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Ascertaining the Truth in Ukrainian Criminal Procedure

I. Introduction

The current reform of the Ukrainian criminal law requires a critical reflection of criminal procedure doctrine. Unfortunately, for many years following its proclamation of independence Ukraine did not discard a number of vestiges of the Soviet past in criminal procedure.

In general, Ukrainian scholars and practitioners recognize the need to ascertaining the truth in criminal law. But there is a different understanding as to the nature and the content of truth in criminal procedure.

Debates root in the inconsistent conceptual framework of the Criminal Procedure Code of Ukraine (hereinafter referred to as CPC).[1] This code contains two contradictory elements: on the one hand, the need to address the objective (material) truth and, on the other, the possibility of sentencing based on formal truth. This situation can be explained by the presence of a public investigation and the decision for an adversarial system at the same time. This dichotomous nature of the Ukrainian CPC creates difficulties and controversies. Therefore, today it is first of all important to achieve unity in the Ukrainian CPC's conceptual framework.

A theoretical analyse of the concept of truth is inextricably linked to the challenge of addressing fundamental issues such as different ways of establishing the facts, different criteria for truth etc.

The understanding of objective truth is directly related to providing legal guarantees to enhance people's trust in justice. To deny the truth in court and to set any other purpose than objective truth, stands for subjectivity, pragmatic benefit, formalized proceedings, i. e. to a system in which the incompleteness in solving crimes is accepted. As a result, such a system will prejudice the interests of both the individual and justice in general.[2]

II. Theoretical Concept and Types of Truth

Ukrainian law has no consistent interpretation of truth in criminal procedure. This is caused by the multiplicity of approaches and the lacking definition of the concept of truth in the current CPC of Ukraine. There is an ongoing discussion on setting the types of truth in criminal proceedings.

It should be noted that the majority of legal scholars understand truth as a system of circumstances and material facts, established after a crime was committed, which corresponds to the facts, comprehensively and objectively established by the investigation and the consideration of the criminal case in court.

There is no uniform approach by scholars and practitioners to the definition of objective truth.[3]

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[1] Кримінальний процесуальний кодекс України від 13.04.2012 № 4651-VI/Відомості Верховної Ради України (ВВР), 2013, № 9-10, № 11-12, № 13, ст. 88.

[2] *О. В. Петрова*, Объективная истина и гарантии ее установления в уголовном процессе (*Petrova*, Objective truth and the guarantees of its setting in the criminal process), Дисс. канд. юрид. наук: 12.00.09. – М., 2000. – 220 с.

[3] *Н. Селегей*, Проблема істини в теорії кримінального судочинства (*Selehej*, The problem of truth in the theory of criminal procedure), Проблеми і перспективи розвитку банківської системи України:

Selehej emphasizes that in criminal procedure it is helpful to use the term objective truth.. He is convinced that no other term reflects the specificity of the situation. Dialectical materialism considers objective truth as a process that is constantly evolving, and that appears in two forms: relative and absolute truth. Given the complex nature of a crime, *Selehej* suggests that at the beginning of criminal proceedings objective truth is established in relative form. Gradually improving, better and more deeply reflecting legal reality, absolute truth is achieved. *Selehej* claims that objective truth is the core category of criminal procedure. That allows a judge to reach inner conviction, because it creates justice, not tyranny, all other participants of the procedure therefore understand that the offender is punished justly, public trust will be restored and the innocent defendant will be protected from criminal prosecution by the state[4].

"It is known in philosophy that the desire for absolute truth is infinite in nature, and absolute truth in legal proceedings is a too high ambition, which cannot be performed in terms of practice." *Kučyns'ka* argues, "the question of how to define truth in criminal proceedings (absolute, relative, objective, formal material, etc.) is important in order to determine the extent of its knowledge."[5] *Kučyns'ka* is convinced that the only possible philosophical aspect of the concept of knowing the truth is the transition from relative to absolute one. So, extending the concept of absolute truth in criminal proceedings is very problematic, since it could lead to significant violations of the law in the administration of justice, the courts may hence pass sentences based on an estimate of the reliability of a source of evidence, assumptions, etc.[6]

Absolute truth as a concept is not entirely denied in legal literature. But criminal procedure is understood as a comprehensive, complete and objective reality matching the conclusions of the preliminary investigation, the prosecutor and the court about the circumstances of the case, and the guilt of the defendant.

During the Soviet era as today many specialists in the field of criminal procedure were, and are critically evaluating two contradicting legal concepts, "material truth" (objective, really) and "formal truth" (judicial, procedural).

In particular, *Strogovič*, a representative of the Soviet legal tradition, proposed to understand material truth in criminal proceedings as full compliance of the investigation and trial conclusions with the objective facts; on the other hand he understood formal truth as correspondent with the conclusions of the formal investigation and trial conditions, and not with the actual facts.[7]

There are quite interesting views of contemporary scholars on this issue:

Dvoryc'ka states that "the purpose of criminal procedural law is to establish precisely the objective truth. This must be understood as the compliance of the existing final conclusions and decisions of the investigation, the prosecution and the trial with the knowledge of the circumstances which are the subject of proof in a criminal case."[8]

погляд у майбутнє: збірник тез доповідей за матеріалами Восьмої науково-практичної конференції студентів (18–22 квітня 2008 р.) та Дев'ятої науково-практичної конференції студентів (27 квітня 2008 р.), Державний вищий навчальний заклад „Українська академія банківської справи Національного банку України", Суми 2008, с. 37.

[4] Ibid.

[5] *О. П. Кучинська*, Чи можливо встановити істину в кримінальному процесі? (*Kučyns'ka*, Is it possible to find out the truth in the criminal procedure?), Часопис Академії адвокатури України, 2011, № 10, с. 3.

[6] Ibid.

[7] *М. С. Строгович*, Уголовный процесс (*Strogovič*, Criminal procedure), М. 1946, с. 73–74.

[8] *М. М. Дворицька*, Доказування як процесуальний шлях пізнання істини в кримінальному процесі (*Dvoryc'ka*, The proof as a procedural way of knowing the truth in criminal proceedings), Часопис Київського університету права, 2011, № 3, с. 270.

