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Review of foreign experience of models of criminal procedure in OECD countries

The criminal process of the OECD countries, as well as most other countries, is built on fundamental democratic principles that unite different models of criminal proceedings. At the same time, there is a contrast between Anglo-Saxon and continental, adversarial (accusatory) and inquisitorial (investigative), criminal trials. Among the OECD countries the most influential representatives of the Anglo-Saxon model of criminal procedure are the United States and the United Kingdom (especially England and Wales), while the continental model is represented by France and Germany.

Any model of criminal procedure can be distinguished in two main aspects:

1) on the mechanism of the organization of evidence;

2) on the mechanism for separating police, prosecutorial, and judicial functions.

Thus, the criminal procedure of the United States and England rejects the existence of a single center of procedural power, in the hands of which would be concentrated all the power to conduct criminal proceedings, to make criminal procedure decisions, to implement the evidence in order to complete, comprehensive and objective establishment of all the circumstances of the case.

This approach to criminal proceedings excludes such categories as "criminal case", "criminal proceedings", and "person conducting criminal proceedings", since the prosecution and defense here perform their own proving, each collecting their own "file" for further presentation to the court, i.e. the pre-trial evidence collection procedure is extremely similar to the collection of evidence by plaintiffs and defendants in civil proceedings.

Consequently, under this model of criminal procedure, there is no person who would be obligated to establish the facts and collect evidence in a single criminal case. At the same time, the existence of the "two-file" principle leads to special evidentiary procedures that oblige the parties to disclose evidence to each other.

As for the pre-trial stages, the prosecution is represented by the police, who, if they deem a prosecution appropriate, refer the material to representatives of the Attorney Service in the United States and the Crown Prosecution Service in England. The latter, being analogous to the prosecutor's office, nevertheless do not supervise the criminal and procedural activities of the police. They only represent the prosecution in court. In the United States and England, the victim is not a separate procedural figure - he is involved in the case only as a witness.

If we look at the criminal process in the United States and England from the perspective of the organization of the investigation, it is of a police nature. Police officers have the right to independently conduct only those investigative actions that do not limit the constitutional rights of citizens. Otherwise, they need to go to court and get the appropriate permission to search the home, wiretap the phone, etc., which requires a preliminary accusation. The police have no right to use measures of procedural coercion, except for short-term police detention. For the application of any measure of restraint it is also necessary to apply to the court. As a result, the investigation is an accusatory police activity with a developed system of judicial control, but without prosecutorial oversight. The defense carries out its own investigation at its own expense, so in practice it does not always take place. When the prosecutor receives the prosecution file, it means that from the police point of view the act deserves punishment. But the prosecutor decides for himself whether or not to

support the accusation, and without the slightest consultation with the victim. If he concludes that criminal prosecution is prospective and necessary, he brings the charge before the court.

In the United States about 3% of criminal cases go to trial, in England the percentage is higher. In other cases, the prosecution and the defense make a "deal/agreement", i.e., the defendant pleads guilty and the prosecutor "drops", for example, part of the charge or reclassifies it as less serious. In such a situation, an admission of guilt means a kind of "admission of the claim" - the court immediately determines the measure of punishment without even reading the evidence, because it is not obliged to establish the "truth", but only the "arbiter of the dispute". But when a trial does take place, it is more often than not nonprofessional, as the case is heard by a jury, which reaches a verdict of guilt or innocence of the defendant. The English criminal process is extremely negative about the professional judiciary and about the determination of a person's guilt by professional judges. A professional judge only presides over a jury trial and sometimes hears minor criminal cases (such as magistrates in London). The role of the professional judge in criminal proceedings in England and the United States is mainly to protect the individual rights of citizens against possible abuses by the police during the pre-trial collection of evidence and to monitor due process of law.

Now let dwell on the continental model of criminal procedure, inherent in France and Germany, which is built on very different foundations. Thus, at the moment when official information about a crime appears, the corresponding representative of the authorities has the obligation to investigate this fact, collect all possible information about it, accumulate it in a single criminal case, and then make a procedural decision on the further movement of this case. Significantly, as a result, procedural power over the case is centralized in the hands of an official who is obligated to act comprehensively, fully, and objectively, which rules out one-sided accusatory activity by the police, the investigation, and the prosecution. There can be no parallel investigation - the defense can not carry out independent evidence, because it does not have the proper measure of objectivity and is interested in the outcome of the case.

