

## Prosecution and Defense in the Russian Criminal Process

Aleksandr V. Grinenko <sup>1\*</sup>, Ivan N. Kondrat <sup>1</sup>, Sergey N. Khoryakov <sup>2</sup>, Vasily J. Potapov <sup>3</sup>

<sup>1</sup> Moscow State Institute of International Relations (University) of the Ministry of Foreign Affairs of the Russian Federation (MGIMO-University), Moscow, RUSSIA

<sup>2</sup> The Russian Presidential Academy of National Economy and Public Administration (Lipetsk Branch), Lipetsk, RUSSIA

<sup>3</sup> Pitirim Sorokin Syktyvkar State University, Syktyvkar, RUSSIA

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### ABSTRACT

The purpose of this study is to identify problems arising in the process of realizing the functions of prosecution and defense in criminal proceedings of the Russian Federation. The author analyzes the concept of "adversarial nature". A direct relationship is established between the adversarial principle and the positions of prosecution and defense. The necessity of comprehensive improvement of the existing criminal procedure legislation is shown by creating an effective mechanism to protect the rights and interests of individuals and legal entities that suffered from illegal actions, as well as protecting a person from unlawful and unsubstantiated accusations, infringing his rights and freedoms. In a positive way, the similar experience of foreign countries is being investigated. Among the main findings outlined in this article, the following points are worth emphasizing: in the field of criminal justice, provisions of the Criminal Procedure Code and international regulatory legal acts should be provided in relation to the presentation of the initial charge in order to eliminate the negative consequences not only for the outcome of specific criminal cases, but also for law enforcement in the preliminary investigation process in general; the solution of the task of expanding the adversarial principle at the preliminary investigation stage should be based on the legislative abolition of the unilateral procedure for introducing the facts to the materials of the criminal case presented by the defense; a clear legal status of the parties of the defense and prosecution, provided by the law and the mechanism for its execution, takes criminal procedural relations to a new qualitative level, which positively affects the reputation of the social state.

**Keywords:** criminal proceedings, adversarial principle, prosecution, defense, the rights of the individual, the investigator, the victim, the suspect, the accused

### INTRODUCTION

According to Part 3 of Art. 123 of the RF Constitution equality and adversary character of the parties are recognized as the principle of legal proceedings [1]. In addition, Art. 48 of the Constitution of the Russian Federation guarantees the right of everyone to receive professional legal assistance [1]. These constitutional provisions are of particular importance in the field of criminal proceedings, since everyone who is suspected of committing a crime has the right to receive a lawyer's assistance. This is due to the fact that it is in this area that significant opposition to the provision of constitutional human rights and freedoms is found. The regulation of the competition of the parties at the constitutional level predetermines the paramount place of the principle of competition, and also provides the parties of the prosecution and defense with considerable procedural possibilities.

Many well-known provisions of international law at the national level are enshrined in the Constitution of the Russian Federation and the Criminal Procedure Code of the Russian Federation. Among such provisions, the adversarial principle should be noted, which by design should serve as a guarantor of the rights of an individual

involved in the sphere of criminal proceedings. The adversarial principle, as the driving force of criminal proceedings, determines the procedure for resolving a dispute between the prosecution and the defense, which have opposing interests.

Unfortunately, conflicting interests arise not only among the participants who act in the opposition. The contradicting character of public and private interests is observed between the prosecutor, the investigator, the interrogating officer on the one hand, and the victim, the private prosecutor, the civil plaintiff on the other hand. This happens not only because the interests of public and private interests are always opposed to each other, but, most likely, to a greater extent because the appropriate mechanism for resolving such disputes has not been developed. If a dispute between the parties of the prosecution and defense is resolved by the court on the basis of the adversarial principle, then there is essentially no procedure for resolving the dispute, such as that arising between the prosecutor and the victim. In such situations, it is easy to predict the fact that individuals representing private interests are always on the losing side.