Nor also prefers objective truth, his proposed definition of truth in criminal procedure reads as follows: "Truth (objective, material) in criminal proceedings is the compliance of the preliminary investigation and trial conclusions with the objective facts."[9]

Actually this understanding of truth, i. e. objective proof in a criminal trial, is based on its general philosophical sense, as adequate, proper reflection of phenomena, processes, objects of reality in the consciousness of a person who reflects on them.[10]

Meanwhile *Kostytsky* notes that the truth in legal proceedings can only be relative and ideal, and not material (objective) due to the retrospective nature of cognition.[11]

In contrast, *Potoms'ka* and *Tračuk* state:

> We can talk about objective truth in criminal process as a cognitive ideal which we must aspire, but it cannot always be achieved. It is impossible to define the purpose of proof using specific norms and regulations. You can regulate only the way to achieve it, which is the process of proving. The purpose of proof must not only be the truth, but also the reliability of the evidence.[12]

These scholars refer to *Alpert,* an expert in Ukrainian criminal procedural law, who wrote: "Every subject of criminal procedure may be a member of the process." He came to the conclusion that truth itself is objective by its content, but it is subjective by its form.[13]

Prior to supporting or denying the viewpoint of *Kostytsky*, we consider it appropriate to answer to another question: "Is it possible to establish objective truth in criminal trial?" Objective truth is a full compliance of the gained knowledge with the facts of reality. However, the CPC defines only a limited, but complete enough, list of circumstances that are subject of investigation and prove in criminal proceedings. This list is known as the subject of proof, and it is defined in Art. 91 CPC. It includes all necessary data for examination by the Court to answer questions regarding: 1) circumstances of the offence (time, place, method and other things) and the offense itself; 2) the guilt of the accused,, the form of guilt, the motive and purpose of the criminal offense; 3) the type and amount of damage caused by a criminal offense, as well as the amount of procedural costs; 4) circumstances that affect the degree of severity of the criminal offense, describing the identity of the accused, aggravating or mitigating punishment, i. e. circumstances which exclude criminal liability or constitute a reason for abandoning criminal proceedings; 5) circumstances that constitute grounds for exemption from criminal liability or punishment.[14]

Zeykan also believes that "in fact the criminal process, at least for the defendant, does not establish the truth, but the proof or failure to prove the crime and the guilt. The wrongdoing of the real offender cannot be proved, and therefore, objective truth of the case cannot be installed, so the offender will not be punished. Conversely, they may punish the innocent person (miscarriage of justice)."[15]

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[9] *В. Т. Нор*, Істина у кримінальному судочинстві: ідея, догма права, реалізація (*Nor*, The truth in criminal proceedings: an idea, a dogma law implementation)/Часопис національного університету «Острозька академія», серія «Право», 2010, № 2, с. 6.

[10] Ibid.

[11] *О. Г. Яновська,* Роль суду в змагальному кримінальному судочинстві (*Yanovs'ka*, The role of the court in adversarial criminal proceedings), Юридичний часопис національної академії внутрішніх справ, 2013, № 1, с. 88.

[12] *Н. А. Потомська/Т. В. Трачук,* Актуальні питання з'ясування істини в процесі доказування (*Potoms'ka/Tračuk*, Current issues in the process of ascertaining the truth of proof), Науково-практична інтернет-конференція, 10.10.2012.

[13] Ibid.

[14] Ibid.

[15] *Яновська,* fn. 11.

Kučyns'ka warns against the denial of the objective truth concept and asks not to endorse the diametrically opposite theory of maximum probability in criminal proceedings. According to this theory, the court cannot establish virtually a complete reliability of the facts being tried and investigated, guilt or innocence of the person being laid to criminal responsibility. This theory was formed and it was used in the time of the "cult of personality" ("культ личности"); it admits and allows the possibility of judicial errors by the state in advance (innocent conviction, acquittal guilt and mistakes made by the court of first instance, provided that they can be corrected in cassation and supervisory instances). On the other hand, the standard of the objective truth concept, that anyone who committed a crime should be brought to justice and no innocent should be punished, is not always and not fully implemented in practice. The implementation of law on the punishment for anyone who has committed an offense involves the disclosure of any crime having been committed before. But if we look at statistics, the figure for disclosure of recorded crimes in the capital of Ukraine (Kyiv city) is only 43 percent (and most of solved crimes are crimes committed on everyday reason).[16] Looking at these figures, the question arises: what about the requirements of the law on the punishment for anyone who committed a crime? Such rule is contained in the Art. 2 "The task of the criminal proceedings" in the CPC of Ukraine: "[...] to carry out a prompt, full and impartial investigation and a trial, so that everyone who committed a criminal offense is prosecuted guilty [...]."

So, firstly in theory and then in law unrealistic objectives are put forward, i. e. there are tasks that cannot be resolved by investigators. Furthermore, it makes law enforcement officers presume falsification of statistics on crime detection, use illegal methods during investigations, etc. After all, the main task of law enforcement agencies is solving crimes at least documentarily. Thus, the requirement of the law that everyone who has committed a crime should be punished, and the pressure of statistical indicators do not allow them to focus on discovering more dangerous and serious crimes, forcing them to investigate minor offenses.

In the context of these data, *Kučyns'ka* proposes to refer to the conventional concept of truth. This concept implies the recognition of truth by convention or agreement. Certain judgments are considered true not because they are true, but the parties have agreed to consider them true. The current CPC of Ukraine defines the procedure for the possibility of such conventional agreements at the legislative level, i. e. agreements on recognition of guilt[17] (chapter 35 "Criminal proceedings on the basis of agreements"). In Ukraine it is common to understand this agreement as a voluntary will of the suspect or the accused and the prosecutor to cooperate in exposing criminal offenses; it has to be conducted in form of a written document containing information about the circumstances of the criminal offense, the degree of assistance, the suspect or accused authorities of preliminary investigation, the nature and severity of liability, etc.[18]

While implementing this one should strictly follow the compliance with the requirement of voluntary agreement between the parties, the participants of criminal procedure. "Having recognized the idea of a plea in law," *Kučyns'ka* confirmed: "Ukrainian legislators proved that the basic principle of criminal justice is not the objective truth, but the procedural, conventional truth."[19] *Kučyns'ka* gives another example of the recognition of

[16] *Кучинська*, fn. 5, c. 4.

[17] Ibid.

[18] *Р. В. Новак*, Укладання угоди про визнання винуватості між підозрюваним чи обвинуваченим у кримінальному провадженні (*Novak*, Agreements recognition of guilt between the suspect or accused in criminal proceedings), Часопис Академії адвокатури України, 2014, Том 7, № 4 (25), с. 31.

[19] *Кучинська*, fn. 5, c. 4.

procedural truth (not objective truth) by the courts, i. e. the truth in criminal cases of rehabilitation. She is convinced that in this category of cases the courts were limited to state the absence of proof of guilt for the person rather than sending the case for additional investigation.

It seems that the conclusions that meet the formal signs and conventional truths can be used only for the adoption of interim court decisions that do not achieve the required reliability. For rendering final judgments only objective (material) truth should be set. The verdict addresses the issue of liability of the defendant for committing unlawful acts. Therefore, forming a conclusion about the act of the defendant, the court mustn't correlate it (the report) with "something", but with reality. According to this, rendering lawful, reasonable and fair judgments requires to reflect the actions that happened in reality in the verdict adequately. Only adequacy provides material truth. Formal (procedural) and conventional truths don't correlate with reality but with procedural rules or agreements.

Undoubtedly, procedural rules contribute to establishing truth, but they do not automatically lead to truth itself. In particular, truth is not achieved as a result of different arrangements. Therefore, the conclusions in formal and conventional truth cannot achieve a complete and accurate reflection of reality. There should not be any probabilities in the justification of sentences. The only exception may be acquitted because of the presumption of innocence. But it can be argued that such sentences are made without considering the truth, no truth has to be achieved in this situation.

