past) may be prohibited by a court.

Initially, the FPT doctrine was applied quite straightforwardly: if the police (even indirectly) committed at least some illegal actions when obtaining evidence, the evidence obtained was not used by the courts. However, even before 1939, the Supreme Court determined that the rule of exclusion of evidence incriminating an accused person on the commission of a crime could be declared inapplicable if there was an independent source of evidence.[21]

The following two cases can serve as examples of such recognition.

Silverhorne Lumber Co. v. United States. The owners of the wood processing company were arrested without a warrant, and all the company's documents were seized by the police. Subsequently, the owners were released, and the documents were returned by court order. However, the police remained with copies of all the documents. After examining the information obtained in copies, the police officers obtained a warrant for the seizure of certain company documents and the arrest of the owners of the enterprise. Although the documents for the prosecution were directly obtained by lawful means, the initial information that served as the basis for the lawful actions of the police was collected in violation of legal provisions,

[20] Nardone v. United States 308 U.S. 338, 341, 84 L Ed 307, 605 S Ct 266 (1939).
[21] Silverhorne Lumber Co. v. United States 251 385, Ed 319, 40 S Ct 182 (1920). US64 L

particularly the Fourth Amendment to the Constitution. Therefore, the court prohibited the use of these documents as evidence.

The case *of Nardone v. United States* (in which the court officially defined the ODF doctrine). The Nardone's telephone line and office were tapped by the police without the necessary warrant, which allowed the police officers to collect the necessary evidence of fraud. The Supreme Court returned the case for a new trial, ruling that the evidence obtained by wiretapping the defendant's office and phone could not be used, since the method of obtaining it violated the rights of citizens, defined by the Fourth Amendment to the Constitution.

Thus, the essence of the FPT doctrine arising from the above decisions is the recognition of the inadmissibility of the use of evidence that has been obtained in violation of the law and is subject to the rule of exclusion of evidence. However, it was not until 1975 that the Supreme Court began to consider the FPT doctrine strictly in terms of the exclusion rule.

As one of the "watershed" precedents, after which the courts began to check whether the exclusion of the collected evidence serves the purposes of justice and the purposes of the exclusion rule, we can cite the case *of United States v. Ceccolini.*[22] His decision is based on the right not to incriminate himself, guaranteed by the Fifth Amendment to the Constitution, and the right to be free from unreasonable searches (seizures), guaranteed by the Fourth Amendment to the Constitution.

A local police officer went to the store where his friend worked and picked up an envelope addressed to the owner of the store (his friend's employer). The police officer looked inside the envelope and found evidence that the employer had violated the gambling law. Thus, it constitutionally unjustifiably restricted the right of this citizen to freedom from unjustified searches (seizures). However, at the same time, the police officer did not actually (physically) seize anything, that is, the restriction of the said right was a "technical error". He only showed what he saw in the envelope to his friend (a store employee) and passed on the information about what he found to his superiors, who in turn forwarded it to the FBI. It turned out that the FBI is already aware of this violation of the law, and they are monitoring the said citizen for evidence of his illegal behavior.

After assessing the above circumstances of the case, the court held that an employee who had seen written evidence against their employer (a suspect in the case) and therefore fell under the protection of Amendment V could nevertheless be recognized as a witness in the case. The basis for this conclusion, according to

[22] United States v. Ceccolini 435 268, Ed 2d 268, 98 S Ct 1054 (1978). U.S.55 L

the court, is that, firstly, the price of silence of an important witness is too high for society, and secondly, this or similar evidence would have been obtained later in any case. The inevitability of obtaining evidence in the future has thus become another circumstance in the absence of which the ODD doctrine becomes applicable.[23] Moreover, the court noted that the police officer who accidentally found evidence and thereby violated Amendment IV, acted "of his own good will."

It should be emphasized that the limitations of these rules and doctrines related to "acting in good faith", "technical error", the inevitability of obtaining evidence in the future and, most importantly, the amount of public losses and benefits from the exclusion of evidence, are an important addition to the idea of the inadmissibility of the use of illegally obtained evidence. The introduction of these restrictions is aimed at correcting the mistakes of the police that led to the violation of the rights of suspects, as well as at achieving the main goal of the legislator: to ensure the triumph of justice.

This is exactly what famous Russian (pre-revolutionary) lawyers were talking about, whose scientific disputes are surprisingly reminiscent of modern theoretical discussions. Thus, according to the apt expression of the great Russian scholar and proceduralist I.V. Mikhailovsky, the court "must remain a dispassionate, calm, reasonable and powerful controller(...) the fight (against crime – N.S.) – moderating its extremes(...)".[24] “Of course, it is better to release 10 and 100 guilty than to convict one innocent person, but if the legislation, without in the least reducing the guarantees of judicial protection enjoyed by innocence, will only reduce the chances of impunity for real villains, then one cannot but wish that it will change its system in this direction”.[25]

This issue is resolved in a similar way in modern Russian legal doctrine[26] and practice[27], which proceed from the fact that:

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[23] This rule can be dangerous if its frequent application gives free rein to police officers to use illegal methods of work, violating the constitutional rights of citizens when collecting evidence, which can be obtained without violating rights, but in a more complex way.

[24] Mikhailovskiy I. V. Osnovnie principy organizacii ugolovnogo suda. Tomsk, 1905. S. 94.

[25] Spasovich V. D. O teorii sudebno-ugolovnikh dokazatelstv v svyazi s sudoujstroistvom i sudoproizvodstvom. M., 2001. S. 24.

[26] Stoyko N. G. Sostyazatelnost v rossiyskom ugolovnom protcesse. State and Law N 2 (96) 2023. S. 41–46.

[27] Opredelenie Konstitutcionnogo Suda Rossiiskoi Federatcii ot 18 iyunya 2004 g. № 204-O «Ob otkaze v prinyatii k rassmotreniyu zhaloby grazhdanina Budaeva Tcota Natcagdorzhevicha na narushenie ego konstitutcionnich prav chastiyu vtoroi statii 283 Ugolovno-protcessualnogo kodeksa Rossiiskoi Federatcii. URL: https://www.garant.ru/products/ipo/prime/doc/1253594/; Opredelenie Konstitutcionnogo Suda Rossiiskoi Federatcii ot 6 marta 2003 g. № 104-O " Ob otkaze v prinyatii k rassmotreniyu zaprosa Boksitogorskogo gorodskogo suda Leningradskoi oblsti o proverke

1. Criminal prosecution bodies (prosecution) are obliged to ensure at their disposal the fulfillment by the state of its obligation to recognize, observe and protect human and civil rights and freedoms.
2. The prosecution and the defense have equal procedural opportunities to defend their rights and interests in court (participation in evidence, filing motions, appealing against actions and decisions of the court).
3. The court may not substitute for the parties, assuming their procedural powers.
4. The court is not exempt from the obligation to use the powers to examine evidence for the purpose of administering justice.
5. Proving the circumstances incriminating and/or acquitting the defendant is among the powers of the court exercised in accordance with the procedure established by the criminal procedure legislation for the purpose of a fair and impartial resolution of the criminal case on the merits.

That is why the tasks of justice (and, more broadly, the goals of the criminal procedure), regardless of the type of legal proceedings, correctly understood, are, on the one hand, to guarantee the effectiveness of the fight against crime, and, on the other hand, to ensure the rights of the individual.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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RUSSIAN CRIMINAL PROCEEDINGS: PROCEDURAL FORM VS RULES OF PROCEDURAL RECORD KEEPING

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Abstract. The article examines the law-making trends associated with the strengthening of the formalization of criminal procedure law and expressed in the content of the Criminal Procedure Code of the Russian Federation with purely technical and technological rules that determine not so much the high purpose of the criminal procedure form, but the procedure for judicial, prosecutor's and investigative paperwork and document management.

The article explores the reasons for the emergence of such trends, which are associated with two objective factors inherent in the formation of the early Soviet criminal justice system in the 1920s. In addition, an attempt is made to identify the reasons that led to a sharp increase in the considered trends at the turn of the XX-XXI centuries and their reflection in the text of the current Criminal Procedure Code.

In this regard, it is hoped that this shortcoming in the national law-making policy will be eliminated as soon as possible and that the rules of criminal procedure paperwork will be gradually excluded from the scope of legislative regulation. It is noted that the form of criminal procedure that follows from the Federal Law, which is predetermined by proper legal guarantees of the quality of the intended results, cannot be identified with the rules of criminal procedure record-keeping and document management.

Keywords: *law-making policy; law-making; criminal proceedings; criminal procedural form; criminal procedural acts; criminal procedural documents; criminal procedural law.*

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Introduction

To date, the law-making policy of the Russian Federation, in particular the policy pursued in the field of criminal procedure regulation, is characterized by rather destructive, but at the same time interesting trends. They are aimed at strengthening the formalization of the activities of the court, prosecutor's office, bodies of inquiry, preliminary investigation, non-governmental participants in criminal proceedings and are expressed in the intention to "legalize" (settle precisely through federal law) a much wider range of issues arising in the field of criminal justice than common sense requires.

Currently, many of the norms included in the content of the Criminal Procedure Code of the Russian Federation (hereinafter referred to as the Code of Criminal Procedure of the Russian Federation, the Code) are generally devoid of any truly legal value ("high" purpose). They are not pre-determined by legal guarantees of the suitability of the results of the relevant procedural actions, legality, validity and adequacy (fairness) of procedural decisions, the good quality of mechanisms for the implementation of other criminal procedural powers and competence, but *assume a pronounced technical or technological nature*. In other words, *such norms establish not so much the procedure of criminal proceedings as the rules of criminal procedure paperwork.* As some modern publications rightly point out, the current Code of Criminal Procedure of the Russian Federation is increasingly beginning to resemble a "soulless" instruction addressed to ordinary officials[1], a kind of administrative regulation[2]. While one of the authors of this article, fully sharing these assessments, at one time expressed an even more harsh judgment-he called these law-making trends the gradual transformation of the Code from embodying the "high" meaning of the criminal procedure form of a legislative act into a kind of "memo" for illiterate law enforcement[3] officers.

These legislative excesses are evident when you read the literally step-by-step rules for drawing up and executing a number of procedural documents. For example, Part 2 of Article 146 of the Code of Criminal Procedure of the Russian Federation explicitly obliges interrogators and investigators to indicate in the decision to initiate a criminal case the date, place and time of its issuance,

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[1] See: *Pobedkin A.V.* The Code of Criminal Procedure: a form of living law or a "soulless" instruction // Criminalist's Library. Scientific journal. 2017. № 3. P. 111.

[2] See: *Grigoriev V.N.* Criminal procedure form or administrative regulations: current trends // Bulletin of St. Petersburg State University. Right. 2018. Vol.9. Issue 1. P. 44.

[3] See: *Rossinsky S.B.* The Criminal Procedure Code of the Russian Federation: the embodiment of the "high" purpose of the criminal procedure form or a "memo" for illiterate law enforcement officers? // Laws of Russia: experience, analysis, practice. 2021. № 6. p. 42.

information about its author, the reason and grounds for initiating a criminal case, and a preliminary legal assessment (qualification) of what happened. Similar rules are also established for other criminal procedure acts of the bodies of inquiry, preliminary investigation and court: decisions on involvement as an accused (Part 1 of Article 171 of the Code of Criminal Procedure of the Russian Federation), decisions on the appointment of a forensic examination (Part 1 of Article 195 of the Code of Criminal Procedure of the Russian Federation), an indictment (Article 220 of the Code of Criminal Procedure of the Russian Federation) Article 225 of the Criminal Procedure Code of the Russian Federation), a decision on the appointment of a court session (Part 1 of Article 231 of the Criminal Procedure Code of the Russian Federation), a decision (determination) on the termination of a criminal case or criminal prosecution (part 2 of Article 213, Part 3 of Article 239 of the Criminal Procedure Code of the Russian Federation), a sentence (Articles 304-309 of the Criminal Procedure Code of the Russian Federation Decisions of the court of appeal (Article 389.28 of the Code of Criminal Procedure of the Russian Federation), etc. Similar legal requirements are also established for a number of investigative or judicial protocols (Part 3 of Article 166, Part 2 of Article 259 of the Code of Criminal Procedure, etc.), expert opinions (Article 204 of the Code of Criminal Procedure), appeals, cassation, supervisory complaints (Part 1 of Article 389.6, Article 401.4, 412.3 of the Code of Criminal Procedure), and other procedural documents.

It is likely that in the foreseeable future, such trends may lead to even greater law-making excesses, for example, to the "legalizing" of the requirements for the color of paper, technical characteristics of the printing device (printer), the permissible degree of deviation of the handwriting of the author of the protocol from the registration, etc. 476, 477 of the Code of Criminal Procedure of the Russian Federation, the generally binding templates (forms) of investigative, investigative, prosecutor's, judicial and other documents used in criminal proceedings were excluded, that is, finally, one of the "innovative" decisions of the developers of the Code, which for more than five previous years was generally abroad, was annulled. It was beyond the comprehension of the vast majority of specialists and did not stand up to any criticism.

