

## General and Theories of Criminal Procedure

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### Abstract

This article proposes theoretical aspects and practical solutions to emerging problematic issues based on the criminal process of Ukraine, the construction of theoretical approaches based on Anglo-Saxon law, which is important for optimizing the criminal process of the Republic of Uzbekistan.

**Keywords:** theory; repression; proof; proof; investigator; prosecutor; investigative judge; collegiate court; protocol; procedural; investigative (search); legal actions.

The relevance of the work can be determined on the basis of scientific research into general theories of the criminal process. The main theoretical provisions of the criminal process began to be developed in 1864, after the adoption of the Charter of Criminal Proceedings of Uzbekistan [1]. In this case, the design of the Charter of the Criminal Code was built on the basis of the procedural norms of continental Europe and the Romano-Germanic legal system. Theoretical developments included a conceptual approach that determined the guarantees of the rights, freedoms and interests of participants in the process, basic principles, forms of evidence and proof, and the procedural procedure for conducting investigative and judicial actions.

It is necessary to note the works in which, since 1894, general theories of the criminal process have been defined. These are the works of K.D. Antsiferova, S.I. Viktorosky, V.F. Deryuzhinsky, T.Ya. Foinitsky and other scientists [2–5]. All of them defended the point of view of building the process on the basis of the Romano-Germanic legal system. Certain elements of the Anglo-Saxon system were included in the Charter of Criminal Procedure and determined the procedure for the trial of a criminal case, the establishment of guilt, the participation of the defense in the examination of evidence, decision-making by the jury, etc.

Further development of procedural science has continued since 1949. S.A. Alpert, M.I. Bazhanov, Yu.N. Belozerov, A.Ya. Vyshinsky, M.M. Grodzinsky, G.F. Gorskiy, L.D. Kokarev, N.V. Zhogin, A.M. Larin, M.S. Strogovich and many other scientists [6–14].

Process science does not stand still; process theory is the foundation for the development of practice. Those issues that practice poses today must be resolved and are being resolved with the improvement of legislation, the creation of new conditions for the mechanism for the production of procedural, investigative (search) and judicial actions. Theoretical development and a new direction of science were determined on the basis of optimization, procedural economy of the process. The investigator, prosecutor, and judge must establish as much evidence to confirm the guilt of the suspect or accused as is necessary to qualify his actions under the criminal law. If the evidence is insufficient and its possibility is lost for further proceedings of the criminal case, the investigator, prosecutor, judge, on the basis of the criminal procedure law, have the right to close the proceedings. It should be noted that according to the Code of Criminal Procedure of 1961, the judge had the right to send the materials of the criminal case for additional pre-trial proceedings. The

criminal case was submitted to the prosecutor, who decided to search for new evidence or decide to close the criminal proceedings.

According to the new current Code of Criminal Procedure of the Republic of Uzbekistan and Ukraine, such a “loophole” has been closed. The law determined that a judge is obliged to decide on the guilt or innocence of a person in a court hearing and to draw up and announce a verdict. However, despite the categorical approval of the law of Ukraine, there are still certain elements of the process, on the basis of which the prosecutor supporting a public charge in court has the right to change the wording of the charge or refuse the charge. In this case, a number of procedural and procedural issues arise. Participants in the process must become familiar with the new charge during the trial of the criminal case, and the indictment, in accordance with Art. 338–341 of the Criminal Procedure Code of Ukraine, loses its procedural essence, since the prosecutor draws up a new charge. The theoretical problems of the current Criminal Procedure Code of Ukraine in some aspects do not coincide with general and particular theories of the process.

The purpose of the article is to reveal the theoretical content of general theories of the process and identify new private or special theories that are established in the current legislation. If general theories of the process were considered at the level of monographic research, then specific, special ones remained outside the zone of scientific research. In this case, it is necessary to take responsibility for determining private, special theories of the process, which have not only theoretical, but also practical significance for its subsequent improvement. As a rule, there is no limit to improvement, so it is necessary to turn your attention to new constructive provisions for the definition of private, special theories.