Thus, we must recognize that truth is necessary in a criminal trial. A sentence has no legal quality without its establishment. It is necessary to have an objective (material) truth, as it adequately and fully reflects the actions of the defendant, which took place in reality.[20]

At the same time *Pryluc'kyj* is taking into consideration the variety of definitions of truth in criminal procedure and its various types and tries to provide a definition of truth, which, in his opinion, can meet the needs of modern criminal proceedings: "Truth in criminal proceedings is a legal compliance of a court's conclusions, noted in the sentence, with the real facts of the case established by the court, based on the evidence reviewed, evaluated by inner conviction."[21]

III. The Peculiarities of Truth in Criminal Proceedings

During the first years of the Soviet period the concept of truth in criminal proceedings were neither discussed in legal literature nor in practice. The category of truth was proclaimed to be the structure of bourgeois criminal proceedings. However, under the pressure of common sense, this concept was revived in theory and practice of Soviet criminal procedure in the 1940s, although in a distorted form.

The theoretical underpinnings of Soviet criminal procedure were based on the provisions of the theory of truth by Marx and Lenin.[22] "Truth" in this theory was considered to be the objectively correct and confirmed by the practical reflection of reality in our heads; it was understood as a reconstruction of the object that is cognitively reflected in such a form, as it existed independently and outside of our consciousness.

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[20] Ibid.

[21] *П. Прилуцький*, Поняття і види істини в кримінальному судочинстві (*Pryluc'kyj*, Concept and types of truth in criminal proceedings), http://www.pravo.vuzlib.su/book_z726_page_3.html.

[22] *П. В. Прилуцький*, Проблема істини у кримінальному судочинстві України (*Pryluc'kyj*, The problem of truth in the criminal procedure of Ukraine), дисс. канд. юрид. наук: 12.00.09, Київський національний ун-т ім. Тараса Шевченка, Київ 2006, с. 14–15.

Lenin described objective truth as the meaning of human knowledge, "which does not depend on the subject, the man or humanity [...] is a set of all parties' phenomenon of reality and their (mutual) relations that the truth consisted of."[23] The independence of the content of our knowledge of a person is treated as the objectivity of this content, its independence from subjective perceptions and thoughts of a man. A slogan was proclaimed – it stated that if any knowledge reflects reality correctly, then it is objectively true.[24] Soviet criminal procedural theory adopted this doctrine almost categorically. In particular, *Cheltsov-Bebutov* declared the objective truth to be a bourgeois procedural design and put forward the claim that such concept as a philosophical category of truth could not be applied in the field of justice and therefore should not be an issue of objective truth in the criminal process.[25]

In Soviet and post-Soviet time, until the turn of the millennium, court activity and its determining role in establishing truth in a criminal case by a comprehensive, complete and objective examination of evidence, was based on procedural law, implicitly recognized in the criminal procedure doctrine.[26] But during the so-called "small judicial reform" that took place in June and July 2001,[27] the Ukrainian CPC of 1960[28] (after its independence, the CPC of the Ukrainian Soviet Socialist Republic became a part of the law in Ukraine on the basis of the Law of Ukraine "On Legal Succession"[29] and expired on Nov. 19, 2012) introduced a series of short chapters[30], which at that time was acknowledged as being important for the principle of truth by all experts. First of all, it was important because: 1) the Court was expelled from comprehensive, complete and objective investigation of the circumstances of the case (Art. 22 CPC);[31] 2) the presiding principal in court (i.e. judge) lost the judicial inquiry of direct obligation to provide full and objective investigation of the case and the truth (Art. 260 CPC);[32] 3) the court gained the opportunity to insist on judicial investigation (Art. 299 CPC).[33]

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[23] Марксистско-ленинская философия. Диалектический материализм (Marx and Lenin Philosophy), Dialectical materialism – М.: Политиздат, 1977 – с. 248, 249.

[24] Ibid.

[25] *Прилуцький*, fn. 22, с. 14–15.

[26] *Нор*, fn. 9, с. 7.

[27] На виконання обов'язків та зобов'язань України перед Радою Європи був прийнятий Верховною Радою України 21.06.2001 р. пакет із десяти законів (As the duties and obligations of Ukraine before the European Council, a package of ten laws was adopted by the Verkhovna Rada of Ukraine 21.6.2001), (про внесення змін до Закону України - «Про судоустрій України», «Про Кримінально-процесуальний кодекс України», «Про статус суддів», «Про кваліфікаційні комісії, кваліфікаційну атестацію і дисциплінарну відповідальність суддів судів України», «Про міліцію», «Про попереднє ув'язнення», «Про адміністративний нагляд за особами, звільненими з місць позбавлення волі» та ін.) («мала судова реформа»), що обумовив поправки до існуючих законів, спрямовані на забезпечення діяльності судових органів та органів правопорядку після припинення 28.6.2001 р. дії в Конституції України 1996 р., так званих «тимчасових положень».

[28] Кримінально-процесуальний кодекс України від 28.12.1960 № 1001-05/Відомості Верховної Ради УРСР, (ВВР УРСР), 1961 р., № 2, ст. 15.

[29] Закон України «Про правонаступництво» від 12.09.1991 № 1543-XII/Відомості Верховної Ради України (ВВР), 1991, № 46, ст. 617.

[30] Про що зазначено у прийнятій 27.9.2001 р. Парламентською Асамблеєю Ради Європи Резолюція 1262 (2001) «Виконання обов'язків та зобов'язань Україною», http://zakon0.rada.gov.ua/laws/show/994_607?nreg=994_607&find=1&text=%EC%E0%EB%E0+%F0%E5%F4%EE%F0%EC%E0&x=0&y=0.

[31] Кримінально-процесуальний кодекс України від 28.12.1960 № 1001-05/Відомості Верховної Ради УРСР, (ВВР УРСР), 1961 р., № 2, ст. 15.

[32] Ibid.

[33] Ibid.

