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# Prosecutor Under the Current Criminal Procedure Code: Accuser or Supervisor?

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## Abstract

Turbulent changes in legislation in recent years are an extensive basis for studies. Sometimes laws that regulate criminal procedural relations are adopted so quickly and spontaneously that later they only harm the interests of the state and complicate the work of the prosecutor – the procedural head during the investigation of criminal proceedings. Considering this, the issue of the role and place of the prosecutor in the mechanism for ensuring the rights and freedoms of citizens in the implementation of criminal proceedings, the implementation of its functions and powers is relevant. This is confirmed by the amendments to the Constitution of Ukraine adopted in July 2016, which still have not been implemented in other laws of Ukraine. The updated status of a prosecutor enshrined in the Basic Law creates a new basis for the procedural tactics of investigating criminal proceedings. Thus, it is worth analysing the new legislative regulation, empirical results, and practical components of the prosecutor's activity. The paper considers the functional algorithm of actions of the prosecutor – procedural head for the investigation of criminal offences. The purpose of the study is to characterise the features of the implementation of the procedural status of a prosecutor as a subject of criminal procedural activity in the investigation of crimes, the component of this activity as a supervisor or accuser in criminal proceedings, comparing such powers and determining the nature of these activities, considering their number in the law. Formal-logical, system-structural, comparative-legal, and statistical methods were used to achieve this goal. Based on the analysis of the provisions of recent changes in legislation and judicial and prosecutorial practice, the main area of the prosecutor's work as an accuser in criminal proceedings is established. The specific features of the prosecutor's procedural tactics at the stage of pre-trial investigation and in court, its focus on reasonably bringing to justice a person who has committed a criminal offence, to pass a guilty verdict of the court, are outlined. The importance and functional content of the prosecutor's criminal procedural activity in Ukrainian judicial system is established. Now they are primarily an accuser with a small number of supervisory powers, so the supervisory functions of the prosecutor are defined as secondary. Therewith, the prosecutor is the main participant in criminal proceedings, since they act at all stages from the beginning of criminal proceedings to their end

## Keywords:

prosecutor; criminal procedure activity; accuser; public accusation; prosecutor's supervision; procedural guidance

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## Introduction

The activity of the prosecutor in criminal proceedings is regulated by a number of legislative and departmental (interdepartmental) regulations, among which the basic ones are the Constitution of Ukraine (Art. 131-1) [1], the Law of Ukraine "On the prosecutor's office", the Criminal Procedure Code of Ukraine [2], orders of the General Prosecutor of Ukraine "On approval of the procedure for organising the activities of prosecutors and investigative bodies of the prosecutor's office in criminal proceedings" dated March 28, 2019, No. 51 [3], "On the organisation of prosecutor's supervision over compliance with laws by bodies conducting operational search activities" dated December 3, 2012, No. 4/1gn K [4].

The result of the constitutional reform in Ukraine in 2016, was that the prosecutor's office acquired updated powers [5]. According to Art. 131-1 of the Constitution of Ukraine, the prosecutor's office is entrusted with three basic functions: 1) maintaining public accusation in court; 2) organising and procedural management of pre-trial investigation, resolving other issues during criminal proceedings in accordance with the law, and supervising secret and other investigative and search actions of law enforcement agencies; 3) representation of the interests of the state in court in exceptional cases and in accordance with the procedure established by law.

The constitutional functions of the prosecutor in the criminal procedure field (1-2), not fully complying with those enshrined in the Law of Ukraine "On the prosecutor's office", which must be brought into compliance with the Constitution of Ukraine.

The Law of Ukraine "On the prosecutor's office" states, however, that the prosecutor's office is entrusted with the function of maintaining public accusation and supervising compliance with laws by bodies engaged in operational search activities, inquiry, and pre-trial investigation (Art. 2). Despite the fact that the last influential changes to the law [6] were made in 2019, that is, after the constitutional ones, the legislator did not bring the prosecutor's functionality in criminal proceedings in line with the Constitution.

The relevant powers of the prosecutor are specified in the Criminal Procedure Code of Ukraine, the laws of Ukraine "On operational search activities" [7], "On the Security Service of Ukraine" [8], "On the National Anti-Corruption Bureau of Ukraine" [9], etc.

