

The Adversarial System in Criminal Procedure: Norms and Implementation



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Abstract: *The research is devoted to the analysis of the essence and place of the adversarial system in modern criminal procedure regulation. The existing acute debatability regarding the procedural status of the adversarial system in the criminal procedure law of the Russian Federation necessitates the appeal of scholars to this category. The purpose of identifying the true procedural nature of the adversarial system and the boundaries of its implementation is directly related to the determination of the correct place of this procedural category in the modern system of criminal procedure regulation. The analysis of modern scientific views on the procedural status of the adversarial system indicates the presence of diametrical views on the compliance of the adversarial system with the characteristics of an independent industry-wide principle. A controversial opinion about the extension of the principle of adversarial practice to the pre-trial stages of Russian criminal proceedings is noted. According to the authors, the current law enforcement practice confirms the implementation of the "pure" adversarial system only in the judicial stages of the criminal process. Taking into account the provisions of the Constitution of the Russian Federation and the position of the Supreme Court of the Russian Federation, the work provides an argumentation of the authors' position on the advisability of changing the status and, accordingly, the place of the adversarial system in the structure of the Code of Criminal Procedure of the Russian Federation from the "industry-wide principle" to the "general condition of the trial".*

Index Terms: *adversarial proceedings, Code of Criminal Procedure of the Russian Federation, criminal procedure regulation, criminal process, general conditions of the trial, legal proceedings, principle of law.*

I. INTRODUCTION

The direct purpose of criminal law regulation in any modern state is the effective achievement of the criminal justice goals set by society. This criterion should form the basis for the formation of an appropriate procedural mechanism functioning within the boundaries of a certain model of the criminal procedure [1]. Moreover, doctrinal models of the criminal process must be used following the real needs of law enforcement practice.

It doesn't matter "whether the rule is 'adversarial' or 'inquisitorial', the main thing is that it helps courts in carrying out their tasks and meets the standards of a fair trial" [2].

In the modern world, legal practice gives priority to the adversarial form of the criminal process [3]. Moreover, the named form has various degrees of certainty and "purity". Some countries have long been firmly supporting adversarial proceedings. Some states are moving in the direction of perceiving the traditions of oral adversarial proceedings [4] and some are still improving the adversarial model of criminal proceedings using modern electronic information technologies [5], [6].

As the analysis of the most extensive legal literature shows, the adversarial system is the most controversial of all the modern categories of criminal procedure legislation. However, the unequivocal concept of the adversarial system has not yet been defined; its status and place in the criminal procedure regulation have not been established [7]. This circumstance, taking into account the fact that the meaning of any normative prescription is expressed "both by its text and place, by the relationship among other prescriptions, divisions of the code" [8], raises the urgent question of clarifying the place of the adversarial system in the structure of the modern Code of Criminal Procedure of the Russian Federation.

The foregoing also determined the purpose of this work, which consists in the intention to bring certainty into the concept of the status of adversarial process in criminal proceedings and in determining its place in the structure of the Code of Criminal Procedure of the Russian Federation.

II. PROPOSED METHODOLOGY

A. General description

The methodological basis of this study included the dialectical method of scientific cognition of social phenomena, as well as general and special scientific methods: systemic, logical, comparative-legal, formal-legal, formal-dogmatic, systemic-structural, sociological, etc. The interest in the main trends in the development of the category of adversarial system predetermined the wide use of the comparative-legal method. The formal-legal method was used to clarify the criminal procedural essence of the category of the adversarial system. The formal-dogmatic method was used when studying the legal maintenance of the concept of the adversarial system. The systemic-structural method was used in the analysis of the place of the category of the adversarial system in the structure of the criminal procedure legislation.

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The sociological method was applied in the process of interviewing judges on the research topic.

B. Algorithm

The need to clarify the doctrinal definiteness of the term "adversarial system" in the criminal process in Russia and to establish the correspondence of the place of the adversarial system in the Criminal Procedure Code of the Russian Federation to its real place in the process of law enforcement is justified. The possibility of its exclusion from the system of industry-wide principles is allowed. This procedure is quite natural in the legal field since the system of principles of criminal proceedings is formed under the requirements of the time, state will and social needs but these criteria tend to change.

Principles, like any legal categories, develop: starting with their inception, they receive their full development and then can undergo various transformations, including a change in their procedural legal status. An example is the principle of comprehensiveness and objectivity, which was now known in the Soviet period in the development of the criminal process.