The legislators formulated the following provisions in the CPC of Ukraine, adopted on April 13, 2012: 1) the prosecutor, the head of the preliminary investigation and the investigator are required to carry out a full, complete and impartial investigation of the circumstances in the criminal proceedings in order to identify the circumstances exposing and justifying the suspect, to give them proper legal assessment and to ensure that the legal and justified procedural decisions are made (Ch. 2, Art. 9 CPC);[34] 2) the evidence in criminal proceedings is the actual data received in the manner as prescribed by this CPC, based on which the investigator, the prosecutor, the investigating judge and the court determine whether or not the facts and circumstances are relevant to the criminal proceedings and have to be properly proven (Ch. 1, Art. 84 CPC); 3) the evidence that directly or indirectly confirms the existence or absence of circumstances has to be proved in criminal proceedings and other circumstances relevant to the criminal proceedings, as well as the authenticity or inauthenticity, the possibility or impossibility of using other evidence (Art. 85 CPC); 4) the evidence is admissible if it is received in the manner prescribed by CPC of Ukraine. Illegal evidence cannot be used in making procedural decisions; it may not influence a judgment (Art. 86 CPC). There are inadmissible evidences which were obtained as a result of a significant violation of the rights and freedoms guaranteed by the Constitution of Ukraine and laws of Ukraine, international treaties ratified by the Verkhovna Rada of Ukraine, as well as any other evidence obtained through information obtained as a result of substantial violation human rights and freedoms (p. 1 p. 86 CPC); 5) the conviction cannot be based on assumptions and is accepted only if the guilt of a person has been proved during the trial in a criminal offense (Ch. 3, Art. 373 CPC); 6) the investigator, the prosecutor, the investigating judge and the court in its inner conviction, basing on a comprehensive, full and impartial examination of all circumstances of criminal proceedings, guided by the law, evaluate each argument in terms of relevance, admissibility, reliability, and the set of the collected evidence for being adequate and related to appropriate procedural decision (Ch. 1, Art. 94 CPC); 7) the judgment must be lawful, justified and motivated. A decision is lawful only if taken by a competent court in accordance with the rules of substantive law in compliance with the requirements of criminal proceedings stipulated by the CPC of Ukraine. A decision is justified if taken by the court on the basis of objective clarified circumstances supported by evidence, studied at the trial court and assessed according to Art. 94 CPC. A motivated decision is a decision which was taken on appropriate and sufficient reasons and grounds (Art. 370 CPC); 8) the court evaluates the evidence for its internal conviction, based on a comprehensive, thorough and impartial examination of all the circumstances of the case in its (evidence) unity, guided by the law (Ch. 3 Art. 323 CPC); 9) aiming at the adoption of a fair judgment, protection of human rights and fundamental freedoms, the court may leave the accused specification in the indictment only regarding changes in the legal qualification of the criminal offense if it improves the position of the person who is the subject of the criminal proceedings (Ch. 3 Art. 337 CPC); 10) approving the sentence, the court must decide the following issues: a) whether there had been an act committed by the person which is accused of having committed such act; b) whether the act is a criminal offense, its corpus delicti, which article of the law of Ukraine on criminal liability it envisaged; c) whether the accused person is guilty of committing a criminal offense; d) whether the defendant is subject to punishment for a criminal offense committed by him; e) whether there are circumstances aggravating or mitigating punishment of the accused person; f) what punishment should be imposed and whether the accused person should serve it; g) whether there is a subject to satisfaction of a civil

[34] Кримінальний процесуальний кодекс України від 13.04.2012 № 4651-VI/Відомості Верховної Ради України (ВВР), 2013, № 9-10, № 11-12, № 13, ст. 88.

action being brought and, if so, in whose favor, to what extent and in what order; h) whether there are grounds to apply measures of criminal law to the legal entity; i) whether the accused person committed a criminal offense in a state of diminished responsibility; j) whether there are grounds to apply compulsory medical measures to a defendant who committed a criminal offense in a state of diminished responsibility; k) whether in the cases under Art. 96 of the Criminal Code of Ukraine,[35] the compulsory treatment must be applied to the accused person; l) whether to assign a minor public educator; m) what should be done with the owned property, which seized material evidence and documents; n) on whom and in what amount should procedural costs be imposed; o) what measures should be taken in order to ensure criminal proceedings (Ch. 1, Art. 368 CPC).

The new CPC of Ukraine has introduced a new approach to the role and powers of the court in adversarial criminal proceedings. It raised a controversial discussion revolving around the following questions: how will the truth be revealed in criminal proceedings under the conditions of a passive role of the court, who is responsible for the collection of evidence and what is the content of the legal parties in the process? This question will be discussed more thoroughly in the next chapter of this article.

Although we often encounter statements of national lawyers that the current CPC of Ukraine expresses truth we should agree only partly with these statements.[36] First of all, the task of establishing the truth is not expressly enshrined in the CPC of Ukraine; this task can be detected only by interpretation of the CPC. Secondly, the interpretation reveals the presence of both, objective and formal truth. As already mentioned above, there is no unity, in this regard, in the CPC of Ukraine. Thirdly, the CPC did not find a display of all the legislation required to achieve the truth

However, despite the fact that the current CPC of Ukraine does not contain any pro-vision that clearly states the obligation of the court, we entirely support the idea of a contemporary specialist in this field. *Nor* wrote that:

> The principle of truth is the constant and indispensable foundation, the basis of justice in criminal matters [...] The Court has to establish the truth in its decision (verdict, order or decision) which is recognized in accordance with the reality of the circumstances, and only on this basis, recognize the accused person as being guilty, and sentence him to appoint, or find him innocent, and resolve other issues.[37]

A large number of scholars and practitioners consider the denial of objective truth finding in criminal proceedings as unacceptable.

The achievement, of truth in criminal proceedings is caused by features as: 1) the limited range of persons who are subjects of the procedure and are required to establish the truth or have the right to participate in its establishment; 2) the truth setting is not carried out arbitrarily, but only in a form suggested by the specified criminal procedural law and defined procedural means; 3) the limited procedural terms for the process of establishing the truth, i.e. the time frame; 4) the counteraction to the process of achieving the truth by separate entities and other persons who are not interested in its establishment; 5) the application of knowledge, gained by specially applied scientific disciplines, including: criminology, legal psychology, ethics, etc.[38]

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[35] Кримінальний кодекс України від 05.4.2015 р. № 2341-III/Відомості Верховної Ради України (ВВР), 2001, № 25-26, ст. 131.

[36] *М. К. Свридов*, Задачи установления истины и средства ее достижения (*Sveridov*, The objectives of establishing the truth and the means of achieving it), Вестник Томского государственного университета, 2013, № 2 (8), с. 102.

[37] *Нор*, fn. 9, с. 7.

[38] Ibid.

Lastly, it has to be mentioned that the legislator demands "procedural economy": tasks have to be fulfilled within specified time limits; limited cognitive abilities (only the means established by law) and generally limited human, scientific, technical, material and financial resources. But the experience of combatting crime shows that strict compliance with procedural law, proper organization of work, high professionalism of operative and investigative bodies, investigators, prosecutors, on the one hand, and lawyers and advocates, on the other, allow a court to achieve the goal of justice.[39]

IV. Truth and a Type of Criminal Process

Objectives and methods of establishing the objective truth must be consistent with the conceptual provisions and specific to the relevant type (form) of the criminal process, i.e. public or adversarial. It is well known that public criminal proceedings give priority to the authorities that establish truth and solve the case by virtue of their employment, regardless of the position of individuals or organizations. The main driving force here is the actions of officials who have no business in their own interests and act on behalf of the state and its interests.

In adversarial criminal proceedings parties with their own interests prevail. The parties taking into account their interests form the means of establishing truth (the evidence base), and the parties provide their interests to the court, which solves the lawsuit on basis of such evidence base. "Criminal proceeding is based on competition, which involves self-assertion of the legal positions, rights, freedoms and legitimate interests by the prosecution and the defense, provided by this Code", the legislator declared in Ch. 1, Art. 22 CPC.

The continental law supposes the activity of the court to be the subject of evidence-based increases, thereby satisfying public interest while in Anglo-Saxon countries criminal procedure tends to show more adversarial elements. In the process of rapprochement between continental and Anglo-Saxon forms of criminal justice, there is general tendency to move in the continental model of justice from "absolute activity" of the court towards "limited activity". The content of this transition is "maintaining the activity of the court in the procedural manual process and limits the activity of court in the collection and evaluation of evidence." In the adversarial Anglo-American legal system it is replaced by "a model of full satisfaction of private interests considering the necessity of protection of public interest."[40]

An analysis of the current CPC justifies stating that the Ukrainian criminal procedure has a mixed form, i.e. it is containing elements of publicity as well as competition. Indeed, the CPC establishes the adversarial principle incompletely. But the assignment of full competition occurs only in some details and separate articles. In the main concepts the adversarial element is preserved. It should be noted that while the pre-trial proceedings have only got a low level of competitiveness, the latter, however, prevail in court.

