National and international legal acts guarantee everyone the right to hear their case by a competent court. The same principle can be applied to the stage of pretrial investigation, although only a competent investigator or prosecutor can ensure the implementation of an effective investigation. The very process of criminal proceedings is carried out by the general principles of criminal proceedings, among which one of the universal principles is the principle of adversarial. Taking into account the components of the principle of competitiveness, this article is defined as clarifying the place and role of the institution of victim representation in implementing the principle of competitiveness. It is substantiated that to implement the principle of competition in criminal proceedings fully, certain provisions of the current Criminal Procedure Code of Ukraine require revision and certain changes.

**Keywords:** criminal proceedings, legal basis, victim, institute of representation, victim's representative, legal representative, procedural rights and obligations.

**Research Problem Formulation.** Among the main principles of criminal proceedings, a legislator has singled out the “competitiveness of the parties”. This approach is fully consistent with international law, as it is the basis for ensuring justice in the consideration and resolution of criminal proceedings. In particular, this is guaranteed by Art. 6 of the European Convention for the Protection of Human Rights and Freedoms of 1950. A similar conclusion was also reached by the European Court of Human Rights in its judgment “Lawless v. Ireland” (1960), stating that competitiveness in proceedings is a mean of achieving justice.

Numerous provisions of the current criminal procedure legislation are aimed at implementing competitive principles. At the same time, violations of the latter, according to generalizations of investigative and judicial practice, may be recognized as sufficient grounds for declaring evidence inadmissible. Therefore, there is a need to continuously study the practice formed as a result of law enforcement activities to identify typical issues that make it impossible to implement the competitive principle and, taking this into account, to develop appropriate recommendations for improving current legislation and problems arising in the practice of pre-trial investigation and trial of criminal proceedings.

In addition to the competitive principle, national and international legal acts guarantee everyone the right to have their case heard by a competent court. The same principle can be applied to the stage of pretrial investigation, although only a competent investigator or prosecutor can ensure the implementation of an effective investigation. The very process of criminal proceedings is carried out by the general principles of criminal proceedings, among which one of the universal principles is the principle of adversarial. Taking into account the components of the principle of competitiveness, this article is defined as clarifying the place and role of the institution of victim representation in implementing the principle of competitiveness. It is substantiated that to implement the principle of competition in criminal proceedings fully, certain provisions of the current Criminal Procedure Code of Ukraine require revision and certain changes.

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ПРЕДСТАВНИЦТВО ПОТЕРПІЛОГО ЯК ПЕРЕДСТАВНИЦТВО | ПЕРЕДСТАВНИКУ ЗМАГАЛЬНОСТІ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Направлені її міжнародними нормативно-правовими актами кожному гарантія право на розгляд його справи компетентним судом. Це ж засада можна застосовувати і до стадії досудового розслідування, адже лише компетентний слідчий, прокурор здатні забезпечити здійснення ефективного розслідування. Сам же процес кримінального судочинства здійснюється відповідно до загальних засад кримінального провадження, серед яких одне з універсальних є засада змагальності сторін. Ураховуючи складові засад змагальності, мету статті визначено як збільшення місця та ролі інституту представництва потерпілого в реалізації засад змагальності. Обґрунтовано, що задля повноцінної реалізації засад змагальності у кримінальному судочинстві, окремі положення чинного Кримінального процесуального кодексу України потребують перегляду та внесення певних змін.

Ключові слова: кримінальне провадження, права засади, потерпілого, інститут представництва потерпілого, законний представник, процесуальне право й обов'язки.

Analysis of Essential Researches and Publications. Peculiarities of implementing the competitive principle in criminal proceedings were revealed by S. Kovalchuk3, D. Kryklyvets4, M. Markush5, O. Mokhonko6, M. Nozdrina7, I. Podolinska8, Yu. Khomatov9, B. Yavorskyi10, O. Yanovska11, etc. S. Ablamskyi12, R. Pozhar13, V. Samoliuk14, Ye. Shcherban15, O. Yakymchuk16 and many others have been engaged in determining the legal basis for victim representation in criminal proceedings and the specifics of their implementation. Certain aspects of victim representation in criminal proceedings were analyzed by A. Marynych and P. Stepanov. The latter, in court. This fully applies to the pre-trial investigation stage, as only a competent investigator, inquirer, or prosecutor can ensure an effective investigation. Simultaneously, the current legislation also provides for the victim’s right to engage a representative, which, in certain cases, is a reasonable step towards ensuring the fulfillment of the tasks of criminal proceedings. The fact that the United State Register of Court Decisions is filled with numerous court decisions on the satisfaction of victims’ complaints against decisions of investigators and prosecutors raises questions about whether the investigator can fully ensure that the interests of the victim are met. It also raises questions about whether the investigator can be identified with the victim’s “representative” since both are representatives of the prosecution. Moreover, it prompts consideration of whether the investigator can be considered an interested party in protecting and restoring the victim’s violated rights or whether they are a person authorized to establish the objective truth in the case.