Proper legal regulation of individual rights leads to the emergence of a judicial method of legal regulation, and the ideal type of adversary criminal process organically combines public and private interests. In accordance with the adversarial principle, the prosecution and the defense oppose their positions, and the court, when reviewing and resolving a criminal case, is independent, its actions and decisions do not depend on the positions of the parties. For the purpose of achieving justice, there is a criminal procedure form in which the court independence is ensured primarily of the parties, as well as the formal equality of the parties, in which the dispute between the prosecution and the defense is the driving force of the process.

This provision is one of the most important principles of the Russian criminal process, that is, the proper, ideal, normative criterion of procedural legislation, the behavior of officials and citizens (which is especially important in individual cases of law enforcement).

The adversarial principle is not a goal in itself, but it is justified, because the adversarial principle of equal parties, under condition of court activity, is the most guaranteed legal instrument ensuring that a citizen can be found guilty of a crime, if this is really true to the fact. It determines, first of all, the mechanism of the criminal process and should be applied if it does not come into conflict with the ultimate goals of the criminal process and other, more universal principles.

Therefore, adversarial principle in criminal proceedings should not exclude, but, on the contrary, assume the court's activity in proving and its duty to take all measures to establish the actual circumstances (within the framework of indictment). Only in this interpretation will this principle be in harmony with other principles and with the ultimate goals of the criminal process.

## METHODOLOGICAL FRAMEWORK AND METHODS

This study, in its methodological terms, is a study of Russian and foreign legislation, normative legal acts of the international level, as well as law enforcement practice in the field of criminal justice. The following methods were used: comparative legal, historical law, sociological, method of interpretation of legal norms, a number of logical methods. On the basis of the data obtained, key conclusions were formulated, which allowed us to reasonably apply a number of terms, establish the need for systemic modernization of Russian legislation through the introduction of mechanisms ensuring the rights, freedoms and legitimate interests of the individual, which in the long run will have a positive effect on the improvement of the social state (Constitution of the Russian Federation, Article 7) [1].

## RESULTS AND DISCUSSION

Let us go directly to the examples.

**№ 1.** The adversarial principle regulated by Art. 15 of the Criminal Code is recognized as one of the primary principles of criminal proceedings. The distribution of functions between the prosecution and the defense in the process, as well as the same amount of rights to provide parties with information in court to defend their positions serve as the main criterion for the implementation of the considered principle.

In the criminal proceedings of the Soviet period, the adversarial principle was replaced in many aspects by the activity of the court. It was the court that was obliged to guarantee an impartial and thorough examination of the materials of the criminal case and the establishment of the truth. But a significant drawback of such an order was that the representatives of the prosecution (investigator, prosecutor) had extremely broad powers in the pre-trial proceedings, which turned the court into the body that most often confirmed the indictment; the size of the punishment. In this regard, the term "adversarial" was used quite widely at the stage of a trial, but its real content was extremely non-specific, and the rules themselves did not work.

Progress in the effectiveness of the implementation of the adversarial principle became noticeable as a result of judicial and legal reform, namely after the powers of the prosecution began to be exercised more in pre-trial proceedings, but not in the course of the trial [2]. In this connection, the court had the opportunity to consider a criminal case, in establishing the circumstances in which both the prosecution and the defense took part. In the current situation, the implementation of the adversarial principle demanded that the adversary parties be given equal volume of procedural rights.

The problem of implementing the adversarial principle in pre-trial criminal proceedings has been considered by many experts in the field of law. A.B. Chichkanov [3], a scientist in the field of legal proceedings believes that the adversarial principle does not make sense to apply at the pre-trial stages of criminal proceedings, since the result of the preliminary investigation stage should express the position of the prosecution, and the defense can state its position in court [3]. At the same time, the lack of adversarial in the pre-trial proceedings will allow the prosecution to form such a position that the defense will not be able to refute during the trial, even if it is endowed with significant procedural opportunities. Therefore, the defense must have the authority to influence the formation of the evidence base in a criminal case directly at the time of the initial collection of evidence during the preliminary investigation.

