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Comparative overview of the preliminary proceedings in the Republic of Serbia, Germany, and Italy

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1. Introduction

There have long existed two major criminal procedure systems in the world: the inquisitorial *(civil law)* system which originated and is predominant on the European continent, and the adversarial *(common law)* system which prevails in Great Britain and its former colonies. Countries such as Argentina, South Africa, Egypt, Russia, China, and Japan have criminal procedure systems derived from one of, and increasingly, a combination of, these models (Bradley, 2007, p. xvii). In the continental European system (i.e. the inquisitorial model), the court undertakes an active role in determining the truth of what has actually happened regarding a certain criminal matter and is responsible for introducing the relevant evidence necessary for the resolution of a dispute. In the adversarial system, two opposing parties, rather than the court, are responsible for the preparation and presentation of their cases before the court, and a court case often appears as a dispute between two lawyers.[1] Although these traditions seem quite different, the borrowings between the two systems have become so extensive that no one country's system in Western Europe can be described as demonstrating the pure version of either model (Spencer, 2005, p. 5).

Bearing in mind this modern trend, that is, intensive changes to the criminal procedure legislation of the countries following the continental European legal tradition,[2] it may be observed that the major feature of these reforms, in addition to the introduction of simplified forms of criminal procedure, is the reorganisation of the preliminary proceedings. This is significant because it is common knowledge that in the countries following the continental tradition the outcome of the main criminal proceedings substantially depends on the outcome of the preliminary proceedings. The reorganisation of the preliminary proceedings and the introduction of a new, simplified procedure is characterised by the adoption of a number of aspects of the adversarial system of criminal procedure, meaning primarily the U.S. In this respect, a crucial question arises: “Should we implement full reforms and replace the mixed criminal procedure with the accusatorial one or should we

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[1] From the perspective of judicial powers in criminal procedure, procedural theory makes a clear distinction between two concepts, English and French: in some systems, judge is not more than an arbitrator in a court dispute and the liability for the correctness of the decision does not rest with him or her, but, instead, with the jury, which is a typical feature of the English concept, whilst, in some other systems, the judge is obliged to administer and actively participate in the trial, and is also liable for the correctness of the decision, which is typical of the French concept – (Salas, revised by Alvarez, 2005).

[2] Interestingly, only in the last decade of the XX century, geographically speaking, as many as 25 European countries implemented significant reforms in the criminal procedure - (Pavišić, 2007, p. 327).

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implement partial reforms in such a way as to harmonise and adjust certain aspects of the Anglo-Saxon legal tradition to the principles typical of the continental European model of procedure?" (Đurđić, 2009; Krapac, 2007).

Depending on the model of the criminal procedure adopted, the organisation of the preliminary proceedings varies from country to country, that is to say, different models of investigation exist. In this regard, continental European countries differ in whether the investigation is conducted by an investigative judge or a public prosecutor. Hence, two models of investigation can be distinguished: the judicial investigation and the prosecutorial investigation with all its modifications. Depending on police powers and authorities in the prosecutorial investigation, we may also add the prosecutorial-police investigation (Bošković, 2013, p. 85). Contrary to continental European countries, England uses the concept of the police investigation, implying that the police are granted sufficient autonomy to conduct investigations; police officers represent the main body which may conduct investigations when they witness an offence or are alerted to the commission of an offence, or even initiate a criminal prosecution.[3]

The paper examines the scope and content of the reforms of preliminary proceedings in the Republic of Serbia, Germany, and Italy. The purpose of this research is to analyse the current concepts of investigation in the selected countries in order to reach certain conclusions on whether it is more appropriate to introduce prosecutorial or parallel, the so-called defence, investigation, or to potentially retain the concept of the judicial investigation, given the omnipresent tendency for more efficient criminal procedure.

2. Initial hypotheses and methods

In this paper, we address the following initial hypotheses: (1) the reform of criminal procedure laws of the countries following the continental European system should be partial – the mixed type of criminal procedure should not be completely replaced with the accusatorial one; (2) it is necessary to implement partial reform by adopting and adjusting aspects of the Anglo-Saxon legal tradition to the principles typical of the continental European model and in this context introduce the prosecutorial investigation; (3) the prosecutorial investigation should be characterised by a new position of the public prosecutor who becomes *dominus litis* of the investigation, a body collecting evidence for the prosecution, conducting preliminary proceedings, and having instructing powers towards other authorities, primarily the police; and (4) when conducting an investigation, the public prosecutor should be objective and impartial, act as a state authority rather than a typical party to the criminal proceedings, whereby there is neither room nor justification for introducing the defence investigation that would allow the defendant and his or her defence counsel to conduct their own investigations.

In analysing reforms of the preliminary proceedings in the selected countries, the legal dogmatic method, along with the sociological method, was used to gain a deeper insight of positive procedural norms, which enabled us to conduct a comparative evaluation of other procedural laws. Secondly, the content analysis was used to examine the domestic and foreign scientific literature that addresses the issues of prosecutorial and defence investigations, as well as relevant provisions of the criminal procedure laws, while the comparative method was used to examine and compare the concept of investigation in the criminal procedure laws of the selected countries. Finally, other methods, such as induction, deduction, synthesis, analysis, and description, were used where necessary.

3. Critical analysis of the preliminary proceedings in the Republic of Serbia

Following the modern European tendencies, the Republic of Serbia enacted the new CPC in 2011 (Official Gazette of the Republic of Serbia, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 i 55/2014), which entered into force on 15 January 2012 for offences within the jurisdiction of the Public Prosecutor's Office with special jurisdiction (Prosecutor's Office for Organised Crime and Prosecutor's Office for War Crimes), while the remainder of the CPC entered into force on 1 October 2013. The new CPC brought a number of new procedural rules untypical of the countries following the continental European legal tradition, including Serbia. The main purpose of enacting the new CPC was to shift from the concept of judicial investigation to the prosecutorial investigation. However, it should be noted that the prosecutorial investigation is not a feature of the adversarial model of criminal procedure but rather the concept that predominates in Europe today, including all its variations. The essence of the prosecutorial investigation is that several actors are involved in conducting investigations, which is similar to the judicial investigation, except that the public prosecutor is the main actor in the criminal proceedings because he or she issues investigation orders, conducts investigations, and may assign to the police the undertaking of certain investigative actions (Bošković, 2013, p. 85). The public prosecutor plays a pivotal role in the prosecutorial investigation. The police must execute the public prosecutor's orders, but can undertake certain actions on their own authority, while the role of the judge for the preliminary proceedings is primarily limited to the protection of fundamental human rights and liberties, particularly those of the defendant, during the preliminary proceedings.

[3] In England, the autonomy of the police during the investigation is reflected primarily in the fact that, when gathering evidence on the committed criminal offence and its perpetrator and when undertaking certain evidentiary or criminal tactical actions, the police do not need prior approval from the public prosecutor's office and are not even obliged to report to the Crown Prosecution Service on the course of the investigation. For more details on police investigations in England, see: Feldman, 2007, Zander, 2007, Bošković, 2014.

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