There is no disclosure, i.e., exchange of evidence between the parties, because the criminal case is one and the materials can only be consulted at a certain point.

Moreover, in judicial proceedings, criminal trials in France and Germany broadly allow for a full hearing by professional judges. Participation of non-professionals here is also possible, but is rather of secondary importance. That is why laymen most often form a single panel with professionals (the Schaffen court in Germany), jointly deciding both questions of guilt and questions of punishment. There is no jury trial in the classical sense in these countries. Trial is built on the principle of an active judge, obliged to establish all the circumstances of the case, regardless of the evidentiary initiative of the parties. Therefore, the judge has the right to question witnesses independently, appoint examinations, etc. Some analogies to "deals with justice" in Germany and France certainly exist today, since continental criminal procedural systems are also influenced by American criminal procedure. However, in any case, in Germany and France, the conclusion of various kinds of "deals/agreements" between the prosecution and the defense leads only to an acceleration and simplification of the process, but no more than that, because it does not relieve the state of its obligation to establish the truth, that is, the agreement exists here not by itself, but in combination with the collected and examined case materials.

The most significant specificity that distinguishes the continental process from the Anglo-Saxon one has to do with the organization of the preliminary investigation.

For example, the French criminal procedure has retained the classical structure of pre-trial proceedings. Here the police only conduct inquiries under the supervision of the prosecutor, without being obliged to necessarily identify the person to be brought as an accused. Upon completion of the inquiry, the case materials are sent to the prosecutor, who decides whether or not to initiate criminal proceedings, and the case may be initiated against an unidentified person. In the latter case, as well as for all serious crimes (regardless of the identification of the suspect), the prosecutor, when bringing the case, does not refer it to the court, but to the investigating judge for the preliminary investigation.

Thus, while the function of inquiry belongs to the police in France, not very different from the Anglo-American police investigation, the function of the preliminary investigation here is judicial in nature. An investigating judge is a full member of the judiciary and has the same status as other judges, including in terms of independence. Therefore, having referred the case to the investigating judge, the prosecutor has the right to address him only with motions.

In France, the investigating judge as an investigator performs the necessary investigative actions, collects evidence, forms the materials of the criminal case, and as a judge he takes procedural decisions: considers motions of the parties, terminates the case, refers it to court for trial, etc.

Since the investigating judge is a full-fledged judge, he does not need external judicial control as in the U.S. - he himself has the right to decide issues related to the restriction of the constitutional rights of citizens, to apply preventive measures, etc. This allows the parties to bring all claims against the investigating judge, even during the preliminary investigation, by virtue of which the parties, including the defense, do not have the right to refer during the trial to any violations of the criminal procedure law committed during the preliminary investigation.

In turn, the preliminary investigation in Germany is much simpler, because the investigation in Germany has a police-prosecutor nature - the police collect evidence, and the prosecutor makes procedural decisions based on it. The police are required to solve all crimes on their own, and this, in turn, often requires restrictions on the constitutional rights of citizens. Such measures require a judicial decision, which entails increased external judicial control of the police and prosecutor.

Such control is exercised by ordinary judges, who, when exercising it in a procedural sense, are called investigative judges (Ermittlungsrichte). They do not conduct preliminary investigations or hear criminal cases on the merits, but they supervise police and prosecutorial inquiries, authorizing, in appropriate cases, actions that limit the constitutional rights and freedoms of citizens.

Thus, there are the following distinctive features of the German criminal process:

First, the police operate under the strict "total" supervision of the prosecutor, i.e. Germany is characterized by a "strong prosecutor's office" model in pre-trial proceedings;

Second, there is the "investigating judge". Here it is important not to confuse investigating judges in France, who fully conduct preliminary investigations, solve criminal cases, collect evidence, etc., with investigating judges in Germany, who deal exclusively with judicial review.

In conclusion, we would like to add that today the improvement of domestic criminal proceedings is seen in the implementation of international standards in the field of criminal procedure, belonging to the category of so-called soft law (soft law). They are developed within the framework of the activities of leading international organizations and in most cases use the positive experience of various Western states.