German specialists in legal procedures perceived the ideas of the adversarial nature. Reasoning on the draft of a new criminal procedure law contained proposals to follow the requirements of a sound legislative policy, taking account of both their own positive experience and the experience existing in other legislation systems. Such an approach, in German specialists' opinion, raised the legislative case "to the model of progress and perfection" [4].

Thus, it can be concluded that the spread of the adversarial principle to pre-trial criminal proceedings will have a positive effect on the enforcement of individual rights in criminal proceedings, and this, in turn, will improve the efficiency and fairness of the trial.

**№ 2.** The latest edition of the Code of Criminal Procedure of the Russian Federation significantly expanded the powers of a lawyer in criminal proceedings. The legislator, considering the adversarial nature as the basis of criminal proceedings, gave the defense counsel a wide range of rights to collect evidence in the process of rendering legal assistance. But in accordance with the current legislation, the defender does not collect evidence, but only the information containing proof facts. Since the list of evidence contained in Part 2 of Art. 74 of the Criminal Procedure Code does not include information obtained by the defense counsel, any actions of a lawyer aimed at finding information are regarded as vigorous activities to create an evidence base in a criminal case, which comes into conflict with the law [5].

Accordingly, at the preliminary investigation stage, it is the side of prosecution that decides which information can act as evidence and which information is not. The main reason hindering the application of the adversarial principle at the stage of preliminary investigation is an unmotivated and unsubstantiated refusal of the investigator to add petitions filed by a defense lawyer to the case file. There is no doubt that the investigating officer, when deciding on the satisfaction of petitions of the defense, for example, on the significance of questioning a witness, first of all takes account of official interests. For the purpose of eliminating the adversarial principle restriction at the stage of preliminary investigation, it is required to legally cancel the unilateral procedure of attaching facts presented by the defense to the criminal case materials.

**№ 3.** The main condition that contributes to the accomplishment of the criminal proceedings' objectives in the criminal process in Russia is the secret of the preliminary investigation. Non-disclosure of information about planned and conducted investigative actions and their results protects the prosecution from counteraction. At the same time, the theory of criminal procedural law identifies the problem of the lack of a specific definition, elements and volume of such a secret [6]. Participants in criminal proceedings with such information are also not indicated in the law. Accordingly, in the course of criminal proceedings, the category of secrecy of the preliminary investigation can be attributed to a rather significant array of information, and a narrow circle of people with access to it. Beyond any doubt that, in order to prevent the opposition to the preliminary investigation from the side of the defendant, before the completion of this stage he should not have access to the complete information available to the prosecution. However, in connection with this, the problem of limiting the culprit's rights to defense is becoming evident.

Analyzing the chronology of the consideration of this problem, it should be noted that in the 1950-s of the 20th century, people who did not want a defense lawyer to participate in the preliminary investigation process were afraid of the information being spread beyond the preliminary investigation. At the same time, there was an option of allowing a defense lawyer to familiarize with the materials of the criminal case at the final stage of the investigation. Since 1958, this rule has been introduced into the criminal procedure legislation in all the republics that were members of the USSR.

The next step in the issue of allowing a lawyer to familiarize with the materials of the criminal case was the introduction of changes in 1970, according to which he was recognized as a participant in the criminal process immediately after the indictment. This allowed the lawyer to participate more actively in providing proofs, in

particular, to file an application with the investigator during the preliminary investigation, including the elimination of violations of the law. In addition, the lawyer has the right to get acquainted with all the materials of the criminal case at the end of the preliminary investigation.

In connection with changes in the criminal procedure legislation, on April 10, 1990, the defense lawyer was granted the right to participate in the case from the moment the person was called as a suspect. The effectiveness of this provision was limited by the lack of a possibility of the defense lawyer to get acquainted with the documents justifying the detention [7].

At present, the possibility of a person in relation to whom criminal prosecution is carried out is not limited to any formal framework. Among other cases, the defense lawyer is entitled to assist even a person in respect of whom the issue of a criminal lawsuit is only going to be filed.

