

ppi 201502ZU4645

Esta publicación científica en formato digital es continuidad de la revista impresa  
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185 Depósito legal pp  
197402ZU34

# CUESTIONES POLÍTICAS

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Maracaibo, Venezuela



Vol.37

No 65

Julio  
Diciembre  
2020

# The Adversarial Approach in the Pre-trial Phase of Prosecution

DOI: <https://doi.org/10.46398/cuestpol.3865.21>

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## Abstract

The confrontational or adversarial approach is one of the main factors that forms the basis of the criminal justice system. However, its application in the pre-trial phase is limited. Therefore, this document aims to demonstrate the importance of analyzing theoretical and practical problems. The choice of documentary and casuistic methodology allowed the following conclusions to be reached: Currently, the Russian police are undergoing changes that aim to humanize the criminal process, to solve fundamental challenges in the protection of the rights, liberty and interests of a person in the pre-trial investigation that will guarantee the confrontation system in criminal proceedings. We conducted a comparative legal investigation and analyzed criminal case files, as well as the results of questionnaire surveys conducted among investigators and attorneys. Overall, the results represent the actual state of cases in the pre-trial phase and help determine areas of development. We propose feasible changes to the criminal procedure legislation of the Russian Federation that will eliminate the disparity between some of its regulations and the requirements of the confrontation system in general.

**Keywords:** confrontational approach; pre-criminal proceedings; confrontational principle; criminal investigation, criminal lawyer in Russia.

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## El enfoque adversarial en la fase previa al juicio

### Resumen

El enfoque de confrontación o adversarial es uno de los principales factores que forman la base del sistema de justicia penal. Sin embargo, su aplicación en la fase previa al juicio es limitada. Por lo tanto, este documento tiene como objetivo demostrar la importancia de analizar los problemas teóricos y prácticos. La elección de la metodología documental y casuística permitió arribar a las siguientes conclusiones: actualmente, la policía rusa está experimentando cambios que tienen como objetivo humanizar el proceso penal, para resolver desafíos fundamentales en la protección de los derechos, la libertad y los intereses de una persona en la investigación previa al juicio que garantizará el sistema de confrontación en los procesos penales. Realizamos una investigación legal comparativa y analizamos los archivos de casos penales, así como los resultados de encuestas de cuestionarios realizadas entre investigadores y abogados. En general, los resultados representan el estado real de los casos en la fase previa al juicio y ayudan a determinar las áreas de desarrollo. Proponemos cambios factibles a la legislación de procedimiento penal de la Federación de Rusia que eliminará la disparidad entre algunas de sus regulaciones y los requisitos del sistema de confrontación en general.

**Palabras clave:** enfoque de confrontación; procedimientos previos al juicio penal; principio de confrontación; investigación penal, abogado penalista en Rusia.

### Introduction

If the law stipulates the adversarial principle in its regulations, it demonstrates the level of democracy in the State, humanization and justice of criminal law, protection of rights, freedom, and legal interests of persons, and equal and effective defense by law and courts (Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 1990).

The adversarial system as a general independent principle is specified in art. 123, para. 3 of the Constitution of the Russian Federation. Also, this principle is enshrined in art. 6 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) since the adversarial principle ensures legal justice. Notably, the analysis of the European Court of Human Rights practices revealed that the adversarial approach lies in providing the defense and prosecution with equal opportunities to study the evidence of the other

party and state their opinion on it. Consequently, it ensures the equality of the parties in criminal proceedings.

## 1. Materials and Methods

The empirical basis consists of the results of 211 criminal cases tried in different regions of the Russian Federation; applications and complaints to the Constitutional Court of the Russian Federation and the European Court of Human Rights; questionnaire results among 45 investigators of The Russian Federation Investigative Committee and the Central Investigation Department in Moscow as well as 40 attorneys and 68 members of the teaching group of the Ministry of Internal Affairs of the Russian Federation, Kikotyia Moscow University of the Ministry of Internal Affairs, Saint-Petersburg University of the Ministry of Internal Affairs and the People's Police Academy in Vietnam.

To study the data, we employed the analytical method which helped summarize the results of specific legal methods. The legal comparative method helped analyze and detect regulations of the Criminal Procedure Code of the Russian Federation and several international legal acts that stipulate the adversarial system as a basic principle in criminal proceedings. The sociological method in case analysis and surveys among employees helped obtain realistic results of the empirical research as well as analyze, systemize, and summarize it. The formal legal method helped describe the current conditions of implementing the adversarial principle in the pre-trial phase of prosecution in the Russian Federation as well as analyze them and classify the detected problems and propose possible solutions.

## 2. Results Analysis

It is deemed crucial to implement the adversarial approach to all stages of criminal proceedings. Although its implementation in the pre-trial phase is limited, it is still valuable (Pushkarev et al., 2019a; 2019b). The main reason for that is the limited nature of the defense party's power compared to the powers of prosecution. This represents a declarative nature of the adversarial system established by art. 26 of the Criminal Procedure Code of Vietnam which states that parties have equal rights to present and evaluate evidence. In the Russian Federation, para. 2 of the Decision of the Constitutional Court of the Russian Federation on 29th June 2004 shall be applied. According to this Decision, art. 15, para. 2 of the Criminal Procedure Code of the Russian Federation shall be considered as not contradicting the

Constitution since its regulations require the prosecution to protect the rights and freedom of persons including unreasonable accusation, conviction, and other forms of rights violation (Decision of the Constitutional Court of the Russian Federation No. 13-P, 2004). The aforementioned arguments suppose the confusion in the roles of prosecution and defense. In other words, the prosecution party is under a constitutional obligation to protect the rights and freedom of persons which violates the prohibition stipulated in art. 15, para. 2 of the Criminal Procedure Code of the Russian Federation.

