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PRESUMPTION IN FAVOUR OF RELEASE AS A MEAN TO OPTIMIZE ECONOMIC PROCESSES

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Abstract

In Russian criminal proceedings, pretrial detention is quite often chosen as a preventive measure. A significant part of the federal budget is spent on the keeping of suspects (accused) in places of detention. It is not uncommon when such a severe preventive measure is chosen unjustifiably and inappropriately, resulting in appeals against decisions to choose detention not only in a national court, but also in the European Court of Human Rights, awarding appropriate compensation to those illegally detained. The aspiration to meet international standards in the administration of justice and the clear need to optimize and update the system of preventive measures require the search for modern legal means capable of changing the current situation. The updating of issues related to the choice of detention is connected with a number of economic, political and legal factors. In the present study, the attention is paid to the factors that caused the need to apply the presumption in favor of release when choosing measures of restraint to a suspect (accused) in criminal proceedings of Russia. The authors argue that its application will ensure a balance between private and public interests in criminal proceedings and justify the rules of its action. The author's definition of a presumption in favour of release is given, which is understood as the assumption that the accused in a criminal case may be limited in his or her right to personal freedom as long as his or her detention is consistent with a real public interest.

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Keywords: Russian criminal justice, pretrial detention, presumption.

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1. Introduction

Contemporary Russian realities require rethinking the existing approaches to the system of preventive measures in criminal proceedings from the point of view of economic expediency, saving repressive and preventive impact, while respecting human rights. Sufficiently high expenditures of the State on the field of application of preventive measures to suspects (accused) become economically unprofitable for the budget. In this regard, new modern means are required that would reduce the time, labour and material costs of the system of preventive measures in criminal proceedings without hindering objective pretrail investigations and without violating the human rights to personal inviolability and personal freedom.

2. Problem Statement

The preventive measure in the form of detention is practiced on a wide scale in Russian criminal proceedings. This is inexpedient from the point of view of the administration of justice and is economically unprofitable for the State budget. In this connection, it is necessary to justify the existence of a presumption in favour of release and other means to optimize the practice of preventive measures.

3. Research Questions

To analyze current trends in law enforcement practice regarding the application of preventive measures. To justify the need for a presumption in favor of release in order to resolve the issue of reducing a significant amount of the application of detention as a preventive measure for the purpose of economic feasibility and the balance of private and public interests. To provide an author's definition of the presumption in favour of release.

4. Purpose of the Study

Study of the law enforcement practice of preventive measures to justify the presumption in favor of release as a means of updating preventive measures in order to optimize the costs of keeping a person in detention.

5. Research Methods

The research methods are: general scientific (systematic, logical) and private scientific (formal and legal).

6. Findings

With a view to the positive economic effect of significantly reducing State expenditure on the detention of suspects and accused, the Russian legislator is attempting to modernize criminal procedure legislation, including with regard to the legal regulation of preventive measures. The Code of Criminal Procedure of the Russian Federation currently provides for eight preventive measures, including the

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following: recognizance not to leave; personal suretyship; supervision of the command of a military unit; supervision of juvenile accused; prohibition of certain acts; bail; house arrest; detention. Preventive measures are selected if there is sufficient reason to believe that the accused (suspect) will abscond the inquiry, preliminary investigation or trial; may continue to engage in criminal activities; may threaten the witness, other participants in criminal proceedings, destroy evidence or otherwise obstruct the proceedings in the criminal case.

The need for changes in the system of preventive measures is caused by several factors, in particular, the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the significant costs associated with paying compensation for its violation due to unjustified detention of suspects (accused), confirmed by statistical data and a number of studies. During the period of Russia's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights (hereinafter – the ECHR) considered 353 cases of complaints from Russians about failure to provide adequate conditions in pretrial detention facilities, correction facilities, as well as conditions of convoy, in which violations were found. About 750 other cases in this category are currently pending before the ECHR. In compliance with court orders and decisions the Russian authorities paid about 3.4 million euro for compensation to the applicants for the damage caused, as well as court costs and expenses (The law on compensation for improper conditions…, 2019).