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Representation Of The Victim As Implementation Of The Principle Of Competitiveness In Criminal Proceedings

Ivan Iemets

National and international legal acts guarantee everyone the right to hear their case by a competent court. The same principle can be applied to the stage of pretrial investigation, although only a competent investigator or prosecutor can ensure the implementation of an effective investigation. The very process of criminal proceedings is carried out by the general principles of criminal proceedings, among which one of the universal principles is the principle of adversarial. Taking into account the components of the principle of competitiveness, this article is defined as clarifying the place and role of the institution of victim representation in implementing the principle of competitiveness. It is substantiated that to implement the principle of competition in criminal proceedings fully, certain provisions of the current Criminal Procedure Code of Ukraine require revision and certain changes.

Keywords: criminal proceedings, legal basis, victim, an institution of representation, victim’s representative, legal representative, procedural rights, and duties.

particular, proposed to engage a lawyer to represent the interests of the victim if the prosecutor refuses to support the state prosecution. V. Kaniuk and R. Oliynychnuk formulated the definition of the concept of “representative” and developed a classification of representation types. N. Rohatynska and K. Skliaruk have identified and characterized the peculiarities of the procedural status of a victim in criminal proceedings. However, despite numerous studies and a significant level of theoretical elaboration on certain issues of victim representation in criminal proceedings, some issues of this issue, including the role of the institute of victim representation in competitive criminal proceedings, continue to remain unaddressed by researchers. This indicates that these issues have not been sufficiently researched and highlights the need to intensify scientific research in this area of scientific knowledge.

Article Purpose is to determine the place and role of the institute of representation in the implementation of the competitive principle, based on the generalization of theoretical developments of researchers and the current legal framework for victim representation in criminal proceedings.

Main Content Presentation. Criminal procedural relations arise in connection with the violation of rights, freedoms, and interests protected by criminal law of the participants in social relations. As indicated in legal literature, such relations are always conflictual, as their basis is the facts of one subject encroaching upon the interests of another. This leads to a collision of interests between opposing parties, and their non-conformity, which gives rise to a dispute that forms the foundation for a competitive process.

The principle of competitive proceedings is stipulated by the Fundamental Law of Ukraine. The Criminal Procedure Code of Ukraine of 2012 defined it as one of those principles that must correspond to the content and form of criminal proceedings. Based on the generalization of theoretical developments, we can state that the competitive principle is a fundamental basis for many other principles of criminal proceedings currently defined and enshrined by the legislator. Such a position is supported by other authorial approaches as well. For instance, H. Mamka indicates that the competitive principle, along with others, belongs to the general procedural (universal) principles.

Other Ukrainian researchers engaged in the study of specific principles of criminal proceedings come to a similar conclusion. For instance, O. Dehtiar, in her research, concluded that the principle of immediacy (“the court’s duty to personally examine the evidence, provide the opportunity for direct participation of other participants in the criminal process in conducting procedural actions, familiarize them with the materials of the criminal case”) derives from the principle of competitive proceedings.

21 Конституція України: Закон України від 28.06.1996 № 254-к/ВР: URL : https://zakon.rada.gov.ua/laws/show/254-%D0%BA/96-%D0%B2%D1%80#Text
Representation Of The Victim As Implementation Of The Principle Of Competitiveness In Criminal Proceedings

Following the normatively defined understanding of the principle of competitive proceedings, its essence lies in the independent advocacy by “the prosecution and the defense of their legal positions, rights, freedoms, and legitimate interests by means provided for by the Criminal Procedure Code of Ukraine”\(^{24}\). In addition, Article 22 of the Criminal Procedure Code of Ukraine also stipulates that the defense and the prosecution have equal rights to gather and submit evidence to the court, petitions, and complaints, as well as exercise other procedural rights guaranteed to them by law. The functions of defense and state prosecution are entrusted to different subjects of criminal procedural relations, and “the court, preserving objectivity and impartiality, creates the necessary conditions for the parties to exercise their procedural rights and fulfill procedural duties”\(^{25}\).

Regarding the determination of the court’s role in the competitive proceedings, we consider the position of D. A. Pieshyi, who noted that during the pre-trial investigation stage, the court, exercising its supervisory powers, should ensure the rights of the participants in the proceedings in accordance with the law and legal practice, taking into account the decisions of the European Court of Human Rights, while remaining objective and impartial. Under such conditions, recognizing the decisions, actions, or inaction of pre-trial investigation bodies, the prosecutor as illegal and unfounded, the court cannot give any instructions to the pre-trial investigation body, prosecutor, and remains indifferent to the final result of the investigation \(^{26}\).

