HISTORICAL ASPECTS

UDC 343.163(09)

Rohatiuk Igor – PhD, Associate Professor, Honored Lawyer of Ukraine

FORMATION OF THE CRIMINAL PROCEDURAL PRINCIPLES OF THE PROSECUTOR'S ROLE IN THE CRIMINAL PROCEEDINGS: CONNECTION HISTORY WITH MODERNITY

The article attempts to analyze the existing criminal procedural principles of the prosecutor's role in the criminal proceedings and explore the historical origins of these principles and their determinants origin.

Keywords: criminal procedural principles; principles; prosecutor; adversarial process; dispositivity; criminal proceedings.

Timeliness. The Prosecutor's Office as the main mechanism of control and supervision in the state apparatus designed to use all legally defined possibilities for legal regulation of the state accusation in court, supervision over the law compliance during the pre-trial investigation, representing the interests of the citizens and protection of their rights and freedoms and the implementation of a number of other tasks defined the normative acts.

The principles or foundations, so-called today were an important element of legal regulation of the criminal proceedings at all times. They spread sphere of its influence on all participants in the criminal process. Considering the accelerated pace of reforming the law enforcement system, which also includes the institute of prosecution, we cannot say about the key role of the criminal procedural principles that form the scientific and theoretical basis for further empirical research. Most of these principles define the vector directions of both the criminal process and create a favorable climate for behavioral aspects of parties to the criminal procedure and proceedings.

Latest studies. The problems of the principles of the criminal proceedings were studied by A. V. Lapkin, T. N. Dobrovolska, M. P. Omelchenko, V. I. Shyshkin, P. M. Rabinovych, V. M. Maliuga, V. T. Maliarenko and others.

The main material. With the adoption of the Criminal Procedure Code, the legislator replaced the term «principles» by «foundations». The legal approach focuses on the legal side of the principles of the criminal procedure. Within the concept of the principle of the criminal procedure means – rules, governing normative requirements that underpin the entire system of rules of the criminal procedure law and regulated by its procedure of investigative, prosecutorial and judicial activity [1, p. 42–50]. Therefore, the principles of the criminal procedure is a reflection of the basic principles of the prosecutor's role in the criminal proceedings. Summary principle is that it is defined as a basic principle of the criminal procedure law based on the general principles of law, key requirements that apply to participants of social relations [2, p. 321–327].

Exploring the correlation between the terms «principles» and «foundations», O. Z. Hotynska stresses that there is no single approach to these definitions in the literature [3]. Speaking about the concept of these terms, the author entirely shares the opinion of V. V. Navrotska that the term «principles» and «foundations» for lexical meaning is very close (for example, under the «principles» we understand the original, main provisions, the principle, basis philosophy, rule of behavior), and they are etymologically identical [4].

The Constitution of Ukraine Art. 129 uses the term «basic foundations» of the criminal procedure, recognizing that the basic foundations are: legitimacy; legal equality of all participants before the law and court; providing proof of guilt; adversarial of the sides and freedom to provide their evidence and to prove their persuasiveness before the court; the state accusation in court by prosecutor; ensuring the right to a defense to the accused; publicity of a trial and its complete recording by technical means; ensuring appeal and cassation court decision, except in cases established by law; a binding court decisions [5].

V. T. Maliarenko, giving a definition of the foundations of the criminal procedure, understands the fundamental ideas and

regulations that determine the direction and the construction process, form and content of its stages and institutions [6, p. 4].

Thus, we can confidently affirm that the principles of the prosecutor's role in the criminal procedure arise from the principles of the criminal procedural law, but under the new code – foundations, expressing the rules of conduct regulated by the state regulatory requirements. According to the Article 7 of the CPC the general principles of the criminal proceedings are: rule of law; legality; equality before the law and the courts; respect to human dignity; ensuring right to freedom and personal inviolability; inviolability of dwelling or other property; secret communication; non-interference in private life; inviolability of ownership; presumption of innocence and providing proof of guilt; freedom from self-revelation and the right not to testify against close relatives and family members; prohibition of double criminal liability for one and the same offense; ensuring the right to protection; access to justice and a binding court decisions; adversarial procedure and freedom in presenting their evidence and proof their persuasiveness before the court; immediacy of evidence studies, things and documents; the right to appeal the procedural decisions, acts or omissions; publicity; dispositivity; transparency and openness of the court proceedings and its complete recording by technical means; terms of reasonableness; language of the criminal proceedings [7].

According to p. 19, Ch. 1, Art. 3 CPC the party of the criminal proceedings for the prosecution is a prosecutor. The prosecutor represents the prosecution, as stipulated with p. 5 Ch. 3 Art. 129 of the Constitution of Ukraine, where the state accusation in the court by the prosecutor also has the status of one of the foundations of justice [7].

