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# Genesis of the Institute of Procedural Guidance: Historical and Legal Aspect

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## Abstract

The result of the reform of the criminal process in 2012 was the introduction of a new institute of procedural guidance for pre-trial investigations. This institute has become the object of many scientific discussions, and therefore there is a need to analyse its historical and legal genesis to clearly understand the place and role of the prosecutor in modern criminal proceedings. The purpose of the study is to examine the institute of procedural guidance in criminal proceedings and identify promising areas for improving its legal regulation. The study used dialectical, system-structural, synthesis, formal-logical, and historical methods. It is proved that the institute of procedural guidance originated quite a long time ago. From the very beginning, monarchs used civil servants to represent exclusively their interests in certain processes that were important to them. It is established that the genesis of the institute of the prosecutor's office began to be used quite widely, up to the development of a separate structure of the relevant state bodies and assigning them the function of supervision over certain spheres of life, that is, the functions of the prosecutor's office expanded sufficiently and representation of the interests of the state in criminal proceedings became part of the overall function of supervision. With the change in the socio-political orientation of Ukraine's development after independence, the place and role of the prosecutor's office in the system of state bodies have evolved under the influence of advanced European trends. The reverse process of changing the functions of the prosecutor's office in criminal proceedings has begun, namely, the function of total prosecutor's supervision has begun to narrow and be reduced to procedural guidance of the criminal process and representation exclusively in certain cases. As a result of the study, it was stated that the legislation regulating the legal status of the prosecutor's office has contradictions, namely, the Law of Ukraine "On Prosecutor's Office" imposes broader powers on the prosecutor than the Constitution of Ukraine, which undoubtedly requires legislative correction by making appropriate changes. The findings of the study can be used in rule-making and law enforcement activities

## Keywords:

pre-trial investigation; procedural head of the pre-trial investigation; supervision; powers; investigation; inquiry

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## Introduction

Nowadays, the active development of society, the continuous process of regulating public relations, globalisation and integration on the European continent require the active development of legal institutes to bring them in line with international standards. Not an exception is the system of prosecutor's offices, which during the years of independence of Ukraine has been undergoing both structural and functional changes. The most relevant change in the activities of the prosecutor's office, which took place in 2012 with the adoption of the new Criminal Procedure Code of Ukraine<sup>1</sup>, was the introduction of a new function – procedural guidance of pre-trial investigations. In addition, further amendments to the Constitution of Ukraine in 2016<sup>2</sup> showed a narrowing of the powers of the prosecutor's office and their reduction exclusively to participation in criminal proceedings and representation in clearly defined cases. The function of procedural guidance of the pre-trial investigation and the role of the prosecutor in criminal proceedings as the head of the pre-trial investigation causes a lot of discussion in connection with the consolidation of the principle of immutability of the prosecutor throughout criminal proceedings, which raises doubts about their impartiality during the pre-trial investigation because under such conditions, the prosecutor actually prepares to maintain the state prosecution in court even from the stage of collecting evidence during the pre-trial investigation.

The general trend in the development of human rights and freedoms in the world has become an increase in the standards of these rights and freedoms, which leads to the activation of the state represented by its bodies in the relevant field of activity. An important tool in ensuring human rights and freedoms by combating crime is the activity of law enforcement agencies, in particular, the prosecutor's office, as one of the key subjects of criminal proceedings. During the existence of the prosecutor's office on the territory of Ukraine, the functions and powers of these bodies have been changed by the state. Thus, in Soviet times, the prosecutor's office mainly served the political regime and senior officials in the state, controlling all spheres of public life and all branches of the national economy. During the years of independence, the prosecutor's office has undergone structural and functional changes, and its role and tasks in the system of state bodies have changed.

The institute of procedural guidance in the scientific literature causes quite a lot of discussion since it is a novelty of national legislation and many of its aspects remain unexplored and theoretically unfounded. In particular, historical periods in the development of national prosecutor's offices, the genesis of their powers, and the

place and role of the prosecutor in modern criminal proceedings remain understudied.