The penetration of office management rules into legislative matters is not limited only to the introduction of requirements for the registration of criminal procedure documents in the Code of Criminal Procedure of the Russian Federation. In reality, there are other legislative provisions of a purely technical and technological nature, which may not be so noticeable, but are still conditioned by the same trends, which help the inquirer, investigator, prosecutor and court to

properly exercise their powers, and the rights granted to non – government participants in criminal proceedings. Such, for example, is the imperative requirement that follows from the content of Part 9 of Article 166 of the Code of Criminal Procedure of the Russian Federation on the mandatory placement of a procedural act on the secrecy of personal data of a participant in an investigative action in a paper envelope (not in any acceptable packaging, namely in an envelope!) and the obligatory sealing of this envelope (not on ensuring the inviolability of its contents in any reliable way, namely, about its sealing!). Another example of the penetration of technical and technological rules of record-keeping into the criminal procedure legislation is an order addressed to a potential private prosecutor on the mandatory attachment of copies to the application for initiating a criminal case of a private prosecution to be served to alleged defendants (Part 6 of Article 318 of the Code of Criminal Procedure of the Russian Federation). This article is devoted to these problems.

Reasons for the legislative legalization of the rules of criminal procedure records management.

What are the main reasons for the gradual legislative legalization of technical and technological rules of criminal procedure records management? What influenced the emergence of such law-making tendencies?

It seems that it is not so difficult to answer these questions – the reasons for the incremental "legalizing" of the rules of criminal procedure records management, that is, their introduction into the "high" sphere of legislative regulation, are directly related to the circumstances that objectively affected the national system of public administration in general and criminal justice as one of the areas of implementation of state-government functions. Powers in particular. Moreover, the springboard for the emergence of such law-making tendencies was prepared 100 years ago, in the 1920s, which was actively promoted by two important factors inherent in the formation and further development of Soviet judicial and law enforcement agencies and the mechanisms of preliminary investigation and judicial proceedings of criminal cases under their jurisdiction.

I. One of them was expressed in a kind of administratization of criminal justice, in the assignment of jurisdictional and supervisory powers to executive authorities, including "law enforcement" agencies, in changing the traditional principles of organizing judicial, prosecutor's and investigative work, in adding administrative and bureaucratic forms and methods to the corresponding types of activities. This factor was caused by the revolutionary events of 1917, which predetermined a

change in the very paradigm of state power, which, in turn, could not but lead to the need for quite serious changes in the field of criminal justice.

It should not be forgotten that the model of socialist statehood stipulated by the program documents of the RSDLP(b), including the well-known slogan "All power to the Soviets!", did not presuppose the idea of separation of powers either in the classical understanding of European liberal enlighteners, or in the truncated form characteristic of the last decades of the Russian Empire-strongly limited by the canons of autocracy, but still characterized by relatively independent investigative, prosecutorial and judicial institutions (as they said at the time, institutions). Therefore, despite the general" conservative " desire of the Soviet government to ensure the continuity of the principles of organization and activity of the newly formed judicial and law enforcement agencies in relation to the sufficiently reliable, proven, efficient, and generally not contrary to the interests of the working people of the imperial justice system, its individual elements have undergone significant changes. And first of all, such changes affected the sphere of criminal proceedings - the mechanisms of preliminary investigation and trial of criminal cases could no longer fully comply with the pre-revolutionary canons based on the classical "Napoleonic" model, which assumes the differentiation of the functions of justice and preliminary investigation (investigation) and at the same time refers both functions to the jurisdiction of fairly independent representatives of the judiciary: justice - to the jurisdiction of the court, and preliminary investigation - to the jurisdiction of a special investigative judge (in the Russian Empire – a judicial investigator). Instead, in view of the rejection of the principle of separation of powers, the "revolution – born" Soviet courts, the prosecutor's office, and the investigative apparatus were quite naturally transferred to a single subordination of the relevant state administration body-the People's Commissariat of Justice (Narkomjust), and the criminal process itself began to be filled with administrative and bureaucratic forms and methods. In other words, people's judges, people's investigators, and public prosecutors have turned into classic officials and found themselves in the position of ordinary "cogs" in the growing state bureaucracy. And all subsequent, including cardinal, changes in the Soviet criminal justice system were, if not entirely reasonable, then at least quite natural and understandable.

As a result of such administrationization, investigative, prosecutorial and judicial activities have become characterized by a bureaucratic aura, a special "ministerial" climate and a peculiar bureaucratic mentality. Moreover, these symptoms were most clearly manifested in the organization and work of extra-judicial criminal justice bodies (preliminary investigation bodies and prosecutor's

offices). They became characterized by clear management verticals, strict hierarchy of powers, reverence, the ordered nature of the orders of their superiors; there were both written and unwritten duties to coordinate certain procedural acts with the management, approve relevant documents, etc. In the system and structure of prosecutor's and investigative bodies, main departments (departments), departments, divisions, etc. gradually emerged.

However, to a certain extent, these symptoms began to manifest themselves in judicial activity. It would seem that the Russian judicial system, which has long been removed from direct subordination to the executive branch and has been developing as an autonomous and independent state institution for almost 30 years, should have been completely freed from the administrative pattern typical of Soviet justice by now. But in reality, such an exemption did not happen: the courts still have the same "ministerial" climate, the same bureaucratic aura and official mentality. Last but not least, this is due to the established practice of forming a judicial corps – mainly consisting of former employees of the courts' offices, employees of the Judicial Department under the Supreme Court of the Russian Federation, or former employees of the same preliminary investigation bodies and the Prosecutor's Office.

In view of all the above circumstances, the trends associated with the "legalizing" of office management rules, with the incremental introduction of purely technical and technological regulations in the "high" sphere of criminal procedure regulation, no longer seem so strange and incomprehensible. After all, if a classic criminal justice official should be guided by the Law in his work, then the main "guide" for an ordinary official is a legal act of management, often representing the very instructions, the very administrative regulations. If the exercise of classical criminal procedure powers usually proceeds in conditions of discretion (the right to choose the most acceptable of the ways of behavior provided for by law) and is associated with the possibility of casual interpretation of the law, then the activity of a "ministerial" employee assumes a much more formalized character, and sometimes even characterized by a step-by-step algorithm. If classical investigators, prosecutors and judges are full-fledged subjects of law enforcement practice in the field of criminal justice, then the work of an ordinary official is often reduced to office work and document management.

II. Another factor that had a significant impact on the gradual penetration of technical and technological rules of office management into the" high " sphere of legislative regulation also emerged in the 1920s and also owes its appearance to the well-known circumstances accompanying the formation of Soviet statehood. It was caused by the lack of professional lawyers (judges, prosecutors, investigators),

primarily specialists of the "old school" who are able to competently perform their work, especially in the context of the post-revolutionary surge in crime. The need to overcome such a shortage of personnel as quickly as possible predetermined the adoption of very risky, but clearly forced and, apparently, no alternative anti-crisis measures – workers, soldiers, sailors, raznochintsy, etc. who did not have proper education and practical experience, but were ideologically loyal to the Soviet government, began to be accepted into the service of the justice authorities.[4]

Thus, the establishment of the Soviet criminal justice system was accompanied by an objective need to strengthen the guarantees of ensuring the legality, at least some correctness, of the work of officials of the preliminary investigation bodies, the prosecutor's office, and the court acting on behalf of the state, but not fully qualified and trained to participate in law enforcement practice. And in this regard, the first attempts to legalize the rules of criminal procedure records management and introduce purely technical and technological regulations in the "high" sphere of criminal procedure regulation once again cease to seem so strange and incomprehensible. By developing and" legitimizing "detailed algorithms for the implementation of judicial, prosecutorial, investigative, and investigative powers – those very "memos" - the state hoped to limit the degree of discretionary freedom and creative independence of illiterate law enforcement officers (such were the first Soviet servants of criminal justice), rather than minimize the likelihood of primitive errors that lead to actual meaninglessness or legal devaluation of the results legal actions taken or decisions taken. Moreover, these efforts were far from being in vain, but brought great benefits, since they made it possible to ensure a more or less tolerable practice of investigating and trying criminal cases in the conditions of the post-revolutionary personnel shortage with "little blood".

Reasons for strengthening the formalization of the rules of criminal procedure records management in the Code of Criminal Procedure of the Russian Federation.

So, the reasons for the emergence of law-making trends associated with the legislative legalization of technical and technological rules of criminal procedure records management seem quite understandable. It is also obvious that the factors that determined them have remained in the past, so at the present time they are unlikely to have a significant impact on law-making policy. Thus, the administratization of investigative, prosecutorial and judicial activities in general was completed during the Soviet period of criminal justice development; to date,

[4] For example, according to official statistics for 1921, only 17% of judges had higher legal education and 1% had other higher education. While the qualifications of 10% of judges were limited to secondary education and another 66% to primary education; the remaining 6% of judges had no education at all, that is, they were actually illiterate.

there are only numerous ongoing adjustments, for example, related to the establishment, reorganization or abolition of any state authorities performing criminal procedure functions, with more or less successful attempts to de-administrativeize individual cases. of these, primarily ships, etc. And the post-revolutionary personnel shortage, which was felt in the early 1920s, was generally overcome in the pre-war period. It was then that the system of legal education was established in the USSR; large centers for training lawyers were established; well-known scientific schools in the field of criminal law, criminal procedure, and criminalistics were formed; preliminary investigation bodies, prosecutor's offices, and courts began to be staffed with highly educated, experienced, and well-qualified employees who were able to properly manage their powers without any legislative restrictions "memos" and step-by-step instructions.

Thus, it is not entirely clear why by the time of the adoption of the Code of Criminal Procedure of the Russian Federation, these trends did not stop, but, on the contrary, entered the most active phase of their development. What can explain the sharp increase in the formalization of the rules of criminal procedure records management in the current criminal procedure legislation?

Asking such questions, it should be noted that the Code of Criminal Procedure of the Russian Federation has become an absolute "leader" in terms of the number of technical and technological rules, surpassing all its predecessors. Neither the Criminal Procedure Codes of the RSFSR of 1922 and 1923, nor the Criminal Procedure Code of 1960, which were already affected by these trends, were characterized by such large volumes of paperwork, especially requirements for the registration of judicial, investigative acts and other procedural documents.

Of course, it is possible to put forward a hypothesis that the authors of the Code of Criminal Procedure of the Russian Federation somewhat resembled their predecessors involved in the development of early Soviet criminal procedure legislation-they did not discount the new crisis of Russian statehood that broke out in the 1990s, which led to mass dismissals of experienced judges, prosecutors, and investigators, that is, However, this, without a doubt, turning point in the development of criminal justice still did not give rise to such devastating consequences as were once caused by the revolutionary events of the early twentieth century. Moreover, in recent years, the State has made great efforts to restore the former human resources of the criminal justice system. While the number of technical and technological rules introduced in the Code of Criminal Procedure of the Russian Federation, on the contrary, only increases. In particular, in 2009 the law was supplemented with an "instruction" on the execution of a pre-trial cooperation agreement (Article 317.3 of the Code of Criminal Procedure of

the Russian Federation), and in 2018 – a technical algorithm for removing digital information carriers or copying it to another medium (Article 164.1 of the Code of Criminal Procedure of the Russian Federation), etc.

In this connection, another hypothesis is more plausible. In all likelihood, the abundance of technical technological rules is another consequence of the well-known destructive circumstances that accompany the preparation and adoption of the Code of Criminal Procedure of the Russian Federation. Do not forget that the Code was prepared quite impulsively, in the context of fierce disputes and discussions, under strong pressure from "external forces", etc. At the same time, many of the "specialists" included in the relevant working group were clearly not ready to participate in such a complex and responsible project, did not know the subtleties of the theory of criminal procedure, did not have a proper law-making outlook, and did not have the skills to develop draft laws, especially codified regulations.

Of course, among the participants of this group were also prominent scientists who clearly understand the difference between the "high" purpose of the criminal procedure form and the rules of criminal procedure records management. However, it seems that they have become too much involved in the most "important" and fashionable issues of the development of Russian criminal justice (competition, rights of the accused, presumption of innocence, jury trial, etc.), without paying due attention to more "mundane" problems. As you know, this "menial" work was carried out by representatives of practical bodies who have exuberant energy, invaluable professional experience, are well-versed in the procedural bureaucracy, are able to defend and lobby for corporate interests, but at the same time do not bother to particularly immerse themselves in the subtleties of legal doctrine or generally consider the relevant knowledge superfluous and useless.

Conclusions

Based on the above, we can only hope that the Russian law-making policy in the foreseeable future will still be able to overcome the flaw considered, that is, to put an end to the clerical "boom" and begin to develop along a slightly different vector, which implies the gradual exclusion of technical and technological rules from the "high" sphere of legislative regulation. By the way, reducing the number of purely clerical norms will also reduce the need for constant changes and additions to the Code of Criminal Procedure of the Russian Federation, many of which are clearly technical or technological in nature.

The rules of record-keeping and document management cannot be identified with the "high" purpose of the criminal procedure form, the need for which is determined not by the legislator's intention to provide assistance in mastering applied skills in working with documents, but by the need to support investigative, judicial, and other procedural actions and decisions taken with proper legal (not office-keeping, but "high" legal!) guarantees of the intended results' quality. Therefore, the criminal procedure form does not need a subordinate law, but rather a legislative regulation, with complicated law-making mechanisms inherent in it and the highest legal force of the relevant normative acts.