As of January 1, 2020, 523,928 people were detained in penitentiary institutions, including: 423,825 people were serving sentences in penal colonies; 97,781 people were kept in pretrial detention centers; 1,116 people were serving sentences in prisons; in juvenile prisons - 1,155 people (Statistical data of the Federal Penitentiary Service…, 2020). In addition, experts estimate that expenses from the federal budget of Russia on the keeping of one suspect, accused and convicted person amount on average to 15,511.14 rubles per month, of which: 2 179.22 rubles – food costs; 253.92 rubles – expenses for medical support; 94.73 rubles – expenses for clothing support; 8.73 rubles – expenses on payments upon release;1,557.70 rubles – expenses for public utilities; 11,516.84 rubles – employee salary costs (The Federal Penitentiary Service of Russia…, 2019).

A serious problem of criminal proceedings in Russia is the frequent use of detention as the form of a preventive measure in the investigation of crimes. As far back as November 2016, the Commissioner for Human Rights in the Russian Federation, Moskalkova (2016) stated that for people who do not pose a social danger, recognizance not to leave or house arrest as a preventive measure is quite sufficient (Moskalkova, 2016). On a separate note is the fact that such a problem is not unique to the Russian legal system. For example, Austin (2017) points out that in the United States the level of pretrial detention has been steadily increasing on a federal scale since 1984 (Austin, 2017). Besides, results indicate that those defendants who had been subject to pretrial detention were more likely to be incarcerated, and to receive longer sentences if they were incarcerated, than defendants who had been released pending case disposition (Williams, 2003).

From the perspective of Titaev (2017) the analysis shows that the key predictors of pretrial detention are unemployment status, informal criminal records, and the non-confession of guilt. Furthermore, it is shown that the fact of pretrial detention significantly influences the likelihood of the non-dismissal of the

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case. The key predictor for the likelihood of choosing imprisonment as a type of punishment is pretrial detention.

In our opinion, the means capable of changing this situation should be recognized the presumption in favor of release, which is based on Article 5, paragraph 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This presumption ensures that the interests of the pretrial investigation and the individual in criminal proceedings are preserved and balanced. The meaning of this assumption – the presumption in favour of release (is the particular case of the presumption of inadmissibility of unjustified restriction of individual rights) – lies in the obligation of the court before which the application for pretrial detention was filed to remember that, in accordance with the adversarial principle, it is incumbent upon the court to maintain a balance of interests between the defense and the prosecution. Only after making sure that the application of other preventive measures does not produce the necessary result, the judge takes the accused into custody.

Until recently, however, maintaining such a balance in the realities of the Russian State was very problematic, primarily due to established law enforcement practices and the fairly frequent use of detention. As the ECHR has repeatedly pointed out, this presumption does not allow the judicial authorities to choose between delivering the accused to a judge within a reasonable period of time or releasing him or her before trial (the ECHR Resolution of March 24, 2016 in the case "Zherebin v. the Russian Federation", Application No. 51445/09, 2016). The meaning of the presumption in favor of release is the possibility of temporary release of the accused as soon as his detention ceases to be justified (the ECHR Resolution of June 12, 2008, in the case “Vlasov v. the Russian Federation”, Application No. 78146/01, 2009). An analysis of the ECHR decisions allows us to come to the conclusion about the rules for applying the presumption in favor of release. In particular, firstly, the court is obliged to investigate all facts evidencing for or against the existence of a real public interest, and the arguments for and against the release must not be general and abstract; secondly, the investigation must necessarily take into account the principles of presumption of innocence and respect for personal freedom; thirdly, the decision about the prolongation of the period of detention and the impossibility of release an accused person must contain conclusions based on the investigated facts (the ECHR Resolution of March 24, 2016, in the case "Zherebin v. the Russian Federation", Application No. 51445/09, 2016; The European Court of Human Rights Resolution of June 7, 2007, 2008; the ESHR Resolution of March 15, 2011, in the case "Sizov v. the Russian Federation", Application No. 33123/08, 2012).