The novelty of the work lies in the disclosure of theoretical and practical aspects of general and particular, special theories of criminal proceedings on the basis of current legislation and the practice of its application by criminal justice authorities and collegiate courts. The novelty is based on the Anglo-Saxon process of Ukraine, which differs significantly from the criminal process of the Republic of Uzbekistan. In this case, it is proposed to consider the theoretical aspects of the private, special theory of Ukraine for subsequent scientific designation and possible application in the criminal process of Uzbekistan. The main provisions of novelty determine the solution of procedural and procedural provisions of optimization, procedural economy. A new formulation of the private theory is proposed, which is defined as a reference theory, providing the main provisions for exemption from criminal liability on procedural grounds with the use of alternative measures, establishing the possible re-education of a person who has committed a crime that is not serious. In this theory, the main aspect is aimed at the possibility of correcting a person without the use of criminal repressive measures associated with imprisonment.

Theoretical developments in constructing general theories of the process were aimed at ensuring the rights, freedoms and interests of its participants. The science of criminal procedure has always defended classical theories, without trying to go beyond its limits. Recent scientific publications by scientists from Uzbekistan and Ukraine indicate that the research is carried out on the basis of collecting empirical material, which confirms existing general theories of the process. Analysis of scientific provisions makes it possible to determine individual theoretical aspects of problems of general and particular, special theories of the process. Basically, the general mistake is that during the substantiation of theoretical positions, as a rule, individual repeating events are removed, and then this general thing is fixed using abstraction. If we consider these errors, we can create a certain formula and define it as “abstract - general.” The set of such identified patterns was defined as a set of abstractions. After this, the logical connection of abstractions is not entirely clear. In this case, it is not practice that is subject to theoretical elements, but, on the contrary, theory adapts to practice, which is an obstacle to the creation of new theoretical developments. The science of criminal procedure is no exception to this rule, which confirms general theories and, on their basis, provides the formulation of new particular theories.

Methodological provisions allow us to assert that the scientific construction of the process is carried

out on the basis of the hierarchy of criminal procedural theories. Metatheory of criminal procedure, general theories establish theoretical constructs that have common connections with each other. In addition, private procedural theories are aimed at legislative regulation of procedural activities regarding the application of individual procedural institutions. In turn, private procedural theories are divided into system theories, for example, the theory of evidence, pre-trial and judicial proceedings, and element theories, for example, the theory of exemption from criminal liability. At the same time, the significance of special element theories is not the same for system theories and general procedural theories. Most element theories use the theoretical constructs of general theories and system theories to develop their own theoretical positions. Individual element theories, their conceptual apparatus, and theoretical provisions provide new impetus for the construction of general procedural theories and systems theories.

The basis of criminal proceedings can be defined as bringing the perpetrator to criminal liability. The criminal process in Ukraine is built on the basis of a criminal claim. Article 214 of the Code of Criminal Procedure of Ukraine indicates that pre-trial proceedings begin after the acceptance of a statement about an offense committed, when there are signs of it, and the person who committed it has been identified. That is, if there is no statement or the victim refuses to file one, then criminal proceedings do not begin. Elements of Anglo-Saxon law in this case are at odds with the public process of Uzbekistan.

The institution of criminal prosecution is intersectoral. On the one hand, criminal liability, concept, characteristics are determined on the basis of criminal law. The second component includes the procedure for bringing to criminal liability as the subject of the science of criminal procedure. It can be said that the theoretical concept of “bringing to criminal liability” is the “basic construction of the cell”, which underlies the meta-theory of the criminal process.

When receiving an application, the investigator must determine the qualifications of the criminal offense (according to criminal law, this is the concept of a crime) and begin a pre-trial investigation. In this case, there is a sharp difference from the criminal process in Uzbekistan, when the criminal justice authorities conduct an investigation into the commission of a crime and decide to initiate a criminal case, after which they transfer it to the investigator, who begins the preliminary investigation.