Article 121 of the Constitution of Ukraine, defining the functions of the prosecutor's office, gives priority to prosecution in the court, and among other the functions of prosecutor's office in the criminal proceedings calls the supervision over law observance by the agencies that conduct operational search activity, inquiry, pre-trial investigation and supervision over the law observance in the execution of a judgement in the criminal cases [5]. Referring to Article 3 of the Law of Ukraine «On Prosecution», which defines the

principles of prosecution, we analyze the following principles of the prosecutor's part in the criminal proceedings [8]:

the rule of law and recognition of a person, his/her life and health, honor and dignity, inviolability and security by the highest social value;

legality, justice, impartiality and objectivity;

territoriality;

presumption of innocence;

independence of prosecutors, suggesting the existence of guarantees against unlawful political, financial or other influence on the prosecutor to adopt his decisions in the performance of official duties;

political neutrality of the prosecution;

inadmissibility of unlawful interference of prosecution in the activities of the legislative, executive and judicial power;

respect for the independence of judges, which prohibits public expressions of doubts on judgments outside of the appeal procedures in the manner prescribed by the procedural law;

transparency of prosecution activity, provided open and competitive positions of prosecutor, free access to reference information, providing information on request, if the restrictions on its provision are not established by the law;

strict compliance with the requirements of the professional ethics and conduct.

However, not all of these principles related to the prosecutor's part in the criminal proceedings, they regulate the general procedure, form and content of the criminal proceedings, its organization and the nature of the parties of the criminal proceedings.

We consider it appropriate to allocate such principles of the prosecutor's part in the criminal proceedings: the principle of legality, equality before the law and the courts, respect for human dignity, presumption of innocence and providing proof of guilt, publicity, adversarial of the parties and freedom of the submitting their evidence to the court by them and to prove their persuasiveness.

Analyzing the principle of legality, we can consider it in terms of several positions: in the criminal proceedings the court, an investigator, judge, the prosecutor, the head of the pre-trial investigation, other officials of the state authorities are obliged to strictly abide by the requirements of the Constitution of Ukraine, the

CPC; the prosecutor, the head of the pre-trial investigation, the investigator are obliged comprehensively, fully and impartially to investigate the circumstances of the criminal proceedings, to identify both those circumstances, exposing, and those justifying the suspect, accused as well as the circumstances mitigating or aggravating his punishment, to give them proper legal assessment and ensure adopting the legitimate and impartial judicial decisions.

Under the principle of legality, we understand the requirement for all subjects of the criminal proceedings, including the prosecutor, to use correctly, to comply consistently and perform accurately the norms of the Constitution of Ukraine, Criminal and Criminal Procedure Codes and other legislation.

As it was pointed by I. V. Mykhailovskii, legality is not just the fact of the normative and legal act that regulates certain relations, and how these relationships are regulated by this normative and legal act and what results are obtained as a result of its implementation. He believed that the meaning of the principle of legality was the requirement of a rigorous and strict compliance with all requirements of the legal norms by all subjects [9, p. 55].

For disclosure the principle of legality, we should define its place among the principles of the criminal procedure, and to follow the correlation of the principle of legality with other principles and in particular with the dispositivity. The right of the parties and other persons involved in the criminal proceedings freely to dispose of material and procedural rights, in which the principle of dispositivity is reproduced, has limits, which are stipulated by protection and public interest. This will be discussed later.

As you know, liberalism proclaims freedom of the highest value, grounds the ideas of the individual's inviolability and private property, free business activity, noninterference of the state into the economy. The most famous representatives of Western liberal political thought of the nineteenth century are B. Kostan, A. Tocqueville, Y. Bentham, J. S. Mill. It is believed that the first historical document that laid the foundations for the development of the principles of equality and respect for human dignity in the criminal process was the Magna Karta in 1215, which limited the arbitrariness of feudal lords and developed the idea of equality, even in a narrow (class) sense [10, p. 48].

In Kievan Rus as early as in the tenth century the principle of equality functioned. Exactly the adversarial process was crucial for the establishment of the principle of equality and competition, because they were characteristic features.

The principle of legal equality in the criminal proceedings also installed the Statute of the Grand Duchy of Lithuania in 1529 (first «Old»), which extended its influence on the Ukrainian land in the days of their staying in Lithuania.

During the existence of the Polish-Lithuanian Commonwealth on the Ukrainian lands that went into this association, Lithuanian Statutes spread their effect in 1566 and 1588, according to which the criminal process was mostly adversarial, and therefore equality of the parties in the court proceedings took place, and therefore the respect for human dignity [12, p. 59].

