

STRUCTURE OF THE PROSECUTION IN CRIMINAL PROCEEDINGS IN UKRAINE



Ivan Kanfui

*Ph.D. in Law, Department of Criminal Law and Procedure,
Kyiv University of Law of the National Academy
of Sciences of Ukraine, Kyiv, Ukraine
ORCID ID: <https://orcid.org/0009-0003-2083-9647>*

Abstract. This article deals with the content and essence of the concepts of “state prosecution” and “prosecution” enshrined in the current criminal procedural legislation of Ukraine. The activity of authorized officials and bodies in the pre-trial investigation stage of criminal proceedings was considered in the context of determining the end of this stage. The article analyses subjects assigned to the prosecution party by the current legislation. The compatibility of this legislative structure with the functions assigned to these

entities has been considered. It has been established that the content of the concepts of “state prosecution” and “prosecution” are not identical. The provisions on drawing up the final document (indictment, application for medical or educational measures, application for exemption from criminal liability) as the moment of completion of the pre-trial investigation have been substantiated. Proposals have been made to amend criminal procedural legislation to exclude the investigator, the person conducting the initial inquiry, their leaders and the operational and investigative units from the list of subjects of the prosecution. The results of the research should contribute to a deeper understanding of the nature of the concepts of “state prosecution” and “prosecution” and in the future entail the introduction of appropriate changes in the criminal procedural legislation of Ukraine.

Keywords: *prosecution, state prosecution, investigator, prosecutor, criminal process.*

Introduction

Problem statement. “State Prosecution” is one of the basic concepts of modern Ukrainian criminal process as the concept of “prosecution”. At the same time it has not been studied in sufficient depth in both normative and doctrinal terms so that legislative regulation is ambiguous and remains controversial. The same applies to questions related to the definition of the notion of “prosecution” first of all with regard to the definition of subjects assigned to it.

The importance of research in this area lies in the fact that it is a natural part of the definition of the functions of the subjects of power involved in some form of pre-trial investigation of criminal proceedings. The achievement of certainty in this matter should contribute to a deeper understanding of the nature of the Ukrainian criminal process, a reasonable choice of its appropriate type (competitive – mixed). In this regard, it will be possible to clearly identify the place and role of those in authority during the pre-trial investigation phase. In the process of reforming the criminal procedure and the criminal justice system this will make possible to move away from the practice of mechanically transferring the procedural practice of foreign States to the territory of Ukraine and to avoid systematic manifestations of crisis processes.

There is an urgent need to determine when the pre-trial investigation will end as this is directly related to the moment when the function of maintaining a public prosecution will arise. In our view this is linked to the high level of discussion regarding the existence or absence of conflict of interest between the prosecutor as the procedural head of the pre-trial investigation and the prosecutor – the public prosecutor. Since, according to the provisions of the current criminal law they may be the same person.

Analysis of recent researches and publications. The adoption and entry into force in 2012 of the new Criminal Procedure Code of Ukraine (hereinafter referred to as the CPCU) the provisions of which had already been the subject of considerable discussion, ranging from outright seizure to categorical non-reception, led to increased interest among scholars in his novels. Among other

things scientists such as P. Andrushko, V. Galagan, V. Gryniuk, M. Danshyn, V. Dolezhan, N. Karpov, O. Kislitsyna, M. Kosiuta, T. Myronenko, V. Nor, M. Pogoretskyi, M. Rudenko, Ya. Tolochko, L. Udalova et. all have been researching questions related to the understanding and content of the concepts of "prosecution", "state prosecution", "prosecution (party)" and other closely related categories. At the same time the problems of interaction of the subjects referred to the prosecution by the current criminal procedural legislation regarding the nature and content of the public prosecution, the timing of the prosecution function, etc. has not been properly investigated and remains contentious.

The purpose of this research is to determine the place and role of the investigator, the prosecutor and their supervisors among the subjects referred by the Ukrainian procedural legislation to the prosecution, an analysis of the provisions of existing legislation and their comparison with the respective authorized subjects in the criminal proceedings of some States of the continental system.

Presentation of the main research material. The task of the authors of the CPCU dated 2012 was to transform the type of criminal proceedings in Ukraine from mixed to competitive, as one of them even 5 years ago M. Pogoretskyi noted: "It [the Code] lays down a competitive model of criminal proceedings and provides mechanisms for ensuring". At the same time he acknowledges that "the Code is imperfect, even though more than 570 amendments and additions have been made to it in 5 years" (Volina, Pohoretskyi, 2018).