In most studies on the chosen issue, only the functions of the prosecutor in criminal proceedings are compared with their status as a procedural leader in criminal proceedings. Since the procedural guidance is one of the guarantees for achieving the tasks of criminal proceedings defined in Art. 2 of the Criminal Procedure Code of Ukraine<sup>3</sup>, this function of the prosecutor's office requires scientific analysis with an appeal to the historical origins of the foundations of the prosecutor's office's leadership in criminal proceedings to investigate the genesis of the role of the prosecutor in criminal proceedings in different historical epochs. The issue of studying the dependence of the place and role of the prosecutor in criminal proceedings on the general tasks of criminal proceedings remains important, along with the consideration of the principle of immutability of the prosecutor throughout criminal proceedings.

The People's Deputy of Ukraine S. Ionushas in his study analyses many options for regulating the powers of the prosecutor's office in the constitutional drafts of Ukraine, but emphasises the problem of the relationship between the function of supervision of the prosecutor's office and procedural guidance rather superficially [1]. S. Nazaruk, a graduate student of the Department of State Legal Disciplines and Administrative Law of V. Vynnychenko Central Ukrainian State Pedagogical University, in his paper, indicated certain periods in the development of prosecutor's offices in Ukraine without detailing the genesis of their role and powers [2]. A. Mykhailiuk, a graduate student of the Security Service of Ukraine Academy, in his paper correlated the concept of "prosecutorial supervision" and "procedural guidance", but did not highlight the problem of contradiction between the regulation of prosecutorial powers in the Law of Ukraine "On Prosecutor's Office" and the Constitution of Ukraine<sup>4</sup> [3]. D. Mirkovets, in his study, distinguished between the powers of the head of the prosecutor's office and the procedural head but did not indicate the supervisory component in the powers of the head of the prosecutor's office [4].

As a result of examining the above studies, it was established that all of them are reduced to conducting a similar periodisation in the development of prosecutor's offices, analysing their powers towards narrowing the function of supervision of "everything and everyone", and actively investigating the form of prosecutor's supervision – procedural guidance. This study aims to analyse the prerequisites for changing the functions and powers of the prosecutor's office in different historical times along with the contradictions in the legal

<sup>1</sup>Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>2</sup>Law of Ukraine No. 1401-VIII "On Amendments to the Constitution of Ukraine (Regarding Justice). (2016, June)". Retrieved from <https://zakon.rada.gov.ua/laws/show/1401-19#Text>.

<sup>3</sup>Criminal Procedure Code of Ukraine, op cit.

<sup>4</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

regulation of the functions of the prosecutor's office in the Constitution<sup>1</sup> and the Law of Ukraine "On Prosecutor's Office"<sup>2</sup>.

*Purpose of the study:* to analyse procedural guidance as a form of implementation of functions by a prosecutor in criminal proceedings and develop scientific recommendations to improve the legal regulation of the institute of procedural guidance.

## Materials and Methods

The study is based on conventional systems of general scientific and special legal methods. The development of the powers of prosecutor's offices in dynamics was considered using the dialectical method. The system-structural and synthesis methods were used when considering the powers of the prosecutor's office in different historical times. The formal-logical method was used to identify the features of procedural guidance as a form of prosecutor's activity. The historical method was used to examine the periods of development of prosecutor's offices and their powers.

In the course of the study, papers on criminal law were processed, namely, the study of S. Nazaruk in which the detailed periodisation of the history of national prosecutor's offices was conducted and the genesis of powers of prosecutors was investigated [2]. Furthermore, the study of the applicant of Kharkiv National University of Internal Affairs E. Shinkarenko was processed, in which he analysed in detail the problem of lack of definition in the legislation of "prosecutorial supervision" along with its theoretical content, but did not specify procedural guidance as one of the forms of supervision [5]. In addition, a study by V. Klochkov, Candidate of Law, Prosecutor of the Main Investigation Department of the Prosecutor General's Office of Ukraine, was analysed, which covered the relationship between "prosecutorial supervision", "procedural guidance", "organisation of pre-trial investigation" [6].