Whereas the rules of criminal procedure record-keeping, on the contrary, do not imply any "high" purpose, but are aimed solely at optimizing law enforcement practice. Therefore, such rules have no place in the Criminal Procedure Code – they should be assimilated by professional law enforcement officers "with mother's milk", that is, in the process of forming an appropriate level of education, legal understanding, legal culture and other necessary personality traits of a modern lawyer. And if you do not understand the meaning of criminal procedure records management or lack basic skills in drawing up legally significant documents, you should not "chew" these questions in the text of the federal law, but think about the professional suitability of the relevant subject, about the expediency of his being in the public service and granting jurisdictional or supervisory powers in a criminal case. In other words, instead of turning the Code of Criminal Procedure of the Russian Federation into a "memo" for illiterate law enforcement officers, it is more reasonable to direct maximum efforts to conduct a more balanced personnel policy in relation to the judiciary, prosecutors, and officials of preliminary investigation bodies – to try to ensure that genuinely professional lawyers fill the relevant public positions. While it is more reasonable to devote educational and methodological literature to criminal procedure records management, and if necessary, some technical or technological rules can be explained in decisions of the Plenum of the Supreme Court of the Russian Federation and subordinate regulatory legal acts of a departmental nature issued in order to optimize law enforcement practice.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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SOME FUNDAMENTAL ISSUES REGARDING JUDICIAL APPEALS OF PRE-JUDICIAL ACTS BY PUBLIC PARTICIPANTS IN CRIMINAL PROCEEDINGS

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Abstract. This scientific article is dedicated to the judicial appeal of pre-trial procedural acts performed by public participants in criminal proceedings. It examines the subjects entitled to appeal, the written and oral procedures for examining appeals, as well as the evidentiary process related to facts under appeal in judicial proceedings.
The Criminal Procedure Code establishes a system of guarantees designed to protect the rights and legitimate interests of individuals within the framework of criminal proceedings. Appealing the actions and decisions of public participants during pre-trial proceedings is one of the key guarantees that enables judicial review of the legality of procedural acts carried out by public participants.
The new Criminal Procedure Code provides detailed regulation of the scope of judicial appeals concerning pre-trial procedural acts, the parties entitled to appeal, the powers of the court, and the participants involved in the proceedings. A review of judicial practice reveals numerous cases involving appeals against the actions and decisions of public participants in pre-trial proceedings. This underscores the significance of challenging pre-trial procedural acts and highlights the necessity of ensuring their effective application in practice.

Keywords: *criminal proceedings, pre-trial proceedings, procedural act, appeal, participants, grounds for appeal, initiation of criminal proceedings, appellant.*

Introduction

Chapter 2 of the Constitution of the Republic of Armenia is devoted to the protection of the fundamental rights and freedoms of individuals and citizens,

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many of which are reflected in the Criminal Procedure Code of the Republic of Armenia (2021). In the fight against crime, it is often necessary to restrict the rights and freedoms of private individuals involved in criminal proceedings, as it is impossible to safeguard public interests without the use of coercive measures. This necessity arises from the fact that individuals accused of committing a crime typically seek to avoid criminal liability and punishment. Nevertheless, one of the essential objectives of criminal proceedings is to ensure the protection of individual rights, so that the rights and freedoms of private participants in the process are not restricted without just cause.

Research Part

The Criminal Procedure Code provides various mechanisms for protecting the rights and legitimate interests of individuals during pre-trial proceedings, among which judicial guarantees hold particular significance. These guarantees have become increasingly diverse in their nature and scope. Judicial oversight in pre-trial proceedings ensures the enforcement of fundamental rights, including personal liberty and inviolability, privacy, property rights, and the right to judicial protection.

The ability to appeal the actions and decisions of public participants in pre-trial proceedings is a critical safeguard. It allows for judicial scrutiny of the legality of procedural acts carried out by public officials involved in criminal proceedings. This institution is rooted in Part 1 of Article 61 of the Constitution of the Republic of Armenia, which states: "Everyone shall have the right to effective judicial protection of his or her rights and freedoms."

Accordingly, the actions of public participants—such as the prosecutor, investigator, head of the investigative body, or the investigative authority—that restrict an individual's fundamental rights and freedoms during pre-trial proceedings may be subject to judicial review. The court, as an independent and impartial body, plays a key role in upholding the rights and legitimate interests of individuals within the criminal justice system. Judicial practice demonstrates that this institution of judicial control significantly influences the conduct of public participants and reinforces the legality of their procedural actions.

The new Criminal Procedure Code provides a detailed regulation of the scope of judicial appeals concerning pre-trial procedural acts, including the subjects entitled to appeal, the powers of the court, and the participants involved in the proceedings. Judicial practice indicates that there are numerous cases involving the appeal of actions and decisions made by public participants during pre-trial proceedings.

This fact underscores the significance of the procedure for challenging procedural acts at the pre-trial stage.

For the effective exercise of the right to appeal, it is essential to clearly define the range of individuals entitled to file such appeals. This issue has been thoroughly addressed in the current Code, thereby eliminating the ambiguity that existed under the previous legislation. Specifically, Article 300 of the Code states: "Complaints against pre-trial acts provided for in Article 299 of this Code may be filed by a private participant in the proceedings, as well as by any other person, if they substantiate that the act has had a disproportionate impact on their legitimate interests."

A noteworthy development in the new regulation is that the right to appeal is not limited to private participants in the proceedings. It also extends to individuals who are not formally recognized as participants but whose rights have been affected by a procedural act carried out by a public participant. This provision is consistent with the constitutional right to judicial protection.

Undoubtedly, a complaint should not be rejected merely on the basis that the complainant has not been granted participant status in the criminal proceedings according to formal legal procedures. As O. V. Khimicheva rightly notes, individuals who do not hold a specific procedural status are often involved in criminal legal relations. These may include persons subjected to searches, seizures, or confiscation of property—individuals who cannot be deprived of the right to appeal when their rights are infringed upon[1].

Furthermore, a person who has submitted a crime report and whose application has been dismissed by a public participant in the proceedings also holds the right to appeal in court.

It is true that judicial guarantee proceedings apply to the pre-trial stage of criminal proceedings; however, it is important to emphasize that the court issues a separate decision to initiate such proceedings to challenge a pre-trial act. In other words, judicial guarantee proceedings are not a continuation of the pre-trial process but are independent legal proceedings. While they are undoubtedly closely connected to pre-trial criminal proceedings, they are not an integral part of them. This distinction is precisely why a separate judicial decision is required to commence such proceedings.

This approach has a clear legal basis. In particular, Article 7, Part 1, Clause 3 of the Criminal Procedure Code specifies that the bodies conducting criminal

[1] **Khimicheva, O. V., Sharov, D. V.** On the Implementation of the Freedom to Appeal in Criminal Proceedings // *Proceedings of the Academy of Management of the Ministry of Internal Affairs of Russia*. 2019. No. 1 (49), p. 102.

proceedings include the court—from the moment it receives the indictment from the prosecutor until the conclusion of the criminal case—as well as in matters concerning judicial guarantees.

According to Article 302, Part 1 of the Code, proceedings to challenge a pre-trial act may be conducted either in oral or written form. In practice, however, courts of first instance primarily conduct these proceedings in written form. This tendency has significantly diminished the effectiveness of judicial protection of individual rights and freedoms. Even when a private participant explicitly requests an oral hearing in their complaint, the court often proceeds with a written review without providing any justification.

We argue that such an approach deprives the complainant of the opportunity to present their case in person, to question the public participant, and to draw the court's attention to relevant materials in the case file. This practice substantially restricts the effective exercise of the right to judicial protection.

It is also important to note that, under judicial guarantee proceedings, oral hearings are to be conducted based on the principles of party equality and adversarial procedure. This framework ensures that both public and private participants in the proceedings have equal opportunities to present their arguments and objections. Moreover, the Code stipulates that the review of such complaints should follow the general procedure applicable to judicial hearings.

Since the purpose of appealing a procedural act by a public participant is to assess its legality, the scope of the court's authority in such cases is limited. Specifically, the court is not permitted to evaluate matters that are to be resolved later during the trial on the merits of the case. Within judicial guarantee proceedings, the court may, upon determining the illegality of a procedural act, oblige the public participant to restore the violated rights of the affected individual. Thus, the evidentiary process involved in the examination of such a complaint is distinct from the evidentiary process used in the trial on the merits of a criminal case.

The Code provides that, in the context of examining a complaint, the court may request case materials from the relevant public participant in order to make a lawful and well-reasoned decision. Reviewing these materials implies the court engages in evidentiary activities: it evaluates the materials and makes a ruling based on its findings. For example, if a victim appeals a supervising prosecutor's decision not to initiate criminal prosecution, the court must examine the factual circumstances that led to that decision. In doing so, it assesses whether the appeal is substantiated or unfounded.

During the examination of the appeal, all materials submitted to the court are reviewed, and participants in the proceedings are given the opportunity to confirm or challenge the circumstances forming the basis of the appeal. The court evaluates these materials in order to render a lawful and well-founded decision. This examination may include not only materials already present in the case file, but also any newly submitted evidence.

Given the specific nature of appeals against pre-trial procedural acts, it is necessary to predefine the key issues that form the subject of judicial examination. Before considering the appeal, the court must clarify the following:

a) Whether the procedural act is subject to judicial appeal in accordance with Article 299 of the Code;

b) Whether the procedural act of the public participant has restricted or violated the fundamental rights and freedoms of the private participant;

c) Whether the procedural act may infringe upon the individual's right to a fair trial;

d) Whether the issues raised in the appeal are matters that fall within the scope of judicial examination at the trial stage.

The court's evidentiary activities are directly linked to the scope of these issues. For example, if the defense appeals a decision to initiate criminal prosecution on the grounds of lack of justification, or challenges the appointment of an expert examination on the basis that it is unlawful, the court may refuse to admit such appeals. This is because these issues fall within the domain of the trial on the merits and should be addressed during that phase of the proceedings.

Depending on the nature of the procedural act being appealed, the court's authority and scope in examining the case materials may vary. For example, when a person who has reported a crime appeals the investigator's decision—typically in the form of a letter—refusing to initiate criminal proceedings, the court is required to verify the factual basis suggesting the occurrence of a criminal act.

The Criminal Procedure Code sets a deliberately low threshold for initiating criminal proceedings based on a crime report. According to this principle, *initiating criminal proceedings should be the rule, while refusal should be the exception.* However, investigative practice does not always align with this standard. The principle arises from the legal provision that investigative bodies do not possess the authority to verify the existence of a crime prior to the initiation of criminal proceedings.

Under the previous Criminal Procedure Code (1998), investigators were authorized to carry out preliminary verification actions before deciding whether to open a case. These included collecting explanations, inspecting the scene, and

appointing forensic examinations—actions that allowed the investigator to gather preliminary evidence and make an informed decision. By contrast, the current Code eliminates this pre-investigation stage. Investigators are now limited to the information provided in the report or attached to it. As a result, when both an occasion and a legal basis exist, the investigator is obligated to initiate criminal proceedings without further verification.

This regulatory change leads to a practical challenge: if an investigator refuses to initiate proceedings and that decision is appealed in court, the court faces difficulty in thoroughly evaluating the complaint. This is because the investigative body was not empowered to verify or assess the report's claims, and thus the evidentiary foundation for judicial review is weak or nonexistent.

A somewhat different situation arises when appeals concern decisions such as refusal to initiate criminal prosecution, termination of prosecution, or closure of criminal proceedings. In these cases, the court examines not only whether the responsible body acted within its powers and followed the correct procedural steps, but also evaluates the evidentiary foundation upon which the contested decision was based. The court must assess the specific circumstances that form the subject of the appeal. A thorough review of the case file, as well as any supplementary materials submitted by the appellant, is essential for the court to issue a lawful and well-reasoned decision.

Of particular interest is the approach advocated by N. S. Kurisheva, who argues that when a court examines the legality of a challenged action or decision, it should actively organize the evidentiary process during the hearing. This includes facilitating the parties' presentation of evidence, maintaining an orderly sequence of evidentiary submissions and examinations, and documenting the necessary procedural steps to ensure a comprehensive and fair review[2].

Today, the issue of using inadmissible evidence in pre-trial proceedings is of significant practical importance—particularly when such evidence forms the basis for restricting a person's constitutional rights and freedoms. In practice, these violations occur both during the execution of operational-investigative measures before the initiation of criminal proceedings and during investigative and covert investigative actions after proceedings have begun.

A review of case law reveals that many petitions submitted by investigators to the court—seeking to restrict a person's freedom or privacy—are predominantly based on such inadmissible evidence. The defense often lacks a meaningful

[2] Kurysheva, N.S. *Issues of Proceedings on Complaints Against Actions (Inaction) and Decisions of the Inquirer, Investigator, and Prosecutor: Monograph.* Moscow: Yurlitinform, 2009, p. 85.

opportunity to challenge the legality of this evidence, and during the examination of these petitions, the evidence cannot be formally excluded as inadmissible. Consequently, criminal prosecution bodies repeatedly rely on this evidence throughout pre-trial proceedings to curtail constitutional rights.

As a result, the defense is forced to wait until the case is transferred to court, or hope that the preliminary investigation body recognizes the inadmissibility of the evidence and refrains from presenting it at trial. Although numerous examples of this practice exist, it is our firm view that, in the interest of protecting individual rights and legitimate interests, such unlawful practices must be terminated. The bodies conducting proceedings should be strictly prohibited from submitting inadmissible evidence to the court.