If the national law upholds the presumption in favour of continued existence of the preventive measure, the specific facts that prevail over the principle of respect for personal freedom must be convincingly demonstrated in a procedural decision. The existence of a reasonable suspicion is a determining condition for the lawfulness of detention, but over time it ceases to be sufficient. According to the ECHR case law, the question of what period of detention is considered reasonable cannot be resolved by diversion from a criminal case. The validity of extending the period of pretrial detention must be determined in each specific case on the basis of objective criteria.

Having analyzed the ECHR Resolution of March 15, 2011, in the case "Sizov v. the Russian Federation", we come to the following conclusions. The applicant's detention in October 2004 may have been based on suspicion of involvement in attempts to witnesses intimidation. However, as early as

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December 2004, two months later, the criminal investigation was suspended and the applicant was still being held in pretrial detention center up to 2008. In the period from 2005 to 2008, when extending the period of detention, the National Court referred to the gravity of the charges against the applicant, claiming that he had the possibility to abscond, obstruct the investigation of the criminal case or put pressure on witnesses, but did not provide any factual evidence of the applicant's possibility to abscond from the investigation and court. In connection therewith, the ECHR concluded that the threat had been minimized over time, due to the deterioration of the applicant's health and his subsequent hospitalization at the prison hospital in July 2007, so that the applicant could not in any way threaten witnesses. There was no evidence in the case file that the applicant had indeed attempted to threaten witnesses or otherwise interfere with the criminal proceedings. The existence of a charge of criminal conspiracy could also not be grounds for extending the period of detention repeatedly. Based on the foregoing, the ECHR was unable to adequately establish the risk of the applicant's interference in the administration of justice. Moreover, this risk tended to decrease as the trial progressed and key witnesses were questioned. Without examining the individual circumstances of the criminal case and without considering the possibility of applying alternative measures of suppression, being guided only by the gravity of the charges, the national court extended the applicant's detention on the grounds which, although relevant to the case, could not be considered as sufficient to justify the length of the period. Consequently, the fundamental rights and freedoms of the individual were violated in criminal proceedings, which allow us to ascertain that the authorities of the Russian Federation have not fulfilled their obligations to protect citizens from unlawful and unjustified conviction, prosecution and other restrictions on rights.

Restriction of the right to liberty and personal security, when a preventive measure in the form of detention is chosen, means termination of normal activities and exclusion of a member of society from the sphere of his or her usual communication, interests and functioning in public life (Prelovsky, 2016). Unfortunately, it should be recognized that situations with the unreasonable, excessive and unjustified use of detention of a suspect (accused) are quite common in Russian law enforcement practice. If all investigative actions have been carried out, in particular, all witnesses have been questioned, evidence has been seized and examined, expert examinations have been carried out, there is no need to detain a person, it is neither expedient nor justified from the economic point of view, when the State bears the expenses of keeping this person. Thus, a preventive measure in the form of detention cannot be punitive. In such a situation, the presumption in favour of release should come into play. In our opinion, the presumption in favour of release can be formulated as follows: an accused in a criminal case may be restricted in his or her right to personal freedom as long as his or her detention is consistent with the real public interest. Guided by the presumption in favour of release, pretrial detention facilities for suspects (accused) will be significantly relieved and the cost of keeping them will be reduced.

Other, more lenient preventive measures, such as house arrest and bail, also do not solve the problem of reducing the number of people in detention. It was assumed that bail and house arrest would be an alternative to detention, and therefore the efforts of the State were aimed at expanding the scope of their application, however, the measures taken did not bring any significant positive effect (Ryabinina & Chebotareva, 2019). According to Andronik (2014) main reasons for the low demand for house arrest and bail are: inaccuracy and disputability of the legislative wording; the complexity of the procedure of

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choosing a preventive measure, which do not meet the significant restrictions on the rights and freedoms of the person; difficulties in implementing mechanisms for monitoring compliance by suspects (accused) of certain restrictions and prohibitions, etc.