However, the main purpose of the prosecutor is to achieve the tasks of criminal proceedings. The key concept that identifies the content of the criminal procedural activity of a prosecutor is the concept of functions that they perform. The subject of their implementation is exclusively the prosecutor.

Delegation of functions of the prosecutor's office, and assignment of these functions by other bodies or officials, is not legitimate.

A review of amendments to the Constitution and Ukrainian laws shows that the legislative discussion continues. The constant interest in this subject of powers and the role of the prosecutor in the system of criminal justice bodies among legal scholars in today's conditions is in an active phase [10-12]. The issues of determining the status of a prosecutor were investigated in papers by such Ukrainian and foreign researchers: S.A. Alpert, O.M. Bandurka, Yu.M. Hroshevyi, V.V. Dolezhan, M.V. Kosyuta, I.Ye. Marochkin, O.I. Medvedko, M.I. Mychko, V.V. Sukhonos, V.Ya. Tatsiy, Yu.S. Shemshuchenko, M.K. Yakymchuk and others. The legal nature of the criminal procedural activity of the prosecutor served as the subject of scientific analysis in the studies of O.S. Alexandrov, M.I. Bazhanov, V.I. Baskov, V.G. Besarabov, O.M. Vasilyev, L.Ye. Vladymyrov, S.I. Zarudnyi, G.A. Dzhanshiyev, V.S. Zelenetskyi, G.M. Korolyov, M.V. Muravyov, I.L. Petrukhin, M.M. Rozin, V.I. Rokhlin, M.V. Rudenko, V.M. Savitskyi, G.P. Sereda, O.V. Smirnov, M.S. Strogovych, A.V. Tushhev, I.Ya. Foynitskyi, S.D. Shestakova, and others. The question of the functions of the prosecutor's office was investigated by V.S. Babkova, L.R. Hrytsayenko, L.M. Davydenko, O.M. Lytvak, V.T. Malyarenko, O.R. Mykhailenko, Yu.Ye. Polyanskyi, P.V. Shumskyi, and others. In their studies, researchers have highlighted various aspects of the implementation of criminal procedural functions and powers by prosecutors. However, the issues of determining the legal status of a prosecutor under the current updated legislation are insufficiently investigated.

*The purpose of the study* is to determine the role and place of the prosecutor in criminal proceedings. This task is implemented through a thorough analysis of the procedural status of the prosecutor as a subject of criminal procedural activity, the characteristics of a component of this activity due to the presence of supervisory and accusatory powers during the investigation and maintenance of public accusation in court.

## Results and Discussion

The place and role of the prosecutor in criminal proceedings are outlined in special norms of the Criminal Procedure Code and other legislative acts. Thus, according to part 2 of Art. 36 "Prosecutor" of the Criminal Procedure Code of Ukraine [2], 20 powers are provided, due to which the prosecutor exercises their functions. According to the functional purpose, they can be divided into supervisory and accusatory ones. However, those are referred to as supervisory entities conditionally, since supervision essentially provides for two components:

verification and responsibility, and in the current Criminal Procedure Code, the responsibility of supervised entities is excluded. Therefore, the prosecutor has only the right to recommend bringing to justice for violating the law, and not actually bringing the guilty official personally.

Thus, the powers of a supervisory nature, include the following:

1) cancel illegal and unjustified decisions of investigators;

2) have full access to materials, documents and other information concerning the pre-trial investigation;

3) initiate before the head of the pre-trial investigation body the issue of removing an investigator from conducting a pre-trial investigation and appointing another investigator if there are grounds provided for in this Code for their recusal or in the case of an ineffective pre-trial investigation;

4) coordinate or refuse to coordinate the investigator's applications to the investigating judge for conducting investigative (search) actions, secret investigative (search) actions, and other procedural actions in cases provided for in this Code, or independently submit such applications to the investigating judge;

5) instruct the pre-trial investigation body to fulfil the request (instruction) of the competent body of a foreign state for international legal assistance or the adoption of criminal proceedings, to check the completeness and legality of the procedural actions, and the completeness and objectivity of the investigation in the adopted criminal proceedings; to check before sending to the prosecutor of the highest level the documents of the pre-trial investigation body on the extradition of a person (extradition), to return them to the relevant body with written instructions, if such documents are unsubstantiated or do not meet the requirements of international treaties, the consent to be bound by which is granted by the Verkhovna Rada of Ukraine, or the laws of Ukraine.