Considering the outlined legal provisions, scientists engaged in the doctrinal (scientific) interpretation of the current Criminal Procedure Code of Ukraine have concluded on the separation of three main elements of the competitive principle. Among these, they included, in particular, the following: “1) division of functions between the prosecution, defense, and case resolution; 2) endowing parties with equal procedural rights to fulfill their functions; 3) the leading role of the court in criminal proceedings and granting the court alone the right to make decisions on the case. Competitive nature encourages the court to properly examine the case materials and deliver a lawful and justified judicial decision”\(^{27}\).

Regarding the theoretical understanding and definition of the principle of “competitiveness”, various proposals can be found in the theory of criminal procedure. For instance, M. Markush has taken a rather broad approach to its interpretation. She proposed understanding the principle of competitiveness as a legal institution and made suggestions for expanding the structure of this principle. In addition to traditional components such as the division of procedural functions of the prosecution, defense, and adjudication, the presence of active and equal parties, and a court deciding the case and ensuring the parties’ rights in the performance of their functions, the researcher emphasized the need to include elements such as access to justice, the freedom to challenge all decisions in court, and procedural equality.


\(^{26}\) Там само.

\(^{27}\) Пєший Д. А. Засада законності та її забезпечення у досудовому кримінальному провадженні : автореф. … канд. юрид. наук: 12.00.09. Київ, 2016. С. 16-17.
of participants in criminal procedural activities who carry out prosecution and defense 28.

O.O. Mokhonko, in her research on the concept and determination of the essence of the competitive principle in criminal proceedings, proposed to distinguish the following components of the content of competitiveness: 1) division of functions: the function of prosecution, the function of defense, the function of case resolution; 2) the presence of a defense side and a prosecution side; 3) the existence of an independent, autonomous court; 4) the presence of a certain scope of rights and duties for the parties that must be balanced; 5) procedural procedures regulated by current legislation through which the competitive principle is implemented 29.

D. Kryklyvets emphasized the need for a broader understanding of the category “competitiveness”. By the latter, it is proposed to understand a certain procedural regime that covers organizational and functional aspects. Except for traditional provisions, scientists have generalized that competitiveness also includes some legal provisions, including: 1) the parties’ right to use procedural tools (one of which is the institute of judicial control over pre-trial investigation) to prove their own and refute other legal positions; 2) pre-trial proceedings are conducted as openly as possible for the defense and the victim 30.

Based on the above, we can generalize that the main components of the principle of competitiveness are usually associated with those defined in Article 22 of the Criminal Procedure Code of Ukraine. We favor the approach by D. E. Kryklyvets, who suggests that competitiveness can be equated with a certain procedural regime. However, a logical question arises as to whether the modern criminal process (provisions of modern criminal procedural legislation) corresponds to such criteria as a competitive procedural regime. Although legal literature mentions such inherent features of the latter as procedural equality of the prosecution and defense, provision, and equality in the use of certain procedural instruments, they have not been fully implemented so far. For example, this involves the limitation of the defense side in challenging individual decisions of the investigator and prosecutor, the lack of information for the defense side regarding procedural decisions made in criminal proceedings, etc. Unequal opportunities for representatives of the prosecution and defense to involve experts with special knowledge in criminal proceedings. For example, to ensure the conduct of forensic examination in criminal proceedings, decisions on resolving the expert’s “own” issues at the pre-trial investigation stage, the defense side usually has to apply to the investigative judge with the relevant motion. Given this, the thesis that the defense side and the prosecution side have equal procedural rights and instruments for implementing their procedural will in the context of conducting criminal procedural activities seems somewhat doubtful.

Another question that remains unresolved is what is the role and place of pre-trial investigation bodies in criminal proceedings: proving the circumstances to be established in criminal proceedings or establishing the objective truth? Undoubtedly, the common goal of both the prosecution and the defense is to fulfill the tasks of criminal proceedings, which involve ensuring “swift, complete, and impartial investigation and judicial consideration so that everyone who has committed a criminal offense is held accountable to the extent of their guilt, no innocent person is accused or convicted, no person is subjected to undue procedural coercion, and that each participant in the criminal proceedings is subject to due legal

30 Мохонько О. О. Поняття і сутність засади змагальності сторін у кримінальному процесі України. Юридичний національний електронний журнал. 2015. № 4. С. 252.
Representation Of The Victim As Implementation Of The Principle Of Competitiveness In Criminal Proceedings

Ivan Iemets

REPREZENTACJA OFIARY JAKO REALIZACJA Zasad konkurencyjności w postępowaniu karnym