In adversarial proceedings, truth is achieved by the effort of the parties. They gather evidence in accordance with their interests and then provide them to the court. According to this provision the CPC of Ukraine stipulates a separation of functions because of the inadmissibility to perform multiple functions by one person (Ch. 3, Art. 22 CPC, "During the criminal proceedings the functions of prosecution, defense and trial cannot rely on the same body or officer"),[41] as well as the equality of the parties (Ch. 2, Art. 22 CPC,

[39] Ibid.

[40] *Яновська*, fn. 11.

[41] Ibid.

"Parties of the criminal proceedings have equal rights to the collection and submission to the court belongings, documents and other evidence, petitions, complaints, and to implementation of other remedial under the bill of rights").[42]

But regardless of how equality existing in adversarial proceedings is regulated, the parties cannot reach actual equality. The defense is unable to collect evidence as effective as the prosecution, because for the collection of evidence it is necessary to have powers, which the defense does not have. Therefore, the actions of defense do not ensure the collection of all exculpatory evidence that might exist. At the same time the prosecution has all the possibilities to collect evidence. However, the evidences collected by the prosecution (by virtue of the distribution functions) are reflecting only the indictment side. As they do not constitute additions to adequately protected evidence, they will show only part of the truth.

Apparently, the inherent adversarial process scheme of truth setting means that the efforts of the parties, each of which establishes "a part of the truth", do not provide a complete picture of the restoration of the events that took place. This problem can be solved in other ways, e.g. by the state bodies which perform the demand for a comprehensive, complete and objective investigation of the circumstances of the case (including the actions of the court). But this is a method, which tends not to be a more competitive, but a public process.

The concepts of competitiveness that have found their reflection in the current CPC of Ukraine cannot be fully joined with state of the court, which is required to establish the objective truth. The priority of adversarial parties causes the court to be rather passive (fully or partially) to study the case, while searching for the necessary solution of the case evidence. The court, deciding a criminal case, uses only the evidence that is provided by the parties.

"We can accept this state of the court, if the formal or conventional truth is established," *Sveridov* supposes, "Passivity of the court does not help the establishing of objective truth. Getting the evidence only from the parties, the court is largely dependent on the parties' activity."[43] As already mentioned earlier, it is not possible to provide the court with a set of evidence, which would reflect the events that took place fully because of the actual inequality of the parties. The court cannot "fill up" the evidence if there is a lack of such evidence. It takes decisions only on the basis of evidence submitted by the parties. Considering this value of duties of the court and the parties, it would be logical to place the responsibility for the quality of judgment on the parties. But the law states otherwise – it holds the court responsible for the verdict (Art. 370–377 CPC). Therefore, the court must not only take evidence from the parties, but also take steps to replenish the legislative framework, if the court discovers it to be incomplete. This situation is more typical of the court in adversarial procedures than in a public one where the court decides the case as a criminal state body by virtue of its powers, and not because of its actions. The court – because of the virtue of its office – is responsible for the sentence itself, and it must adequately reflect on what actually took place to establish the objective truth. We can only reject the principle of the objective (material) truth if we withdraw the responsibility of the professional judge for the relevant decisions in the criminal case that occur only in case of the jury classical form, and the decision deals only with the question of guilt (innocence) for a crime.

We believe that the introduction of the article to the current criminal procedure law, reflecting the achievement of the objective truth, will not bring about the expected positive results. This is because of the fact that, as noted above, they are "incompatible" with

[42] Ibid.

[43] *Свердов*, fn. 36.

a number of competition provisions enshrined in the CPC of Ukraine. On the contrary, it will complicate the situation because of the contradictions, inconsistencies that already exist in the current CPC of Ukraine. Fixing objectives and methods for establishing the objective truth requires serious processing of the CPC of Ukraine and changes in its conceptual framework.

V. Objectivity and Impartiality of the Court

The constitutional consolidation of the principle of adversarial rights and freedoms in the provision of evidence by the court as well as in bringing credibility to justice (P. 4, Ch. 1 Art. 129 of the Constitution of Ukraine) led to this principle's special role in criminal proceedings.[44] And as we have already noted, this principle is reflected in the legislation (Ch. 1, Art. 22 CPC): "Criminal proceedings are based on competition, which involves self-assertion by the prosecution and the defense of their legal positions, rights, freedoms and legal interests by means provided by the CPC." The main idea of this principle is the parity of the prosecution and defense, which are proving their own legal position in the type (form) of case law provided by implementing procedural rights and fulfilling procedural obligations.

Traditionally, Ukrainian criminal process theory identifies three main features in the structure of adversarial proceedings: 1) a clear separation of functions for public prosecution, defense and litigation; 2) equality in procedural rights of the parties to perform their functions; 3) a special role in the court process as an objective and impartial entity.

Parties to criminal proceedings are participants of these proceedings that perform the function of adversarial prosecution or defense.

The prosecution is represented by the investigator, the heads of the preliminary investigation, the prosecutor and the victim, its representative and legal representative in cases specified by the CPC of Ukraine. The defense is represented by the suspect, the accused (defendant), convicted, acquitted person against whom the use of compulsory measures of medical or educational nature is assumed, or a question about their use, their defenders and legal representatives (P. 19, Ch. 1, Art. 3 CPC).

The adversarial principle is reflected in the realization of the opposite features of the prosecution and the defense; the parties who defend their interests are vested with rights that equate their procedural capabilities. Equality between the parties means that each of them resorts to the same amount of procedural rights to perform their functions, and neither party takes precedence over the other party before the court in bringing credibility of its position, declaration and satisfaction of petitions, complaints, evidence, etc. (Ch. 2, Art. 22 CPC). The implementation by the parties of their procedural rights makes it possible to perform their proper procedural function effectively (public prosecution, defense and judicial review).

Criminal procedural law prohibits combining the functions of prosecution, defense and the trial and placing them on one subject. Separating these functions means that neither the prosecution, nor the defense has the right to exercise the function of the trial, and the court has no right to act as a party of criminal proceedings. In fact, there is a professional dispute as to the question whether a party has the right to take over the functions of the other party or not.

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[44] *А. Гетьман*, Науково-практичний коментар нового Кримінального процесуального кодексу України від 13.4.2012 № 4651-VI., Харків: Право, Національний університет «Юридична академія України імені Ярослава Мудрого» Національна академія правових наук України, 2012. – 681 с., http://www.twirpx.com/file/1005252/.