The principle of equality before the law interprets the vision of what there can be no privileges or restrictions in the procedural law based on race, color, political, religious or other beliefs, sex, ethnic or social origin, property, residence, nationality, education, occupation and linguistic or other characteristics. At the same time providing additional warranty during the criminal proceedings to certain categories of persons (minors, foreigners, persons with mental and physical disabilities, etc.).

In addition, the prosecutor has to be guided by the principle of respect for human dignity, rights and freedoms of every person. This in turn is revealed through prohibition in the criminal proceedings to exposer a person to torture, cruel, inhuman or degrading treatment or punishment, threats of such behavior, to keep the person in humiliating conditions, to compel to inhuman or degrading actions.

Another equally important principle, in our opinion, is the presumption of innocence and proof of guilt, because the prosecutor as the part of prosecution is required to establish the guilt or innocence of a person without any pressure from others. This principle is revealed in the following positions:

a person is presumed innocent of a criminal offense and will not be subjected to criminal punishment until his guilt is proven in the established order and installed by a guilty verdict, which entered into force;

nobody is obliged to prove his innocence in a criminal offense and should be justified if the prosecution can prove a person guilty beyond reasonable doubt;

suspicion, accusation can not be based on evidence obtained by illegal means;

all doubts about proof of guilt of a person are interpreted in favor of the person;

treatment of a person whose guilt in a criminal offense is not installed by guilty verdict, which entered into force must comply with the treatment innocent person.

The historical and legal origins of this principle is accepted by the Roman law, the presumption of innocence was analogous rule «praesumptio boni viri» (member of legal action considered to be acting in good faith until another proven) [13, p. 12].

In addition, this rule is found in the texts of texts of the Laws of the twelve tables that perpetuated the certain provisions of the presumption of innocence, or so-called presumption of decency.

In Roman law was first rule of evidence: ei incumbit probatio qui dicit, non qui negat – the burden of proof rests on that who asserts, not the one who denies. This position is the most important provisions of the presumption of innocence in its legal interpretation. Position for doubts which are interpreted for the benefit of the person, in the Roman law the presumption of innocence was the rule in dubio pro was formulated by prominent Roman lawyer Julius Paul [14, p. 16].

In the future, this principle is reflected in almost all the legal systems of the world in the form that we know today.

The principle of adversarial is closely linked to the principle of dispositivity of the prosecutor's participation in the criminal proceedings. Yes, adversarial is self-defending by the prosecution and the part of defense of their legal positions, rights, freedoms and legitimate interests by means, equal rights for collecting and submitting to the court things, documents and other evidence, petitions, complaints, for the implementation of other procedural rights; and the functions of the state prosecution, defense and the trial cannot rely on the same body or official; a notification to the person suspected of having committed a criminal offense, appeal the indictment and state accusation in court are carried out by prosecutor, except in the cases when the notification to the person

suspected of a criminal offense can be carried out by the investigator with the consent of the prosecutor, and charge may be supported by the victim, his representative.

Protection is carried out by the suspect or accused, his counsel or legal representative. And the court acts as an independent arbiter that based on objectivity and impartiality, creates the necessary conditions for the implementation by the parties of their procedural rights and fulfillment of the procedural obligations. In turn, the dispositivity is expressed through the possibility of free use of their rights; attorney refusal of the state accusation involves the closure of the criminal proceedings; the investigating judge, a court in the criminal proceedings solve only those issues submitted for their consideration by the parties and within their authority.

The adversarial is considered by us as a principle, although the legal literature reviews adversarial form of the process.

At the time of Kievan Rus the common law where were the elements of adversarial was in the courts. The advocates in the court were relatives and friends of the parties, witnesses of the accused's decent life and «vidocq» – the witnesses committed by the party or disputed fact. The adversarial received further consolidation in «Rights, on which Little Russian people is tried» – the draft of the Code of the Ukrainian law, by which its codification was completed in 1743.

By Decree dated by 1723 «On the form of court» the judge is not a passive arbitrator, the main essence of adversarial is the obligation to prove the position of the parties in the court; the investigating process where elements of adversarial left is declared, search is abolished. The first codified act in the criminal proceedings is the Statute of the criminal proceeding, adopted in 1864, gave a new impetus to the development of adversarial.

The basis of the adversarial proceedings is arbitral method and of the investigative is the method of power-conquest (administrative, imperative). Both these methods are in the arsenal of the Ukrainian justice, but under the preliminary investigation the proportion of the imperative method much prevails over dispositivity, because the norms of the preliminary investigation are based on the imperative basis [15].