The accusatory powers are:

1) initiate a pre-trial investigation if there are grounds provided for in this Code;

2) instruct the pre-trial investigation body to conduct a pre-trial investigation;

3) instruct the investigator, the pre-trial investigation body to conduct investigative (search) actions, secret investigative (search) actions, and other procedural actions within the time period established by the prosecutor; or to give instructions on their conduct, take part in them, and if necessary – personally conduct investigative (search) and procedural actions in accordance with the procedure established by this Code;

4) instruct the relevant operational units to conduct investigative (search) actions and secret investigative (search) actions;

5) make procedural decisions in cases provided for in this Code, in particular regarding the closure of criminal proceedings and the extension of the terms of pre-trial investigation, if there are grounds provided for in this Code;

6) notify the person of suspicion;

7) file a civil claim in the interests of the state and citizens who, due to their physical condition or financial situation, not being of legal age, older age, disability, or limited ability, are unable to independently protect their rights, in accordance with the procedure provided for by this Code and the law;

8) approve or refuse to approve an indictment, applications for the application of coercive measures of a medical or educational nature, make changes to the indictment or these applications of the investigator; independently draw up an indictment or the specified applications;

9) apply to the court with an indictment, a request for the application of coercive measures of a medical or educational nature, a request for the release of a person from criminal liability;

10) support the public accusation in court, refuse to support the public accusation, change it, or bring an additional charge in accordance with the procedure established by this Code;

11) coordinate the request of the pre-trial investigation body for international legal assistance, transfer of criminal proceedings, or independently submit such a request in accordance with the procedure established by this Code;

12) instruct the pre-trial investigation bodies to search for and detain persons who have committed a criminal offence outside Ukraine, perform certain procedural actions for the purpose of extraditing a person (extradition) at the request of the competent authority of a foreign state;

13) appeal against court decisions in accordance with the procedure established by this Code;

14) exercise other powers provided for in this Code.

Thus, considering the above, it can be concluded that, firstly, the current prosecutor has substantially fewer supervisory powers than accusatory ones, and, secondly, even supervisory powers are accusatory in nature.

The status and powers of the prosecutor in criminal proceedings have changed dramatically after the constitutional reform in the field of justice. This objectively led to the institutional and functional transformation of the prosecutor's office.

The activity of the prosecutor covers the following constitutional functions of the prosecutor's office: 1) support of public accusation in court; 2) organisation and procedural management of pre-trial investigation, resolution of other issues in criminal proceedings in accordance with the law, supervision of secret and other investigative and

search actions of law enforcement agencies and meets the requirements of the Criminal Procedure Code of Ukraine.

The legally defined functions of the prosecutor correspond to the areas of their criminal procedure activity – accusatory (starting from notifying a person of suspicion of committing a criminal offence and before passing a guilty verdict of the court) and supervisory (procedural management of pre-trial investigation).

However, there is no consensus among researchers on this issue. In Particular, A. Dvornyk notes that the analysis of the positions available in the doctrine regarding the functional role of the prosecutor in pre-trial criminal proceedings allows distinguishing at least four main views: the prosecutor is the subject of supervision; the only function of the prosecutor is the accusation (criminal prosecution); the prosecutor combines supervision with the accusation (criminal prosecution); the prosecutor conducts supervision and accusation (criminal prosecution) along with other functions, in particular, procedural guidance of the investigation, protection of human and civil rights, etc. [13]. The conceptual originality of the Criminal Procedure Code of Ukraine is giving the prosecutor the authority to supervise compliance with laws during a pre-trial investigation in the form of procedural guidance (Part 2 of Art. 36).

Within the framework of supervision in the theory of criminal procedure, there are different views on the definition of the concept of prosecutor's supervision. In the legal literature, prosecutor's supervision is a type of activity of specially delegated state authorities to identify violations of laws, take measures to restore the violated rights of citizens and legal entities, and bring those responsible to justice [14]. V.M. Savytsky states that the main purpose of the prosecutor's supervision is ensuring a normal investigation, in accordance with the laws, and timely prevention of violations of procedural norms [15].

