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The models of organizational and legal construction of criminal proceedings

Abstract: Investigation of the processes of optimization of organizational - legal and procedural construction Azerbaijani legal proceedings is impossible without addressing to the critical assessment of the relevant criminal procedural institutions of the most developed countries.

The usage of the comparative - legal method that studies the problems of criminal law-proceedings is necessary, on one hand, for getting acquainted with its institutions and procedures that proved to be effective and vital for adoption, on the other, for their registration.

It is considered the systems of pre-trial proceedings in England, the USA, France and Germany.

As the comparative analysis of concrete norms of Azerbaijan's criminal procedural institutions demonstrates, that their creators who adopted the classical Anglo-Saxon ideas and institutions from the spectrum of western variations, did not take into account the possible consequence of break of personal and state interests, and did not take care of preserving native traditions and Azerbaijani mentality.

Keywords: legal proceedings; comparative historical analysis; legal institution; pre-trial proceedings; police; inquiry; concept of suspicion; evidence; criminal trial.

The legal system of any country cannot develop in isolation, only being

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closed within native history. It cannot ignore the positive experience of the legal system in the world, either.

The researches of the processes of optimization of organizational, legal and procedural construction of native law-proceedings are not possible without consideration of critical evaluation of adequate criminal procedural institutions of more developed foreign countries. L.M. Volodina justly marked, that "in order to make a right choice, it needs naturally to watch how is getting on matters at neighboring countries, what positive elements are available in the legal traditions and cultures of foreign states" (7, p.14).

The expediency of the wide use of comparative-legal method in the research of criminal law-proceedings was frequently marked by many scientists, who considered it necessary both for acquaintance, and for registration of the institutions and the procedures that proved to be effective and vital for adoption, as long as we concern the experience of countries with the legal culture of high level, in which the prestige of justice had traditionally played a significant role, and its organizational principles were tested at times (11, p. 4-5).

Pre-trial proceedings in some countries, especially when, it is based on Anglo-Saxon legal traditions, does not cause a barrier between exclusive procedural actions and operative-investigative measures, and naturally it does not coincide with our concept of organizational-procedural construction (2, p. 191).

The stage which is usually called police investigation is a significant part of pre-judicial action, but it does not absorb the latter. It contains relatively two autonomous, but interrelated types of criminal – procedural activity: 1) getting a testimonial information for revealing the crime and convicting the person who committed it, and 2) application of measures for procedural constraint.

Thus, a combination of actions the English police carry out is permitted either on court decision, or on personal initiative and independently by officials, that is, without any compulsory sanction of the court. The growth of specific gravity of the second group has become a characteristic tendency of the development of on the criminal procedure in England. The English police who, functions rather as

detectives than functionaries in their daily activity, are guided not through law, but mainly through the collection of practical rules, that is, departmental acts, constantly corrected by ministry of internal affairs (9, p.45).

It is explained with the fact that the main goal of the activity of police in the initial stage of pre-trial proceedings is to search the signs of the crime in a concretely investigated event, which puts into operation all existing methods and ways of operative- investigative activity, that, for instance, are not brought into regulation in the USA.

Raising criminal proceedings in the countries with Anglo-Saxon legal traditions is connected with taking measures on criminal-procedural constraint. Thus, in the presence of a motive for raising criminal proceedings against a person, the police functionaries appeal to the court with a declaration for an issue of warrant for arrest or searching the dwelling-house. The official registration of warrant formally means raising criminal proceedings, but the warrant for arrest or search serves as an official document, which records the beginning of official execution on the case (6, p.122).

Extensive and wide authority of bodies of police inquest in the countries having Anglo-Saxon criminal procedure "is controlled" by the institution of control on observance of the constitutional rights of individuals in the criminal procedure, which is carried out through judicial inspection of police activity, and sanctioning some compulsory measures (4, p.24-25).