It can be stated with confidence that the principle of the adversarial system is fully implemented only in the judicial stages of the criminal process. This fact requires the determination of its new place in the content of the Russian Code of Criminal Procedure. It appears that these are the general conditions of the trial. Here are the following arguments:

1) Constitutional norms, as a result of their implementation in sectoral law, do not necessarily have to receive the status of sectoral principles. Not all of them have it; for example, the provision on publicity contained in Article 123 of the Constitution of the Russian Federation is not reflected as a principle but as a general condition for a trial.

2) Currently, the grounds for a different determination of the status of the principal norms determining the activities of the court are largely lost: there are no strict criteria for classifying some of them as the principles of criminal proceedings and others – as the general conditions of the trial [9]. This follows from the related legal nature of the principles and general conditions of the trial.

3) From the content of the Decree of the Plenum of the Supreme Court of the Russian Federation, it is possible to establish the relationship of adversarial duty with the obligation of the court to observe the conditions for its implementation by the parties. That is, the adversarial system is included in the scheme of conditions for the organization of judicial activity. In particular, the attention of the judges is drawn to the following: "In accordance with the provisions of Articles 15 and 244 of the Code of Criminal Procedure, the trial is conducted on the basis of the adversarial system and equality of participants, the court, considering the case in the general procedure of legal proceedings, is obliged to create the necessary *conditions* for the parties to exercise their rights" [10].

In fact, with industry-wide principles, the general conditions of the trial can be considered as principles of a lesser generality, the subject of regulation of which is the criminal procedural relations that develop in a part of criminal proceedings, namely, judicial stages.

III. RESULT ANALYSIS

The term "adversarial process in criminal proceedings" seems to include almost the entire possible spectrum of procedural legal categories and concepts in the modern doctrine of the criminal process. In particular, the adversarial system is proposed to mean: type of criminal trial [11]; form of organization of legal proceedings [12]; principle of national and international criminal procedure law [13]; independent principle of the criminal process [14]; principle of democratic justice [15]; means to establish the truth [16]; judicial truth tool [17]; legal proceedings of the stages of judicial proceedings [18] and other elements of the right [19].

There are numerous works concerning each of these positions and providing relevant argumentation and we do not have the goal and ability to analyze them within the framework of one publication. Summarizing, it is possible to note that two opposite positions have been developed: supporters of the first one defend the status of the adversarial system as a principle while others believe that the adversarial system does not meet the characteristics of the industry-wide principle of the criminal process. The latter position seems more convincing. If the opinion on the loss (or initial absence) of the adversarial features of the criminal procedure principle is recognized as true, then its procedural nature should be determined and its new place in the system of criminal procedure regulation should be found.

In the current Code of Criminal Procedure of the Russian Federation, the adversarial system is normatively expressed in the content of Article 15 under the title "Adversarial process of the parties", located in the second chapter of the Code of Criminal Procedure of the Russian Federation "Principles of Criminal Procedure". Thus, the legislator highlighted the most important provisions of criminal proceedings in "the adversarial system of the parties" – industry-wide principles, which, in theory, must regulate criminal procedural relations that take shape at all stages of criminal proceedings, both judicial and pre-trial.

What caused the decision of the legislator to place the adversarial system in the system of industry principles? There is no doubt that this is the result of concretization of the constitutional principle of "the adversarial system of the parties", enshrined in Part 3 of Article 123 of the Constitution of the Russian Federation. "The consolidation and development of the constitutional principle of the adversarial system and equality of participants in the Code of Criminal Procedure of the Russian Federation was the implementation of not only the constitutional provision of Part 3 of Article 123 of the Constitution of the Russian Federation. This short story brings Russian criminal proceedings closer to international criminal trial standards... Europe has been guided by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in this area, the implementation of which is also inconceivable without recognition and ensuring the real adversarial system and equality of participants to the proceedings" [20].

However, did the legislator accurately perceive the meaning of the constitutional provision on the adversarial system and was it the only rightful place in the structure of the Code of Criminal Procedure of the Russian Federation?

To clarify, Part 3 of Article 123 of the Constitution of the Russian Federation proclaims the following: legal proceedings (in all forms) are to be conducted based on adversarial proceedings and equality of participants. Attention is drawn to the fact that the constitutional norm of unity and interrelation reflects the adversarial nature and equality of participants. This version is impeccable since the equality of participants is one of the main conditions for the implementation of the adversarial system, which has an independent value for the parties in the process of exercising their right to judicial protection in criminal proceedings.