However, in accordance with the Code of Criminal Procedure, the powers of the defense lawyer to familiarize himself with the materials of the criminal case remain limited until the completion of the preliminary investigation. According to paragraph 6 p. 1 Article 53 of the Criminal Procedure Code of the Russian Federation the rights of the defense lawyer comprise: familiarization with the detention report, investigative measures taken in the presence of the defense lawyer, other documents the contents of which the suspect or accused knows or should know [8]. Accordingly, the amount of information that the defense lawyer has in the preliminary investigation stage is equal to the amount of information that his client has. In this regard, there are doubts about the effectiveness of professional defense.

The defense lawyer does not have an opportunity to file a reasoned petition to take the necessary investigative actions before the completion of the preliminary investigation, since he does not have the full amount of information collected by the investigator. At the final stage, after reviewing the contents of the documents, the defense lawyer's petition is interpreted by the investigator as opposition and is not subject to satisfaction, since the procedural time limits for the investigation expire and their extension is rather difficult for the investigator [9]. Such circumstances, when a defense lawyer at the stage of preliminary investigation formally provides legal assistance, but in fact is limited in his actions, make defense lawyers file the main petitions only at the trial stage. We consider it expedient to review the provisions of the criminal procedure legislation and provide defense lawyers with broad opportunities to familiarize themselves with the materials of the criminal case directly during the preliminary investigation.

**№ 4.** The main stage of pre-trial criminal proceedings is bringing a person to justice as an accused. As a result of the analysis of judicial practice, it can be stated that a significant part of cases where the law is violated when the culprit is brought to justice causes negative consequences not only for specific criminal cases, but also for the public order as a whole.

According to Art. 171 of the Code of Criminal Procedure of the Russian Federation the legal basis for bringing a person to justice as the accused is "the presence of the required evidence giving grounds to charge a person with a crime" [10]. However, such a rule does not give an answer to the question of what motives exactly and at what point in the preliminary investigation the indictment takes place.

The indictment procedure itself established in the Code of Criminal Procedure of the Russian Federation is very unclear. For example, when a person is summoned to bring charges against him, he is only explained in general terms about the right to use the assistance of a lawyer, but his role is not specified during the subsequent indictment and interrogation.

The procedure for bringing an accused to justice includes the following components: a decision to bring an accused to justice, bringing charges against a person, telling him about the rights, interrogating the accused, and if necessary changing and adding the indictment.

However, the initial indictment is a formal statement by the investigator, who represents the prosecution, about the proof of a crime committed by a particular person. It may not include specific information against which the accused and his defense counsel can put forward and substantiate their counterarguments. The investigator, on the other hand, has a possibility to make a final and detailed statement of prosecution just before the end of the preliminary investigation, and then refuse the defense to provide the satisfaction of petitions.

To eliminate the gaps in the theory and the regulation of law enforcement practice, we propose to state Part 1 of Art. 171 of the Code of Criminal Procedure in the following wording: "When there is a sufficient aggregate of evidence confirming the fact of an act, the guilt of a particular person in its commission, the form of guilt and motives, then the authorized official decides to bring this person to justice as an accused, makes a relevant decision." The proposed amendment will contribute to the improvement of the procedure for bringing a person to justice as an accused and, as a result, will give the defense a chance to provide defense against the accusation.

**№ 5.** The adversarial principle, proclaimed in the Code of Criminal Procedure of the Russian Federation as one of the key ones, cannot be implemented without the interaction of the defense and prosecution parties. These parties should be given an equal volume of procedural rights in order to refute the arguments and demands of the

opposition party, and prove their own allegations. The court is the ruling body of the proceedings throughout its course, whose jurisdiction is to sum up the statements of the parties, analyze the evidence presented and make the final decision - the verdict. The established mechanism makes it possible to counteract subjectivity in establishing facts and making a fair decision, and also helps with the realization of the rights of the victim and culprit in the process of interaction between the parties.