Conclusion

The procedure of judicial guarantees is a crucial and foundational institution within criminal proceedings, ensuring the protection of the rights and legitimate interests of private participants. It serves as a check on public participants, preventing the unjustified exercise of procedural actions that infringe upon individual rights and freedoms. Given that the current Criminal Procedure Code was newly adopted, challenges remain in the effective implementation of this institution. These challenges call for thorough scientific research and the development of appropriate legal regulations to further advance and refine the legislation.

Conflict of Interests
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Ethical Standards
The author affirms this research did not involve human subjects.

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THE CONCEPT AND THE FUNDAMENTAL GUARANTEES OF LEGALITY OF SECRET INVESTIGATIVE ACTIONS

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Abstract. This article discusses a number of important issues regarding the implementation of secret investigative activities. Secret investigative operations, as operations carried out during pre-trial proceedings, have specific tasks aimed at detection and prevention of crimes, collection of evidence and identification of the person who committed the crime. In the legal and linguistic sense, "covert" means a secret, non-public, inconspicuous practice, the purpose of which is to provide evidence necessary for the investigator's actions. The probative value of secret investigative operations is largely determined by the protection of the guarantees provided by law during their implementation. Compliance of national legislation with international standards is essential to ensure the legality of covert investigative activities. The position of the European Court of Human Rights on this issue emphasizes that the competent authorities of the states can carry out secret operations to ensure the protection of public safety, but there must always be clear and effective guarantees for the protection of human rights. The guarantees established by the state for the implementation of secret investigative activities are intended to exclude human rights violations, possible interferences and abuses. For example, according to Article 243 of the Criminal Procedure Code of the Republic of Armenia, secret investigative actions are carried out based on a court order and only in the event that gathering evidence by other means is impossible. In the case of conducting secret investigative activities, priority is given to the proportionality of the interference with personal data and the protection of private life and fundamental rights. The legislation of Armenia also sets clear restrictions on the scope of persons against whom secret actions can be carried out, including with the permission of the court. The author concludes that secret investigative actions, being an independent type of state activity carried out by law enforcement agencies within the scope of the functions assigned to them by law, are subject to implementation in accordance with the nature of that activity, its purpose and the legality conditions set by the legislation,

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always guaranteeing a fair balance between the public interest and the rights of the individual.

Keywords: *secret investigative operations, legality, fundamental guarantees, human rights and freedoms, criminal trial, evidence collection, court decision, criminal proceedings, RA Constitution, European Court, private communication, public security.*

Introduction

Covert investigative actions are carried out during pre-trial proceedings to solve specific problems, the resolution of which must be ensured as a result of their implementation. The purpose of covert investigative actions, in a broad sense, is to combat crime; in this context, it is to prevent and solve crimes, for which purpose information is collected, evidence relevant to the resolution of the case is obtained, and persons who have committed crimes are found.

In a philological sense, covert means hidden, not publicized, not visible, not noticed, not outwardly expressed, having no external manifestation[1]. From a legal point of view, in particular, L. O. Krasavchikova defines a secret as certain information about the actions of a certain person (citizen, organization, state) that is not subject to publication[2].

Chapter 30 of the current RA Criminal Procedure Code is dedicated to the legal regulation of covert investigative actions. Although they are not new criminal procedural institutions in their nature and content, their systematic incorporation into criminal procedural legislation can be considered one of the innovations of the current code.

To get a general idea about covert investigative actions, it is necessary to refer to the views expressed by legal scholars on the matter.

For example, A. M. Baranov proposes to introduce a non-public method of collecting evidence into the Criminal Procedure Code and give them the quality of procedural actions[3].

According to K. S. Doronin, a covert investigative action can be characterized as a special procedural action intended to obtain evidence by covert (disguised) methods using special means. The participants in the criminal proceedings,

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[1] Eduard B. Aghayan, "Hayastan" (Armenia) Publishing House, Yerevan, 1976, p. 217. http://www.nayiri.com/imagedDictionaryBrowser.jsp?dictionaryId=24&dt=HY_HY&pageNumber=233

[2] Krasavchikova L. O., Private Life Under the Protection of the Law, 1983, p. 160.

[3] Doronin K. S., "The Concept of a Covert Investigative Action in Criminal Procedure" // Bulletin of Moscow University. Series 11. Law. 2017.

including the participants in the investigative actions, should not be informed about the purposes of their execution, with the exception of those carrying out the action[4].

B. M. Nurgaliev and K. S. Lakbaev noted that disguised investigative actions are aimed at clarifying the circumstances subject to proof during criminal proceedings and are carried out without notifying the participants in the criminal proceedings and those providing the information. They can be carried out only when the circumstances to be proved cannot be established otherwise.

Covert investigative actions can be defined as an activity carried out by order of the investigator during pre-trial proceedings on the basis of a court decision, within the competence of the investigating body, to protect human and civil rights and freedoms, state and public security from illegal encroachments, aimed at obtaining evidence relevant to the proceedings, if it is reasonably impossible to obtain that evidence by other means.

Ensuring the criminal procedural prospects of the results of covert investigative actions is directly conditioned by the observance of the guarantees of their lawfulness. The guarantees of the lawfulness of covert investigative actions are the procedural regulations and procedures that are designed to exclude violations of human rights during the performance of the actions under discussion, as well as to exclude various types of interference as much as possible.

Main Research

The legal basis for covert investigative actions as a specific area of the state's law enforcement activities is formed by the legal acts that contain legal norms regulating the public relations that arise, change, and cease during the implementation of the aforementioned actions. Among these, the Constitution of the Republic of Armenia is particularly important as the fundamental law of the state.

The Constitution, while enshrining the rights and freedoms of man and citizen, also defines the possibility of their restriction in the public interest. These rights can be restricted only by law for the purpose of protecting state security, the economic well-being of the country, preventing or detecting crimes, public order, health and morals, or the fundamental rights and freedoms of others.

Within the scope of covert investigative actions, the restriction of human and civil rights may relate, in particular, to rights enshrined in the Constitution, such as

[4] Nurgaliev B. M., Lakbaev K. S., "Covert Investigative Actions: History, Concept, Problems, Prospects" // Current Problems of Using the Situational Approach in Legal Science and Law Enforcement.

the inviolability of one's home, the freedom and secrecy of communication, and the right to respect for private and family life.

Article 29 of the 1948 Universal Declaration of Human Rights provides: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

In this context, it is necessary to refer to the position of the European Court of Human Rights that "when (...) a balance was struck between, on the one hand, the respondent State's interest in protecting security with the help of secret surveillance measures, and on the other hand, the seriousness of the interference with the applicant's right to respect for private life, the competent national authorities have a certain margin of appreciation in choosing the appropriate means to be used to achieve the legitimate goal of national security."

However, [according to the European Court of Human Rights], there must be sufficient and effective safeguards to prevent abuse. Thus, the Court takes into consideration all the circumstances of the case, for example, "the nature, scope, and duration of the possible measures, the reasons required for their ordering, the bodies authorized to permit, carry out and supervise them, as well as the type of legal remedy provided by national law"[5].

It is obvious that the implementation of covert investigative actions involves an interference with fundamental human rights and freedoms. Therefore, even when deciding on the choice of a particular covert investigative action, as well as throughout its implementation, it is necessary to take into consideration the positive and negative obligations assumed by the state regarding the protection of human rights and freedoms, while constantly maintaining the necessary balance between public and individual interests. In particular, as the Court of Cassation emphasizes in the case of Gor I. Sargsyan, based on the nature of operational-investigative activities, when choosing the type of a relevant measure and implementing it, the competent authorities must, in line with the principle of proportionality, also ensure adequate protection of the right to a fair trial, respect for private and family life, and other fundamental rights and freedoms[6].

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[5] See the European Court of Human Rights' judgment in the case of Roman Zakharov v. Russia, December 4, 2015, application No. 47143/06, paragraph 232; judgment in the case of Irfan Guzel v. Turkey, February 7, 2017, application No. 35285/08, paragraph 85.

[6] Moreover, the necessity of maintaining the necessary balance between public and private interests is also emphasized in point 4.4 of the Constitutional Court of the Republic of Armenia's decision DCC

In the case of Sefilyan v. Armenia, the European Court noted that in its case law regarding secret surveillance measures, the European Court has developed the following minimum safeguards that must be established by law to prevent abuse of powers: "the nature of the crimes that can be a basis for a surveillance decision; the definition of the categories of people whose telephones can be subject to wiretapping; the limited period of telephone wiretapping; the procedure to be followed for the study, use, and storage of the data obtained; the precautionary measures to be taken when providing this data to other parties; and the circumstances in which the recordings can or must be deleted or the tapes destroyed"[7].

The European Court also noted that the choice of measures aimed at achieving the pursued goals, while in principle falling within the state's own margin of appreciation, has a broad or narrow manifestation depending on the nature of the right to be protected. For example, "given the fundamental importance of the rights guaranteed by Article 8 [of the European Convention] to self-determination of identity and physical and moral inviolability, the margin of appreciation reserved to States in matters of home is narrower if the matter relates only to the rights protected by Article 1 of Protocol No. 1 [of the European Convention]"[8].

Thus, according to Article 8 of the European Convention:

1. "Everyone has the right to respect for his private and family life, his home and his correspondence."
2. "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 8 of the European Convention protects the secrecy of "private communication" regardless of the content (...) and form of the communication. This means that the protection of Article 8 applies to the secrecy of all "exchanges" through which individuals communicate with each other. (Frerot v. France, 12.06.2007, application 70204/01, § 53).

The task of national courts is to control and ensure that the activities of the competent authorities do not violate the rights defined by Article 8, Part 1 of the

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1526 of April 28, 2020, in the context of appealing decisions allowing the implementation of operational-investigative measures.

[7] See the European Court's judgment in the case of Sefilyan v. Armenia, October 2, 2012.

[8] European Court of Human Rights' judgment in the case of Gladysheva v. Russia, December 6, 2011, application No. 7097/10, paragraph 93.

Convention. According to Article 8, Part 2 of the Convention, interference with the rights defined by Article 8, Part 1 is allowed only when "it is in accordance with the law and is necessary in a democratic society (...) for the prevention of disorder or crime." Therefore, the decision allowing the interference must show how the national courts have applied Article 8, Part 2.

When choosing a specific type of covert investigative action, the idea of distinguishing the discretionary scope reserved for the state, based on the nature of the interference with a person's rights, is reflected in Article 242, Part 1 of the RA Criminal Procedure Code. According to this article, a covert investigative action can only be carried out when there are sufficient grounds to assume that it may result in obtaining evidence relevant to the given proceedings, and at the same time, it is reasonably impossible to obtain that evidence by other means.

One of the main goals of a democratic society is to limit the arbitrariness and abuse of state bodies. In this regard, the RA Criminal Procedure Code contains an important legal provision that establishes the guarantees for the lawfulness of covert investigative actions.

As a result of a systematic analysis of the norms of the RA Criminal Procedure Code, we can distinguish elements of the lawfulness of covert investigative actions, such as their duration, the circle of persons against whom they can be carried out, the types of crimes within which certain covert investigative actions can be carried out, the minimum threshold that must be overcome for them to be carried out, the conditions for the preservation or elimination of unforeseen results, as well as the scope and conditions for the use of special technical means, and so on.

However, it should be noted that the current RA Criminal Procedure Code, emphasizing the importance of the criminal procedural institution of covert investigative actions, has dedicated a separate norm to the guarantees of their lawfulness.

Thus, it follows from the formulation of Article 243 of the RA Criminal Procedure Code that such guarantees are:

- The non-absolute prohibition of the use of data obtained about a person during a covert investigative action under certain conditions.
- A specific circle of persons against whom certain covert investigative actions can be carried out.
- A specific circle of persons to whom the information to be obtained as a result of a covert investigative action may reasonably relate.
- The general deadlines for carrying out certain covert investigative actions, as well as their total duration.
- The specific grounds for terminating a covert investigative action.

- The direct prohibition of carrying out certain covert investigative actions when a person is communicating with their lawyer.
- The circle of special technical means and the subjects authorized to use them during the performance of covert investigative actions, as well as the conditions for their use.

If, during the performance of a covert investigative action, information, materials, and documents about a person were obtained, the receipt of which was not foreseen by the decision to perform the given action, then they cannot be used in the criminal proceedings, except in cases where the investigating body acted on the basis of a court decision and in good faith. It is possible, however, that as a result of a covert investigative action, information is obtained that, although containing data about a crime being prepared, committed, or having been committed, was not foreseen by the decision to carry out the given action. In order for such information not to go unnoticed, and on the other hand, for the covert investigative action not to be carried out for other, disguised purposes, the RA Criminal Procedure Code has provided for the mandatory requirement of the simultaneous presence of the following two conditions for the lawfulness of using such information, materials, and documents in the proceedings: a) the investigating body must have acted on the basis of a court decision, i.e., it must have performed the covert investigative action specified in the court decision under the relevant conditions set by the court decision, and b) the investigating body must have acted in good faith (RA Criminal Procedure Code, Article 243, Part 1).