In our view this inadequacy of the CPCU has led to the fact that among Ukrainian scholars and practitioners the provisions introduced in 2012 by the current CPCU remain highly controversial. There are no exceptions to the provisions on the basis of which the prosecutor, the pre-trial investigation body (bodies conducting pre-trial investigation and inquiry), the head of the pre-trial investigation body, the head of the body of inquiry are referred to the prosecution, pre-trial investigator, investigator and operational units (arts. 36 – 41 of the CPCU).

The charge under the current CPCU is defined as a "allegation of the commission by a certain person of an act provided for by the Law of Ukraine on Criminal Liability, made in the manner established by this Code" (Paragr. 13, section 1, art. 3 of the CPCU).

At the same time, paragraph 3 of the same legal norm stipulates that the state prosecution is "the procedural activity of the prosecutor which is consisting in bringing charges before the court for the purpose of ensuring criminal responsibility of the person who has committed a criminal offence".

It is clear that the contents of the concepts are not identical which is already the source of the discussions emerging in the scientific environment.

As a manifestation of such contentiousness is considered the position of I. Kislitsyna. She shares the opinion of a group of scientists that the term "state prosecution" is used in the following meanings: a) the prosecution formula, the thesis on the culpability of a person in committing a crime, attempt to refute the presumption of innocence in respect of a person notified of a suspicion; b) activity aimed at establishing the crime of an act of a person; c) procedural document (indictment); d) function of the Prosecutor's Office" (Maintaining the state prosecution, 2012 pp. 10; Kislitsyna, 2018, p. 181).

On the basis of the content of the legal norms we must come to the conclusion that as an allegation the accusation concerns a "certain person" and must be put forward "in the order provided by this Code". The current CPCU provides that during the pre-trial investigation stage such an allegation is made when a person is notified of a suspected criminal offence in the cases provided for by law (Section 1, Art. 42, Art. 276-279 of the CPCU). At the same time the law establishes three cases where a person is necessarily informed of a suspicion only one of which (detention at the place of commission of a criminal offence or immediately after its commission) may occur at the beginning of the pre-trial investigation. However, the law does not provide for such a person to have the status of an accused person at the pre-trial stage. According to Section 2, Art. 42 of the CPCU establishes the status of an accused person when the indictment has been referred to the courts under the Art. 291 of the CPCU.

Taking into account the legislative definition of the concepts of "prosecution" and "state prosecution" which we have given above we can come to the conclusion that the prosecutor can start the activity on the implementation of state prosecution not earlier then the Committee is of the opinion that the State party is not a party to the Convention. Even so the person does not acquire the status of accused.

In such circumstances the only possible means of obtaining answers to the questions posed is an analysis of the functions performed by the said authorities and officials during the pre-trial investigation.

According to the Section 2, Art. 36 of the CPCU at the stage of pre-trial investigation the prosecutor shall "supervise compliance with the laws during the pre-trial investigation in the form of procedural guidance of pre-trial investigation". To this end he is given certain facilities set out in the same rule of law. An analysis of these powers leads us to conclude that the competence of the prosecutor as defined by the said article of the CPCU goes beyond the powers necessary for the conduct of the pre-trial investigation since the requirements of paragraph 2, Section 15, Art. 36 of the CPCU which deals with the powers of the prosecutor to bring a public prosecution before a court, to dismiss a public prosecution, to modify it or to bring a supplementary charge concerns not the pre-trial investigation stage but the trial stage.

An analysis of paragraphs 11, 13 and 14 of the same rule of the CPCU shows that an official of a public authority entrusted with the responsibility of procedural direction of a pre-trial investigation at a certain stage it acquires the power to determine a certain level of culpability. In our view, this is a manifestation of the prosecutor's activity in support of the public prosecution. In such case the allegation that the prosecutor had a conflict of interest would be absolutely justified.

It is obvious that the state of conflict of interest does not disappear even when we acknowledge that the prosecutor ceases to exercise the function of monitoring the observance of the law during the pre-trial investigation after notification of the suspicion (procedural guidance) and he starts acting as a public prosecutor because it's the same person.

It should be taken into account that after notification of the suspicion the pre-trial investigation authorities and their officials continue their activities aimed at ensuring the full and high-quality investigation of criminal proceedings. It is only after the indictment has been drawn up and sent to the court that this function becomes impossible. It clearly determines the moment when the pre-trial investigation is completed and the beginning of the public prosecution function.

During the considering the powers of pre-trial investigation bodies, heads of pre-trial investigation and initial inquiry bodies, investigators and persons conducting initial inquiries we conclude that their function is not to establish the information accusing the individual but also to justify his statements i.e. the purpose of the pre-trial investigation is to establish the truth in criminal proceedings. This claim was made many years ago but it has not yet been refuted. Even when these bodies and officials carry out certain investigative and other procedural actions after informing the person of suspicion they do not assume the function of prosecution.