The essence of prosecutor's supervision in pre-trial proceedings, according to O.Yu. Tatarov consists, on the one hand, in monitoring that the bodies and officials whose activities are subject to supervisory powers comply with the duties and rules assigned to them, and on the other – in case of violation of these rules – in timely application of measures to restore the rule of law with bringing the perpetrators to justice. Moreover, the object of the prosecutor's supervision is the procedure established by law for resolving applications and reports of criminal offences and the process of their investigation [16].

The most controversial issue regarding the definition of the concept of prosecutor's supervision is the question of assigning it to procedural or

non-procedural activities, and the search for criteria for the correlation of prosecutor's supervision and the function of procedural management of pre-trial investigation [17]. According to part 2 of Art. 36 of the Criminal Procedure Code of Ukraine, procedural guidance is a form of prosecutor's supervision of compliance with laws during a pre-trial investigation.

The assertions of process researchers regarding the relationship between the prosecutor's supervision and procedural guidance also differ. A certain part of researchers notes that the concepts of “supervision” and “guidance” have different semantic meanings: supervision is “verification or observation for the purpose of verification”, and guidance is actually a “management process”, which consists in the implementation of “guiding activities”.

In the Western criminal procedure doctrine, the view of procedural guidance as a form of prosecutor's supervision is widespread. Experts of the Council of Europe stated that “supervision is identical to procedural guidance, and the prosecution and maintenance of public accusation in court are also identical, and, consequently, these novelties of The Criminal Procedure Code of Ukraine comply with the Constitution of Ukraine.” Experts also noted that there are no provisions in the Criminal Procedure Code of Ukraine that do not comply with the Basic Law, and the comments made in this part are questions of interpretation of certain norms [18].

The actual concept of procedural management of pre-trial investigation I. Glovyuk defines as regulated by the norms of criminal procedural legislation purposeful activity of the prosecutor to organise a quick and thorough investigation (in the form of an inquiry and pre-trial investigation) by making procedural decisions and ensuring their implementation [19].

Therewith, to understand procedural guidance, there is a need to answer the question: What does it exist for, what purpose should it solve? This type of activity of the prosecutor, and all their criminal procedural activities, is an indictment aimed at fulfilling the tasks of criminal proceedings (Art. 2 of the Criminal Procedure Code of Ukraine), namely, that everyone who has committed a criminal offence should be brought to justice in accordance with their guilt, that is, the prosecutor, using the powers granted by law, should collect as much information as possible confirming the guilt of a certain person in committing a crime.

Thus, procedural guidance is the accusatory area of the prosecutor's activity at the stage of pre-trial investigation, the essence of which is the criminal procedural activity of the prosecutor regulated by the Constitution and laws of Ukraine, which is implemented by organising supervision in

criminal proceedings and which is a component of public accusation. 68.5% of the interviewed prosecutors are inclined to this opinion.

Given the legal nature of the prosecutor's activity, they have a huge responsibility, since they must be objective and unbiased, so everyone who has committed a crime is brought to criminal responsibility, and no innocent person is accused, convicted, or subjected to unjustified procedural coercion.

Regarding the relationship between the functions of procedural guidance and accusation, the content of the prosecution is a much broader type of activity, and therefore contains procedural guidance. The current version of the Constitution of Ukraine does not entirely specify the function of prosecution. Thus, Art. 131-1 of the Constitution of Ukraine states that the prosecutor's office is charged with maintaining public accusation in court (paragraph 1), thus limiting the prosecutor's activities only to the judicial stage. Consequently, the prosecutor's implementation of the accusation function at the stage of the pre-trial investigation remains outside the scope of constitutional and legal regulation. There are several arguments in support of this thesis.

First, it is only possible to "support" the charge in court, [20], and to formulate, form, and draw up an indictment – only at the stage of pre-trial investigation. Therefore, such an accusatory criminal procedural activity should be considered in general, from the beginning of the registration of the crime to the end, and not just as an episodic final stage.

Secondly, in the Constitution, the charge is defined by the term "public", which is more complete and correct in this case, since it comes from the Latin word "publice", which means "officially on behalf of or by order of the state, in the interests of the state for the benefit of society". (This thesis was also supported by over 60% of the surveyed prosecutors.) However, the content of the indictment activity is also limited to a single judicial stage.