Of course, these facts cannot be called positive in order to save punitive repression and restrict the rights of suspects (accused). This situation has served as a major catalyst in addressing the need for new, more flexible preventive measures. In addition, the possibility of reducing the reputational losses caused by the satisfaction of the European Court of Human Rights with complaints from citizens of the Russian Federation and the reduction of the cost of compensation for the harm caused by detention was envisaged. In order to modernize criminal procedure legislation, the Criminal Procedural Code of the Russian Federation introduced in 2018 a new preventive measure – prohibition of certain actions. This novelty should be considered important and relevant, as the legislator has attempted to shift the "centre of gravity" of the application of detention towards the prohibition of certain actions. There is a practice of replacing detention with prohibition of certain actions, where the court, in assessing the circumstances of the case, the identity of the accused, his or her marital status, state of health and other noteworthy circumstances, concludes that it is possible to choose prohibition of certain actions over detention (Markovicheva, 2019). According to Gershevskiy (2019) the use of detention is possible only if less stringent preventive measures cannot be considered sufficient to ensure the balance of public interests associated with the use of preventive measures, the human right to freedom, personal inviolability, therefore, the emergence of a prohibition of certain actions is due to the need to improve the effectiveness of the mechanism for maintaining such a balance.

The positive economic effect of applying this preventive measure for the economic processes of Russia is obvious, since the prohibition of certain actions will allow the entrepreneur, in respect of whom a preliminary investigation is being carried out, to engage in legitimate entrepreneurial and other economic activities, which should be approved at a time when much attention is paid to the development of small and medium-sized businesses in Russia (Endoltseva, 2019).

The legislative basis for the prohibition of certain actions as a preventive measure is currently provided by only one article of the Criminal Procedure Code of the Russian Federation. Certainly, one article of the Criminal Procedure Code of the Russian Federation, containing only general provisions on this measure cannot coordinate the whole complex of legal relations generated as a result of imposing restrictions envisaged by such a prohibition. The problem of ensuring the control over compliance by suspects (accused) with the prohibitions has not been resolved (Malikova, 2018). From the standpoint of Yakovleva and Kutyanina (2019) if technical means (bracelets, audiovisual surveillance systems) are sufficient to control the movement of the suspect (accused), then the effectiveness of the control of such prohibitions as communicating with certain individuals; sending and receiving mailed items; using communication facilities and the Internet is being questioned.

These factors demonstrate the urgent need to create a legal framework regulating the procedure for monitoring the suspect (accused), in respect of whom such a preventive measure has been chosen, the procedure for the controlling authority in the case of a violation of the prohibition, ways of cooperation with the investigator and others. It should also be noted that in the formation of judicial practice in the

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matter of election of the prohibition of certain actions, there is a need for the Supreme Court of the Russian Federation as a higher court to give explanations for lower courts.

7. Conclusion

As a result of a study of the law enforcement practice of preventive measures, it appears that in order to update preventive measures and optimize the cost of keeping a person in detention, the best legal measure is presumption in favour of release. The essence of this presumption is that a suspect (accused) in a criminal case may be restricted in the right to personal freedom as long as his or her detention is consistent with the real public interest. The presumption in favour of release is confirmed and consistent with the judicial practice of the ECHR. The rules of operation of the presumption in favour of release are the obligation of the court to investigate all facts showing a real public interest, the pros and cons of release must be specific; the investigation must take into account the principles of the presumption of innocence and respect for personal freedom; a decision to extend the period of detention and the impossibility of releasing a person accused of a crime must contain conclusions drawn from the facts investigated. The presumption in favour of release would ensure a balance between private and public interests in criminal proceedings.

The prohibition of certain actions as a new preventive measure can serve as an alternative to detention only if the legal regulation of its execution is properly regulated. Given the short period of application of the prohibition of certain actions (since 2018), it seems difficult today to assess the positive effect of its application as a preventive measure.

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