The Institute of procedural guidance, periodisation of the development of prosecutor's offices, and Soviet and modern criminal procedure legislation were also analysed.

## Results and Discussion

Prosecution as a social phenomenon has undergone a long path of development from ancient times to the present. The genesis of this phenomenon indicates that it gave rise to criminal proceedings.

However, according to M. Muravyov, the original prosecution is characterised exclusively by private features, and in the future, the functions of the prosecution began to be assumed by the state, which gives grounds from early times to divide its forms into private and public [7].

At the first stages of implementing the functions of the prosecution, the monarch usually instructed

representatives of the Senate to organise the collection of evidence and support the prosecution of the most complex and high-profile offences. Thus, in Ancient Rome, the terms "prokuro" – trustees and "procurator" – administrator or manager appeared. There is no historical information about the participation of these persons in the prosecution proceedings, mostly these persons were engaged in tax collection and administration of specific policy areas [8].

In the early stages of development, the state did not need to maintain special bodies to perform the accusatory function and represent its interests. The state enjoyed the privilege of exercising the prosecution function selectively, that is, from time to time, when a certain state interest was seen in a particular case.

The homeland of the prosecutor's office is France, and its direct ancestor is Philip VI (the Fair), who in 1302 formalised the existence of the prosecutor's office as a separate institution of France. Initially, the powers of the newly created body included only representation of the interests of the monarch in the judicial bodies, but later, with the strengthening of the absolute monarchy, the powers of the prosecutor's office were expanded [9].

The institute of the prosecutor's office in France developed and strengthened along with the institute of the monarchy and reflected the level of absolutism in the state. In fact, the scope of powers of the French prosecutor's offices under Philip VI (the Fair) reflected the dynamics of the growth of the monarch's power, and the prosecutor's office with the possibility of exercising the function of the prosecution to represent the interests of the monarch was, so to speak, the privilege of the latter.

According to Montesquieu, the King of France was ex officio a party to the charge of all offenses committed in France, as he was responsible for ensuring the rights of its citizens and maintaining public order [10].

The date of establishment of the prosecutor's office in the Russian Empire is considered to be January 12, 1722, when Tsar Peter I signed a decree on the establishment of prosecutorial positions in the Senate and Boards. The purpose of signing this decree was to develop a separate structure designed to combat bribery and lawlessness in the course of court activities. During the stay of Peter I in power, the powers of the prosecutor's office changed several times towards their expansion, but it is worth noting that among other powers these bodies already had the obligation to participate in criminal proceedings in the form of supervision of legality, including pre-trial investigation bodies. Until the middle of the 19<sup>th</sup> century, the Russian Empire had a system of prosecutor's offices, which was mainly supervisory, including in the field of criminal proceedings at the pre-trial stage [10].

The signing of the above-mentioned decree on the establishment of prosecutor's offices was preceded by an

<sup>1</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

<sup>2</sup>Law of Ukraine "On the Prosecutor's Office". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1697-18#Text>.

investigation of the French experience of their functioning. Therewith, it is worth noting that the prosecutor's offices of France and Russia at that time actually had nothing in common, since the French prosecutor's office performed the function of prosecution, and the Russian prosecutor's office was primarily entrusted with the function of supervision – the “eye of the sovereign”. The need for such a supervisory body can be explained by the fact that most of the regulations that were adopted in the Russian Empire did not meet the interests of society, and therefore were not implemented.

The first regulations that directly instructed the prosecutor's office to monitor pre-trial investigations were the Code of Laws of the Russian Empire in 1832, which stated: “prosecutors must carefully monitor justice” [11]. In 1862, the authorities developed and adopted a concept for the development of the prosecutor's office, which was later embodied in the “Institutions of Judicial Institutions” [12] and the “Statute of Criminal Procedure” [13]. In particular, the prosecutor's office was charged with supervising the compliance of pre-trial and judicial bodies with the procedural form. According to the statute of criminal proceedings, the prosecutor had the right: to independently initiate criminal cases; to provide written requirements and demand materials from the bodies of inquiry and investigation; to provide instructions to the bodies of inquiry and preliminary investigation; to demand an additional inquiry and preliminary investigation; by their decision to remove inquirers and investigators from further participation in cases; to be present during investigative actions [13].