Krajowe i międzynarodowe akty prawne gwarantują każdemu prawo do rozpoznania jego sprawy przez właściwy sąd. Samą zasadę można zastosować na etapie postępowania przygotowawczego, gdyż jedynie kompetentny śledczy i prokurator może zapewnić przeprowadzenie skutecznego śledztwa. Sam proces karny toczy się zgodnie z ogólnymi zasadami postępowania karnego, wśród których jedną z uniwersalnych zasad jest zasada kontradyktoryjności stron. Biorąc pod uwagę elementy składowe zasad konkurencyjności, cel artykułu określono jako wyjaśnienie miejsca i roli instytucji reprezentacji ofiar w realizacji zasady konkurencyjności. Uzasadnia się, że w celu pełnego wdrożenia zasady kontradyktoryjności w postępowaniu karnym konieczne jest dokonanie przeglądu niektórych przepisów obowiązujących Kodeksu postępowania karnego Ukrainy i wprowadzenia pewnych zmian.

Słowa kluczowe: postępowanie, karno, podstawa prawna, pokrzywdzony, instytucja zastępczasta, przedstawiciel pokrzywdzonego, przedstawiciel prawnny, prawa i obowiązki procesowe.

procedure”31. At the same time, it remains unclear why the victim is obliged to provide only truthful testimony, while the suspect or accused does not abuse their rights when providing information to the investigation, inquiry, or other authorized persons, that does not correspond to reality. Whether the equality of the parties can be asserted in this case is an open question.

The question also arises as to whether the victim needs a competent legal representative at the pre-trial investigation stage or whether there is no need for this, considering that the investigator, inquiry, and prosecutor represent the prosecution and focus their activities on ensuring its rights and legitimate interests. To support this thesis, it is worth noting that quite often in investigative practice, cases occur where due to mistakes made by representatives of pre-trial investigation bodies, sources of information or material objects that could acquire the status of evidence in criminal proceedings may be lost. Sometimes, the victim is not properly informed of their rights, and as a result, they do not fully exercise the procedural rights guaranteed to them by law. For example, victims often turn to lawyers for assistance in drafting civil claims to ensure further compensation from suspects, defendants, or accused individuals for the harm caused to them through the commission of a criminal offense. The results of the analysis of judicial practice support this position. According to recent trends, it is considered typical for investigators to refuse to inform victims about procedural actions taken in criminal proceedings, to satisfy requests for investigative (search) actions, and sometimes even to initiate criminal proceedings, etc. Moreover, quite often investigative judges, after considering the substance of the complaint, uphold them, indicating that there are widespread cases where investigators (inquirers) resort to inaction.

Moreover, in favor of introducing the idea of victim representation in criminal proceedings, the procedural duty of the investigator to involve a minor victim or a person recognized by law as incapacitated or limited in legal capacity, a legal representative, and to conduct the questioning of a minor witness in the presence of a legal representative, educator, or psychologist serves. Due to the inability to understand certain procedural features of conducting proceedings, the latter, mentioned above, require a legal representative. However, whether the legal representative is capable of fully understanding and exercising their procedural rights is also an open question.

Thus, the legislator’s approach to guaranteeing the right of the victim to be represented in criminal proceedings by a person who may act as a defender in criminal proceedings (Part 1 of Article 58 of the Criminal Procedure Code of Ukraine)32, is entirely justified and thoughtful. However, the legislator has not yet decided in favor of involving such a representative in every criminal proceeding.

Conclusions. The competitive principle is guaranteed by the provisions of the Constitution of Ukraine and the Criminal Procedure Code of Ukraine. It is universal and inherent in any proceedings, as the presence of the victim and the subject who has encroached on the protected legal interests of another person

already gives rise to the existence of a dispute, which is the foundation for the competitive process.

In legal literature, scientists have different approaches to the interpretation of the substantive elements of the principle of competitive proceedings in different ways. We support scientists who, in addition to components such as the division of procedural functions of the prosecution, defense, and case resolution, the presence of active equal parties and a court that decides the case and ensures the parties’ rights while performing their functions, also include access to justice, freedom to appeal procedural decisions, and procedural equality of subjects in criminal procedural activities conducting prosecution and defense.

The analysis of investigative and judicial practices indicates that the prosecution, represented by the investigator and prosecutor, often makes decisions that do not always align with the legal position of the victims and sometimes inadequately explain their rights, leading to inaction. These facts explain the actions of victims related to involving representatives authorized to act as defenders in criminal proceedings. Moreover, investigators, inquiry officers, and prosecutors are obliged to act objectively, applying procedural tools to fully and impartially understand the circumstances of the criminal offense, both preceding and following it. Given this, considering the unevenness of procedural statuses, we believe that sometimes involving a representative of the victim is a thoughtful and justified step that contributes to the full implementation of the competitive principle in criminal proceedings. In view of the above, the prospects for further research should involve scientific exploration aimed at improving criminal procedural mechanisms for protecting the rights and legitimate interests of victims in criminal proceedings, as well as ensuring the proper legal procedures for the latter.

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