

Peculiarities of the Public Prosecutor's Speech in Judicial Proceedings

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Annotation: The article highlights some aspects of the prosecutor's speech during the court hearings, legal basis and types of speeches, gaps in the legislation on this issue, proposals for improving the legislation, objections and opinions of the public prosecutor, as well as the improvement of substantive and procedural legislation.

Key words: court proceedings, arguments of the parties, prosecutor, prosecutor's speech, indictment, speech on dismissal of charges, speech on changing charges in mitigating circumstance, procedural documents, evidence, foreign experience, objection, remark.

The participation of the public prosecutor (accuser) in the judicial proceedings is an important criterion for the implementation of the principle of adversary proceedings established by the Criminal Procedure Code. The principle is reflected in the parties' presentations (negotiations).

The parties' presentation is an independent part of the judicial proceedings, which comes after the completion of the judicial investigation, within which parties present their opinions on the results and procedure of the preliminary and judicial investigation(s), and propose a decision on the merits of the case¹.

At this stage, the prosecutor, as a public accuser, gives his opinion on the outcome of the case.

According to the Code of Criminal Procedure (hereinafter as CCP), the parties' presentations (parties' negotiations) begin with a public prosecutor's speech. The public prosecutor in his speech may not present evidence, which has not been examined in judicial examination. If it is necessary to present new evidence to the court for investigation, the public prosecutor may request the resumption of the judicial investigation.

The public prosecutor's speech in the parties' presentations is divided into two types: accusation, renunciation of the accusation or modification of the accusation (partial renunciation). The prosecutor shall be obliged to submit accusation, renunciation of the accusation or modification of the accusation (partial renunciation) in writing.

¹ Капустянский В.Д. Судебные прения в уголовном судопроизводстве: от истории к современности // Российский судья. – Москва, 2005. -№6.

The public prosecutor is obliged to substantiate the guilt of the defendant in the accusation, that the guilt of the defendant is not proved with evidence in the renunciation of the accusation (dropping the accusation), and the grounds for modification or mitigation of charge.

However, criminal procedural legislation does not define the public prosecutor's (accusative) speech.

According to V.Andreyanov, "opinion is one of the forms of expressing one's views. The opinion of the public accuser in judicial debates is of a special nature because he supports the prosecution on behalf of the state, and protects the public interests in court"².

There were also opinions on a number of requirements for judicial debates, and V.Isenko's opinions regarding the participation of the public accuser in judicial debates are noteworthy. In his opinion, most public prosecutors consider it logical and psychologically feasible to list the evidence proving the defendants' guilt in judicial debates in the order in which they were presented during the judicial investigation. This is because, when evidence are presented in judicial debates, this leads to an internal conviction of the judges that the public prosecutor's explanation the of the nature and significance of the evidence and the links between the evidence is substantiated³.

The public accuser should clearly state the purpose and objectives of his speech, thus the effectiveness of his speech depends primarily on the validity and reliability of (the speech)⁴.

Summarizing the opinions of the scholars, we conclude that the public prosecutor's speech is based on internal conviction, which is based on the results of a judicial investigation, and which are presented judicial debates that proves or denies the defendant's guilt in committing the crime.

Consequently, proving the guilt of the defendant is a key element of the accusation (charge), renunciation of the accusation or modification of the accusation (partial renunciation), which covers to all other matters within its structure. Because, according to the proven accusation against the defendant, his or her criminal actions will be qualified, punishment will be selected, and other matters prescribed in law will be resolved.

The public prosecutor's speech must be substantiated, objective, meaningful, clear, and ethical.

In particular, although there are no requirements for the formulation of a public prosecutor's speech, articles 449 and 450 of the CCP specify requirements for accusative speech.

² Андреев В.А. Обвинение в российском уголовном процессе: понятие, сущность, значение и теоретические проблемы реализации: дис. ... канд. юрид. наук. Екатеринбург, 2009. С.56.

³ Исаенко В.Н. Анализ доказательств прокурором в судебных прениях// Актуальные проблемы российского права. 2018. № 9 (94). С.221.

⁴ Иванкина Н.Н. Основы судебного красноречия (Риторика для юристов). Учебное пособие. М., 2001, С. 169.