According to Art. 53 and 54 of the Criminal Procedure Code of the Ukrainian SSR of 1922, the prosecutor had the authority to monitor the state of pre-trial investigation of criminal cases by investigative bodies, initiate criminal cases, make decisions on sending them to court, and the Criminal Procedure Code of the Ukrainian SSR completely duplicated the relevant provisions of the National Code<sup>1</sup>.

The next stage in the genesis of the prosecutor's office was the adoption of the Criminal Procedure Code of the Ukrainian SSR of December 12, 1960, which imposed on the prosecutor's office, according to Art. 25, the duty to “monitor compliance with laws by bodies conducting inquiries and pre-trial investigations”<sup>2</sup>.

Notably, the provisions of the law “On the Prosecutor's Office” of 1991 actually duplicated its Soviet-style function, regarding supervision of the legality of activities and decision-making by bodies of inquiry and pre-trial investigation<sup>3</sup>.

The next stage in the genesis of the functions of the prosecutor's office was the adoption of the Constitution of Ukraine<sup>4</sup> in 1996, which devoted the seventh

section to the prosecutor's office and imposed on these bodies the duty to monitor compliance with the law by bodies that conduct intelligence-gathering activities, inquiry, and pre-trial investigation.

Amendments to the law “On the Prosecutor's Office” of 1992 to bring it into line with the Constitution of Ukraine were made in 2001 [11].

An important element of these changes was the consolidation in the principle of the adversarial nature of the criminal process of the participation of the prosecutor as its subject. In general, the function of the prosecutor in criminal proceedings was mainly supervisory, not accusatory, as evidenced by the title of Art. 25 of the Criminal Procedure Code of 1960 “Prosecutor's Supervision in Criminal Proceedings”<sup>5</sup>.

With the adoption of the new Criminal Procedure Code of Ukraine in 2012, the status of the prosecutor in criminal proceedings changed<sup>6</sup>. Thus, the new Code:

- excluded the provision concerning the supervision of criminal proceedings by the prosecutor;
- established a new form of procedural activity of the prosecutor – procedural guidance of pre-trial investigation;
- expanded the powers of the prosecutor at the stage of pre-trial investigation;
- consolidation of the principle of invariable participation of one prosecutor in pre-trial and judicial criminal proceedings;
- principle participation of prosecutors in all criminal proceedings without exception;
- granting prosecutors the right to determine the boundaries of judicial consideration of a case;
- introduction of the institute of agreements with the participation of the prosecutor.

The expediency of fixing the principle of immutability of the prosecutor throughout criminal proceedings remains an urgent issue today. Thus, when taking part in criminal proceedings at the stage of pre-trial investigation, the prosecutor understands in advance that in the future they will support the state prosecution in court in this case, and therefore is actually interested in collecting indictment evidence as a guarantee of successful support of the state prosecution.

On 10/14/2014, the Verkhovna Rada of Ukraine adopted a new Law “On the Prosecutor's Office”<sup>7</sup>, which should improve the legal status of the prosecutor, detail their functions, and harmonise national legislation with international one. The law distinguished itself by eliminating the function of general supervision by the prosecutor's office over compliance with laws by bodies, legal entities, and individuals, and reducing the functions of the prosecutor's office to the representation of the interests of the state and citizens in certain cases in court, procedural guidance of pre-trial investigations, and maintenance of public prosecution in court.

<sup>1</sup>Criminal Procedure Code of the USSR. (1922, August). Retrieved from [https://web.archive.org/web/20170527070402/http://leksika.com.ua/12860501/legal/kriminalniy\\_kodeks\\_usrr\\_1922](https://web.archive.org/web/20170527070402/http://leksika.com.ua/12860501/legal/kriminalniy_kodeks_usrr_1922).