As a rule, police inquest ends by presenting the collected material to an official of the court (in England in most cases this official is a functionary of the Royal service investigation, but in the USA – a functionary of the public prosecutor's office, for formulation of accusation, solution of the question of bringing a case to court and continuation of criminal persecution in court. In the case of failure of criminal persecution, not answering the requirements, police have right to end the investigation in the case when revealing the crime is not achieved (the case is kept in the police office), and that does not require taking any special decision for ceasing (or ending) the execution of the case. According to the data of

English researchers, police cease the action of accusation in regard to 26 % of adults and 24 % of infants, detained on suspicion for committing crime; practically every fourth suspect is relieved of responsibility (20, p. 794).

In some circumstances between the police inquest and the judicial execution of the case there emerges an intermediate phase (committal proceedings), stipulated by law that is, the preliminary consideration of the case by the magistracy's court for checking the lawfulness and validity of preventive punishment, defining the legal ground for a thorough consideration of the case, bringing accusation, bringing the case to court, solving the question of justifiability (for instance, sending the case to the Royal Court for consideration and establishing the punishment).

The Grand jury that presently kept in the USA, but abolished in England, serves as a characteristic element of Anglo-Saxon criminal procedure. It contains taking a decision about bringing a case to court for a grave crime, providing private investigation and composition of an indictment.

It is evident, that in the English and American model of the police inquest contesting possibility in equal terms is excluded more than in the countries with the continental legal systems, as long as the criminal prosecutor keeps all evidences from the other side until the trial begins and delivers them only to the sitting of the court, which can hardly be considered to be just and democratic.

The developments of law proceedings in Europe, as well as the legal procedure in Azerbaijan were mostly influenced by the French Code of criminal investigation (Code destruction criminelle) of 1808. Within a definite period of its development the native pre-judicial execution, based on the Russian one, began tending to the continental model with the orientation towards strict differentiation from the separate forms of investigation: the inquest as the action of administrative and preliminary inquisition derived from judicial activity (justice).

Within a long evolution the systems of criminal procedure in France, was distinctly defined as the combination of separate phases, split into the preliminary (inquest, raising a criminal persecution, preliminary investigation) and final

execution (court examination, appeal, cassation).The pre-trial proceedings in France consists not of two, but of three phases where raising a criminal persecution precedes not the inquest, but follows it directly. In this connection it is not possible to agree with the outlook concerning the French inquest and the preliminary inquest as the forms (but not phases) of preliminary execution.

Modern French inquest (enquete) derives from the continental inquisitional criminal procedure, stipulating the differentiation of general and special investigations (10, p.152).

In order to characterize the French criminal execution it is necessary to take into account the differentiation, basing on the division of all criminal acts into three categories (crime, misdeed, offence) , predetermining the combination and sequence of further phases of the process. Thus, misdeed and offence can only infrequently (on public prosecutor’s demand) avoid the phase of preliminary inquest, but not all criminal categories can avoid the phase of raising persecution, rarely the phase of inquest can avoid it.

Inquiry is considered to be the initial phase of the French criminal procedure, beginning from the moment of getting information about the crime and ending with public prosecutor’s decision concerning the presence of grounds for raising an indictable offence. The law associates the necessity of the execution of the inquest with “the ascertainment of the facts about the criminal offence against the law” (article 14 CPC of France), which envisages two interrelated goals: quick revealing of a crime ascertaining the suspect through the execution of urgent procedural actions and preparation of material for public prosecutor. The inquiry begins either on the instruction of public prosecutor, and its beginning (as the opening of the whole criminal process) is not legalized by a special procedural decision. Thus, the inquest is the combination of preliminary investigations undertaken by the officials of the court police responsible to establish the circumstance of the case before an action is brought in to jurisdiction for consideration and making the point essentially clear. The court police acts under supervision of public prosecutor of

the Republic, however its role is so essential that the inquest is often called "the police phase of the process" (18, p.332).

The criminal-procedural law of France does not regulate the activity of the court police in full measure, and does not present the comprehensive list of the procedural activity. The reason for this was an unintentional desire of the French legislator to make the inquest less formal, as well as the legislative mechanism of the country in which abstract generalizations methods are not used almost. According to G. Denis, different actions, contrary to the preliminary inquest, carried out within inquest, are neither specially determined, nor carefully regulated in CPC (15, p.211-212).