The main feature of the adversarial is the presence of equal parties and independent court, which enables to determine an

adversarial as a form of the process where the dispute of equal parties is decided by an independent court, that is the legal status of its participants, which provides the functions of prosecution, protection and solution by independent entities is characteristic for adversarial process.

Adversarial process is considered a dispute, where the court judges the case involving parties – prosecution and defense, while the accused party (defendant) has all the rights, the parties with equal procedural rights examine evidence themselves; the functions of the parties are separated from the functions of the court, which is not a party in the trial. There can be no question of dispute of equal parties before an independent court without a clear distribution of the basic procedural functions. This basic type of adversarial of the criminal process is at the heart of the whole procedure of the legal proceedings, and therefore a violation of this provision certainly violates the principle of adversarial and significantly restricts the rights and guarantees of the parties to perform their functions.

Adversarial in the criminal process is considered the way of interaction the prosecution and defense parties, the principle of organization of joint activity, the essence of which is the struggle of opposites, i.e. on the basis of opposing interests of the parties is a contradiction – the conflict, the manifestation of which is in the confrontation between these parties. This conclusion deserves attention.

As it was noted the dispositivity and adversarial of the prosecutor during the criminal proceedings are interconnected. According to the dispositivity principle, the parties are free to dispose of their material and procedural rights. Adversarial, thus, is the right of the parties to dispose of the actual material and forensic evidence on the case. The dispositivity by its continuation has the adversarial principle because the realization of the right freely to use their rights is implemented into the possibilities to defend and argue their position using legitimate means and methods that a person considers necessary.

Dispositivity is first mentioned in the Roman law, although the official consolidation had no. The Roman formula – nemo judex sine actor – «No judges without the plaintiff» meant that filing a claim depends entirely on the plaintiff, who is also entitled to determine the amount of claims. For example, in the Roman Empire the plaintiff

had the right to claim the appointment of an elected judge in the case. However, a plaintiff's right belonged to him when he demanded a certain amount or thing prescribed by him.

At a later stage in the Roman law, there were other interpretations of the principle of dispositivity, which gave it some legal nuances. One of the formulas, including defining the content of the dispute as follows: the claimant cannot claim any other object or present other reasons of his right; the defendant is not entitled to challenge except those provided by formula. Law action cannot be re-filed or in the modified form [14, p. 25–29].

The Roman private law gave the principle of dispositivity considering that this institution was built on the principles of voluntariness autonomy, the legal protection of private interests and dispositivity. The subject of law disposed of his rights at his discretion. He could realize the subjective rights personally, transfer or entrust of their further implementation to other entities, or could not use all appropriate rights.

The principle of dispositivity, publicity and adversarial, of course, reflected in the Statute of Hanover in 1850, who established an oral judgment, publicity and dispositivity, freedom of the parties in the adversarial. Dispositivity was the constituent of the concept of adversarial process. Adversarial process was associated with the process of proof.

In Kievan Rus there was an accusatory-adversarial process for which was the characteristic active participation of the parties, in particular all began with the complaint – «slander». Particularly the active role in the process belonged to plaintiff, according to whom the court proceedings began. We cannot say the principle of publicity, which along with dispositivity and adversarial grew rapidly.

Today under the publicity we are to understand the prosecutor's obligations within his competence to begin the pre-trial investigation in each case of the direct detection of the criminal offenses (except in the cases where the criminal proceedings may be initiated only on the basis of the victim's statement) or statement (message) on committing a criminal offense and to take all legal measures to establish the criminal offense and the person who committed it. During the Kievan Rus the procedural and investigative figure of prosecutor did not exist, because in fact the

victim and the offender carried out the functions of the one and other. «Ruska Pravda» included the search for the guilty person at the initiative of the victim in the form of «call upon», «persecution on the trail» [12, c. 66].

The historical origins of the principle of dispositivity as officially recognized emerged with the adoption of the Statute of Civil Justice dated November 20, 1864 and other Court statutes in 1864. All the above considered the dispositivity principle is a basic leading principle, which determines the nature of the prosecutor's part in the proceedings. This rule regulates the powers of the prosecutor during the proceedings and determines their specificity.

We will note also that the action of the dispositivity principle stipulated by two factors arising from the functions of the prosecution agencies to promote the functioning of the criminal proceedings. The first is the lack of the prosecutor's supervision of the judicial agencies. The second is the principles of adversarial process and equality of the parties in the criminal proceedings.