The function of public prosecution is performed by the prosecutor.[45] Written notification of the suspicion of a criminal offense is performed by a prosecutor (P. 11, Ch. 2, Art. 36 CPC) or an investigator in consultation with the prosecutor (Ch. 1, Art. 277 CPC). In criminal proceedings written notice of suspicion can only be made by an attorney appropriate within its powers (Art. 481 CPC) against a certain category of people (deputies of Ukraine, Constitutional Court judges, a professional judge, a candidate for President of Ukraine, a lawyer, etc.)

The prosecutor, exercising supervision over the observance of laws during the pre-trial investigation, is authorized to go to court for the purpose of bringing an indictment and supporting public prosecution (P. 14, 15, Ch. 2, Art. 36 CPC). However, the prosecutor is required to abandon the state accusation, if the trial results in the belief that the charges against the accused are not confirmed (P. 1 Art. 340 CPC). This rule cannot be considered a step away from the principle of adversarial proceedings, because it does not provide the obligation to support the charges of the prosecutor in any case, despite evidence that is material to criminal proceedings and the inner convictions. In the event of refusal of the prosecutor for the state prosecution to support the prosecution in court, its representative has the right to represent a victim on its behalf, and it hence has all the rights of the prosecution during the trial (P. 4, Art. 56, Art. 340 CPC).

The functions of defense may be performed by the suspect or the accused person through the implementation of the rights provided by law. These allow defending ones interests at all stages of the proceedings (Art. 42 CPC), and with the assistance of a lawyer (Art. 48–49 CPC), and (or) a legal representative (Art. 44 CPC).

In adversarial criminal proceedings the person presiding in court ensures the implementation of procedural rights of the participants, so that they can perform their duties. The presiding judge also directs the judicial consideration to clarify all circumstances of the criminal proceedings, the trial of eliminating everything that is not relevant to the criminal proceedings (Art. 321 CPC).

The adversarial construction of criminal procedure determines the special role of the court, which is an objective and impartial examination of evidence and does not work in favor of the prosecution or defense. Therefore, the court has no right to: 1) send the direct results of the criminal proceedings for further investigation; 2) give instructions to the pre-trial investigation agencies for the replenishment of evidence against it; 3) take measures on its own initiative to prove the guilt of the accused person.

However, an adversarial court does not exclude activity in research and verification of evidence submitted by the parties in the case. In particular, on its own initiative, the court may: 1) authorize examination (Ch. 2, Art. 332 CPC); 2) call for an expert examination to clarify the conclusion (Ch. 1, Art. 356 CPC); 3) examine the evidence put forward and other evidence available to the court by proposing questions to a witness (Ch. 11, Ch. 13, Art. 352 CPC), a victim (Ch. 2, Art. 353 CPC), an expert (Ch. 2, Art. 356 CPC), any specialists (Ch. 2, Art. 360 CPC); 4) ask questions to the parties or other participants in criminal proceedings in the case of a claim applications for additions trial (Ch. 2, Art. 363 CPC); 5) restore clarifying the circumstances established during criminal proceedings, and verify the evidence if the accused reports in its last word about new circumstances that are essential for the criminal proceedings (Ch. 4, Art. 365 CPC); 6) declare records of investigative (detective) and other actions attached to the criminal proceedings papers (Ch. 1, Art. 358 CPC) and others.

[45] Державне обвинувачення - процесуальна діяльність прокурора, що полягає у доведенні перед судом обвинувачення з метою забезпечення кримінальної відповідальності особи, яка вчинила кримінальне правопорушення (п. 3 ч. 1 КПК України).

Furthermore, as *Nor* states, at least in respect of a number of investigative and judicial actions listed above, the relevant rules of CPC of Ukraine do not contain direct instructions as to the initiative of the judge holding court. But in the context of other rules and on the basis of the principle of immediacy (Ch. 1, Art. 23 CPC) there is no doubt that they are aimed on an initiative of the court. The aim is their conduct, i.e. achieving the truth in the case. And the court, being neither the prosecution nor the defense, should have sufficient powers to achieve the truth.[46]

These powers allow the court to objectively assess the parties who bring forward their legal position, remove the doubts that arise during a trial, and therefore resolve a criminal legal dispute through compliance with the statutory procedures and adoption of a legal, grounded and reasoned decision.

As for the impartiality of the trial (a judge in resolving legal disputes), this term should be understood as the impartial investigation of the circumstances in the criminal proceedings, gathering incriminating as well as exculpatory evidence, until all the data that characterize the personality of the accused person is gained. Impartiality involves the attentive study of both the victim's testimony and the testimony of the suspect, their requests and complaints. All statements of such persons should be carefully checked and requested, and if they are justified, they should be admissible for further use. In contrast, biased criminal proceedings would be proceedings carried out with a specific interest, most commonly "accusatory bias".

Impartiality implies that the judge, in the consideration of specific materials of the criminal proceedings, is subjectively free of personal beliefs regarding the participants of the proceedings, its action should exclude any reasonable doubt in the fact that the judge must be objectively impartial. The judge should not have any interest in the proceedings with one exception, i.e. the correct application of law.

During the trial, the judge must carefully analyze the arguments of prosecution and defense, guided only by the interests of justice.

Impartiality is, on the one hand, a subjective category, depending on subjective factors; on the other hand, it is an objective that is shaped by the objective conditions for its manifestation.

The objective conditions ensuring the impartiality of judges should include the construction of a judicial system, a special procedure for funding courts, the appointment and dismissal of judges, their material and social security as well as the independence and security of the tenure of judges.

Since impartiality and objectivity of judges are important prerequisites for compliance with the law in the administration of justice, the law orders the judge performing its powers to avoid anything that may diminish the authority of the judiciary in private relations, or compromise its objectivity, impartiality and fairness. A judge must not hold positions in any other government agency, local government and representative mandate. The judge has neither the right to combine its operations with business, legal practice, nor any other paid work (except for teaching, research and creative activity), nor is he allowed to be member of the governing body or supervisory board of a company or organization that aims at generating profit. A judge must not belong to a political party or trade union; show commitment to them to participate in political actions, rallies, strikes (Ch. 1–3, Art. 53 of the Law of Ukraine "On the Judicial System and Status of Judges").[47]

[46] Закон України «Про судоустрій і статус суддів» від 07.07.2010 № 2453-VI/Відомості Верховної Ради України (ВВР), 2010, № 41-42, № 43, № 44-45, ст. 529.

[47] Ibid.

Impartiality is a category including an objective that depends not only on objective conditions, but also on the subject of voluntary guidelines. Impartiality implies that the judge cannot be directly or indirectly interested in solving criminal proceedings which came to him for consideration.

A direct personal interest is an interest in the criminal proceeding, when the judge has a financial or other interest that is or may be concerned during the trial.

An indirect personal interest is a situation in which a judge is not directly interested in the outcome of the trial; however, there is some interest of others whose interests are not indifferent for the judge's interests because of family, friendly or close relations, etc.

In order to ensure the impartiality and objectivity of judges in criminal procedural law a list of circumstances was established to prevent the participation of judges in the trial of specific materials of criminal proceedings (Art. 75, 76 CPC).

The concept of "fullness" and "impartiality" are interrelated. Criminal proceedings cannot be considered impartial if all possible versions are not verified carefully, and if the circumstances that both expose and justify a person with a criminal offense (criteria of completeness) are not properly clarified. There will be no completeness if the proceedings are performed on biased research, and if extremely incriminating evidence is compiled without checking the arguments of the innocent person.