Among the actions, more or less regulated in connection with the execution of inquest in CPC of France, the following should be noted: being on the spot and inspection, interrogation of the witness and seizure of documents (including the apartment), execution of technical and scientific investigations, detention and interrogation of the detainee. Other procedural actions, not concerning the rights and interests of citizens, according to legislator, are not needed in systematic regulation that does not exclude the lawfulness of their realization during the inquest.

For the development of criminal-procedural legislation of France is characteristic the tendency of the observed to tend to enlargement of the normative regulation of the police activity at the expense of the inclusion into the content of the criminal procedure. It caused an enlargement of the French inquest and appearance in it the features relating to operative-investigative activity.

Using the method of comparative jurisprudence one can be convinced that the French inquest and our pre-judicial check up carry out analogical functions, they both search for the motive to raise criminal persecution. Simultaneously, the legal devices and procedural opportunities, assigned for law executors for solving their task in European countries have a striking difference.

What was stated lets us conclude that the activity of the court police in France for the most has an investigative character and its criminal-procedural activity is

interweaved with operative – investigative one. As for the procedural supervision over the lawfulness of the inquest by public prosecutor's office and interrogative cell, that was named till 2000 as an accusatory cell, was conjugated with departmental supervision by higher police officials (5, p. 138).

As for Germany, before adoption of the Law "About the reform of criminal-procedural law" of December 9, 1974, aiming at the acceleration of law proceedings, and abolishment of the institution of preliminary inquest, the pre-judicial execution in this country was realized on the French model in the form of police inquest and preliminary inquest provided by court investigator. However, for the purpose of further improvement of law proceedings the preliminary investigation was abolished because of the duplication of the "parallel" investigation of the police and public prosecutor in the course of case (3, p. 69).

At present the preliminary investigation in FRG is realized in the form of police and public prosecutor inquiry. The body of inquiry within CPC is the prosecutor's office, although in practice police practically is independent and often provides private investigation without the prosecutor's supervision and control, and presents the material of the case to the prosecutor only when the prosecutor's office has to solve the question of raising a public accusation or ceasing the case. Thus, the police have changed, into an independent body of inquest not stipulated by law, and the preliminary inquest is practically within its competence (9, p.419).

The task of the German inquiry is elucidating the question of the presence of suspicion, which permits to judge of the possibility of raising a public accusation. The theory of German criminal procedure denies the role of the inquest in the exposure of the accused, otherwise the accusatory inclination could be deep-rooted in the execution (9, p.119-125).

In this connection the theoretical and legal base of the German pre-judicial execution serves as the elaborated suspicion concept which methodologically is based on the philosophy of the category of probability, determining the suspicion as a retrospective – prognostic conclusion based on facts and has the feature of verification.

According to the degree of probability and the functional designation, three types of suspicion are distinguished: a) ordinary – minimal probability of committing a crime, adequate for the beginning of the pre-judicial execution (both on facts and in relation to a concrete person) ; b) a sufficient (as the Supreme Court Of FRG explains), arising on the basis of the combination of facts, which with the account of the practical experience, indicates the possibility of convicting the accused for committing a crime, on the basis of irreproachable proof; c) reasonable suspicion, on the basis of which taking the accused might be taken into custody (§112 CPC FRG) (17, p.728).

Undoubtedly, such a concept harmonically "inscribes" itself to the pre-judicial execution as one of the mechanisms of solving the case in the given phases of the principle of presumption of innocence. However in practice the presence of difficulties in determining and the differentiating of the degree of probable suspicion are unavoidable.

The theory and practice of the criminal legal execution in FRG, based on the concept of suspicion, considers the legal nature of the German inquest, its role and significance just in its preparatory character, not having an independent sense and the phase of legal action, and in its turn, explains the steady tendency towards the simplification of procedure, called forth with the abolishment of the phase of preliminary investigation. Furthermore, the given concept as a guaranty against the groundless inquest commencement, permits the appearance of some "victims", manifesting itself in the persecution of the innocent, and proposes reconciliation with this circumstance in the name of the capability in functioning of justice on criminal cases (18, p. 123-130).

In German criminal procedure, making no provision for the phase of raising criminal proceedings, the execution of the first interrogative actions means the commencement of the criminal law-proceedings. A reason for the execution of the inquest besides the private official discretion by the police and the public prosecutor also serves the declaration of private persons including also anonymous one, information of the police, communal and judicial powers.

