


## Case Note


# PECULIARITIES OF PROSECUTOR PARTICIPATION IN PRIVATE CRIMINAL CASES: THE UKRAINIAN EXPERIENCE

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**Competing interests:** The author declares of any competing interests exist.

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The content of this article was translated with the participation of third parties under the authors' responsibility.

**Managing editor** – Dr Serhii Kravtsov. **English Editor** – Dr Sarah White.

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**How to cite:** Bazeliuk V, Demyanenko Yu, Maslova O 'Peculiarities of Prosecutor Participation in Private Cases: Ukrainian Experience' 2022 1(13) Access to Justice in Eastern Europe 203-211. DOI: <https://doi.org/10.33327/AJEE-18-5.1-n000107>

**Published:** 01 Feb 2022 (<https://doi.org/10.33327/AJEE-18-5.1-n000107>)

Submitted on 11 September 2021 / Revised 24 October 2021/ Revised 2<sup>nd</sup> 20 December 2021

Approved 14 Jan 2021 / Published: 01 Feb 2021

**Summary:** 1. Introduction. Distinguishing between Public and Private Prosecution. – 2. The Legal Nature of Private Prosecution. – 3. Features of Prosecutor Participation in Private Criminal Cases: The Example of the Supreme Court Grand Chamber Decision. – 4. Concluding Remarks.

## ABSTRACT

**Background:** *Maintaining prosecution in criminal cases in court is a specific function of the prosecutor, which is enshrined in both the Constitution of Ukraine and the provisions of the Criminal Procedure Code of Ukraine. This function should meet not only the objectives of criminal justice but also international standards in the field of criminal justice. Criminal proceedings are divided into public and private, depending on the type of socially dangerous act. And depending on the type of accusation, the functions of the prosecutor in the exercise of their powers are different. Thus, in cases of private prosecution, the participation of the victim is crucial, and his/her refusal to prosecute may be grounds for closing the criminal proceedings. This note related to the study of the innovative approach of the Supreme Court's law enforcement practice shows the active role of the prosecutor in considering these categories of criminal cases in court.*

**Methods:** *We thoroughly analysed the case-law of the Supreme Court of Ukraine, as well as the provisions of the Criminal Procedure Code of Ukraine and other legislative acts. We also generalised and studied the case-law of Ukrainian courts, as well as recommendations of the CoE and the doctrine of the criminal procedural law of Ukraine.*

**Results and Conclusions:** *The authors drew several conclusions about various forms of private prosecution with their own specifics, which are manifested in the aspects mentioned in this note.*

**Keywords:** *prosecutor; criminal procedure; private criminal case; Ukraine*

## 1 INTRODUCTION. DISTINGUISHING BETWEEN PUBLIC AND PRIVATE PROSECUTION

The introduction and development of such an institution as the maintenance of public prosecution in court was due to evolutionary processes in society and associated with the introduction into national law of adversarial proceedings, which contributed to several judicial reforms and changes in independence in Ukraine.<sup>4</sup>

Arts. 129, 131-1 of the Constitution of Ukraine<sup>5</sup> stipulate that the constitutional function of the prosecutor and the basis of the proceedings is the support of the public prosecutor in court. However, the criminal procedure legislation operates with the concept of 'public

4 On the evolution of criminal procedure in Ukraine, see V Shybiko, 'The Evolution of Criminal Procedure in Ukraine over 30 Years of Independence' (2021) 3(11) Access to Justice in Eastern Europe 23-51. DOI: 10.33327/AJEE-18-4.3-a000069. A very interesting study related to the criminal procedure development and ECtHR case law is O Kaplina, A Tumanants, 'ECtHR Decisions That Influenced the Criminal Procedure of Ukraine' (2021) 1(9) Access to Justice in Eastern Europe 102-121. DOI: 10.33327/AJEE-18-4.1-a000048.

5 The Constitution of Ukraine, adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 <<https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>> accessed 24 October 2021.

prosecution', which, in accordance with para. 3 of Part 1 of Art. 3 of the CrPC of Ukraine<sup>6</sup> is a procedural activity of the prosecutor that consists of bringing charges to court to ensure the criminal responsibility of the person who committed a criminal offence.

According to V. Dolezhan, in the Constitution of Ukraine, the support of public prosecution in court is the first among the other functions of the prosecutor's office, which, to some extent, reflects the European Community's approach to the role of prosecutor, who is primarily considered a public prosecutor in criminal justice.<sup>7</sup> Para. 1 part 1 of Art. 2 of the Law of Ukraine 'On Prosecution' distinguishes the maintenance of public prosecution in court among the functions of the prosecutor's office.<sup>8</sup> Thus, one can see the difference between the definition of 'support of prosecution in court' in the Constitution of Ukraine and special rules of criminal procedure legislation.