<sup>2</sup>Code of Criminal Procedure of Ukraine. (1960, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1001-05#Text>.

<sup>3</sup>Law of Ukraine No. 1401-VIII “On the Prosecutor's Office”. (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1789-12#Text>.

<sup>4</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>.

<sup>5</sup>Code of Criminal Procedure of Ukraine, op cit.

<sup>6</sup>Criminal Procedure Code of Ukraine. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>7</sup>Law of Ukraine “On the Prosecutor's Office”, op. cit



On June 2, 2016, the norms of the Constitution of Ukraine were harmonised with the norms of the Criminal Procedure Code, namely section 7 was excluded from the text of the basic law and Art. 131-1, according to which the functions of the prosecutor's office are defined<sup>1</sup>.

The text of Article 131-1 of the Constitution of Ukraine<sup>2</sup> defines that the prosecutor's office, in addition to the procedural guidance of pre-trial investigation, also performs the function of organising it, but for some reason, this function is ignored in most of the studies that were analysed. From the above, it is appropriate to indicate that the current national legislation does not contain a definition of "organisation of pre-trial investigation" and "procedural guidance", which undoubtedly complicates law enforcement practice.

Thus, according to Art. 25 "supervision of compliance with laws by bodies conducting intelligence-gathering activities, inquiry, pre-trial investigation" of the Law of Ukraine "On Prosecutor's Office" of 10/14/2014<sup>3</sup>, the prosecutor's office is assigned the function of supervision of bodies of inquiry and pre-trial investigation, but the text of Art. 131-3 of the Constitution of Ukraine<sup>4</sup> indicates the procedural guidance of pre-trial investigation, its organisation, and supervision of investigative (search) actions as a function [4].

The analysis of the norms of the basic law and the specified law "On the Prosecutor's Office"<sup>5</sup> showed their contradiction. Therefore, according to Art. 131-3 of the Constitution of Ukraine<sup>6</sup>, the prosecutor's office is assigned the function of supervising only the conduct of investigative (search) actions, and the provisions of the law assign the function of supervising compliance with laws by bodies, including inquiry and pre-trial investigation. Moreover, Art. 133-3 of the Constitution of Ukraine<sup>7</sup> indicates the "organisation of pre-trial investigation" as one of the functions of its activities, but this function is not detailed in the legislation [1].

Given that the Constitution of Ukraine<sup>8</sup> and the current Law of Ukraine "On the Prosecutor's Office"<sup>9</sup> interpret the functions of the prosecutor's office somewhat differently. It is worth noting that the above-mentioned current law "On the Prosecutor's Office"<sup>10</sup> more broadly regulates the powers of the prosecutor's office using the word "supervision", while Art. 131-1 of the Constitution of Ukraine<sup>11</sup> indicates the supervision of the prosecutor's office exclusively over the conduct of investigative (search) actions by law enforcement agencies as a function [14].

## Conclusions

Prosecutor's offices in Ukraine have gone through a long path of development, and their functions have changed depending on the socio-political orientation of the state's development. Today, the reform of the prosecutor's office of Ukraine continues, the driving force of which is to raise human rights standards. The current trend of reforming the powers of the prosecutor's office is to narrow the function of general supervision and highlight the function of participation of the prosecutor in criminal proceedings, which can manifest itself in the following forms: organisation of pre-trial investigation; guidance of pre-trial investigation; maintenance of public prosecution; supervision of secret and other investigative and search actions of law enforcement agencies; resolution of other issues during criminal proceedings in accordance with the law. In the Constitution of Ukraine, the word "supervision" is used exclusively in the context of supervision "of covert and other investigative and search actions of law enforcement agencies", not supervision of pre-trial investigation in general, which is certainly not limited to covert and other investigative actions. However, Art. 131-3 of the Constitution of Ukraine enshrined, as one of the forms of activity of the prosecutor's office "the resolution of other issues in accordance with the law during criminal proceedings", one of such other issues, according to Art. 25 of the Law of Ukraine "On Prosecutor's Offices" is the supervision of compliance with the law by bodies conducting intelligence-gathering activities, inquiries, and pre-trial investigation. Undoubtedly, conducting covert investigative and other investigative and search actions is a considerably narrower activity in comparison with the activities of bodies engaged in intelligence-gathering activities, inquiry, and pre-trial investigation. The constitutional activity of the prosecutor's office in the form of "decision in accordance with the law of other issues during criminal proceedings" is detailed in Art. 25 of the Law of Ukraine "On the Prosecutor's Office" and imposes on these bodies the function of supervision, which objectively includes supervision of covert and other investigative actions.

