Introduction to an Adversarial System of Criminal Procedure

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17-18 September 2013
Conceptual remarks

Adversarial system v. inquisitorial one

- Role of the court
  - PASSIVE Independent Umpire (depends on the parties, just takes decisions)
  - Proactive in establishing facts and deciding on points of law (impartial in contributing to prosecution and defence) ESTABLISH THE TRUTH

- Role of the prosecution
  - Fully responsible for substantiating guilt and formulating accusation (should not expect that the court will act on its behalf)
  - Feed the court with evidence and legal opinion, which is supposed to supplement the prosecution, if necessary
Conceptual remarks

- **Role of the defence**
  - Fully responsible for rebutting prosecution, present its evidence (should not expect that the court will act on its behalf)
  - Opposing both the prosecution and the court (when the latter takes an initiative on behalf of the prosecution), but can expect that at the same time it can supplement the defence

- Relevant accents in formulating presumption of innocence and other principles
  - Burden of proof must lie with the prosecution
  - Court must find for the accused in a case of doubt

COUNTERBALANCE STATE BACKED PROSECUTION BY MEANS OF GUARANTEES (STATIC IN ADVERSARIAL – NOT ACTIONS)
Adversarial process (ECtHR)

- Adversarial elements of the process (not system)
  - Have knowledge and possibility to comment on (rebut) the observations or evidence adduced by another party

*Krasniki v. the Czech Republic 2006*

- Disclosure of evidence/submissions/facts of the case

*Rowe and Davis v. the United Kingdom 2000*
Adversarial process (ECtHR)

- Equality of arms between the prosecution and the defence
  - duty to hear / cross-examining of witnesses
    *Luca v. Italy 2001*
  - availability of expertise (counter-expertise)
    *Bonisch v. Austria 1985*

- Access to a lawyer and other distinct guarantees strive to ensure the principle

- Process as a whole, including preliminary investigation in civil law systems
  *Pishchalnikov v. Russia 2009*
  Role of investigative judge in Ukraine
Key Principles of the CPC

- Article 7 para. 15
  adversarial nature of parties freedom to present their evidence to the court and prove the preponderance of this evidence before the court

- Article 22
  Adversariality of parties and their freedom to present their evidence to the court and to convincingly prove this evidence

- Article 23
  Direct examination of testimonies, objects and documents
Article 22

Para. 1
Criminal proceedings shall be conducted on the basis of adversarial approach envisaging independent assertion by the side of accusation and the side of legal protection (defence) of their legal positions, rights, freedoms and legitimate interests by means set forth in the present Code.
Article 22

Para. 2
Parties to criminal proceedings shall have equal rights with regard to collecting and producing items, documents, other evidence, motions, complaints, as well as to enjoy other procedural rights provided by the present Code.

Article 42 para 3.9-10, 14; para. 4.1 and 2 = Article 46

Article 87 para. 2.5
Inadmissibility of evidence obtained in violation of the right to cross-examine

Article 93. para. 3 Collection of evidence

Article 160. Provisional access to objects

Article 349. Establishing the scope of evidence
Article 22

6. The court while maintaining the objectivity and impartiality shall ensure the necessary conditions for the realization by the parties of their procedural rights and the performance of their procedural duties.

- Article 26 para. 3.
  In criminal proceedings, investigating judge, court shall address only those matters that the parties have submitted for their consideration and that fall within their competence under the present Code.

- Exceptions = Article 206
Article 23

Principle of immediacy = know and comment

1. The court shall examine evidence directly. The court takes testimonies of the participants in criminal proceedings orally.

2. Except as otherwise provided in this Code, information contained in testimonies, objects and documents that have not been directly examined by court may not be admitted as evidence. The court may admit in evidence testimonies which are not given directly in court only where it is provided for by this Code.

3. The prosecution shall be required to ensure the presence of witnesses for the prosecution during trial so that the defense can enjoy their right to examine them before independent and impartial court.
Immediacy

- Specified in other provisions e.g. para. 4 of Article 95

The court may base its findings only on testimonies taken directly during court session or those obtained under the rules of Article 225 of this Code. The court may not base court decision on testimonies given to investigator, public prosecutor, or refer to such.
Presumption of innocence

- **Article 7 para. 10**  General Principle
  presumption of innocence and conclusive proof of guilt

- **Article 17**
  2. No one shall be required to prove their innocence of having committed a criminal offence and shall be acquitted unless the prosecution proves their guilt beyond any reasonable doubt.
  3. Suspicion, charges may not be based on evidence obtained illegally.
  4. Any doubt as to the proof of the guilt of an individual shall be interpreted in this person’s favor.
  5. A person whose criminal guilt has not been found in a valid judgment of conviction shall be treated as an innocent one.

- **Article 92. Burden of Proof**
Specificity of the role of the court

- There is no simplified understanding of adversarial system
- Adversarial principles are reinforced by:
  - introducing the concept of jury trials
  - expanding the role and availability of defence lawyers and legal aid
  - disclosure of evidence in the course of preliminary investigation (before it is completed) Article 221
- Counterbalanced by the rule of law, legality and a number of other principles / positive obligations
- Article 206. General duties of a judge regarding the protection of human rights
THANK YOU