The stage of preliminary investigation in Uzbekistan and pre-trial proceedings in Ukraine are built on the basis of general theories of the process and legally do not have significant differences. In fact, at the stage of pre-trial proceedings, a public accusation is carried out, control is entrusted to the investigating judge. Only he has the right, after a judicial review of criminal proceedings, to draw up a determination to conduct an examination, certain investigative actions that limit the rights, freedoms and interests of the participants in the process. The ruling of the investigating judge is mandatory for all participants in the process. Certain general theories of the criminal process in Uzbekistan and Ukraine provide for appealing the actions or inactions of the investigator and prosecutor. Moreover, the criminal process of Ukraine provides for such an appeal at the pre-trial stage only by the investigating judge.

General theories of process related to principles, evidence and proof, procedural status, functions, pre-trial and judicial proceedings, science are considered almost in full.

Based on the general theory of the process, the current law determined, in accordance with Art. 3 of the Code of Criminal Procedure of Ukraine, the procedural powers of the parties to the process and indicated that the investigator, the prosecutor belong to the prosecution, here he included the victim, who takes part in maintaining the charges against the suspect, the accused. The defense includes the suspect, the accused, who defends his interests, and the lawyer, who defends the suspect (accused) from the accusation. This theoretical division is correct from the point of view of the general theory of the process.

The prosecution determines the limits of evidence, collects and evaluates evidence, draws up a

notice of suspicion and an indictment. At the trial, the prosecutor supports the public charge, controls the course of the trial, and has the right to change the charge or refuse to support it.

The defense party objects to the prosecution, has the right to collect evidence, evaluate it and put forward its procedural requirements for determining the evidence in terms of admissibility and relevance to the main fact of proof.

The general theory of the process provides for the use of criminal procedural repressive measures against a person held criminally liable. On the one hand, repression is limited by law, on the other hand, by the procedural powers of the prosecution.

The criminal process of Ukraine does not define the concept of repression, but provides its practical provisions and mechanism of application. In particular, the investigator has the right to use physical force when detaining a suspect if the latter offers armed resistance. The investigator has the right to open the premises during a search.

However, the law indicates that when applying repression, the prosecution must remember the following: criminal measures negatively affect the person against whom criminal proceedings are being carried out. Nothing can compensate for the moral damage or feelings experienced in relation to a person prosecuted after his acquittal.

It is necessary to pay attention to the little-studied theory of criminal procedural repression, which is established by law and operates at all stages of the process. It should be said that certain provisions of this theory were considered in the publications of A.Ya. Vyshinsky, A.M. Larina, M.S. Strogovich, I.V. Tyrichev and other scientists [9, 12, 13, 15]. However, the theoretical constructs were constructed in such a way that they affected repression from the point of view of ensuring the rights, freedoms and legitimate interests of the participants in the process. All authors were unanimous in their opinion on the need to use criminal procedural repression against the suspect (accused). In the first case, this is required by law. In the second - the accused. The person who has committed a crime violates the criminal law by acting "outside the law." Criminal justice authorities are obliged to apply repressive measures related to restriction of freedom, movement, possible suppression of further crime, etc. If the accused has fled from the investigation and trial, then he is prosecuted. In order to establish the circumstances of the commission of a crime, establish traces, and prove the guilt of the suspect, it is necessary to carry out investigative (search) actions carried out by the investigator. In this case, the investigator, when carrying out the prosecution, is obliged to use procedural means and measures provided for by the current criminal procedural legislation.

Articles 20, 21 of the Code of Criminal Procedure of the Republic of Uzbekistan established the procedural concept of criminal prosecution. In the criminal process of Ukraine, this term is not defined, since, in accordance with Art. 2 of the Code of Criminal Procedure of Ukraine, the tasks of criminal proceedings are defined in two meanings. On the one hand, this is a quick and complete disclosure of a crime, on the other hand, it is the protection of individuals, society and the state from criminal attacks. Considering the criminal procedural norms of Uzbekistan, we can say that they have a more pronounced repressive approach, which is determined based on the provisions of public law.