Generally, the procedural documents drawn up by the prosecutor, that is, the public prosecutor's speech, must meet the following general requirements:

- the name, formulation and content of the procedural document must comply with the legal provisions for the preparation of this document;
- the name of the procedural document should be included in the very document (for example, the indictment (accusation), renunciation of the accusation or modification of the accusation);
- the content of the procedural document must be substantiated by the requirements of criminal and criminal procedural law, other legislative acts and resolutions of the Plenum of the Supreme Court;
- the procedural document must be prepared in accordance with the rules of spelling and the rules of word combination: using abbreviations or hard-to-understand writing is not allowed.

Resolution No. 126 of the General Prosecutor of the Republic of Uzbekistan (dated November 27, 2015) "On further increasing the effectiveness of the procurator's participation in criminal cases" (hereinafter referred to as the sectorial resolution) states that the justification of the procurator's opinion is the main criterion for assessing the powers of the prosecutor in criminal legal proceedings.

However, the practice shows that the requirements of the CCP and the resolution of the General Prosecutor are not met in checking the validity of the charges against the defendant, in proper qualification of the case, and in focusing on the particular criteria for in commenting on the outcomes of the trial.

In addition, public prosecutors are making a mistake in giving an opinion on the type and extent of penalties to be imposed on the defendant under the criminal code.

Or in some cases, violation of law is observed when public prosecutors offer a prison sentence for the defendants⁵.

In our opinion, the prosecutor participating in a criminal court should, in the light of the duties entrusted to him, deliver his speech in a justified and sophisticated manner (should be able to express public speaking skills), in accordance with the aforementioned requirements.

It shall be binding for the public prosecutor to present to the court opinions in a written form and this is enshrined in sectorial resolution and in the CCP (articles 450 and 457).

According to article 450 of the CCP and the resolution of the General Prosecutor, it shall be binding for the public prosecutor to present to the court substantiated opinions in a written form:

- whether the act the defendant is charged with occurred (for example, to determine if a crime has occurred, that is, finding that the alleged offense was an

⁵ Бош прокуратура жиноий суд ишларини юритишда прокурор ваколатини таъминлаш бошқармасининг танбех хати. 09.11.2018 й. 12/6-18-07/126-8064

act of innocence that could not be regarded as crime under circumstances that exclude administrative, civil or disciplinary infringement or criminality. In such case, acquittal will be issued).

– whether the act constitutes a crime and under what article of the Criminal Code it is punishable (for example, socially dangerous act (action or inaction) prohibited by the Criminal Code under the threat of punishment is recognized as a crime and enshrined in the articles of the mentioned code);

– whether the act was committed by the defendant (for example, whether a defendant is involved in a crime, that is, whether the defendant has committed the crime or if he has participated in it);

– whether the criminal act has been properly qualified (for example, substantiation with normative legal documents of the fact that whether socially dangerous act committed by the defendant is properly or incorrectly qualified);

– whether the defendant is guilty of committing the crime, and what the form of his guilt is (for instance, determining that the socially dangerous act specified in the criminal code is committed intentionally or out of negligence, as the law contains specifics in qualifying and issuing punishment for a wrongdoing in terms of the forms of guilt);

– whether there are circumstances that mitigate or aggravate the liability of the defendant (for example, determining whether there are conditions specified in articles 55 and 56 of the criminal code, as this results in mitigation or aggravation of the punishment against the defendant);

– whether the defendant is subject to penalty for the crime committed by him (determination of the type and extent of punishment established by the criminal legislation based on the existence of grounds for release of the defendant from liability or punishment, character of the crime and degree of social danger);

– when concluded that the defendant is to be sentenced to imprisonment, determination of the type of institution to be served, as well as the existence of any grounds for delaying the execution of the sentence (for example, based on the grounds of application of the type of colony provided by article 50 of the Criminal Code, determination of the address in the colonies: whether it is to be in settled colonies, in colonies of general security, or in colonies of high security. Also to ascertain the circumstances envisaged by article 533 of the CCP);

– additional punishment to be applied (for example, grounds and limits of issuing the punishment of Deprivation of certain right based on the article 45 of the criminal code);

– satisfaction of civil suit on compensation of the damage to the property or the moral damage (for example, grounds specified in chapter 33 of the CCP, filing a lawsuit through the entitlement prescribed in article 409 or satisfaction of the civil suit brought by the prosecutor);

– regarding the arrested assets, financial means, material evidence, documents and other items (for example, resolving the case on the grounds stated in article 211 and 471 of the CCP).