The inquest includes the execution of interrogative actions and taking procedural decisions, and is realized by the police under the leadership of the public prosecutor's office. The judicial investigator (local judge-inquirer) only takes an episodic part (on the petition of the public prosecutor), in connection with taking important decisions on the case and the legalization of evidences (§ 162 CPC FRG). Accusation is not brought in the courts of the preliminary investigation while a criminal proceeding is initiated after it.

The term "accused", used by the German legislator, has a formal sense.

The preliminary investigation realized by the German police or public prosecutor does not have any procedural form regulated in detail and is carried out in the form of quest. Such kind of investigation is hardly differing from the operative-investigatory activity. Furthermore, a number of secret operative investigative measures were regulated by the Criminal-procedural Code of the FRG, and the police have a right to apply them in judicial execution (12, p. 148-149).

In this connection the theory of criminal procedure in Germany distinguishes severe and free proof, the former of which is associated with the judicial activity having procedural regulation, while the latter is mostly applied by the police, and is not connected with the procedural form. The activity of the police is of preparatory character for judicial proving and is connected with searching the bearers of the information which after the procedural meeting – legalization, can start to be the proofs for the case. Thus, as a result of the direct activity of the police and the public prosecutor the judicial proof are not revealed, and accordingly, the records drawn by the police cannot be announced in the judicial investigation (12, p.21-38).

One of the ways of legalization of inquest results is the interrogation of the police who provides preliminary investigation in the court as witnesses, with this aim the police appeal to the local court where examining judge, whose duty is carried out by the local judge, on the petition of the public prosecutor's office or defense, executes separate interrogative actions. Here he does not take the case

under his execution, consequently he does not bear any responsibility for the results of the criminal persecution, and thus it remains independent from the function of accusation. Similar investigative actions are carried out in a competitive form-with the participation of the representatives of the sides in the sitting of the court. The records drawn within these arrangements serve as the material evidence and can be used at court examination in essence. For instance, the record of the judge's interrogatory evidencing about the avowal of guilt confessed by the accused can be announced during the court investigation when the accused refuses of his evidence he gave during the preliminary investigation (12, p.89-90).

The end of the inquest both in France and FRG is marked with bringing in an action or public accusation, but as it is presented on the French legislation, it is an independent phase of criminal procedure. However, in Germany it is only a stage that ends the pre-judicial execution.

In France when inquest comes to an end the public prosecutor initiates criminal proceedings through making demands for execution of preliminary investigation, which is sent to the examining judge, responsible to start the preliminary investigation. Similar procedural action (requistitore introductif) permits the public prosecutor brings in an action on the case which requires the preliminary investigation. This is: 1) all the cases about the criminal deeds; 2) the case in relation to those under legal age; 3) the case about some misdeeds, determined by law; 4) the cases according to which there was not established a person, to be brought to bringing to account and 5) any other case at the discretion of the public prosecutor (5, p. 84).

The institution of initiating public accusation in Germany is based on above mentioned concept of suspicion, according to which the accusation does not indicate having a strong confidence in the crime of the accused. It is only based on suspicion, i.e. the given act is not connected with proof of the accusation, and the distinction between "the public prosecution" and "sufficient suspicion" is never being considered. According to p.1 § 170 Criminal procedural code of the FRG,

the public prosecutor's office initiates public accusation by means of formation (§ 200 CPC) of an indictment and sending it to the court (9, p. 120).

Thus, the pre-trial proceeding in Germany is completed with the provision of inquest, while in France it can continue with the stage of preliminary investigation. According to the French theory of criminal procedure, inquest is a general investigation (inquisition generalis) for determining the case and the guilty of crime. The following preliminary investigation is assigned for execution of special task (inquisition specialist), i.e. gathering evidences of committing crime and solving the question for bringing a case to court (23, p.269).