The question arises: does the prosecutor engage in accusation activities during the pre-trial investigation? The answer is undoubtedly positive. Even if the current Criminal Procedure Code of Ukraine does not contain the concept of a "decision to bring charges", this does not mean that the suspicion reported to a person is "exculpatory" in nature. It is the basis of further charges formulation.

Thus, the function of public accusation should be implemented by the prosecutor on behalf of the state during the pre-trial investigation and judicial proceedings. It consists of criminal procedural activities related to the prosecutor's supervision, procedural guidance, and support of the accusation in court.

The current Criminal Procedure Code of Ukraine defines the concept of prosecution more

broadly than in the Basic Law – as a statement about the commission by a certain person of an act provided for by the Law of Ukraine on criminal liability, put forward in accordance with the procedure established by the Criminal Procedure Code of Ukraine (paragraph 13 of part 1 of Art. 3), and state accusation – as a type of procedural activity of a prosecutor, which consists in bringing charges before the court to ensure criminal liability of a person who has committed a criminal offence (paragraph 3 of part 1 of Art. 3) [2]. From the legally established definitions, it is clear that the concept of public accusation in court is narrower in content than the concept of accusation, which covers all accusatory activities from the beginning of criminal proceedings to the sentencing in court and therefore relates as a part and a whole.

It was noted that the accusation is a separate criminal procedural function, the essence of which is the area of activity of the subjects of the prosecution (prosecutor, investigator, victim and civil plaintiff, their representatives) regulated by law, which is conducted by asserting the guilt of a particular person who committed a crime, and consists in formulating suspicion, accusation, applying procedural coercion measures to it, in particular preventive measures, collecting evidence of the guilt of this person and justifying the criminal responsibility of the accused before the court [21].

In legal science, there is a lot of scientific discussion about the choice of an approach to understanding "accusation" as a fundamental legal category. However, most authors agree that a public accusation in the procedural sense has pre-trial (initial) and judicial (final) components, that is, the accusation is still conducted at the stage of pre-trial investigation, and not only during the trial [22]. This study is also inclined to this opinion, but there are certain additions.

It is worth mentioning one of the conceptual innovations of the new Criminal Procedure Code of Ukraine, provided for in paragraph 2 of chapter 3, according to which the prosecutor belongs to the accusation. Since Art. 36 of the same chapter provides mainly for the powers of the prosecutor during the pre-trial investigation, this means that the involvement of the prosecutor on the accusation side is conducted at all stages of criminal proceedings, respectively the accusatory activity is conducted before the start of the trial. Only the moment of the beginning of this activity and its limits remains uncertain.

The principles of accusation begin to form at the time of registration of criminal proceedings, sufficient data indicating the presence of signs of a crime. This gives grounds for a well-founded assumption about the existence of a "future" suspect, accused, defendant, convicted person, that is, a person

to be brought to criminal responsibility. That is why the proceedings are registered to identify this person in the subsequent stages of the process and bring them to justice by handing them an indictment, and during the trial – supporting a public accusation against them.

Thus, according to the chronology of the investigation of proceedings, the first personalised procedural document of an accusatory nature, in which the future charge begins to form, is a written notice of suspicion. That is, the statement about the commission by a certain person of an act provided for by the criminal law is put forward in accordance with the procedure established by the Criminal Procedure Code of Ukraine. Only in this case does the suspect have the opportunity to fully exercise their right to defence.

Some additional arguments that only one procedural document cannot be considered the beginning of an accusation in a broad sense are provided below. Each procedural act, whether it is a decision, or an application prepared by a prosecutor or investigator, must necessarily have a description of the circumstances that indicate that a person has committed a crime, and therefore the initial indictment. This is confirmed by the legislative definition itself. Since, according to the content of the charge, the statement about the commission of an act by a certain person provided for by the Law of Ukraine on criminal liability is made in accordance with the procedure established by the Criminal Procedure Code of Ukraine (paragraph 13 of part 1 of Art. 3).

Notably, the prosecutor's accusatory function in a pre-trial investigation is completed by drawing up an indictment and applying it to the court. In addition, it is worth clarifying how the prosecution function ends. The logical conclusion of the charge is the court's guilty verdict.

After analysing the prosecutor's activities, it was concluded that their primary appointment in Ukrainian proceedings is not supervision, but the implementation of accusation.