In addition, in the event of compensation for damages, when giving an indictment to a person accused of a crime subject to punishment not related to imprisonment, the prosecutor must pay particular attention to the fact that the damage was actually compensated.

When deciding on the type and extent of penalties for incomplete crimes, the extent to which criminal intentions have been carried out and the reasons for the failure to complete should be taken into account.

Attention should also be given to the nature and extent of participation in giving an opinion on the type and extent of penalties for crimes committed in accomplice.

At the same time, the public prosecutor may make comments on other matters provided by article 457 of the CCP, depending on the circumstances of the case.

Along with the foregoing, the prosecutor present in the criminal case must submit report to the court in order to take steps to eliminate the causes of the crime and the circumstances conducive to it, as well as to issue a private ruling on the offenses committed by officials.

In addition, the public prosecutor presents his report to the court on occasions if the case was inadequately qualified by the investigation body, or the accusation has not been confirmed in judicial proceedings, or exclude aggravating qualification from the charges or qualifying for a mitigating punishment.

This is regulated by article 409 (part 3) of the CCP as a modification of the charge (partial renunciation). According to it, if a prosecutor concludes that the charges against the defendant are to be changed, he must provide a substantiated statement to the court. The public prosecutor may make a statement to modify the charge during the judicial investigation or in the parties' presentations. The statements at these stages are different from each other.

The public prosecutor submits a motion to modify the charge to the aggravating side in the manner provided by articles 416 and 417 of the CCP. He makes conclusions in the parties' presentations to change the accused's charge to the mitigating side. However, the criminal procedure law does not stipulate the procedure of mitigating the charges.

In particular, article 246 of the Russian Federation provides the grounds for changing the opinion of a state prosecutor envisaging a milder punishment before entering the retiring room⁶.

Accordingly, it is proposed to complete the third part of Article 409 of the CCP as follows:

⁶ "Уголовно-процессуальный кодекс Российской Федерации" от 18.12.2001 N 174-ФЗ (ред. от 02.08.2019) (с изм. и доп., вступ. в силу с 01.09.2019) http://www.consultant.ru/document/cons_doc_LAW_34481/

The public prosecutor may also modify the charge towards its mitigation before the court departs to the retiring room for passing the sentence, by way of:

- removing the signs of the crime, aggravating the punishment, from the legal classification of the act;
- excluding from the charge a reference to a certain norm of the **Criminal Code**, if the defendant's act is stipulated by another norm of the Criminal Code;
- re-qualification of the act in conformity with the norm of the Criminal Code, envisaging a milder punishment.
- to exclude certain episodes from the indictment.

In addition, one of the most important features of public prosecutor participation in court proceedings is that he not only supports the public prosecution but also he has the right to renounce the charge on the ground of lawfulness, validity, and fairness if the charge is not confirmed.

This is stipulated in the article 409 of the (part 4 and 5) CCP, it states that if the prosecutor concludes on the basis of court findings that the defendant is not guilty, he must dismiss the charge and present the reasons therefor to the court. The prosecutor shall present his opinion on altering the charges or reasons for dismissal thereof to the court in writing. However, the mechanism and legal consequences of the state prosecutor's renunciation of charges have not been regulated.

In this regard, according to the article 246⁷ of the CCP of Russian Federation, "If in the course of the judicial proceedings the public prosecutor arrives at the conclusion that the submitted proof does not confirm the charge brought against the defendant, he shall renounce the charge and explain to the court the motives of the renouncement. The full or a partial renunciation of the accusation on the part of the public prosecutor in the course of the judicial proceedings shall entail the termination of the criminal case or of the criminal prosecution fully or in the corresponding part thereof, and/or if the public prosecutor modifies the charge, this does not preclude further filing and consideration of a civil suit by way of civil procedure".

At the same time, the law of some foreign states require that both the victim and the civil plaintiff refuse the charge for the termination of the case when the public prosecutor renounces the accusation.

In accordance with the article 293 (part 8)⁸ of the Criminal Procedure Code of Belarus, "If the state prosecutor refuses the charge, if the victim, the civil plaintiff or their representatives also refused the charge, the court, by its decision (ruling), close the criminal proceedings in accordance with clause 2 of part 1 of Article 29 of this Code. If the victim, civil plaintiff or their representatives insist on the

⁷ "Уголовно-процессуальный кодекс Российской Федерации" от 18.12.2001 N 174-ФЗ (ред. от 02.08.2019) (с изм. и доп., вступ. в силу с 01.09.2019) http://www.consultant.ru/document/cons_doc_LAW_34481/

⁸ "Уголовно-процессуальный кодекс Республики Беларусь" 16 июля 1999 г. № 295-3 http://etalonline.by/document/?regnum=hk9900295&q_id=799631

charge, the court continues the proceedings and resolves the criminal case in the manner prescribed by this Code. In this case, the public prosecutor is exempted from further participation in the trial, and the prosecution is supported by the victim, civil plaintiff or their representatives”.