The doctrine of criminal procedure is quite common, according to which the concept of 'public prosecution' is broader than the concept of 'public prosecution' because the prosecutor must still act not only on behalf of the state but also society as a whole, protecting the rights and interests of everyone. In cases when human rights and freedoms are not in the state's interests, such a state cannot be considered legal, social, and democratic, as Ukraine considers itself.

However, the protection of the interests of the individual and society who suffered during the commission of a criminal offence, as defined in Art. 2 of the CPC of Ukraine, as a task of criminal proceedings, is the main purpose of the prosecutor's office, which is enshrined in the Constitution of Ukraine as support for public prosecution in court. This approach certainly correlates with current trends in the rule of law and the principle of the rule of law.

At the same time, the terminological conflict regarding the constitutional and sectoral definition of the function of the prosecutor's office can be explained by the harmonisation of constitutional and legal regulation of the functioning of the prosecutor's office with relevant international standards.

Thus, according to para. 12 of the UN Guiding Principles on the Role of Prosecutors,<sup>9</sup> adopted by the Eighth UN Congress on Crime Prevention and Treatment (27 August-7 September 1990), in the performance of their duties, prosecutors protect state interests – effectively, they take due account of the situation of the suspect and the victim and pay attention to all circumstances relevant to the case, regardless of whether they are beneficial or unfavourable to the suspect. Therefore, the state interests, given the concept of common interest, human rights, and freedoms, are essentially identical to the public interest.

According to para. 1 of Recommendation REC (2000) 19 of the Committee of Ministers to member states 'On the role of the public prosecution service in the criminal justice system' (Adopted by the Committee of Ministers on 7 October 2000 at the 724th meeting of the Deputy Ministers)<sup>10</sup> the public prosecution service is a body that, on behalf of society and in the public interest, ensures law enforcement if a violation of the law results in criminal

6 The Criminal Procedure Code [2013] VVR 9-13 <<https://zakon.rada.gov.ua/laws/show/4651%D0%B0-17/print1330026115579985#Text>> accessed 24 October 2021.

7 YuE Polyansky (ed), *Support of public prosecution* (Odessa: Phoenix 2012).

8 Law of Ukraine 'On the Prosecutor's Office' of 5 November 1991 <<https://zakon.rada.gov.ua/laws/show/1789-12#Text>> accessed 24 October 2021.

9 In Ukrainian, see the UN Guiding Principles on the Role of Prosecutors <[https://zakon.rada.gov.ua/laws/show/995\\_859#Text](https://zakon.rada.gov.ua/laws/show/995_859#Text)> accessed 24 October 2021.

10 In Ukrainian, see Recommendation REC (2000) 19 of the Committee of Ministers to member states 'On the role of the public prosecution service in the criminal justice system' (Adopted by the Committee of Ministers on 7 October 2000 at the 724th meeting of the Deputy Ministers) <[https://supreme.court.gov.ua/userfiles/Rec\\_2000\\_19\\_2000\\_10\\_6.pdf](https://supreme.court.gov.ua/userfiles/Rec_2000_19_2000_10_6.pdf)> accessed 24 October 2021.

punishment, taking into account, on the one hand, individual rights and, on the other, the necessary effectiveness of the criminal justice system.

In addition, the definition of 'public prosecution' is contained in the Decree of the President of Ukraine 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023'.<sup>11</sup> Para. 4.4. of this Decree stipulates that in order to develop the prosecutor's office, it is necessary to improve the implementation of prosecutors' constitutional powers to support public prosecution, organisation, and procedural management of pre-trial investigations and representation of the state in court, in particular by introducing specialisation and the unification of prosecutorial and judicial practice.