Taking into consideration that the performance of covert investigative actions implies interference with a person's constitutional rights, the RA Criminal Procedure Code has limited the circle of persons against whom such actions can be carried out. When defining the circle of persons, the basis has been not only or not so much the person's status, but: a) the existence of facts about the person's alleged commission of a crime. For example, the covert investigative action of controlling digital, including telephone, communication can be carried out against a person who does not have any procedural status but about whom there are facts indicating the alleged commission of a crime. b) the existence of certain connections with the person who allegedly committed the crime. For example, the covert investigative action of controlling digital, including telephone, communication can be carried out with the close friend of the person who allegedly committed the crime, who is in constant telephone contact with the person who allegedly committed the crime.

As for the grounds for terminating covert investigative actions, it should be noted that they are clearly and exhaustively defined in the aforementioned legal norm, according to which a covert investigative action is terminated if:

1. the need for it has ceased.
2. the preliminary investigation has ended.
3. the period specified by the decision of the competent court or the general period for the performance of the covert investigative action has expired.

In general, ensuring the protection of the accused is one of the guarantees for the realization of the right to a fair trial. In this regard, it is extremely important for the legislator to establish guarantees for the realization of the right to defense in connection with the performance of covert investigative actions.

Thus, with the exception of the control of financial transactions and the imitation of receiving or giving a bribe, all other covert investigative actions are prohibited when the person against whom the action is to be carried out is communicating with their lawyer. In any case, information obtained as a result of monitoring such communication is subject to immediate destruction; otherwise, it would essentially mean violating a person's constitutional right to defense. The prohibition on collecting, storing, or using information or materials that constitute legal professional privilege is absolute; therefore, the exception provided for in the RA Criminal Procedure Code regarding the use of information constituting legal professional privilege obtained as a result of a covert investigative action is not applicable. This is the reason why the RA Criminal Procedure Code obliges the immediate destruction of information obtained as a result of monitoring communication with a lawyer, even if it was not initially intended to collect such information and it was only found during or after the covert investigative action that the person was communicating with their lawyer.

However, the legislator establishes exceptions to the general rule, particularly in the case of the implementation of the covert investigative actions of controlling financial transactions and the imitation of receiving or giving a bribe, which stems from the nature and specific purpose of the mentioned actions.

Thus, we can state that in connection with the communication between the accused and their defense attorney, the state, through the criminal prosecution bodies, must, on the one hand, refrain from unnecessary interference in these communications within the framework of its negative obligation, and on the other hand, within the framework of its positive obligation, guarantee the proper organization of these communications, ensuring the full protection of a person's fundamental rights[9].

As one of the important guarantees of the lawfulness of a covert investigative action, the RA Criminal Procedure Code has regulated the duration of such actions by setting time limits.

[9] The Court of Cassation's decision No. AVD/0028/01/16 of September 18, 2019.

Thus, permission to carry out a covert investigative action can be given by the court for a period not exceeding three months each time. However, regardless of the person's procedural status or the absence of such a status, the total period of any covert investigative action carried out against the same person cannot exceed twelve months in the same proceedings.

The investigating body is responsible for carrying out the covert investigative actions in the prescribed manner, on time, and effectively. From a tactical point of view, the correct choice of the time period for a covert investigative action is extremely important. Given the fact that a number of fundamental rights are restricted during their execution, they cannot be carried out for an excessively long period. In the case of such time limits, the primary question becomes when to start the covert investigative action. It is necessary to choose a time period during which a person is more likely to show active and proactive behavior, establish contacts with different people, or carry out a certain exchange of information.

The Constitution proclaims the right to life of everyone; "no one may be arbitrarily deprived of life"[10]. The European Court also repeatedly states in its decisions that Article 2 of the Convention places an obligation on the State to protect the right to life of everyone. In other words, the right to life places an obligation on the state to do everything possible so that a person's life is not endangered. This means that the preliminary investigation and investigating bodies must take all possible measures available to them to obtain all the necessary evidence related to the case. However, in all cases, the state undertakes to assume positive and negative obligations to protect a person's right to life, regardless of the effectiveness of the methods used to achieve the pursued goal. The above applies to the technical means used during the performance of covert investigative actions. The law enforcement agencies must under no circumstances allow the use of special technical means during the performance of covert investigative actions to cause harm to human life. The requirement to define the list of technical means used during the performance of covert investigative actions is conditioned by the fact that technical means that can cause harm to human life and health, as well as the environment, should not be used. It is forbidden to use special technical and other means intended for obtaining secret information (developed, programmed, adapted) and to perform covert investigative actions by state bodies, subdivisions, or natural and legal persons not authorized by the RA Criminal Procedure Code. As we have already mentioned, in this case, the investigating body, in accordance with the RA Criminal Procedure Code, performs the covert investigative actions.

[10] Article 24 of the Constitution.

Conclusion

In conclusion, we can state that the main prerequisite for ensuring the criminal procedural prospects of the results of covert investigative actions and their effective use is the unwavering observance of the conditions provided for by domestic legislation and various international legal acts during their performance. In other words, the credibility of the result of any covert investigative action is directly proportional to the observance of the guarantees of its lawfulness. Moreover, it should be noted that such guarantees are mainly related to the time limits of covert investigative actions, the specific circle of persons, the scope of special technical means used during their performance, and the subjects authorized to use them, and so on.

Thus, stating that covert investigative actions, being an independent type of state activity carried out by law enforcement agencies within the functions reserved for them by law, are subject to being carried out in accordance with the nature of that activity, its purpose, and the conditions of proportionality set by the legislation, they constantly guarantee a fair balance between the public interest and individual rights.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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PRACTICAL ISSUES IN THE APPLICATION OF THE PROCEDURAL INSTITUTION OF PRELIMINARY COURT HEARINGS

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Abstrakt. The new Criminal Procedure Code of the Republic of Armenia has introduced fundamental changes to the structure of proceedings in the court of first instance. The trial stage has been divided into three mandatory sub-stages: preliminary, main, and supplementary hearings, each having its own distinct procedural tasks. Preliminary hearings are considered a new, independent procedural institution, the purpose of which is to eliminate shortcomings made in the previous stages and to prepare the proceedings for the main hearings.
During the preliminary hearings, the court examines a number of strictly defined issues, including the matter of preventive measures, as well as the scope and admissibility of evidence.
In practice, however, the legal regulations regarding the issues subject to discussion during the preliminary hearings are applied inconsistently, which prevents the realization of the content originally intended in those regulations.
The article highlights the most common violations encountered in legal practice and presents practical recommendations aimed at ensuring the purposeful application of the institution of preliminary hearings.

Key words: *Preliminary hearing, Criminal Procedure Code, Admissibility of evidence, Evidentiary scope, Judicial efficiency, Equality of arms, Adversarial principle, Preventive measures.*

Introduction

The enactment of the new Criminal Procedure Code of the Republic of Armenia marks a profound shift in the structure, logic, and operation of criminal adjudication in the court of first instance. One of the most significant innovations

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introduced by the Code is the tripartite division of the trial stage into three successive and interdependent sub-stages: the preliminary court hearing, the main court hearing, and the supplementary court hearing. Each of these sub-stages serves a distinct procedural function and contributes to the overall efficiency, fairness, and legality of the criminal trial process.

Among these, the preliminary court hearing stands out as a novel procedural institution in Armenian criminal law. It serves a dual purpose: first, to address and correct deficiencies arising during the pre-trial phase, and second, to establish the necessary legal and procedural preconditions for the smooth and effective conduct of the main court hearing. The introduction of this sub-stage is intended to reduce procedural delays, ensure compliance with fundamental rights, and enhance the practical implementation of the adversarial principle—core elements of a modern criminal justice system aligned with international human rights standards.

The matters considered during the preliminary hearing are diverse and often complex. They range from jurisdictional and recusal motions, to the review of preventive measures, to issues related to the scope and admissibility of evidence. The procedural handling of these issues is governed by a strict framework established by the Code, particularly Article 311. Yet, despite clear legislative intent, the practical application of this institution has revealed significant inconsistencies and challenges. Courts frequently misinterpret or disregard procedural requirements, rely on outdated practices inherited from the former legal regime, and apply asymmetrical standards to the prosecution and the defense—particularly in matters concerning evidentiary scope and admissibility.

One particularly contentious area involves the assessment and delimitation of evidence to be examined during the main hearing. Although the Code mandates a reasoned justification for the inclusion of each piece of evidence—based on relevance and necessity—courts often bypass this requirement, especially in relation to prosecution evidence. Similarly, motions to exclude inadmissible evidence, even when based on formal and readily verifiable grounds, are often deferred under the pretext of requiring substantive analysis. Such practices undermine the equality of arms between the parties and dilute the intended procedural safeguards of the preliminary hearing.

This article critically examines the practical implementation of the preliminary court hearing in Armenia, identifying the main procedural and interpretative issues that hinder its effectiveness. It assesses the gap between legislative design and judicial practice, and argues for a more consistent, purpose-oriented application of this sub-stage. By doing so, the article aims to contribute to the broader discourse on procedural reform and judicial efficiency in transitional legal systems, while

offering concrete recommendations for aligning courtroom practices with both domestic law and international fair trial standards.

Discussion

The new Criminal Procedure Code of the Republic of Armenia (hereinafter "the Code") has fundamentally transformed the proceedings in the court of first instance in terms of content, structure, and terminology governing legal relations. The process of adjudicating charges now consists of three successive mandatory sub-stages: **preliminary court hearings**, **main court hearings**, and **supplementary court hearings**. Each of these sub-stages has distinct content and internal logic designed to ensure proper and efficient implementation of this central phase of criminal proceedings[1].

In each sub-stage, the court, with the participation of the parties, discusses and resolves specific matters clearly defined by the Code. Transition to the next sub-stage excludes the possibility of reverting to the previous one. For instance, while errors made during preliminary hearings may be rectified in the main hearings, procedural rules do not provide for correcting errors from the main hearings in the supplementary hearing.

The **preliminary court hearing** — rightly considered an independent procedural institution—is a novelty in Armenian criminal procedure. It encompasses preparatory procedural actions with two key objectives:

1. **To eliminate deficiencies** of pre-trial proceedings;
2. **To establish the necessary preconditions** for smooth and effective conduct of the main court hearing.[2]

The matters discussed in this sub-stage inevitably pertain to any criminal proceeding or may do so under certain circumstances. Some issues aim to ensure the **lawfulness of the court proceedings** (e.g., motions for recusal or jurisdiction), others to establish **conditions for effective adjudication** (e.g., motions to terminate prosecution or exclude inadmissible evidence), and still others aim to **safeguard the rights and lawful interests of participants** (e.g., issues regarding preventive measures or civil claims).

The court addresses these matters in the sequence prescribed by Article 311 of the Code. Initially, the Code provided that only urgent procedural actions could be

[1] See A practical guide to conceptual solutions, innovative approaches and key institutions of the new RA Criminal Procedure Code, Yerevan, 2022. page 456.

[2] See Ghazinyan G., Tatoyan A., Preliminary Court Hearings in Criminal Proceedings. Journal State and Law, N 1(35) 2007, pages 265-273; Dilbandyan S. Collected Scientific Works of the Faculty of Law, Yerevan State University. Yerevan, YSU Press., 2015, pages 160-173.

undertaken before transferring the case to the competent court—e.g., if a defendant's pre-trial detention was about to expire, the court would decide on extending or modifying it before transferring the case.

However, this procedural arrangement was often ignored in practice, possibly due to a lack of awareness. This led to difficulties regarding preventive measures during this phase. As a result, Article 311(2) was amended in 2022 to clarify what had already been implicitly stated in Article 263.

Now, the Code expressly allows for the court to prioritize examination of preventive measures — even before addressing recusal or jurisdictional issues — either upon a party's motion or ex officio.

A question arises: if a previous judge has already ruled on a preventive measure but recused himselfe or the case is reassigned to another judge, must the new judge revisit the matter? The answer is unequivocally yes. This stems from the provisions of Articles 310 and 311, which require the judge, upon receiving a criminal case, to assume jurisdiction and schedule a preliminary hearing within three days, during which all issues listed in Article 311(1) must be considered. Furthermore, Article 18(3) mandates that the court must immediately release any person unlawfully or unjustifiably deprived of liberty. Denying the newly assigned judge the opportunity to reassess a preventive measure would reduce this safeguard to a mere formality.

Another practical issue concerns the order of addressing matters during the preliminary hearing. Occasionally, parties request to prioritize unrelated but relevant matters, such as the use of special protective measures, preservation of physical or documentary evidence, lifting asset freezes, or conducting hearings in the defendant's absence. Courts sometimes reject these motions citing Article 311(1), or they grant them based on procedural efficiency. However, this challenge is largely organizational: if preliminary hearings were held in short, successive sessions, the need to alter the sequence of issues would not arise.

Among the matters discussed at this stage are those crucial for ensuring the effectiveness of the main hearing, particularly the scope of evidence to be establised and issues related to the admissibility of that evidence. These two issues prompted the inclusion of this sub-stage in the first place, with the aim of facilitating orderly proceedings and ensuring the effective implementation of the adversarial principle. Determining the scope of evidence to be examined is a key issue. Parties must identify the evidence they believe should be reviewed during the main hearing. Embracing the principles of equality and adversariality, the Code requires each party to justify why a specific piece of evidence is relevant and necessary. If a party fails to do so convincingly, the court may reject their proposal to examine it.