In such circumstances it is difficult to accept the view that the State prosecution is to establish the crime of an individual. In any case this assertion raises a number of objections which we have already mentioned.

With regard to the determination of the place and role of the operational units in the context of their attribution to the prosecution it should be noted that they have no independent procedural value at the pre-trial investigation stage, procedural actions may be carried out only on the instructions of the investigator.

In this connection we believe that the attribution of these bodies and officials to the prosecution is erroneous and should be eliminated by law.

If the current situation remains unchanged we must note that the activities of these bodies and officials have a legally enshrined accusatory bias which is clearly contrary to European and international standards, attempts to comply with which our state constantly declares.

The reference by the proponents present to the fact that in European States (for example Germany) the same person presides over the proceedings and the prosecution in court is incorrect because the German criminal trial is a classic competitive type from beginning to end. It's also competitive at the pre-trial stage. As such the pre-trial investigation is not carried out by a prosecutor who issues instructions to the police. The prosecution is represented by the prosecution and the defence by the accused and his representatives.

At the pre-trial investigation stage the Ukrainian criminal trial has the features of a mixed type of process which makes it impossible to implement the idea of turning it into a competitive type of process.

Conclusions

Thus taking into account the fact that Ukraine's criminal procedure is of a mixed type, the lack of clarity in the competence of the procedural head of the pre-trial investigation refers to the pre-trial investigation bodies and the heads of the pre-trial investigation and initial inquiry bodies, operational units, investigators and prosecutors to the party are unfounded and must be cancelled.

The time at which the pre-trial investigation ends is not defined in the legislation on criminal procedure nor is the time at which the public prosecution functions. In this connection and in view of the need to avoid a state of conflict of interest in the activities of the prosecutor at the pre-trial investigation and trial stage it is advisable to exclude the possibility of participation in the criminal proceedings as a trial manager and the public prosecutor of the same person.

References

1. The Criminal Procedure Code of Ukraine dated 12.04.2012 No. 4651-VI. URL: <https://ips.ligazakon.net/document/T124651?an=4338> [Date of request 12.04.2023]
2. Volina T. Mykola Pohoretskyi, Head of the Department of Justice of KNU: «Without improving the search procedure, the reform of the pre-trial investigation will not be beneficial». [Interview]. *Law and business*. 09.01–19.01.2018. URL: <https://zib.com.ua/ua/131462.html> [Date of request 12.04.2023]
3. Danshyn M., Kostenko M., Opanasenko N. (2021). Place and role of the prosecution in the pre-trial investigation. *Scientific Bulletin of the International Humanitarian University. Series: Jurisprudence*. 2021. Vol.51. pp. 137–140.
4. Maintaining the state prosecution: educational method. manual. Edited by Yu. Polyanskyi; author coll.: V. Dolezhan, D. Prytyka, M. Kosiuta and others. Odesa: Phoenix. 2012. 81p.
5. Kislitsyna I. (2018). Certain aspects of the prosecutor's support of a state prosecution in court. *Actual problems of domestic jurisprudence*. No. 6. Vol. 2. pp. 180–183.
6. Modern criminal process in European countries: a monograph [V. Lutsyk, V. Savenko, V. Samarin, etc.] ; edited by V. Lutsyk and V. Samarin. Kharkiv: Pravo, 2018. 792 p.
7. Mirkovets D. M. Concept, purpose, tasks and principles of procedural management of pre-trial investigation. *Legal science*. №5, 2020. PP. 178-189.
8. Chorny D. M. Correlation of prosecutorial supervision and procedural guidance of pre-trial investigation. URL: <https://dspace.onua.edu.ua/> [Date of request: 10.04.2023].
9. Bassista I. V., Galagan V. I., Udovenko Zh. V. The powers of the prosecutor to conduct procedural actions in criminal proceedings: individual problems. *Scientific Bulletin of Kherson State University*. Issue 1, 2023. P. 16-25.
10. Galagan V. I., Kanfui I. V. Procedural legal relations of investigator, prosecutor and investigating judge at the stage of pre-trial investigation: monograph. Kyiv, 2018. P. 9.
11. Gorodetskaya M. S. On the possibility of pre-trial investigation by the prosecutor. *Legal Journal of Donbass*, No. 4 (65), 2018. P. 207-213.
12. Burlaka Y. A. Prosecutor's supervision over the observance of laws by the investigator during the pre-trial investigation. *Our Right*, No. 4, 2020. P. 92-98.
13. Shumilo M. E. Legal model of pre-trial investigation under the current CPC: theoretical and practical problems and ways to solve them. *New Ukrainian Law*, Vol. 3, 2021. PP. 262-266. URL: <http://newukrainianlaw.in.ua/index.php/journal/article/view/57/50> [Date of request: 10.04.2023].