Within legal literature, it is clear that a full understanding of the concept of 'public prosecution' can be obtained only by comparing it with such a concept as 'criminal prosecution'.<sup>12</sup>

It should be noted that in 2012, the CPC of Ukraine did not contain a definition of the category of 'criminal prosecution'. Currently, the legal definition of criminal prosecution is formulated only in the Concept of Criminal Justice Reform of Ukraine, approved by the Decree of the President of Ukraine.<sup>13</sup> The concept defines criminal prosecution as the exclusive procedural function of the prosecutor. As can be seen, the maintenance of public prosecution in court is considered by the concept as a form of criminal prosecution (along with prosecution on behalf of the state, participation in the review of court decisions in criminal cases in appellate and cassation instances). The doctrine that the prosecutor's activity in support of public prosecution is an integral part of the criminal prosecution of persons who have committed a crime is also expressed in the doctrine.<sup>14</sup>

## 2 THE LEGAL NATURE OF PRIVATE PROSECUTION

The Criminal Code of Ukraine<sup>15</sup> divides crimes into categories depending on their nature and degree of public danger. At the same time, any crime, even a minor one, is characterised by public danger. It encroaches not only on the specific victim but also on socially significant legal relations protected by the state. In other words, by committing even a single crime, the perpetrator demonstrates a negative attitude towards the values accepted in society, a willingness to violate them repeatedly, which is a potential threat to every member of society.

Criminal proceedings in Ukraine are public. They are carried out not by victims of crimes but by official competent state bodies and their officials, who in the process of relevant activities are entitled, in particular, to apply measures of criminal procedural coercion. Prosecution, which is the most important component of criminal proceedings, is generally public. In most crimes, criminal cases are instituted on the fact of committing a crime, regardless of the opinion of the victim and others, and are not subject to termination, even if the victim and the accused have reached reconciliation.

11 Decree of the President of Ukraine 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <<https://zakon.rada.gov.ua/laws/show/231/2021#Text>> accessed 24 October 2021.

12 V Ostapets, 'Correlation of the concepts of "state prosecution" and "criminal prosecution" in the draft Criminal Procedure Code of Ukraine' (2009) 2 Bulletin of the National Academy of Prosecutors of Ukraine 114-119.

13 The Concept of Criminal Justice Reform of Ukraine, approved by the Decree of the President of Ukraine of 8 April 2008 <<https://zakon.rada.gov.ua/laws/show/311/2008#Text>> accessed 24 October 2021.

14 EM Blazhivsky, MK Yakymchuk, IM Kozyakov, MS Turkot et al., *Prosecutor's support of the public prosecution* (Kyiv: Nat. Acad. of Prosecutors of Ukraine 2014).

15 The Criminal Code of Ukraine <<https://zakon.rada.gov.ua/laws/show/2341-14#Text>> accessed 24 October 2021.

At the same time, Art. 477 of the CrPC of Ukraine, as an exception to the general rule, provides for a private procedure of criminal prosecution for several types of crimes. Given the definition of private prosecution as an institution of criminal procedural law aimed at protecting the purely personal interests of the victim, this type of prosecution cannot be equated with public prosecution.

Despite the fact that the theory of criminal procedure has repeatedly expressed views on the definition of such a procedural institution as private prosecution, scholars have not come to an agreement in this regard.<sup>16</sup> Some researchers define private prosecution in material terms as providing the victims with a request to the relevant body (requesting prosecution) and information about the facts of socially dangerous and unlawful encroachment, which falls under a specific crime, with the possibility of resolving it at its discretion. In the procedural aspect, private prosecution is a special type of criminal procedure conducted by a private prosecutor regulated by law, which includes appealing to state bodies alleging the guilt of a particular person, further support of the prosecution in court, gathering evidence of guilt, and the right to refuse the prosecutor's charges.<sup>17</sup>

In legal dictionaries, private prosecution is defined as

a form of criminal proceedings that are initiated only on the complaint of the victim (or his representative) and are subject to closure upon reconciliation of the victim with the accused, or as one of the forms of criminal proceedings, guilty of a crime, to criminal responsibility only on the complaint of the victim, who is obliged to maintain the charges in court.<sup>18</sup>

Some scholars believe that the specifics of proceedings in private prosecution are due to the nature of the criminal offence, its severity, the fact of harm to a particular legal entity or individual, the relationship between the victim and the perpetrator, which allows for a high probability of their reconciliation, and finding a balance between the interests of the victim of a criminal offence and the state.<sup>19</sup>

Criminal proceedings in the form of private prosecution are special proceedings in the system of criminal proceedings, which provides for its separate legal settlement within an independent legal institution, which has a certain procedural originality.<sup>20</sup>

We must agree with S. Perepelytsia, who believes that 'public prosecution' is a broader concept than the category of 'state prosecution', as the latter (given the widespread perception of him as a prosecutor) is only one form of publicity in criminal proceedings.<sup>21</sup> Therefore, it is advisable to distinguish between these concepts, and it is necessary to take into account the semantic emphasis in the relevant contextual use.