In accordance with the principle of the presumption of innocence, the burden of proof of the accused and rebuttal arguments of the defense belongs to the prosecution. This means that the court is not required to convince whosoever of whatsoever.

A procedural decision must include a proper reasoning, containing the analysis of evidence, the reasons and motives of the court on every matter of any decisions previously made. However, "the duty of the court to substantiate its decisions," according to *Ševčuk*, "is not dependent on its functions and procedural status as it traced the parties and due, firstly, to the requirements of generally accepted legitimacy, justification and motivation solutions as guarantees of legality and justice; secondly, the presence of further control trial stages (stage appeal hearing; second trial stage, the stage of the proceedings on new circumstances)[48]. A characteristic feature of the latter (except appeal) is to assess the legality and validity of judgments not based on direct research evidence, and in consequence to verify compliance with the judgment and, showing its conclusions, the presence of existing case evidence to the extent and manner in which they are reflected in the criminal proceedings."[49] To assess the legality and validity of a judgment in subsequent stages is impossible in the absence of reasoning.

Thus, we should state that the court is not limited to the study of the circumstances of the criminal proceedings, it also provides proof-justification, caused by the need to justify its conclusions; the court also motivates its decisions.

The Ukrainian criminal procedure is of a "mixed" nature, it contains elements of publicity as well as adversarial aspects. As the adversarial proceedings prevail in the trial (dominant competitiveness of the inherent nature of truth and how to install it), the pretrial has rather small adversarial characteristics. So the principle of adversarial proceedings is mostly implemented in the case of the trial. However, there are certain limitations in pre-trial proceedings. Thus, the CPC of Ukraine stipulates the institute of an investigating judge, the main purpose of which is the implementation of judicial control over the observance of rights, freedoms and lawful interests of individuals in criminal proceedings.

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[48] *М. Шевчук*, Функції суду в сучасному кримінальному провадженні України (*Ševčuk*, Functions of court in modern criminal proceedings in Ukraine)/Вісник Львівського університету, Серія Юридична, Вип. 59, 2014, с. 373.

[49] Ibid.

According to the CPC, the main function of the investigating judge is the judicial protection of the rights and legitimate interests of persons involved in criminal proceedings and the compliance with the legality of the proceedings at the pre-trial stages. This explains the specific nature of the criminal procedure, which is to ensure the legality and validity of restrictions of constitutional rights and freedoms in pre-trial proceedings in the relevant criminal proceedings.

In particular, during the pre-trial investigation an investigating judge considers the following objectives (in compliance with adversarial proceedings): 1) to ensure the application of the criminal proceedings (Art. 132 CPC): the investigator's or prosecutor's challenges, court challenge; imposing monetary penalties; restrictions in the use of temporary special law; removal from office, temporary access to things and documents; temporary seizure of property; general seizure; detention; precautions (P. 2, Art. 131 CPC); 2) to complain against decisions, actions or inaction of the pre-trial investigation or a prosecutor (Art. 306 CPC); 3) to grant permission to conduct certain investigative (detective) actions, such as into a dwelling or other property; to search (Art. 233–235 CPC) and others.

Ševčuk states rather correctly that "the introduction of an investigating judge to the institute of criminal proceedings promotes competition to pre-specialization and differentiation of the criminal justice and the efficiency of judicial protection of constitutional rights and freedoms in modern Ukraine."[50] Accordingly, it creates prerequisites for achieving the truth in the case at all possible trial stages.

VI. Active or passive role of court

There are certain features of realizing judicial powers in the context of the principle of adversarial criminal proceedings. Parties' activity as a side of the adversarial principle has an underside, i.e. the passivity of the court.

The degree of activity of the court is an essential procedural description of its activities, it is crucial in determining the role of the court in the place and its proof in criminal proceedings in general. This activity meets certain models (types) of criminal procedure, and is one of the criteria for their distinction. According to *Yanovs'ka*, the activity of the court, as an expression of its cognitive activity, should be kept to a minimum and the focus should rather be placed on the legal regulation of the criminal procedure from mixed to adversarial criminal proceedings.[51] However, the principle of adversarial proceedings directly supposes the responsibility of the court to ensure such conditions in the process, which would enable the parties to fully implement their procedural rights on equality. "Therefore we must talk about the increased activity of the court in terms of exercising general management of adversarial proceedings, including the process of taking evidence."[52] Procedural activity of the court in adversarial criminal proceedings should be understood as the own initiative of the court, which it may detect at its sole discretion.[53]

Ch. 6, Art. 22 CPC provides that a court, maintaining objectivity and impartiality, creates the necessary conditions for the implementation of the procedural rights of the parties by themselves, and also for their procedural obligations.[54]

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[50] Ibid.

[51] *Яновська*, Fn. 11, c. 89.

[52] Ibid.

[53] Ibid.

[54] Ibid.

Therefore, one of the positive features of the contemporary competitive procedure is that the presiding judge directs the course of the court session. The judge ensures the consistency of the proceedings, the implementation of the procedural rights and performing the duties by the participants of criminal proceedings. The judge also directs the trial to clarify all circumstances of the criminal proceedings and to eliminate everything that is not relevant to the criminal proceedings (Ch. 1, Art. 321 CPC).[55]

This aspect of judicial activity is "organically" intertwined with the activities of the court to ensure equality of the parties included in its basic composition. It has the same form of interim activities and consists of the same elements. Managing the research of evidence in the case is a reflection of its overall leadership role in criminal proceedings. It highlights the main central court among other participants in criminal proceedings. This manual, according to *Ševčuk*, is carried out in two ways: 1) organization of research evidence; 2) monitoring the research evidence.[56]

The organization of the judicial investigation of evidence is a purely interim activity aimed at creating the necessary conditions for the effective implementation – by the parties – of proving compliance with the procedural form provided by law. These activities are important in giving the parties the opportunity to actively and fully exercise their rights in the process of proving and direct judicial consideration to clarify all the circumstances of the criminal proceedings.[57]

Control of the process of evidence research includes assessment of its results and monitoring compliance by other subjects of criminal proceedings regulations established by the order of proof, the trial of eliminating everything that is not relevant to the criminal proceedings. During the trial this control is implemented in the powers of the presiding judge, who must ensure the compliance with legal procedures judiciary and implement it in the intermediate court decisions on membership and the admissibility of certain evidence.[58] Monitoring of evidence research complements the organizational component of the leadership of the court, helps the parties to process the proof in trial and aims to achieve positive results, i.e. objective evidence.

The presiding judge and the court in general are required to ensure that the parties do not consciously or unconsciously divert from the subject of litigation, do not rely on circumstances which are not related to the case or circumstances irrelevant to the case, and therefore do not remove from the possibility of achieving the objective truth in resolving the criminal case. This duty is put on trial not only within the cognitive component of the implementation process of proof, but also in the implementation of the justification by the parties of proving. Thus, the presiding judge has the right to interrupt the debate, if it after repeated remarks goes beyond the criminal proceedings.