In the text of the Code of Criminal Procedure of the Russian Federation, namely in Part 1 of Article 15, this constitutional provision is deprived of its component "equality of participants" and is enshrined as the principle of "the adversarial system of the parties" in the form of a requirement for criminal proceedings based on the adversarial system of the parties, regardless of the scope of their rights.

The separation of "equality of participants" from "adversarial system" in the name of the general principle provision allows us to assume that "equality of participants" must have some additional conditions of "existence". This assumption is confirmed by the content of Part 4 of the same article, which states that "the prosecution and defense operate on equal footing" (literally, only in the presence of the court or only in the trial stages?).

We believe this is a hidden recognition of the fact that it is not necessary to speak with confidence about the procedural equality of participants in the pre-trial stages of the criminal process.

Thus, already in the very content of the adversarial rule, a distinction is drawn between the adversarial system in the court, guaranteed by the equality of participants and the adversarial system in other conditions, that is, in the pre-trial stages, where the possible inequality of the parties and, of course, the absence of an independent court are allowed. The latter situation, taking into account the recognition of the classical triangular scheme of the adversarial system (independent court and equal parties with a clear distinction between procedural functions) allows stating that there is no the adversarial system in this case. In this connection, it is reasonable to raise the question of the validity of "its total consolidation" as a principle of all criminal proceedings [21].

The construction of criminal proceedings based on the adversarial system, first of all, requires the availability of adversarial proceedings – this thesis is beyond doubt.

At this stage, the adversarial system is expected, possible and close to the classical model, in which, with a clear distinction between the main criminal procedural functions, parties with equal procedural capabilities, through a procedural contest, defend their interests before an independent and impartial court. Controversy, debate and struggle of positions are indispensable attributes of the adversarial system, which are demonstrated at the stages of the judicial investigation and debate of the parties. The

adversarial system appears to be a procedural mechanism for the exercise of rights by the parties.

Unfortunately, it should be recognized that the adversarial position in modern judicial settlements in criminal cases is noticeably weakening. At present, such an ineffective method of examining the evidence as the publication of testimonies given at the preliminary investigation stage is increasingly being used in court hearings.

The prevailing method was the indirect way of knowing the circumstances of the case in the appeal and, especially, in the cassational and supervisory review proceedings – by examining the written materials in the case. Courts of Appeal primarily rely on an assessment of evidence by the trial court [22].

Taking into account the gradual displacement of traditional justice in modern criminal proceedings by a simplified procedure for sentencing in a special manner – without a full-fledged judicial investigation [23], where the adversarial procedure "withers away" – the adversarial form shows a clear reduction.

Exploring this issue, it was of interest to reveal the opinion of judges. They were asked a somewhat provocative question: "What types of norms – principles or general conditions of the trial – directly guide them in the preparation for a trial?" Recognizing the importance of adhering to the general requirements contained in industry-wide principles, the overwhelming majority of practitioners noted that, in priority, they pay more attention to the general conditions of the trial, as the more obvious and more frequent grounds for the annulment of court decisions, observing the form and procedure of the process.

IV. CONCLUSION

The adversarial system cannot exist as an industry-wide principle in modern mixed criminal proceedings. In our opinion, the correct answer to the question of its possible status and place within the framework of the Code of Criminal Procedure of the Russian Federation was given by Professor A.A. Davletov: "The adversarial system is neither a panacea nor an end in itself. Its place is where the process is unthinkable without it – in the court" [24].

It is proposed to combine the adversarial system and equality of participants in one norm of the Code of Criminal Procedure of the Russian Federation, defining its procedural status as "the general condition of the trial".

Technically, it will look like a merger of Articles 15 and 244 of the Code of Criminal Procedure with the appropriate edition. This will return the constitutional form to this fundamental provision. Giving the adversarial system the status of a prerequisite for a trial, as we believe, will not contribute to losing its procedural legal value but, on the contrary, it will be given greater legal certainty. The constitutional principle of the adversarial system and equality of participants will remain the same guide in the process of improving the type of criminal proceedings.

The proposal is also applicable to cases of judicial activity at the pre-trial stages.

This applies to procedural situations when the court is involved in pre-trial proceedings to consider complaints under Article 125 Code of Criminal Procedure and petitions under Article 165 Code of Criminal Procedure. The exclusion of the adversarial law from the system of general principles of legal proceedings will not damage the guarantee of adversarial requirements since the resolution of these procedural issues is carried out in the form of a court session, respectively, the trial will be conducted according to all the rules of the court arising from the general conditions of the trial (with some exceptions). The influence of the requirement for the adversarial system and the equality of participants in the court will be fully preserved in this procedural field.

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