This process does not require full reproduction or disclosure of the evidence at this stage. The proposing party must simply and clearly establish its connection to a fact in dispute. Merely listing evidence in the indictment's annex does not guarantee its inclusion in the main hearing unless relevance is proven.

This rule resolves two key issues:

1. It eliminates previous unjustified imbalance between parties, where all prosecution evidence was automatically accepted, but defense evidence had to be individually assessed, possibly violating the "equality of arms" principle under Article 6 of the European Convention on Human Rights;

2. It promotes efficiency by limiting the evidentiary mass to only relevant items, relieving the court and parties from analyzing all case materials.

However, in practice, courts often limit this discussion to simply listing the prosecution's evidence, without requiring justification. Higher standards are usually applied to the defense, putting them at a disadvantage.

A widespread practice is for courts to include only existing evidence from the case files, excluding newly submitted items from the evidentiary scope. Some judges justify this by stating that only existing evidence can be included, and all other motions must wait until after the main hearing. This practice contradicts the relevant provisions of the Code and undermines the purpose of this phase.

Another crucial issue at this stage is assessing motions to declare evidence inadmissible. Unlike past practice, the Code now limits the court's discretion in determining the order of examining evidence, making it a matter of clear legal regulation. Still, the evidentiary scope is not final and may change—e.g., if certain items are declared inadmissible, further evidence is added, or examination of some items is limited.

Yet, many courts, relying on old habits and ignoring current procedural rules, unilaterally dictate the order of evidence examination, guided by perceived expediency rather than law.

One major step in improving the main hearing's effectiveness is addressing admissibility during the preliminary hearing. Only evidence already included in the evidentiary scope can be reviewed for admissibility. Importantly, inadmissibility at this stage must be obvious and not require content examination—e.g., evidence collected by unauthorized investigators, actions exceeding judicial warrants, or expert opinions issued by unqualified individuals.

In practice, however, courts often refuse to declare evidence inadmissible at this stage, arguing that it requires content analysis—even in cases where it is clearly unnecessary. Courts even claim that formal aspects of evidence require substantive

examination, which is simply a pretext to delay rulings on admissibility. This reluctance stems from outdated stereotypes shaped by the previous legal regime.

A shift in this approach will only occur when courts recognize that they themselves benefit from proper implementation of this sub-stage. As noted, it is intended to improve both the efficiency and smooth conduct of the main hearing.

Conclusion

The Code has introduced an effective sub-stage that, if implemented by courts in a manner consistent with its purpose and spirit, can significantly enhance the efficiency of court proceedings and strengthen adversarial elements at this phase.

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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SEPARATION OF THE FUNCTIONS OF THE HEAD OF THE INVESTIGATIVE BODY AND THE SUPERVISING PROSECUTOR IN THE CONTEXT OF RELATIONS BETWEEN THE PUBLIC PARTICIPANTS IN THE PROCEEDINGS

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Abstract. This article addresses the fundamental issue of distinguishing the functions of organizing, managing, supervision and oversight of the preliminary investigation. Acknowledging that this issue is not new in the theory of criminal proceedings, the author first outlines its historical background and identifies the factors that have prevented its resolution to this day.

Subsequently, by presenting the existing theoretical approaches to the content of the aforementioned functions, the author concludes that there are no objective and applicable criteria for their delineation.

Based on a combined analysis of the powers vested in the supervising prosecutor and the head of the investigative body, the author concludes that the legislature has failed to implement the "one subject – one function" concept, which is proclaimed as the foundation for regulating the relationships between public participants in criminal proceedings. Although each has been formally assigned a distinct function, in practice, they have also been endowed with powers that are inherent to the function of the other participant. Given the organic interconnection between the functions of organizing, directing, supervising and overseeing the preliminary investigation, the author considers the overlap of certain powers between the supervising prosecutor and the head of the investigative body to be natural, however, the author criticizes the authority granted to the supervising prosecutor to annul procedural acts issued by the head of the investigative body that pertain to the organization of the investigation.

Keywords: *public participant in the proceedings, Prosecutor, Head of the Investigative Body, Chief of the Investigative Division, supervision, oversight, organizing the preliminary investigation, procedural management, functional separation.*

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1. Introduction

The delineation of the directions of public criminal procedural activity is one of the most contested issues in criminal proceedings, an issue that, although it has long concerned both legal scholarship and practice, remains unresolved to this day due to both objective and subjective factors. The point is that public criminal procedural functions are closely interrelated, and the delineation of the powers arising from them presents a truly serious challenge for the science of criminal procedure. On the other hand, the issue of differentiating these functions has consistently been influenced by institutional interests, and discussions on the matter have been conducted not so much with the aim of finding the best solution to the underlying problem, but rather with the objective of expanding spheres of institutional influence. The issue of delineating the powers of public participants in criminal proceedings has always been accompanied by institutional ambitions of various bodies to be regarded as the "master of the criminal proceedings", a tendency that has not only failed to contribute to resolving the problem, but on the contrary, has further exacerbated situations of conflict between criminal procedural functions.

Meanwhile, it is impossible to properly define and implement the legal status of procedural subjects and their interrelations without functional delineation. The duplication of procedural powers not only creates practical obstacles to their implementation, but also undermines values such as the autonomy of public participants in the proceedings.

2. A historico-theoretical analysis of the issue

2.1The Essence of the Issue:

The issue of the interrelations between the public participants in the proceedings is multifaceted and multilayered, encompassing questions concerning the correlation of all the functions assigned to them, among which the most relevant is the delineation of functions between the head of the investigative body and the supervising prosecutor. In light of the new Criminal Procedure Code designating the head of the investigative body as an independent procedural subject, the implementation of the "one subject – one function" concept, proclaimed as the foundational principle governing the interrelations of public participants in the proceedings, warrants examination, particularly in the context of the functional correlation between the head of the investigative body and the supervising prosecutor. In this regard, questions have solidified in theory and practice concerning whether the prosecutor, besides supervision, also exercises procedural control over the preliminary investigation; if so, what is the fully independent role

of the head of the investigative body in criminal proceedings; whether the function of organizing the preliminary investigation also implies procedural oversight of it; and if so, how these functions correlate with those of the prosecutor. It is important to emphasize that the issue is not merely the formal functional separation of these subjects, but rather whether, ultimately, the supervising prosecutor and the head of the investigative body, regardless of the names given to their functions, perform the same role in criminal proceedings or not.

2.2 The History of the Core Issue:

The issue of duplication of functions between the head of the investigative body and the supervising prosecutor has existed since 1963, when the investigative bodies were reconstituted as a relatively autonomous system within the Soviet Ministry of Internal Affairs, established as a distinct subordinate division. Investigative departments, divisions, and units were established, whose heads were entrusted with the authority to manage their operations and to exercise oversight over the propriety of the preliminary investigation. Shortly thereafter, the issue of vesting the chiefs of investigative subdivisions with procedural powers, aimed at ensuring the proper organization of the investigator's work, was brought to the agenda, but it was dismissed as a "violation of the investigator's independence and a duplication of prosecutorial supervision"[1].

Nonetheless, by virtue of directing investigators' work, the heads of investigative bodies gradually began to assume roles in specific procedural matters, as a result of which, pursuant to the amendments to the criminal procedure legislation of January 12, 1966, the chief of the investigative division was, for the first time, designated as an independent procedural subject, entrusted with the functions of overseeing and directing the investigation.

The 1998 Criminal Procedure Code granted the chief of the investigative division a procedural "semi-status", on the one hand, excluding them from the list of subjects of criminal proceedings, while on the other hand, under the general conditions of preliminary investigation, assigning them powers including monitoring investigators' timely execution of investigative actions, compliance with time limits for preliminary investigation and detention, execution of prosecutorial instructions and assignments from other investigators, as well as issuing directives to investigators to carry out certain investigative actions.

Through such regulation, by conferring primarily organizational powers on the chief of the investigative division, specifically, to monitor and supervise the

[1] Chistyakova, V.S. Bodies of Preliminary Investigation of Crimes and the Delimitation of Competence Between Them: Abstract of the dissertation. Moscow, 1964, p. 9.

execution of decisions already made in the case, the Criminal Procedure Code significantly alleviated the dual-subject nature of supervision and management functions over the preliminary investigation, a duality that would have become unmistakably evident following the abolition of the prosecutor's general supervisory role. During the effective period of this criminal procedure legislation, the functional conflict between the supervising prosecutor and the chief of the investigative division was indeed attenuated, primarily by assigning the latter an "institutional" role, by opposing "institutional" to "procedural" in legal interpretation, and by denying the existence of a procedural component within the powers of the chief of the investigative division. Moreover, due to the balance of influence between the investigative and prosecutorial systems, legal practice appeared to accept the purely institutional role of the chief of the investigative division, who almost never exercised their sole genuinely procedural power - the authority to issue instructions to conduct certain investigative actions.

By removing the chief of the investigative division from procedural matters related to ensuring the conduct of the preliminary investigation, the 1998 Criminal Procedure Code not only vested the supervising prosecutor with the powers necessary to exercise supervision over the legality of the preliminary investigation, but also directly defined their function of exercising procedural management over it.

2.3. Prosecutorial Supervision, Institutional Oversight, and Procedural Management over the Preliminary Investigation: A Theoretical Debate.

The discussions concerning the relationship between prosecutorial supervision, institutional oversight, and procedural management over the preliminary investigation remain rather restrained, creating the impression that authors interested in this issue either avoid a thorough analysis of the substantive content of these functions to refrain from acknowledging the overlaps between the prosecutor's and the head of the investigative body's roles or from questioning the status of either, or they limit themselves to noting merely formal distinctions that do not preclude the existence of functional duplication. For example, definitions of institutional supervision as "a system of actions and decisions related to the verification of the investigator's activities"[2] or as "an activity encompassing the verification of the legality and validity of procedural decisions, procedural

[2] Olefirenko, T. G. "Institutional Procedural Control as the Main Means for the Head of the Investigative Body to Ensure the Legality of the Preliminary Investigation," Historical, Philosophical, Political and Legal Sciences, Cultural Studies and Art History. Issues of Theory and Practice, 2014, No. 2, Part 2, pp. 148–150.

management of the preliminary investigation, and measures aimed at organizing the preliminary investigation and eliminating legal violations"[3], do not clearly specify the boundary between institutional oversight and prosecutorial supervision, where the former ends and the latter begins, or how procedural management over the preliminary investigation relates to both.

In more substantive approaches to the issue, the distinguishing factor between procedural oversight and supervision is identified as the "organizational component of the former, which implies that oversight primarily involves reviewing the activities of a subject operating under an organizational and legal subordination, whereas supervision is always exercised over a subject who is not subordinate"[4] and is carried out "without administrative interference" in their activities[5].

According to theorists, another distinction between the functions under discussion is that, "in the case of oversight, its object is subject to a comprehensive examination, assessing not only the legality of the actions taken but also their justification, expediency, and the overall effectiveness of the preliminary investigation, whereas the sole purpose of supervision is to verify whether the supervised activity complies with the law"[6].

The professional interpretation of the content of the procedural management function is based on the linguistic meaning of the term "to manage", which is understood as leading, guiding, and directing the preliminary investigation, that is, procedural powers that enable determining the course of the investigation and issuing instructions to the subject conducting the investigation regarding the performance of procedural actions or the adoption of decisions. Although there are opinions that "procedural management is an additional, yet by its nature independent, criminal procedural function compared to supervisory functions"[7], the more prevalent view is that it is "derivative of the prosecutor's supervisory

[3] Tabakov, S. A. Institutional Procedural Control over the Activities of Investigators and Inquirers of Internal Affairs Bodies: Abstract of the Dissertation for the Degree of Candidate of Legal Sciences. Omsk, 2009, p. 15.

[4] Spirin, A. V. "On the Theoretical Foundations of Distinguishing Prosecutorial Supervision and Procedural (Institutional) Control at the Pre-trial Stages of Criminal Proceedings." Bulletin of the Ural Law Institute of the Ministry of Internal Affairs of Russia, 2016, No. 1, p. 56.

[5] Kashtanova, Kh. Ts., & Shegebaev, I. B. Prosecutorial Supervision and Institutional Control: The Issue of Correlation. Bulletin of Omsk University. Law Series, 2018, No. 2(55), p. 172.

[6] Markelova, O. N. The Correlation Between Procedural Management, Prosecutorial Supervision, and Judicial Control. Humanities, Socio-Economic and Social Sciences, 2019, No. 9, p. 152.

[7] Solovyov A. and Yakubovich N., "Preliminary Investigation and Prosecutorial Supervision in Light of Judicial Reform," Zakonnost (Legality), 1995, No. 8, pp. 41–42. .

function and the investigative body head's oversight function[8] and either serves as a method for implementing them, or vice versa"[9]:

An analysis of the presented approaches clearly shows that they do not distinguish the discussed functions based on any tangible characteristic and do not allow for a clear determination of which procedural authority corresponds to which function and to which subject it should be assigned. Thus, the organizational-legal factor, which serves as the basis for distinguishing judicial oversight from supervision, is related not to the scope or nature of the investigative actions, but to the existence or absence of a service relationship between the body conducting those actions and the investigator, reflecting the subject-object dynamic rather than the substantive content of the function. However, the essence of any activity is determined not by the subject carrying it out, but by the specific characteristics of its content, particularly when the issue is whether the same function has been assigned to different bodies.