- 16 O Kaplina, 'Conclusions and recommendations on the current topic' [Text]: [current topic of the issue 'National Doctrine of Criminal Procedural Law'] (2019) 9 Ukr Law 134-138; I Glovyuk, 'Prosecutor in criminal proceedings: constitutional and sectoral regulation of functional orientation Visnyk kryminalnoho sudochynstva' (2017) 4 Legal Norms 20-26; IA Titko, 'About the legal nature of the institute of private prosecution in criminal proceedings in National Academy of Legal Sciences of Ukraine' (2015) 2(81) Bulletin of the Nat. Acad. of Law Sciences of Ukraine: Coll. Science. etc. 109-120.
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- 18 Yu Shemshuchenko (ed), *Great encyclopedic legal dictionary* (Kyiv: Yurydychna Dumka 2007).
- 19 V Tatsiya, Y Groshevoy, O Kaplina, O Shilo (eds), *Criminal procedure* (Kharkiv: Pravo 2013).
- 20 O Predmesnikov, 'The victim as a party to the prosecution in cases of private prosecution' (2009) 2 Law Forum 345-349
- 21 SI Perepelytsia, *Criminal proceedings in the form of private prosecution* (ed AR Tumanyants, Kharkiv: Pravo 2015).

### 3 FEATURES OF PROSECUTOR PARTICIPATION IN PRIVATE CRIMINAL CASES: THE EXAMPLE OF THE SUPREME COURT GRAND CHAMBER DECISION<sup>22</sup>

The Grand Chamber of the Supreme Court considers that the refusal of the prosecutor to participate in the hearing by the court of first instance, as well as the appellate court during the review of this court decision, is a significant violation of criminal procedure law (para. 3 of Part 2 of Art. 412 of the CPC).

The specifics of criminal proceedings in the form of private prosecution are regulated by Chapter 36 of the CrPC of Ukraine. Thus, the features of criminal proceedings in the form of private prosecution are:

- 1) the basis for the pre-trial investigation of criminal proceedings in the form of private prosecution is the submission of the victim (individual or legal entity) to the investigator, prosecutor, on the commission of criminal offences, an exhaustive list of which is enshrined in Art. 477 of the CrPC of Ukraine;
- 2) the refusal of the victim, and in the cases provided for by the CPC of Ukraine, his/her representative, from the accusation is an unconditional ground for closing the criminal proceedings.

Thus, criminal proceedings in the form of private prosecution, as evidenced by the content of Chapter 36 of the CrPC of Ukraine, has a specific feature in relation to the beginning of such proceedings and their completion. Neither Chapter 36 of the CrPC of Ukraine nor other provisions of the CrPC of Ukraine provide for any other features of criminal proceedings in the form of private prosecution. That is, after the criminal proceedings are initiated on the application of the victim of a criminal offence, which is contained in the list of such offences in Art. 477 of the CrPC of Ukraine, the state power of the pre-trial investigation bodies and the prosecutor's office is used, which serves as a further driving force for the pre-trial investigation and support of the prosecution during the trial.

The procedural procedure of criminal proceedings in the form of private prosecution determined by the CrPC of Ukraine is by its legal nature a private-public type of criminal proceedings and should be considered a variation within the general form of such proceedings regulated by the CrPC of Ukraine.

The accusation may be supported by the victim and/or his/her representative only in the cases provided for in Part 3 of Art. 338 of the CrPC of Ukraine (change of charges by the prosecutor in court) and Part 2 of Art. 340 of the CrPC of Ukraine (refusal of the prosecutor to support the state prosecution). This conclusion correlates with para. 19 of Part 1 of Art. 3 of the CrPC of Ukraine on the prosecution of the victim, his/her representative, and legal representative only in cases established by the CPC of Ukraine, and para. 4 of Part 3 of Art. 56 of the CrPC of Ukraine, according to which. During the trial, the victim has the right to support the charges in court in case of the refusal of the prosecutor to support the state prosecution.

At the same time, Part 5 of Art. 340 of the CrPC of Ukraine stipulates that when the victim agrees to support the accusation in court, if the prosecutor refuses to support the state prosecution, the criminal proceedings on the relevant charge become private and are carried out under private prosecution.

Interpretation of the connections between norms of the CrPC of Ukraine allows us to

<sup>22</sup> Resolution of the Grand Chamber of the Supreme Court of 26 June 2019 in case no 404/6160/16-k <<https://reyestr.court.gov.ua/Review/82885531>> accessed 24 October 2021.

conclude that it is necessary to distinguish between the concepts of 'criminal proceedings in the form of private prosecution' and 'support for victims of private prosecution'.