In order to improve the implementation process of the adversarial principle at the pre-trial phase, art. 144, para. 1 of the Criminal Procedure Code was elaborated. In the verification of a crime report in criminal proceedings, it ensures the rights of persons to counsel, to make complaints against the action (or inaction) and decisions of the investigator, inquest body, etc., to not testify against oneself, one's spouse, and other close relatives (determined by art. 5, para. 4 of the Criminal Procedure Code). Also, art. 144, para. 1 of the Criminal Procedure Code stipulates the obligation of public officials to clarify for persons their rights and obligations, to ensure their rights within the criminal proceeding frame (Ivanov, 2011). Thus, there seems to be a trend in expanding of the adversarial system in the pre-trial phase.

However, there is no definition of the legal status of the attorney of prosecution who acts as a representative of the injured party, civil party, or private prosecutor (Rezvana, Subbotinoy, 2002). Thus, art. 45 of the Criminal Procedure Code shall be complemented by para. 1.1 which is as follows: "The Attorney – a representative of the injured party, civil party, or private prosecutor – is a person who ensures the protection of the rights and interests of the aforementioned parties and provides them with legal assistance in criminal proceedings under the Code". At the same time, the legal status of the attorney shall be specified as well as the role in the process. In the absence of such norms, it seems impossible to ensure the equal rights of prosecution and defense parties as required by art. 15 of the Criminal Procedure Code. Also, it is necessary to provide the injured party with free legal assistance.

The analysis of the investigative practice has revealed the violations of the adversarial principle in the pre-trial phase: 1) the investigator did not provide the accused G. (an attempted theft) with a defense counsel when it was necessary since the said G. had been registered with the psycho-neurological hospital; 2) the investigator did not explain the defense rights to the accused P. (robbery), then the investigator appointed an attorney without the consent of the accused which violates art. 50, para. 1 of the Criminal Procedure Code; 3) the investigator did not comply with art. 122 of the Criminal Procedure Code and did not review the application by the accused O.

Due to such violations, human rights activists can claim that there is an absence of actually implemented adversarial system. They try to raise the awareness of the limits in the implementation of the right to defense in criminal proceedings since, as they claim, the arguments of the defense and attorneys' applications are often ignored, attorneys are often not allowed to participate in the criminal process, and the prosecution and defense are not equal (The Report of the Human Rights Ombudsman in the Russian Federation, 2015).

In the pre-trial phase, the rights of prosecution are also violated: 1) the investigator indicted L., K., M, and G. for art. 30, para. 3, art. 159, para. 4 of the Criminal Procedure Code but did not recognize as victims and did not interrogate those people who were mentioned in the narrative part of the charge forms; 2) the investigator interrogated the underage victim Z., witnesses P. and J. without their legal representatives and teachers; 3) breaking art. 42, para. 2, part 11, the investigator did not inform victim D. about the decision to arrange the examination; 4) the investigator did not comply with art. 215, para. 2 and did not notify the victim about the end of investigation; 5) after the victim reviewed the case files and submitted a relevant application, the investigator issued an order granting the request on adding accounting documents that represent the value of stolen goods to the case files. However, those files were not reviewed and were not recognized as physical evidence, thus, they were not added to the case files. Consequently, the parties did not review the additional materials.

Such actions violate art. 24, para. 2 of the Constitution of the Russian Federation which ensures the right of persons to review the documents and materials that affect their rights and freedom. Also, such actions violate art. 15 of the Criminal Procedure Code that stipulates the adversarial principle and prescribes conditions important for parties to perform their responsibilities and exercise their rights. Thus, the failure to present the case files for parties to review them equals violation of the principles of criminal procedure.

Thus, it seems necessary to amend art. 222, para. 2 of the Criminal Procedure Code as follows: "2. The prosecutor gives a copy of the indictment and additional materials to the accused and the victim. Also, the copy is given to the defender if applied".

The analysis of the law requirements to the structure of the indictment allows stating that, according to art. 220, para. 1, part 6, the investigator shall include the list and content of the evidence. However, the investigator is free to choose the order, the style, and interpretation of the evidence on the defense party including the possibility to provide value judgments (Grinenko, 2002; 2020). We suggest limiting the indictment to the evidence on the prosecution party and giving a right to filing an application to the defender "The application for the inclusion of the evidence invoked by the

defense in the indictment”. The majority of investigators give a positive assessment of the opportunity to include in the indictment the evidence invoked by the accused, and in the version of the document that the defender provides after reviewing the case files. Not only do the aforementioned arguments highlight the importance of this issue but they also suggest areas for further development of the adversarial principle in the pre-trial phase of prosecution.

### Conclusion

This study reveals that in Russian law enforcement the implementation of the adversarial system is broader than using it for ensuring the equal rights of both parties in criminal procedure. It can be seen that there are attempts to apply the adversarial principle in the pre-trial phase of prosecution. The positive experience in Russia should be taken into consideration in Vietnam. The results of the research help deduce the regulations of the criminal procedure law that can be included in the current Criminal Procedure Code of the Russian Federation and the Socialist Republic of Vietnam to ensure the further development of the adversarial principle in the pre-trial phase of criminal procedure.

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\* Although the regulations for the authors of this journal require the full names of the authors to be added to this list of references, unfortunately in some cases the source of origin only places the initial of the name. For this reason, in some cases only the initial of the name is added.

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# CUESTIONES POLÍTICAS

Vol.37 N°65

*Esta revista fue editada en formato digital y publicada en julio de 2020, por el **Fondo Editorial Serbiluz**, Universidad del Zulia. Maracaibo-Venezuela*

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