Establishing the true circumstances of the case depends on a comprehensive, versatile study, characterized by absolute impartiality [11]. Thus, the adversarial nature of the prosecution and defense acts as an anarchist policy, but at the same time is under control of the court. According to the criminal procedural legislation, activities are also carried out in accordance with which the circumstances of the criminal case are analyzed in the framework of the study of the evidence, primarily accusatory base. The relevant rules are enshrined in the Code of Criminal Procedure of the Russian Federation (Art. 15, 73, Part 1, Art. 243, etc.).

Proceeding from the aforesaid, it can be asserted that the proper legislative expression of the adversarial principle helps to level out the main procedural powers of the parties of criminal proceedings. Such powers in the current legislation have specific performers:

- only the court is entitled to exercise the authority to review and resolve criminal cases;
- The prosecutor, the investigator, the victim, the private prosecutor (in criminal cases of some minor acts) have indictment functions;
- The defense lawyer, the counsel for the defense who is advocate in pre-trial proceedings possess the powers of professional defense of the suspect, the accused.

The adversarial principle cannot be accomplished solely by a formal procedure. It does not work in circumstances where there is no prosecutor, the evidence of the prosecution is blurred and does not have the utmost clarity. If the situation develops in this way, then the criminal proceedings must be terminated or the verdict of acquittal must be rendered. The court is strictly prohibited to carry out criminal prosecution and to initiate a criminal case regarding new prosecution or other persons, since this is contrary to the adversarial principle based on a strict distinction between the functions of the prosecution and the defense.

Equality of the parties is also necessary in a jury trial where a professional judge and jurors sit. Article 21, paragraph 6 of Part 1 of Art. 51 of the Code of Criminal Procedure establishes the rules for holding a jury trial, which do not allow the absence of the prosecutor - the public prosecutor and defense counsel.

One more question is brewing up to which degree the phrase “adversarial nature and equality of the parties” fits to this legal phenomenon [12]. The fundamental elements of a fair criminal procedure are: the lack of bias and subjectivity of the court; the compulsory presence of the parties as key participants in the process; equality of the prosecution and defense. Speaking about the structure of adversarial nature and equality of the prosecution and defense, it should be noted that disorganization occurs in the process of forming a logically verified law, since the ratio of the general (i.e., competition) with its elements (equality of the parties) is violated, because both components occupy one level and act on a par. In this regard, the text of the Constitution decided to use both concepts. Thus, the adversarial principle became firmly associated with the presence of equal parties, although in pre-trial proceedings it would be more accurate to call this “procedural parity”.

**№ 6.** The current criminal procedural legislation provides the lawyer with the right to be informed of the ruling content on the commission of an expert assessment, but to exercise any right, it is necessary that the official fulfill the relevant duties. Regarding the notification of the defense about the content of the decision on the commission of an expert assessment, such an obligation rests with the investigator, but Article 195 Code of Criminal Procedure does not establish the period of such familiarization. Such a gap may provoke various unlawful restrictions on the rights of participants in criminal proceedings. In fact, the defense lawyer may get access to the information contained in the decree on the commission of an expert assessment, and simultaneously with its conclusion after the end of the investigative action, [13]. Accordingly, defense lawyers acting in the criminal process cannot realize all the possibilities when familiarizing themselves with the ruling on the commission of an expert assessment.

In order to eliminate gaps arising in the process of the investigator’s familiarizing the people involved with the contents of the decree on the commission of an expert assessment, Part 3 of Art. 195 of the Code of Criminal Procedure should be stated in a new wording: “The investigator must notify the indicated interested parties about the on the commission of an expert assessment and inform them of the relevant decision immediately after its issuance”. The proposed change is the most effective, as it will ensure the rights of the suspect (accused), under Art. 198 of the Code of Criminal Procedure of the Russian Federation, and thus will create appropriate conditions for the implementation of the adversarial principle.