The concept of criminal procedural repression is proposed. The first is established on the basis of criminal law and indicates the application of sanctions under an article of the criminal code. The latter is applied in case of its violation. The second is determined on the basis of criminal procedural law.

In the first case, the criminal law clearly establishes the sanction of the article for its violation. According to the current criminal legislation of Ukraine, the investigating judge at the stage of pre-trial proceedings and the collegial court at the stage of trial have the right, within the sanction of an article of the criminal code, to apply repressive measures to violators of the law. At a court hearing, as a rule, the judge applies penalties to persons who violate court order on the basis of a court

decision. In some cases, upon the recommendation of the investigator or prosecutor, the judge has the right to apply criminal sanctions to the suspect (accused) related to deprivation of liberty. In the second case, criminal procedural repressions are established by criminal procedural legislation and the procedure for implementing procedural decisions. In particular, if it is necessary to conduct a search, seizure of property, seizure of postal and telegraph correspondence, detention, undercover investigative (search) actions, the investigator, prosecutor at the stage of pre-trial proceedings draw up a petition to the investigating judge about the need to conduct investigative (search) actions. The basis for filing this petition is provided for by law in the event of a temporary restriction of the rights, freedoms and interests of sections of the process. The prosecutor addresses the investigating judge with this petition and supports it during judicial consideration. The investigating judge at the court hearing, based on the results of consideration of all materials, draws up a ruling,

which is mandatory for all participants in the process. The investigator is obliged to carry out investigative (search) actions to establish the facts, procedurally consolidate them as evidence and qualify the guilt of the suspect based on the norms of criminal law. If the participants in the process refuse to comply with the legal demands of the investigator, he has the right to apply procedural pressure.

General theories of process consider the principle of the presumption of innocence. All the main provisions of this principle are provided in such a way as to establish legality in determining the guilt of the suspect or accused. If the investigator or prosecutor at the stage of pre-trial proceedings establishes that a person is not guilty of the offense (crime) charged to him, then the investigator, only with the consent of the prosecutor, draws up a resolution to close criminal proceedings on the basis of Art. 283–284 of the Code of Criminal Procedure of Ukraine (Article 25–28 of the Code of Criminal Procedure of the Republic of Uzbekistan).

A comparison of the norms of the article of criminal and criminal procedural legislation of Ukraine indicates that the disposition of these norms is significantly different. The grounds for exemption from criminal liability under criminal law are defined in a completely different aspect than the norms of criminal procedural law. This difference raises more questions than answers when the investigator, prosecutor, or judge decides to release them from criminal liability. Practice mainly determines the disposition of criminal procedural legislation. In this case, it is necessary to combine the wording of the articles of criminal and procedural law into a single whole, to determine the criteria and types, forms of exemption from criminal liability. It should be noted that the legislation of Uzbekistan in this case is more perfect; it defines a unified form of exemption from criminal liability.

If the guilt of the suspect is established, but the latter's legal actions indicate his repentance, the possibility of correction without criminal punishment, the prosecutor has the right, on the basis of Art. 287 of the Code of Criminal Procedure of Ukraine, go to court to resolve the issue of releasing a person from criminal liability. According to procedural law, only a judge has the right to release a suspect or accused from criminal liability and punishment. This theorem cannot be argued with, because its basis is determined by the Universal Declaration of Rights and Freedoms [16].

The current Code of Criminal Procedure of Ukraine establishes the release of a suspect from criminal liability at the stage of preparation for trial. Considering this thesis, we can say that procedural economy in this case can be established at the stage of pre-trial proceedings. All the main provisions are taken from Anglo-Saxon law, when a judge decides on the release of a person from criminal liability only at the trial stage.

Judicial proceedings in continental Europe indicate that the preparatory part of judicial proceedings has organizational issues. The judge decides whether to bring the suspect to trial and determines the moment to begin consideration of the criminal case on its merits. In this case, adhering to the elements of continental law, the issues of releasing a suspect from criminal liability under the Code

of Criminal Procedure of Ukraine should be considered at the stage of pre-trial proceedings by the investigating judge. However, these provisions are more debatable than a practical solution.