This statement corresponds to the PACE Recommendations "On the role of the public prosecutor's service in a democratic society based on the

rule of law" [23]. The UN guidelines on prosecuting persons (prosecutors-accusators) emphasise a clear distinction between the powers of the accuser and judicial functions (Art. 10) [24].

A similar opinion is shared by international experts, who in their study on the role of the prosecutor at the pre-trial stage of criminal proceedings noted that out of over 20 powers, provided for in part 2 of Art. 36 of the Criminal Procedure Code of Ukraine, only seven can be to a certain degree attributed to supervisory [25].

Based on the above, by extrapolating the criminal procedural activity of the prosecutor through the set goal, the praxeological area of their multi-aspect work is aimed at substantiating the charge against the person and confirming it in court.

76% of the interviewed prosecutors – procedural supervisors, who conduct criminal procedural activities, stated that such activities of the prosecutor are accusatory.

Some of the prosecutorial supervision referred to in the 1960 Criminal Procedure Code has been taken over by judicial control. The prosecutor, as a party to the prosecution, performs the function of the prosecution as fundamental in criminal proceedings.

## Conclusions

Thus, having analysed the content of the criminal procedural activity of the prosecutor in the current Criminal Procedure Code, it is not supervisory, but accusatory in nature, since: firstly, the prosecutor is the subject of the accusation; secondly, among their powers enshrined in the Criminal Procedure Code of Ukraine, accusatory ones predominate; thirdly, they form the accusation by organising an effective pre-trial investigation and implementing procedural guidance; fourthly, their professional interest is to conduct the pre-trial investigation in strict accordance with the requirements of the law to form evidence of the accusation that is appropriate, permissible, reliable, and sufficient for a reasonable statement of guilt of committing a criminal offence by the accused; fifthly, they maintain a public accusation in court for the purpose of passing a guilty verdict by the court.

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# Прокурор за чинним КПК: обвинувач чи наглядач?

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## Анотація

Турбулентні зміни законодавства останніми роками є плідним підґрунтям для наукових досліджень. Інколи закони, які регулюють кримінальні процесуальні відносини, приймають так швидко й дивно, що згодом вони тільки завдають шкоди інтересам держави й ускладнюють роботу прокурора – процесуального керівника під час розслідування кримінального провадження. З огляду на це, актуальним є питання щодо ролі та місця прокурора в механізмі забезпечення прав і свобод громадян під час здійснення кримінального судочинства, реалізації його функцій і повноважень. Підтвердженням цього є зміни до Конституції України, прийняті в липні 2016 року, які вже протягом чотирьох років не імplementовані до інших законів України. Закріплений Основним Законом оновлений статус прокурора створює новий базис для процесуальної тактики розслідування кримінальних проваджень. Отже, варто дослідити нову законодавчу регламентацію, емпіричні результати та практичну складову діяльності прокурора. У роботі розглянуто функціональний алгоритм дій прокурора – процесуального керівника щодо розслідування кримінальних правопорушень. Метою статті є характеристика особливостей реалізації процесуального статусу прокурора як суб'єкта кримінальної процесуальної діяльності під час розслідування злочинів, складова цієї діяльності як наглядовця чи обвинувача в кримінальному судочинстві, зіставлення таких повноважень і визначення характеру зазначеної діяльності з огляду на їх кількість у законі. Для досягнення поставленої мети застосовано формально-логічний, системно-структурний, порівняльно-правовий та статистичний методи. На підставі аналізу положень останніх змін у законодавстві та судової і прокурорської практики встановлено основний напрям роботи прокурора як обвинувача в кримінальному провадженні. Окреслено специфіку процесуальної тактики прокурора на стадії досудового розслідування та в суді, його спрямованість на обґрунтоване притягнення до відповідальності особи, яка вчинила кримінальне правопорушення, з метою винесення обвинувального вироку суду. Встановлено значення та функціональне наповнення кримінальної процесуальної діяльності прокурора в українському судочинстві. Наразі він є передусім обвинувачем із незначною кількістю наглядових повноважень, тому наглядові функції прокурора визначено як другорядні. Водночас прокурор є основним учасником кримінального провадження, оскільки діє на всіх його етапах з початку кримінального провадження та до його закінчення

## Ключові слова:

прокурор; кримінальна процесуальна діяльність; обвинувач; публічне обвинувачення; прокурорський нагляд; процесуальне керівництво