**№ 7.** Criminal procedure legislation provides the defense with the right to petition for the necessary investigative actions in order to clarify the circumstances that may affect the preliminary investigation and subsequent court proceedings. The decision of an investigator regarding such petitions is subject to appeal in a manner regulated by law. In accordance with Art. 125 of the Code of Criminal Procedure of an interested person

has an opportunity to appeal the actions of the investigators, inaction and procedural decisions if they can harm persons or impede access to justice.

In theory, the accused is absolutely protected from the investigator's arbitrariness, malicious violations of the rights to his own defense by having the right to appeal the investigator's decisions in court. However, Part 1 of Art. 38 of the Code of Criminal Procedure of the Russian Federation defines the investigator as an official implementing the preliminary investigation, solely determining the course of the investigation, as well as deciding on the implementation of investigative and other legal proceedings.

Article 125 of the Code of Criminal Procedure does not contain a direct ban on appealing against the actions of the investigator regarding the commission of expert assessments. At the same time, in accordance with paragraph 2 of the Resolution of the Plenum of the RF Supreme Court dated from February 10, 2009 No. 1 "The practice of courts considering appeals in accordance with Article 125 of the Criminal Procedure Code of the Russian Federation", the court accepts appeals not only on actions and decisions directly mentioned in this article, but also on other decisions and actions (inaction) of officials taken at the pre-trial stages of criminal proceedings, if they are capable of causing damage to the constitutional rights and freedoms of participants in the criminal case proceedings or other persons [14].

In similar situations, the judge must ascertain any violations of the rights and legitimate interests of the defense, and also determine whether such violated rights and legitimate interests are constitutional, that is, enshrined in the Constitution of the Russian Federation.

Considering such complaints, the court must take into account that the investigator has the greatest interest in carrying out specific investigative actions, and if any rights are violated that reduce the possibility of the defense to implement the adversarial principle, the constitutional rights of the individual are violated. In this regard, we consider a conclusion contained in the legal literature incorrect that it is impossible to appeal against the actions of the investigator regarding the commission and execution of an expert testimony.

At the moment, the courts are guided by the provision regulated by paragraph 1 of the Resolution, which stipulates that when "checking the legality and validity of decisions and actions (inaction) of the interrogator, investigator, head of the investigation body and the prosecutor, the judge should not prejudge issues that may later be the subject of judicial proceedings in examination of a criminal case on its merits. In particular, the judge is not entitled to draw conclusions about the actual circumstances of the case, about the assessment of evidence and the qualification of a particular act."

The incorrect, from our point of view, practice of applying these legal norms is the reason for the frequent cases of refusal by the courts to consider complaints regarding the failure to meet the requirements for conducting an expert assessment, posing additional questions to the expert, establishing or attaching evidence, based on the fact that the court is allegedly forbidden to interfere in procedural activity of the investigator.

A general tendency of reforming the criminal procedure in Russia is currently aimed at realizing the maximum protection of the rights and interests of individuals and legal entities affected by illegal actions, as well as the protection of a person from an unjustified and unsubstantiated indictment and infringement of his rights and freedoms.

## CONCLUSION AND RECOMMENDATIONS

Summarizing the aforesaid and summing up the study conducted, it is necessary to emphasize the following. In the framework of this article, an attempt was made to draw attention to the sphere of legislative regulation in terms of the implementation of the functions of the prosecution and the protection of criminal proceedings in the Russian Federation, its consideration from the standpoint of internal systemic gaps and other shortcomings.

Specialists in the field of criminal justice do not thoroughly investigate this field, primarily because other issues are usually more focused on issues that arise during the initiation of criminal cases and their subsequent course.

Many problems have practical and scientific constituents, some of them are due to the fact that Russian criminal procedural legislation is not fully capable of taking into account the interests of both sides of the process at the same time. A set of rules and procedures arising from their content is required to create, which, on the one hand, will allow one to create an effective mechanism of legal regulation, on the other - to ensure full compliance with the rights, freedoms and legitimate interests of the participants on the part of the defense.

The majority of the identified problems require their solution at the legislative level. At the same time it is advisable to use the positive experience of foreign legislation systems, as well as international standards in the field of criminal justice.

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