By the judicial reform in 1864, the principle of dispositivity in the legislation was not reflected. At one time, A. H. Holmsten nicely put about the adversarial principle. He also had the courage to replace dispositivity by the term «independence» and combined the adversarial principle with the beginning of personal autonomy of the parties. The independence in the actions of the parties is not subject to limitation of the state power. The parties have right to decide which methods to use to prove their points of view and collect evidentiary information [16, c. 412].

Conclusion. Thus, analysis of the historical development of the principles of the prosecutor's role in the criminal proceedings, including the legality, equality, respect for human dignity, adversarial and dispositivity, the presumption of innocence and publicity suggests to conclude:

1) above the principle of the criminal process was developed in parallel with the common principles;

2) as the history shows all the outlined above principles originate from the Roman private law, where the basic principles of the parties' participation in the dispute were formed;

3) the total quantity of the principles of prosecutor's activity is quite large, but we allowed ourselves to emphasize, in our view,

those that are related with the prosecutor's role in the criminal proceedings;

4) the dispositivity and adversarial principles are the main interrelated bases, because the prosecutor, who is a part of the criminal process and follows the rule to dispose of his right within acceptable limits established by the law, using methods and techniques separating the prosecutor's functions from other participants of the criminal proceedings, enabling to exist arbitral justice where the court impartially and fairly evaluates the evidence;

5) the presumption of innocence plays an important role, because the prosecutor being a public prosecutor has a significant role and influence in the media, that is often because of incompetence prosecutors to spread defamation. Therefore, compliance of the main rules of the presumption of innocence allows the protection of suspects and defendants possible from baseless allegation by prosecutors.

REFERENCES

1. Nozdrina M. O. Essence and characteristics of the concept of «principles of criminal procedure» // Bulletin of the Lviv Institute of Internal Affairs: Collection / Goal. Ed. V. L. Ortynsky. – Lviv, Lviv Institute of Internal Affairs at the National Academy of Ukraine. – Ed. 2 (1). – 2004. – P. 43–52.

2. Tertyshnyk V. I. Conceptual model of the principles of the criminal process // Bulletin of Ukrainian Academy of Public Administration under the President of Ukraine. – 2001. – № 4. – P. 321–327.

3. Hotinskaya-Nor O. Z. Principle of reasonable terms as a new principle of criminal proceedings [Text] / O. Z. Hotinskaya-Nor // Lawyer, 2013. t. № 2. – P. 11–14.

4. Navrotska V. The principle of dispositivity and its implementation in the criminal process of Ukraine: Thesis ... candidate of legal sciences / V. V. Navrotska; Kyiv. Nat. university of Taras Shevchenko. – K., 2007. – 16 p.

5. The Constitution of Ukraine: Law of Ukraine on 28.06.1996, № 254/96 // Verkhovna Rada of Ukraine. – 1996. – № 30. – Art. 141.

6. Maliarenko V. T. The constitutional principles of criminal justice / V. T. Maliarenko ; Nat. legal acad. of Ukraine Yaroslav the Wise. – K. : Yurinkom Inter, 1999. – 318 p.

7. Criminal Procedural Code of Ukraine // Verkhovna Rada of Ukraine (VRU). – 2013. – № 9–10, № 11–12, № 13. – Art. 88.

8. On prosecution: Law of Ukraine // Verkhovna Rada of Ukraine (VRU) – 1991. – № 53. – Art. 793.

9. Myhailovskyi I. V. Essays philosophy of law. Cited by : Hropaniuk V. N. Theory of State and Law. Reader. – M. : Interstyle, 1998. – P. 804–805.

10. Principles of the prosecutor's role in the pre-trial criminal proceedings / N. Marchuk // Bulletin of the National Academy of Prosecution of Ukraine. – 2012. – № 4. – P. 43–47.

1. Rasskazov L. P. History of the criminal process of Russia: text edition / L. P. Rasskazov, L. A. Petruchak, I. V. Uporov. – Krasnodar, Krasnodar leg. univers. of Ministry of Internal Affairs of Russia. – 2001. – 104 p.

2. History of the state and law of Ukraine / Ed. A. J. Rogozhin. Part 1. – K. : In Jure, 1996. – 76 p.

3. Larina A. M. Presumption of innocence / A. M. Larina. – M. : Nauka, 1982. – 380 p.

4. Reader on history of the state and law of foreign countries (Antiquities and Middle centuries) / comp. doctor of law, prof. V. A. Tomsinov. – M. : Zertsalo, 1999. – 651 p.

5. Maliarenko V. T. About adversarial in the criminal proceedings and functional state of the court (some aspects) // Bulletin of the Supreme Court of Ukraine. – 2002. – № 6 (34). – P. 6–10.

6. Tauber M. Lawsuit, accusation, adversarial principle // Journal of civil law. – 1917. – № 1. – P. 2–19.