The dominating condition of inquest in pre-judicial execution in France is obviously that the preliminary investigation only occupies an insignificant part in the total execution on criminal case and its specific gravity is constantly decreasing. However the matter in question is the most dangerous criminal cases, directed against the society. In this connection not statistical, but real significance of the given stage is sufficiently high, and the French procedural doctrine goes on referring to preliminary investigation as being rather important, considering it as a significant part of the criminal procedure as a whole, even in relation to the court examination. Examining judge (juge d'instraction), which was called by V. Jandidyeas "one of the most beautiful institutions of the criminal procedure always served as a traditional figure of the French law-proceedings" (16, p.13).

The legal nature of the considered legal institution considered, the origin of which in reality gave rise to the appearance of the continental criminal procedure manifests itself significantly in specific features of preliminary investigation, which: 1) having an exclusively judicial character and is carried out by the independent and impartial officials, referring to judicial power; 2) has a double-instance structure, permitting to establish an efficient system of appeal of court decision taken during the investigation; 3) is traditionally considered to be written and secret, that is to say, corresponding to inquisitional character of the execution.

The last feature also signifies unsoundness of the French preliminary investigation. At the same time yet in 1897 the legislator allowed the advocator to enter the given stage in order to balance the opportunities of the sides.

The introduction of the second instance in which the execution is realized in oral, open and competitive form , marking a specific revolution in the preliminary investigation. And more, over on the Law of June 15, 2000, a part of the power of the examining judge was given to the authorising commitment and setting free, which became a new judicial body, ensuring the lawfulness of the preliminary investigation: the right for taking a decision to take someone info custody presently belongs only to the latter. Separating of the functions of criminal prosecution from to preliminary investigation also deprived the examining judge of the right to begin an individual (ex officio) execution on the case, he and he only acts within the requirement of the public prosecutor.

The elements of competency more and more penetrate info given stage of pre-judicial execution, which is signified as a steady tendency in its development.

According to S. V. Bobotov, the similar construction of the preliminary investigation in France permits the examining judge to be independent from the public prosecutor; to balance the rights of the accused and defendant; ensure the procedural judicial control both over the activity of the police and the investigative body of the first instance and also establish procedural guaranty in the solution of the issue concerning the application of procedural constraint measures (5, p.146-148).

The preliminary investigation of the first instance is executed by examining judge, whose procedural function is divided into the investigatory and jurisdictional (judicial) parts. Accordingly all the procedural actions and procedural acts accompanied by them the procedural bill of indictments the former are also divided into administrative and the jurisdictional ones, which is rather essential for the French law-proceedings. When pronouncing a sentence, the examining judge is implementing the legal procedure with the aim of to solving the dispute between the sides (for instance, to stop the case), only the given decision

can be appealed to the interrogative ell. All other acts refer to administrative organs and are sent to the collection and inspection of the proofs (by law on calling a witness, being on a spot of event, etc.). It should be noted that as a result of the reform of the French criminal-procedural law proceedings, the jurisdictional functions of the examining judge has thoroughly decreased investigative authority, and it "is becoming mostly a judge than an investigator" (9, p.329).

In order to gather proofs the examining judge "has a right to carry out any investigative task, which is necessary for establishing at the truth ", That is to say, all that were not prohibited are allowed (p.1, article 81, CTC of France).

The public prosecutor carries out a double task in the given stage of pre-judicial execution: on one hand, he keeps the side of accusation; on the other hand he is "the eye of society" at criminal courts. He sends to the judge the inquiry about the conclusion of the preliminary execution, then he corrects it to a certain extent (in accordance with p1, article 82, CTC, having the right to demand additional investigative actions from the execution), has a control over its realization (article 119 CTC) permits him to take part in the execution of the investigative action). As a side the public prosecutor can appeal to interrogative cell in relation to jurisdictional resolution of the examining judge (article 185 CTC) (14, p.329).

As the scientists note, the evolution of the public prosecutor's procedural status is characterized by narrowing of his rights and inspection in the course of the preliminary investigation. He is more and more acquiring the role of a side in the given stage of criminal procedure. This tendency particularly manifested itself in the period of codification in1985 (8, p.138).