Court activity in the procedural manual is also reflected in the fact that the parties are prevented from influencing each other directly, without court involvement. Procedural equality of the parties in conjunction with the activity of the court in the procedural manual causes the result (quite positive, by the way) of a change in the procedural status of the parties, i.e. occurrence, change of procedural rights and obligations of the parties; this equality depends on the decision of the court, but not on the will of the opposing party. The driving force behind the execution of courts powers is to initiate the procedural part of the court decision on the procedural status of the opposing party.

The court is interested in establishing the objective truth in resolving the criminal case. In practice, there is no such commitment of the parties in criminal proceedings,

[55] Ibid.

[56] *Шевчук*, fn. 48, c. 372.

[57] Ibid.

[58] Ibid.

"taking into account that each of them stands for personal interest defined procedural function."[59]

In the following, we will discuss the level of activity on the part of the court in its examination of evidence in the context of active implementation of the principle of the universality of the parties at trial stage. According to the CPC of the USSR of 1960 (which was in force in Ukraine until 2012), the Court was granted full activity. Unlimited court activity should not be retained, as such a restriction inevitably leads to negative consequences, i.e. the court is involved in the dispute of the parties, a party is required and it loses objectivity.

Court activity in the course of proving reduces the activity of the parties.

Attempts to remove the bodies of both sides of the proceedings which operate independently led only to the fact that their functions had to be shifted to the court, i. e. the absolute distortion of the judiciary.[60] "But you cannot argue that the court does not take part in the process of proof in criminal proceedings. Undoubtedly, the court is a subject to proof, because the process is proving challenging complex activity that is multistage, it is a cyclically repetitive process of collection, verification and evaluation of evidence," states *Yanovs'ka*, "taking into account the adversarial principles of criminal procedure, we can speak about the right of the court to participate in the assessment of the evidence, which actually is the exclusive competence of the court. Of course, the parties are also involved in this assessment, but this right does not entail legal consequences, in contrast to the assessment carried out by a judge, and it is the result of a decision in the criminal proceedings."[61]

But on the other hand, it is unacceptable to assign a passive role to the court in evidence research. A passive court loses its judicial independence and its activity will depend on its parties and participants.

Thus, in deciding on the state of the court in the cognitive process, the extent of its activity cannot be presumed in extreme form. The Court must be active, but it should be limited. What can manifest judicial activity and what are its limitations?

In general, the boundaries of court activity can be represented as follows:

One cannot impose a duty of gathering evidence on the court; such activities inevitably entail a loss of court objectivity. Evidence must be gathered by the parties.

However, it does not mean that the court must be completely removed from gathering evidence and should consider only the evidence presented by the parties. The extent of evidence required to establish the truth should not be determined by the parties or the court. And if the court, in contrast to the views of the parties, deems that all evidence presented still is insufficient, the court should be given the means to supplement the evidence. Determining the list of these facilities, it is appropriate to proceed with the following: efforts of court must not be focused on gathering evidence because it is not enough, but it is rather important to underline the effect on the parties to ensure that they fully comply with what is required of them, i.e. to provide the court with all necessary evidence.[62] Thus, the court can independently, without depending on the parties to determine the amount of evidence that it is necessary, solve the case. There is no danger of losing objectivity of the court because the court will not "fill up" the evidence itself, and the actions of the parties. "Vested with such powers, the court will not be only the party,

[59] *Яновська*, fn. 11.

[60] *Яновська*, fn. 11, c. 89.

[61] Ibid.

[62] *Свердов*, fn. 36, c. 106.

but with the Head of Truth," claims *Sveridov*.[63] Such a situation in court is paramount because the court accepts full responsibility for its sentence to be rendered.

Firstly, it is possible to get criminal prosecution and subsequent conviction of persons guilty of the crime. This is the case when one of the objectives of the criminal proceedings is "ensuring rapid, full and impartial investigation and trial, so that everyone who has committed a criminal offense was prosecuted as guilty, no innocent has not been accused or convicted, no person has been subjected to unwarranted procedural coercion and that each party to the criminal proceedings was granted due process" (Art. 2 CPC).

Secondly, this is a unique way to justify a careless, negligent attitude of the appropriate officials towards their duties. Considering the inability to establish the truth for each criminal case, and also the idea that there is no need for such a pretension, it may camouflage professional failure as disability to carry proof of guilt based on inner conviction, based only on the criminal case, its evidences and fearing to be held liable for any errors. Investigator, prosecutor, and judge must be confident in their ability to carry out evidence to establish the truth, make informed decisions and to be responsible for their actions and decisions.

Thirdly, another negative consequence could be distrust on the part of crime victims and citizens in the ability of law enforcement and judicial authorities to solve crimes, and ensure that perpetrators face adequate prosecution and punishment, disbelief in the triumph of justice as a whole.

VII. Conclusion

Ascertaining the truth in criminal proceedings is essential. Without its establishment the sentence cannot be regarded as justice. It is necessary to strive for the objective (material) truth only, which reflects the actions of the defendant adequately and fully, enlightens the circumstances revolving around the crime committed by the defendant.

Establishing the truth is the guarantee of a just punishment, because the court, possessing true knowledge of the crime, evaluating it properly, arrives at a sentencing that is adequate in relation to the committed crime.

To deny the truth in court, to set any other purpose for legal proceedings than objective truth, would mean targeting the investigation and trial staff on subjectivity, pragmatic benefit of formalized proceedings. The interests of both the individual and justice will be compromised as a result.

The task of establishing the truth by court is not literally enshrined in the CPC of Ukraine. Its presence can be detected only by interpretation of the Code. We consider it appropriate to regulate the truth legally in criminal proceedings as an objective of criminal proceedings.

Studying the development and evolution of criminal procedure law in modern Ukraine prompts us to assert that there is a national trend of transition from a model of justice – "absolute activity of the court" – towards the principle of "limited activity." The content of this transition is to maintain activity in the court procedural manual process and limit the activity of the court in the gathering and evaluation of evidence.

We raise awareness among the national legal communities' commitment regarding the minimisation of the activity of the parties in court against a background of absolute competitiveness. The existing adversarial principle in Ukrainian criminal proceedings requires the activity of the court in establishing the truth. As the target of the court is not only to resolve a dispute between the prosecution and the defense, but also to decide the

[63] *Яновська*, fn. 11, c. 89.

case fairly, correctly (legally), and on the basis of proven evidence cannot be achieved without establishing the truth in the case.

According to the laws of Ukraine „the parties in the criminal proceedings have equal rights of collecting and submitting items, documents and other type of evidence, petitions, complaints to the court, and also the right of implementing other procedural rights provided by this law" (P. 2, Art. 22 CPC).[64]

But regardless of the extent of equality in adversarial proceedings, in reality, the parties cannot reach complete equality. The defense is unable to gather evidence as effectively as the prosecution. In contrast to the defense, the prosecution has wide-ranging possibilities to gather evidence. However, evidence gathered by the prosecution is one-sided.

This problem can be solved by a court covering the demand for a comprehensive, full and objective investigation of the case. Judges should be given the proper legal assessment. Thus, it can be ensured that the case is correctly resolved.

[64] Ibid