The procedural powers of the investigating judge are defined as a public authority. The investigating judge stands closer to the investigator, controlling the criminal proceedings when giving permission to carry out investigative (search) actions. There is a procedural saving of material, physical, moral, and intellectual costs on the part of the prosecutor and investigator.

Theoretical and practical issues of exemption from criminal liability are acute, since recidivism of crimes in Ukraine, according to the prosecutor's office, police, and courts, is about 80% [17].

The main provision of criminal and procedural legislation is the possible correction of a person who has committed a minor criminal offense (crime). The global practice of criminal proceedings has proposed alternative ways to resolve criminal law conflicts. It is important to note that settlement of the dispute is possible only with the consent of the victim.

Structurally, all aspects of exemption from criminal liability can be determined on the basis of the proposed private reference theory.

The main provisions of this theory are determined on the basis of the theory of spatial curves, which was developed in geometry by Frene Reper [18]. The theory provides a definition of a complex of mathematical symbols that has many centers of gravity but points to a single point. In this case, a point in the process can be defined as a particular theory of the process system. The basis of metric meaning is established by the dimension from a single substance to metatheory. The theory of elements can be developed on the basis of the general provisions of exemption from criminal liability at the stages of the process and the structural elements of the conceptual apparatus, which reveals theoretical constructs that have an impact on the further development of general and particular theories. In particular, theories of optimization, economy, reducing the repressive influence of the prosecution on the participants in the process, etc. The reference theory establishes the economy of repressive influence when releasing a person from criminal liability, the possibility of his correction without the use of criminal measures. The theoretical structure can be determined based on the basic provisions of the process, namely on the basis of the disposition of the norms of criminal law and process, determine the classification and systematize the facts, fragments of scientific provisions; theoretical concepts and their interpretation. When considering specific aspects of reality, it is possible to determine and predict the results obtained; they can be aimed at further

improvement and development of scientific approaches combining with practice. All elements can be applied to the proposed partial procedural reference theory. Its construction does not proceed from the abstract to the concrete, on the contrary, from the concrete to the abstract. The fundamental idea is that a given particular theory always unfolds from an indefinite starting point that captures the essence of phenomena. This point cannot be obtained by simply recording an empirical study. It must be built on the basis of the rule of law and the functioning of the legal system.

The theory of exemption from criminal liability, as a private reference theory, offers new theoretical constructs for bringing to criminal liability, allows us to understand the essence of saving repressive influence and is a radical rejection of the use of criminal procedural repression, its coercion, and also establishes the possibility of renouncing criminal punishment. The procedure for exemption from criminal liability and punishment is aimed at optimizing the criminal procedural procedure, which allows the investigator not to carry out separate investigative (search) actions, which ultimately saves not only material resources, but also moral, physical, time, etc.

At the trial stage, not only time and material costs are saved, but also intellectual costs.

The main concept of the article includes an analysis of general and particular special theories of the criminal process in Ukraine, the determination of provisions for its optimization and procedural

economy on the basis of the uniform content of criminal and procedural norms in establishing the circumstances associated with the closure of criminal proceedings and the release of a person from criminal liability. Based on the analysis of the current criminal procedural legislation of Ukraine, the content of criminal procedural repressions is revealed, which are determined on the basis of the procedural status of the prosecution and the mechanism of its application in relation to a separate category of participants in criminal proceedings. The fundamental difference between criminal prosecution under the Code of Criminal Procedure of the Republic of Uzbekistan and public prosecution under the Code of Criminal Procedure of Ukraine lies in the different legal structure of Romano-Germanic and Anglo-Saxon law. However, the private reference theory of criminal proceedings can be applied both in the Code of Criminal Procedure of Ukraine and the Code of Criminal Procedure of the Republic of Uzbekistan. The conceptual approach in this case can be determined on the basis of optimization and procedural economy of the criminal process.

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