What is more, according to Article 340⁹ of the Criminal Code of Ukraine, “If public prosecutor refuses to prosecute on behalf of the State in court, presiding judge shall be required to advise the victim of his right to press charges in court. Whenever the victim expresses his consent to pressing charges in court, presiding judge shall give the victim sufficient time to prepare for trial. The victim who has agreed to press charges in court shall have all rights inherent in the prosecution during trial. Criminal proceedings on the respective accusation shall acquire the status of private accusation. Repeated non-appearance in court session of the victim summoned in compliance with the procedure laid down in the present Code shall be deemed his refusal to support accusation and shall entail the closure of criminal proceedings on the accusation concerned”.

Similar rules are provided in Article 337¹⁰ of the Criminal Code of the Republic of Kazakhstan.

On the basis of the above, in order to regulate the legal consequences of a public prosecutor’s renunciation, it is proposed to complete the fourth part of article 409 of the CCP in the following wording:

“If a prosecutor is convinced that the evidence in the judicial proceedings proves the defendant’s innocence, he must renounce the charge and state the reasons for the renunciation to the court. The parties have the right to familiarize themselves with the views of the prosecutor. If the public prosecutor renounces the charge, the presiding judge explains to the victim that s/he has the right to support the accusation. If the victim agrees to support the accusation, s/he will have time to prepare for trial. The victim who has agreed to press charges in court shall have all rights inherent in the prosecution during trial. Criminal proceedings on the respective accusation shall acquire the status of private accusation. Repeated non-appearance in court session of the victim summoned in compliance with the procedure laid down in the present Code shall be deemed his refusal to support accusation and shall entail the closure of criminal proceedings. And, this – regarding the related accusations, or when the public accuser dropped the charge, will result in termination of criminal case according to the article 83 of the CCP.”

It shall also be allowed the public prosecutor to state his speech on the grounded renunciation or modification of the charge (partial renunciation) during the judicial investigation and debates.

In view of the essence of the new norm included in this article, it would be necessary to make some changes to the CCP.

⁹ Уголовно-процессуальный кодекс Украины. <http://pravoved.in.ua/section-kodeks/79-upku.html>

¹⁰ Уголовно-процессуальный кодекс Республики Казахстан
<https://zakon.uchet.kz/rus/docs/K1400000231>

In addition, the public prosecutor must also determine the objective (age, sex, pregnancy status) and social (convictions, behavior in family and community, employment, social status, etc.) that characterize the victim and defendant.

It is prohibited for a public prosecutor to propose several options for the legal evaluation of the defendant's actions.

The court may not restrict the arguments of a public prosecutor for a certain period of time, but the presiding judge may restrict if they (arguments) are not relevant to the case.

Another important aspect of judicial debates is to raise objection and remark (rejoinder).

After the parties make their speeches, each of them may take turns to make additional statement with objections or comments on the issues raised in the speeches of the other party. The right to make final objections is always granted to the defense counsel and the defendant.

The objection may answer to objections filed by the defense following the accusation or a brief comment by the public prosecutor to the defense speech

The state prosecutor clarifies or supplements certain points of view in the indictment in his respond to the defense's objection or in his objections or arguments against the stated evidence, qualifications and other matters in defense speech.

As mentioned above, the last objection of the public prosecutor is the objection and remark towards the arguments of the defense. However, it should be noted that the public prosecutor may change his or her opinion based on the arguments and evidence presented by the defense counsel. It is better to correct the error in a timely manner, rather than to insist on an erroneous opinion and to cause prejudice with the judge and other participants in the proceedings or to trigger a wrong decision.

Discussions based on objections or remarks of the public prosecutor must be consistent with logic and good manners. In this process, it is advisable to refrain from using words and opinions that could insult a person.

In conclusion, it should be noted that the justification of the public prosecutor's debate (negotiation) speech is not only a support for the public accusation but also guarantee of protection of the rights and interests of its citizens.

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