These inconsistencies must be corrected by bringing the rules set out in Art. 25 of the law of Ukraine "On Prosecutor's Office" with those tasks which are set before bodies of prosecutor's office of Ukraine, according to Art. 133-1 of the Constitution of Ukraine. Primarily, the law "On the Prosecutor's Office" in its content should regulate "the participation of the prosecutor in criminal proceedings", not supervision of the implementation of criminal proceedings.

<sup>1</sup>Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254к/96-вп#Text>.

<sup>2</sup>*Ibidem*, 1996.

<sup>3</sup>Law of Ukraine No. 1401-VIII "On the Prosecutor's Office". (1991, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1789-12#Text>.

<sup>4</sup>Constitution of Ukraine, op. cit.

<sup>5</sup>Law of Ukraine No. 1401-VIII "On the Prosecutor's Office", op. cit.

<sup>6</sup>Constitution of Ukraine, op. cit.

<sup>7</sup>*Ibidem*, 1996.

<sup>8</sup>*Ibidem*, 1996.

<sup>9</sup>Law of Ukraine No. 1401-VIII "On the Prosecutor's Office", op. cit.

<sup>10</sup>*Ibidem*, 1991.

<sup>11</sup>Constitution of Ukraine, op. cit.

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# Гене́за інституту процесуального керівництва: історико-правовий аспект

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## Анотація

Результатом проведення реформи кримінального процесу 2012 року стало запровадження інституту процесуального керівництва досудовим розслідуванням. Зазначений інститут став об'єктом численних наукових дискусій, а отже, існує потреба в проведенні аналізу його історико-правового генезису для чіткого розуміння місця й ролі прокурора в сучасному кримінальному процесі. Метою статті є вивчення інституту процесуального керівництва в кримінальному провадженні та визначення перспективних напрямів удосконалення його правового регулювання. У межах дослідження застосовано діалектичний, системно-структурний, формально-логічний та історичний методи, а також метод синтезу. Доведено, що інститут процесуального керівництва зародився досить давно. Спочатку монархи використовували державних службовців для представлення виключно їхніх інтересів в окремих важливих для них процесах. У процесі генезису інститут прокуратури почали використовувати досить широко, аж до формування окремої структури відповідних державних органів і покладення на них функцій нагляду за окремими сферами життєдіяльності, з огляду на що представництво інтересів держави в кримінальному процесі стало частиною загальної функції нагляду. Зі зміною суспільно-політичної формації розвитку України після здобуття незалежності місце й роль прокуратури в системі державних органів еволюціонували під впливом передових європейських тенденцій. Почався зворотний процес зміни функцій прокуратури в кримінальному процесі, а власне функція тотального прокурорського нагляду почала звужуватись і зводиться до процесуального керівництва кримінальним процесом та представництва виключно у визначених випадках. Констатовано, що законодавство, яке врегульовує правовий статус прокуратури, містить суперечності, зокрема Закон України «Про прокуратуру» покладає на прокурора більш широкі повноваження, ніж Конституція України. Результати дослідження можуть бути використані в нормотворчій і правозастосовній діяльності

## Ключові слова:

досудове розслідування; процесуальний керівник досудовим розслідуванням; нагляд; повноваження; розслідування; дізнання