If 'criminal proceedings in the form of private prosecution' should be understood as proceedings that may be initiated by the investigator or the prosecutor on the basis of the victim's application for the prosecution of criminal offences from among those listed in Part 1 of Art. 477 of the CrPC of Ukraine and are carried out in the general order provided by the CrPC of Ukraine, the support of victims of private prosecution achieved only in case of refusal of the prosecutor to support the public prosecution.

That is, criminal proceedings under Part 5 of Art. 340 of the CrPC of Ukraine are a separate form of criminal proceedings, the features of which are:

- 1) support the prosecution of victims in court;
- 2) the refusal of the victim, and in cases provided by the CrPC of Ukraine, his/her representative from the accusation, is an unconditional ground for closing the criminal proceedings (Part 4 of Art. 26, para. 7 of Part 1 of Art. 284 of the CrPC of Ukraine).

The current criminal procedure legislation establishes that the judicial review of criminal proceedings is carried out with the obligatory participation of the parties to the criminal proceedings, except as provided by the CPC of Ukraine (Part 2 of Art. 318 of the CPC of Ukraine). In accordance with Part 3 of Art. 36 of the CPC of Ukraine, the participation of the prosecutor in court is mandatory, except in cases provided by the CPC of Ukraine (such a case is the prosecutor's refusal to support the prosecution). Part 2 of Art. 318 and Art. 324 of the CPC of Ukraine also do not contain exceptions under which the participation of the prosecutor would not be mandatory and does not contain such exceptions, nor does Chapter 36 of the CPC of Ukraine, which establishes the procedure for criminal proceedings in the form of private prosecution. In addition, Art. 5 of Law no. 1697-VII stipulates that the functions of the Prosecutor's Office of Ukraine are performed exclusively by prosecutors.

The fulfilment by the prosecution of the procedural duty to the pre-trial investigation of a criminal offence in proceedings in the form of private prosecution and maintenance of public prosecution in court is a guarantee of equality, adversarial proceedings, and freedom to present evidence and prove its persuasiveness before the court.

Also, the current CPC of Ukraine does not regulate the procedural procedure for transferring criminal proceedings from the prosecutor to the victim in cases of private prosecution in order to provide them with a court to investigate and make a lawful, reasonable, and reasoned court decision. As a result, the sense of gathering evidence by the prosecutor at the stage of pre-trial investigation is lost.

The European Court of Human Rights, in the case of *Ozerov v. Russia*,<sup>23</sup> considers

that in cases where the oral hearing is assessed as a favorable factor for a court decision on "any criminal charge" of a person and in cases where, having received adequate opportunity to be present at the hearing, the defense did not refuse it, the presence of the prosecutor in court is usually necessary to avoid legitimate doubts that may arise about the impartiality of the court.

Ukrainian Supreme Court reiterated that based on the above, the absence of the prosecutor during the criminal proceedings in the form of private prosecution indicates:

23 *Ozerov v. Russia* (App no 64962/01) <<https://hudoc.echr.coe.int/eng?i=001-98531>> accessed 24 October 2021.

- 1) the absence of the prosecution, because the victim under Chapter 36 of the CPC of Ukraine is not authorized to support the prosecution unable to effectively gather evidence and support the prosecution on its own);
- 2) on violation of the principles of equality, adversarial proceedings and freedom in presenting their evidence to the court and in proving their persuasiveness before the court;
- 3) the lack of balance of private and public interests in such criminal proceedings.<sup>24</sup>

In this regard, the participation of the prosecutor in criminal proceedings in the form of private prosecution is an additional legal guarantee of the rights of the victim in criminal proceedings and also contributes to a full, comprehensive, and objective consideration of the case.

## 5 CONCLUDING REMARKS

In our opinion, criminal proceedings in the form of private prosecution have their own specifics, which are manifested in several aspects: the status of the applicant and the prosecutor, the procedure for opening criminal proceedings, features of evidence, and the ability to close proceedings at any time. Despite all the differences in the nature of the procedural form of such criminal proceedings, important questions about its legal nature, what criminal offences are included, and on what grounds they are classified as such, are investigated in the form of private prosecution.

Thus, by its legal nature, a private indictment is a means of protecting a person's private rights that have been violated because of a criminal act, which involves imposing on the prosecutor the obligation to support and prove the legality of the accusation.

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24 Decision of the Supreme Court of Ukraine, case no 404/6160/16-к 26 June 2019 <<https://zakononline.com.ua/court-decisions/show/82885531>> accessed 24 October 2021.



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