As a result of completing the actions and taking measures on the realization of procedural guaranties of the sides, the examining judge sends the case to the public prosecutor on which to make a special resolution. Having learned the case, the latter is responsible to send a requirement either to continue the investigation, or about ceasing the indictable offence, or bringing the case to the court. The law of July 6, 1989 limited the term of adopting a resolution on the given question by

public prosecutor within three months on the general rule and one month in case of keeping the accused in custody. And this law obliged the examining judge to notify the lawyers of the accused and the victim on bringing the case to the public prosecutor's office (20, p.282-283).

The requirement of the public prosecutor in the given case is not obligatory for the examining judge, who can take final decision, but the public prosecutor can only appeal of it to the accusatory cell. The rule on bringing the case to the public prosecutor and getting his requirement, as scientist mention, is a guaranty for the investigation quality, as the materials can get to an expert, night point out the existing shortages there. Besides, the public prosecutor is to defend the accusation in the court, therefore studying the case precisely does not prevent him (22, p.113).

After getting the public prosecutor's requirement the examining judge takes a decision about completing the preliminary investigation, with the exception of the case when the public prosecutor requires continuing it, and the examining judge agrees to it.

The decision of the examining judge in the given stage can be of two types: termination of a case or bringing the case to court. In the first case a decision is taken, if the deed is neither a crime, nor a misdeed, or an offence, and in case of non-identification of the person who committed the deed, or in the absence of sufficient proofs against the accused.

Preliminary investigational bodies of the second instance-the interrogative cells (before the adoption of the Law of June 15, 2000 they were called accusatory cells) going in the content of the appeal court, that is the higher instance in relation to the office of the examining judge-tribunal (article 191 CTC of France).

The given institution of pre-judicial execution ceased to be a body bringing a case to court on the Law of June 15, 2000, as for as this function was delegated directly to the examining judge. The interrogative cell, the investigation agency of the second instance, realizes a control over the correctness of the investigation of criminal cases by the examining judge through the consideration of complaints over the resolutions (inspection right) subject to appeal and consideration of the

question of confessing the invalid of investigational acts and their withdrawal (the right of annulment) from the criminal case. The inspection is determined as a right of the investigative cell to restore all the omissions of the examining judge, and according to the metaphorical comparison of Leon Ambass, "it reminds a teacher, checking up his student " and at the same time it is as if "a body of justice" of preliminary investigation (as long as on its initiative mistakes and omissions of the examining judge are revealed), and an investigation agency (as long as it has control over the investigation, but it does not carry out investigative action) (1, p.51).

The investigative cell is controlling over the lawfulness of investigative actions and the acts, hereby having a right of annulling and considering all the appeals against the action and decision of the examining judge, according to the information given by the sides. The interrogative action carried out illegally is announced invalid one by the accusatory cell, the same time the relation between the investigator and interrogative cell, as a representative of the judicial power, bears only judiciary character, with a complete exclusion of administrative subordination.

In definite cases the investigation cell has a right to execute investigative actions and gather evidences, and even withdraw the case from the examining judge for completion the investigation of the first instance independently. It is a collegiate body, created in every appeal court for establishing judges (investigators) in the form of " tutorial duty " , that is, not only a supervision, but also rendering a practical help, a support in the investigation. In addition, the chairman of the investigation cell cannot interfere the preliminary investigation, order the examining judges to do any action.

French procedural experts attack a great attention to the given legal institution, thinking that the executive power in the person of the interrogative cell from now on functioning as an impartial mediator between the accusation and the defense in the phase of preliminary investigation, which democratizes its procedure. The collegiate character of the interrogative cell, besides, the other acts

as a factor shown to persuade the average man for the preliminary investigation, the quality and efficiency of which undoubtedly increases.

The procedure of introducing the one and the other legal institution info the native court proceeding occur practically be more complicated than it is supposed, as long as Azerbaijan is pre-judicial execution essentially differ for having both the features of the competitive criminal procedure, and the inquisitional pre-judicial execution used in the criminal procedure of the continental Europe.

The informative analysis of concrete norms of CPC in Azerbaijan Republic permits to confirm the apprehension of some scientists, that its developers enriching the native criminal procedure with a “competitive spirit”, also adopted classical Anglo-Saxon ideas and institutions from the spectrum of western variations, never taking into account the possible breach of balance of personal and state interests in the given sphere, and not taking care of preserving native traditions and the Azerbaijani mentality (13, p.11-12).

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