The core issue is not clarified by the alternative criterion either: by defining the object of prosecutorial supervision as solely the legality of the investigator's actions, and that of oversight as including, in addition, their expediency, this criterion not only fails to exclude, but in fact directly implies, that oversight is likewise aimed at ensuring the legality of the preliminary investigation. A linguistic analysis of the terms under discussion does not offer a solution either, as the terms "to supervise" and "to oversee" are used synonymously in explanatory sources and both denote the act of monitoring the execution of an activity[10].

The situation is further complicated by attempts to clarify the content of procedural management over the preliminary investigation and its relationship to the aforementioned functions. The presented approaches, while not denying that procedural management of the preliminary investigation aims to ensure both its legality and effectiveness, nonetheless fail to distinguish it clearly from either supervision or oversight.

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[8] Chebotareva I. Yu. "Certain Issues Regarding the Correlation Between the Functions of Procedural Management and Prosecutorial Supervision," Bulletin of Chelyabinsk State University, 2015, No. 17 (372), p. 171.

[9] Pobedkin A. V., "Some Problems Concerning the Content of the Procedural Powers of the Head of the Investigative Body," Bulletin of Voronezh State University. Series: Law, 2008, No. 2, p. 279.

[10] Aghayan E., Explanatory Dictionary of Modern Armenian, "Hayastan" Publishing House, Yerevan, 1976, Vol. 1, p. 899 and Vol. 2, pp. 930 and 1377.

3. The concept of the relationships between public participants in the proceedings and their implementation:

3.1. The "One Subject — One Function" Concept.

The new Criminal Procedure Code of the Republic of Armenia separately regulates the relationships among public participants in the proceedings by establishing the principle of functional differentiation and the "one subject—one function" concept, which requires each subject to perform only one function without interfering with or duplicating another's, and provides that their powers stem organically from their functions to create systems of checks and balances[11].

Accordingly, the Code establishes the prosecutor's responsibility, among other things, for the lawfulness of initiating, not initiating, and terminating criminal prosecution, as well as for the legality of the pre-trial proceedings and the application of restraint measures by public participants in the proceedings, thereby assigning to the prosecutor two functions within the pre-trial phase: initiating criminal prosecution and exercising oversight over the legality of the pre-trial proceedings. In order to ensure the legality of the preliminary investigation, the supervising prosecutor is authorized to verify compliance with legislative requirements for the receipt and registration of crime reports, determine the lawfulness of decisions not to initiate criminal proceedings, examine the materials of the criminal proceedings, resolve motions of recusal and self-recusal concerning the relevant public participants in the proceedings, review complaints against their procedural acts, and perform other related functions.

The relationships between the supervising prosecutor and other public participants in the proceedings have also been formulated with the intent of attributing to the prosecutor an exclusive mission of ensuring the legality of criminal proceedings, by providing that the supervising prosecutor is authorized to issue instructions to the head of the investigative body, the investigator, and the head of the inquiry body to terminate unlawful actions or neutralize their consequences, as well as to address the consequences arising from the annulment of their unlawful decisions. The Criminal Procedure Code authorizes the supervising prosecutor to instruct the investigator to clarify specific circumstances relevant to the proceedings, but does not grant the right to instruct the performance of particular evidentiary actions, considering that the method of clarifying relevant circumstances falls within the scope of effectively organizing the preliminary investigation.

[11] The Practical Guide to the Conceptual Solutions, Innovative Approaches, and Key Institutions of the New Criminal Procedure Code of the Republic of Armenia, p. 190. https://rm.coe.int/new-criminal-procedure-code-guideline-/1680a72908, last accessed: April 27, 2025.

The current Code also designates the head of the investigative body as an independent participant in the proceedings, establishing their responsibility for the proper organization of the preliminary investigation conducted by investigators under their direct authority, including ensuring its effectiveness. Although the legislator referred to the function of the head of the investigative body not as "management of the preliminary investigation" but as its "organization", which may suggest a purely administrative role, in reality the Code has eliminated the basis for attributing to this procedural actor merely an administrative-organizational presence, going so far as to replace the former "service-based" title of "chief of the investigative division" with the functionally meaningful procedural status of "head of the investigative body".

The powers of the head of the investigative body may be conditionally divided into those aimed at organizing the preliminary investigation and those directed toward managing it. In particular, the powers to assign the conduct of the preliminary investigation to an investigator under their direct authority, to transfer the proceedings from one investigator to another, to replace a removed investigator, to assign the investigation to an investigative team or to instruct another investigator under their authority to carry out specific investigative actions, and to submit a request for investigative assistance are all aimed at ensuring procedural conditions for the more effective conduct of the preliminary investigation. And the authority of the head of the investigative body to instruct an investigator to carry out a specific evidentiary action is the most direct expression of leading and guiding the preliminary investigation. It is the exclusive authority of the head of the investigative body to instruct the investigator not only to carry out a particular evidentiary action, but also to determine the conditions under which it is to be carried out.

3.2. The Failure and Impossibility of Functional Differentiation.

By expressing the principle of functional differentiation in this manner, the Code formally assigns to the head of the investigative body the function of managing the preliminary investigation, and to the supervising prosecutor the function of exercising supervision over its legality. By not assigning the function of managing the preliminary investigation to the supervising prosecutor or that of exercising procedural oversight to the head of the investigative body, the legislator has, at first glance, succeeded in avoiding the simultaneous attribution of supervisory, oversight, and managerial functions over the preliminary investigation to both subjects. However, whether functional differentiation has in fact been achieved between the supervising prosecutor and the head of the investigative

body, or whether they continue to perform identical activities within the criminal proceedings, must be examined in the context of their respective powers.

Thus, the Code also authorizes the head of the investigative body to monitor the performance by the investigator under their direct authority of evidentiary and other procedural actions, the execution of the prosecutor's decisions and both the prosecutor's and their own instructions, as well as compliance with the time limits for criminal prosecution and detention. Unlike the previously discussed powers, this authority of the head of the investigative body is not aimed at managing or organizing the preliminary investigation, but rather at ensuring the investigator's compliance with legal requirements by virtue of their hierarchical relationship. In such cases, the head of the investigative body does not decide what action should be taken or create the conditions for its execution, but rather ensures the investigator's fulfillment of their duties by virtue of their hierarchical relationship. Moreover, it should be emphasized that this purely supervisory authority of the head of the investigative body is unquestionably aimed at ensuring not only the effectiveness but also the legality of the preliminary investigation. The execution of the prosecutor's decisions and instructions, as well as compliance with the time limits for criminal prosecution and the detention of the accused, are integral components of the lawful conduct of the preliminary investigation; therefore, the head of the investigative body is vested not only with the authority to manage the investigation, but also with the power to supervise and oversee it for the purpose of ensuring its legality.

As for the supervising prosecutor, the question of whether they continue to exercise management over the preliminary investigation remains a relevant issue. By granting the supervising prosecutor the authority to issue instructions regarding the clarification of specific circumstances relevant to the proceedings, the legislator has effectively enabled the prosecutor to direct the investigation toward clarifying those circumstances, essentially amounting to managing it. Moreover, the inability to formally demand the performance of a specific evidentiary action does not, in practice, deprive the supervising prosecutor of the ability to determine which action is to be carried out, as such a demand may be expressed indirectly: for instance, by recording the fact that a particular action has not been performed and thereby clearly conveying the expectation or requirement for its execution.

Moreover, the supervising prosecutor's management of the preliminary investigation is inevitable and derives from their other procedural functions. His functions of instituting criminal prosecution and defending the public accusation necessarily imply his authority to determine essential circumstances for their effective exercise and to clarify them. It is also natural for the prosecutor to

formulate in some way a requirement to carry out a specific action in the instruction concerning the clarification of those circumstances, since his responsibility for clarifying them organically also implies his ability to indicate the method of clarifying those circumstances. It is unjustified to hold the supervising prosecutor or any other subject responsible for any procedural outcome without providing them with effective means to ensure that outcome.

Conversely, it is unnatural and constitutes a duplication of the head of the investigative body's function of organizing the preliminary investigation to grant the supervising prosecutor unlimited authority to overturn the investigative body head's unfounded and unlawful decisions and instructions. The point is that the supervising prosecutor's authority to annul the procedural acts of the head of the investigative body is not limited by anything, including the principle of functional separation, and he is entitled to annul all such instructions and decisions of the investigative body head, including those exclusively related to the organization of the preliminary investigation, not only on grounds of illegality but also for being unfounded. As a result, the supervising prosecutor, who does not have the authority to instruct the head of the investigative body on matters related to the organization of the preliminary investigation, for example, assigning it to an investigative team, may nonetheless, paradoxically, annul all decisions of the head of the investigative body, including the decision to establish an investigative team. Similarly, despite not being expressly authorized to decide which evidentiary action the investigator must undertake to clarify a circumstance material to the proceedings, the supervising prosecutor has the authority to annul the investigative body head's instruction on the matter, including for any reason related not to the legality but to the expediency of the action. In other words, although the supervising prosecutor is officially vested solely with the function of supervising the legality of the preliminary investigation, in practice, they are also empowered not only to guide the investigation and direct it toward clarifying specific circumstances but also to determine issues related to its effective organization.

4. Conclusion

The functions of organizing, managing, supervising and overseeing the preliminary investigation are deeply interconnected, and there are no clear criteria for their delineation that would preclude overlap or the duplication of procedural authorities arising from them.

By disregarding this circumstance and grounding the relationship between the supervising prosecutor and the head of the investigative body in the principle that each is to be assigned a single function that does not in any way overlap with that

of the other, the Criminal Procedure Code of the Republic of Armenia formally assigns to the supervising prosecutor only the function of supervising the legality of the preliminary investigation, and to the head of the investigative body the function of organizing it, thus ensuring the separation of functions only at a formal level. In practice, the head of the investigative body is entrusted not only with the functions of organizing and directing the preliminary investigation, but also with the function of exercising supervision and oversight over its legality and effectiveness. Similarly, in exercising his traditional function of supervising the legality of the preliminary investigation, the supervising prosecutor has also been vested with the authority to direct it.

Such an overlap of powers between the head of the investigative body and the supervising prosecutor is, for the most part, natural. Due to the organic interrelation of these functions, the legislature has neither succeeded, nor could it have succeeded in vesting the supervising prosecutor and the head of the investigative body with fundamentally distinct or absolutely separable powers. At the same time, this circumstance should not serve as a basis for questioning the desirability of distinguishing between functions that may intersect, or between the subjects responsible for their execution. While acknowledging that the head of the investigative body cannot fail to exercise supervision and oversight over the preliminary investigation, just as the supervising prosecutor cannot in any way refrain from influencing the direction of the investigation, it must be accepted that the head of the investigative body cannot guarantee the legality of the preliminary investigation in the same manner as the supervising prosecutor, nor can the latter organize or direct the preliminary investigation in the same way as the head of the investigative body, who maintains direct hierarchical subordination over the investigator and exercises official supervision over them.

Therefore, the correlation of the powers of the head of the investigative body and the supervising prosecutor should not be formulated with the intention of formally assigning to each exclusively non-overlapping and absolutely separable functions, but rather on the basis that the supervising prosecutor's function may contain elements of the head of the investigative body's function and vice versa, while excluding the assignment of such powers to either that do not fundamentally and organically derive from their respective functions, that is, powers which not only include elements of another function or partially overlap with it, but are inherently aimed at exercising a function belonging not to that subject, but to another, as is the case with the previously criticized powers of the supervising prosecutor.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

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THE ISSUE OF THE COURT'S COMPETENCE TO RELEASE FROM CRIMINAL LIABILITY ON THE BASIS OF ACTIVE REPENTANCE

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Abstract. In this article, the author, taking into account the various approaches developed in legal practice, raises the issue of whether the court can be regarded as an authorized body entitled to exempt a person from criminal liability on the basis of active repentance.
On this matter, the author conducts a corresponding analysis and presents their own approaches.
As a result, the author, also relying on the idea that discretionary criminal prosecution refers to the prosecutor's ability, based on legal criteria and reasoned expediency, not to initiate or to terminate already initiated criminal proceedings, concludes that the existing practical approaches—according to which the court, by virtue of its function of administering justice, is already vested with the right to apply the institution of active repentance—are legally questionable. This includes concerns regarding the proper enforcement of the constitutional chain of "function – body – authority".

Keywords - *active repentance, prosecutor, discretionary criminal prosecution, court, to release from criminal liability..*

Active repentance is one of the traditional types of exemption from criminal liability provided by criminal legislation. It is aimed at economizing criminal-legal coercion in cases where a person who has committed a crime proves, through post-crime positive behavior, that subjecting them to criminal liability is pointless.

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As noted in theory, through the institution of active repentance, the state enters into a so-called "legal bargain" with the offender—prioritizing not so much the punishment of the offender as the protection of legally safeguarded interests and the prevention of potential future crimes1. This institution is, in essence, an alternative reaction by the state to the unlawful conduct of the person who committed the crime2.

A study of legal practice shows that, due to various approaches formed in reality—among other issues—questions especially arise concerning which subjects are authorized to apply this institution. In particular, whether it is to be applied by the prosecutor only, or also by the court3. Regarding this fundamental issue, it is important to note the following:

Article 6, Part 1 of the Constitution states: "State and local self-government bodies and officials are authorized to perform only those actions for which they are empowered by the Constitution or the law."

According to Article 12 of the Criminal Procedure Code (CPC): "1. Criminal prosecution must not be initiated, and initiated criminal prosecution shall be terminated if:
(…) 12) the person is subject to exemption from criminal liability under the provisions of the General or Special Part of the Criminal Code of the Republic of Armenia. (…)"

According to Part 2 of Article 33 of the same Code: "The court shall exercise other powers in cases provided by this Code."

Article 35, Part 2 of the CPC states: "The prosecutor is responsible for the legality of initiating, not initiating, and terminating criminal prosecution, the legality of pre-trial proceedings, the legality of applying coercive measures by participants in the process, for identifying circumstances necessary to file a claim in court for protecting public interests, and for the legality of appealing or not appealing a judicial act."

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[2] Sargsyan, A.A. Features of Regulating the Institution of Active Repentance in the Criminal Legislation of Certain Foreign Countries. Vector of Science of TGU, No. 1(40), 2020. Саргсян А.А. Особенности регламентации института деятельного раскаяния в уголовном законодательстве некоторых зарубежных стран. Вектор науки ТГУ. № 1 (40). 2020:

[3] **The decisions in the following criminal cases:** the decision of the First Instance Court of General Jurisdiction of Lori Province dated October 15, 2024, case no. **ԼԴ/0276/01/23**; the decision of the First Instance Court of General Jurisdiction of Armavir Province dated May 21, 2025, case no. **ԱՐԴ/0129/01/25;** and the decision of the Criminal Court of Appeal dated October 18, 2024, case no. **ԵԴ1/2227/01/23.**

Article 197 of the Criminal Procedure Code of the Republic of Armenia provides: "1. The supervising prosecutor is authorized not to initiate or to terminate criminal prosecution if all the conditions provided in Article 81(1) of the Criminal Code of the Republic of Armenia are present.

2. In the case provided in part 1 of this article, the decision not to initiate or to terminate criminal prosecution is made by the supervising prosecutor on their own initiative, based on the materials of the proceedings or upon the motion of the investigator."

Article 81 of the Criminal Code states: "1. If a person has committed a crime for the first time, they may be exempted from criminal liability if the act they committed is a minor or medium-gravity crime, they cooperate with the criminal prosecution authorities, do not dispute the act attributed to them, and, in case of caused damage, they have compensated or otherwise settled the damage caused by the crime."

Based on a **systematic analysis** of the above provisions, we believe that the legislator **has not granted the court** the authority to apply the material legal norm provided by **Article 81** of the Criminal Code, which concerns exemption from criminal liability on the basis of active repentance. This is justified, among other things, by the following reasons:

1. Why can't point 12 of part 1 of Article 12 of the RA Criminal Procedure Code be considered as a procedural (trial-related) mechanism for the implementation by the court of the criminal-legal norm stipulated by Article 81 of the RA Criminal Code regarding release from criminal liability on the grounds of active repentance?

In order to answer the mentioned question, it is first necessary to refer to the relationship between the norms enshrined in point 12 of part 1 of Article 12 and Article 197 of the RA Criminal Procedure Code, both with each other and with the regulations stipulating the norms for release from criminal liability enshrined in Articles 80–83 of the RA Criminal Code.

Thus, from the combined analysis of the legal norms enshrined in part 1 of Article 12 of the RA Criminal Procedure Code and Chapter 12 titled "Release from Criminal Liability" of the RA Criminal Code, it follows that both the grounds provided in part 1 of Article 12 of the RA Criminal Procedure Code for not initiating or terminating initiated criminal prosecution—including point 12 of that same part (the person is subject to release from criminal liability by virtue of the provisions of the general or special part of the RA Criminal Code)—and the legal norms provided in Articles 80, 82, and 83 of Chapter 12 of the General Part of the RA Criminal Code stipulating grounds for release from criminal liability (release

due to voluntary renunciation of the crime, reconciliation between the victim and the perpetrator, expiration of the statute of limitations), **unlike** the legal norm stipulated by Article 81 of the RA Criminal Code regarding release on the basis of active repentance, **are imperative**—meaning, they oblige the competent authority not to initiate criminal prosecution or to terminate it, if already initiated, in the presence of the relevant conditions. In other words, **only** the legal norm on release from criminal liability on the basis of active repentance, stipulated in Article 81 of the RA Criminal Code, is discretionary. Furthermore, among the legal norms of Chapter 12 of the General Part of the RA Criminal Code that define the grounds for release from criminal liability, **only** the legal norm defined in Article 81 of the RA Criminal Code (based on active repentance) has a specific norm in the RA Criminal Procedure Code regulating its application—**Article 197**, titled "Discretionary Criminal Prosecution."

On this basis, we believe that point 12 of part 1 of Article 12 of the RA Criminal Procedure Code can be considered as a procedural basis for applying the criminal-legal norms stipulated in Articles 80, 82, and 83 of the RA Criminal Code, but **not** for the application of the basis of release due to active repentance. In other words, when any of the grounds defined in part 1 of Article 12 of the RA Criminal Procedure Code excluding criminal prosecution are present, the relevant authorities are **obliged** to make a decision not to initiate or to terminate criminal prosecution. However, **only the prosecutor** has the exclusive discretionary authority not to initiate or to terminate criminal prosecution on the grounds of active repentance.

These conclusions are supported not only by the rules defined in Article 40 of the RA Law "On Normative Legal Acts" regarding the relationship between general and special norms but also by the interpretation of the aforementioned substantive and procedural norms according to Article 41 of the same law.

Therefore, we believe that in order to enforce the criminal-legal norm defined by Article 81 of the RA Criminal Code, the RA Criminal Procedure Code provides **no other** procedural basis besides the regulation defined in Article 197 of the RA Criminal Procedure Code. As for Article 33 of the RA Criminal Procedure Code, which defines the powers of the court, it must be stated that those powers activate other norms, whereas the substantive legal institution in question **does not** have a procedural regulation in the RA Criminal Procedure Code allowing it to be enforced by the court4.

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[4] Virab Hambardzumyan. Authorities Empowered to Exempt from Criminal Liability on the Basis of Active Repentance. Legality, Scientific-Practical Journal of the Prosecutor General's Office of the Republic of Armenia, No. 135, 2024. Վիրաբ Համբարձումյան, Գործուն զղջալու հիմքով քրեական պատասխանատվությունից ազատելու լիազորություն ունեցող մարմինները,

Moreover, the conclusion that the power to apply the institution of active repentance defined in Article 81 of the RA Criminal Code is granted **exclusively to the prosecutor** is also supported by a comparative analysis of the relevant legal regulations of the RA Criminal Procedure Code in force before July 1, 2022, and those in force after that date. Specifically, based on the study of the applicable legal norms of the aforementioned codes, it should be noted that the RA Criminal Procedure Code in force **before** July 1, 2022, explicitly granted the power to terminate prosecution based on active repentance **also to the court** (Article 37), whereas the **current** RA Criminal Procedure Code has granted such power **exclusively to the prosecutor** (Article 197). That is, it can be concluded that the will of the legislator has essentially changed in this regard.

Hence, taking the above into account, we **disagree** with the view formed in practice that in cases under judicial proceedings, where the ground defined in point 12 of part 1 of Article 12 of the RA Criminal Procedure Code is present, the court is empowered to apply that circumstance (active repentance) excluding criminal liability. We also do **not accept** the justification for such a view based on the argument that the presence of a special norm cannot be interpreted as a limitation on the application of the basis for release from liability by the court, or on the claim that no subject in criminal procedure can have broader powers than the court and that no basis for release from liability can exist without the court having the power to apply it.

2. The fact that the court does not have the authority to apply the criminal-legal norm stipulated in Article 81 of the RA Criminal Code is also substantiated by the following:

1) As already stated, release from criminal liability on the basis of active repentance is **discretionary** in nature, meaning the existence of the relevant grounds alone is **not sufficient** for the application of this criminal-legal institution. At the same time, taking into account the powers granted to the Prosecutor's Office by the Constitution, the legislator, as the procedural implementation mechanism for this substantive legal norm, has defined in the RA Criminal Procedure Code that it can be implemented **exclusively by the prosecutor**, through the legal regulations related to discretionary prosecution defined in Article 197. It must be stated that **discretionary prosecution** is the prosecutor's opportunity not to initiate or to terminate criminal prosecution on the basis of legal criteria and substantiated

Օրինականություն, ՀՀ դատախազության գիտագործնական պարբերական, N 135 2024, p. 187-203.

expediency5. That is, in an **adversarial criminal trial**, only the **prosecutor** has both the duty to initiate criminal prosecution and the **discretion** to assess its expediency. The principle of expediency essentially provides broad opportunities for the prosecutor to **save resources** and to counteract crime using **alternative, more effective mechanisms**67. In parallel, it is necessary to note that the principle of expediency assumes that when solving the question of initiating criminal prosecution, the following factors must be taken into account: the personality of the accused, the nature and circumstances of the act, the damage, the victim's position, and other conditions. That is, the existence of the conditions listed in part 1 of Article 81 of the RA Criminal Code **by itself** cannot indicate that release from criminal liability on that basis is **inevitable**, since the prosecutor, based on other considerations, **may refrain** from exercising this exclusive power. In other words, discretion is a **legal institution** that ensures a flexible and effective criminal prosecution process while respecting the principle of the rule of law. The prosecutor's discretion is more flexible because they assess public interest, the behavior of the accused, and both criminal-legal and social factors.

The above confirms that the constitutional function of initiating criminal prosecution—as well as the component of responsibility enshrined in part 2 of Article 35 of the RA Criminal Procedure Code—includes the **exercise by the prosecutor** of the discretionary prosecution power: to not initiate or to terminate prosecution either on their own initiative based on the materials of the proceedings, or based on the investigator's motion8. This also stems from the analysis of the components necessary for the implementation of the criminal-legal institution in question. Specifically, among the conditions required for the application of this institution, the legislator has, among other things, stipulated the condition that the person "**cooperates with the criminal prosecution authorities**." This condition, by its nature and content, is such that its evaluation, in our view, falls **outside the**

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[5] Problems of Simplification of Criminal Proceedings. Scientific-Practical Manual, Yerevan, 2011. Քրեական դատավարության պարզեցման հիմնախնդիրները, գիտագործնական ձեռնարկ, Երևան, 2011, p. 93-105.

[6] Golovko, L.V. Materials for the Construction of Comparative Criminal Procedure Law: Sources, Evidence, Preliminary Proceedings. // Proceedings of the Faculty of Law. Book – Moscow: Pravovedenie, 2009. Головко Л.В. Материалы к построению сравнительного уголовно-процессуального права: источники, доказательства, предварительное производство// Труды юридического факультета. Кн. – М.: Правоведение, 2009.

[7] Jacqueline Hodgson & Laurène Soubise, School of Law, University of Warwick, UK, Prosecution in France, file:///C:/Users/user/Downloads/ssrn-2980309%20(1).pdf:

[8] Similar regulations are also provided for, for example, in the legislation of France or the Netherlands (see the following links: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000047244643, https://wetten.overheid.nl/BWBR0001903/2020-01-01/#BoekTweede_TiteldeelI_AfdelingVijfde_Artikel167):

scope of the court's functions, and in the opposite case, the constitutional chain of "function–body–authority" may be disturbed. We believe that even the **present-tense** formulation of the above condition ("cooperates") should not be given merely formal significance, as it too characterizes the **exercise of the discretionary prosecution power** reserved to the prosecutor.

2) Regarding the issue of whether the prosecutor's decision to reject a motion for release from criminal liability on the basis of active repentance is subject to **judicial appeal** within the framework of procedural guarantees, it must first be noted that the **absence** of the court's authority to apply the criminal-legal norm in question **by itself** constitutes a proper justification for the condition defined in part 2 of Article 299 of the RA Criminal Procedure Code (pre-trial acts are also subject to judicial appeal if their review during the trial is impossible or will clearly deprive the appellant of a real opportunity to effectively protect their legitimate interests). As for the view formed in practice that, under such appeal procedures, a situation might arise where the court, within the framework of judicial guarantees of the legality of pre-trial acts, might review the legality of applying the active repentance institution, whereas during the trial stage the court's powers as the proceeding body would be artificially limited—then it must be stated that the relevant legal structures indicate that within the framework of **judicial guarantees**, the court must review **not the expediency**, but the **legality** of the prosecutor's exercise of authority. That is, at this stage of the proceedings, the court may assess whether the grounds and conditions for active repentance are present or not, or whether the prosecutor's discretion is properly reasoned or not. But **evaluating** whether the **application** of the prosecutor's discretion **is lawful or not**, beyond those criteria, in our view, is **not within the functions of the court**. In other words, by granting the court only the authority to evaluate the **legality** of the prosecutor's exercise of authority, the legal process's **balance** is ensured.

Thus, summarizing the above, we believe that the practical approaches formed—that the court, by virtue of its function to administer justice, is already empowered to apply the institution of active repentance —are problematic from a legal point of view, including in terms of **ensuring the constitutional chain of "function–body–authority."**

Conflict of Interests
The author declares no ethical issues or conflicts of interest in this research.
Ethical Standards
The author affirms this research did not involve human subjects.

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