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GENESIS OF THE INSTITUTE FOR TRIAL POSTPONEMENT IN THE CRIMINAL PROCEDURAL LEGISLATION OF UKRAINE (FROM THE 9TH TILL THE END OF THE 19TH CENTURY)

Taras SENYK,
Postgraduate Student of the Department of Criminal Procedure and Criminalistics
of Ivan Franko National University of Lviv

SUMMARY

The article studies the genesis of the national institute for trial postponement in criminal proceedings in the period from the 9th century till the end of the 19th century. It has been carried out the critical analysis of the legal norms of such documents as the Russian Truth of Yaroslav Mudryi, the Lithuanian Statutes of 1529, 1566, 1588, the Austrian Code of Carolina in 1532, the Austrian Criminal Procedure Code of 1873, the Statute of the Criminal proceedings of the Russian Empire in 1864. It has been stated that their norms were much more progressive than the legislative norms of the European states, that directly concerned the institution of postponement of the trial in criminal proceedings.

Key words: criminal proceedings, essence of the concept, postponement of trial in criminal proceedings, suspension of court proceedings, break in the court session, judicial review.

ГЕНЕЗИС ИНСТИТУТА ОТЛОЖЕНИЯ СУДЕБНОГО РАЗБИРАТЕЛЬСТВА В УГОЛОВНО-ПРОЦЕССУАЛЬНОМ ЗАКОНОДАТЕЛЬСТВЕ УКРАИНЫ (XI – КОНЕЦ XIX В.)

Тарас СЕНЫК,
аспирант кафедры уголовного процесса и криминалистики
Львовского национального университета имени Ивана Франко

АННОТАЦИЯ

В статье исследован генезис отечественного института отложения судебного разбирательства в уголовном производстве в период XI – конца XIX в. Осуществлен критический анализ правовых норм таких памятников права, как Русская Правда Ярослава Мудрого, Литовские статуты 1529 г., 1566 г., 1588 г., австрийский кодекс «Каролина» 1532 г., австрийский Уголовно-процессуальный кодекс 1873 г., Устав уголовного судопроизводства Российской империи 1864 г. Констатировано, что их нормы были значительно прогрессивнее, чем нормы законодательства европейских государств, непосредственно касающиеся института отложения судебного разбирательства в уголовном производстве.

Ключевые слова: уголовное производство, сущность понятия, отсрочка судебного разбирательства по уголовному делу, приостановление судебного разбирательства, перерыв в судебном заседании, судебный надзор.

Formulation of the problem. In the national jurisprudence, there are very few scientific studies devoted to the modern state of the institute for the trial postponement in criminal proceedings, as well as its appearance and development at various stages of the formation of Ukrainian statehood. Meanwhile it is known that the Ukrainian legal culture at various historical stages significantly advanced in its development the doctrine, legislation and law practice of many European countries. Therefore, it is important to study the experience of our domestic predecessors in this field, due to the in-depth study of the institution of postponement of the trial.

Analysis of the recent research and publications. The problem of the historical and legal study of the institute of trial postponement in the criminal proceedings of Ukraine is a gulf of domestic legal doctrine. Thus, in the textbooks on the academic discipline "History of State and Law of Ukraine", a general description of the criminal-procedural legislation of a certain historical period in Ukraine was mainly carried out. Or at the monographic level, there was an exploration of a certain institute of the criminal cycle in the exact historical perspective (Kovalchuk I. The organization of the judiciary in Galicia in the union of Austria and Austria-Hungary (1772–1918), Boyko I. Penalties in the Ukrainian lands under the criminal law of Austria and Austria-Hungary) This situation is unsatisfactory. Therefore, issues related to the emergence and development of the institute of trial postponement in the criminal proceedings on Ukrainian territories require a thorough scientific study.

The aim of the article is to study the genesis of the institution of postponement of judicial review in the criminal procedural law of Ukraine in the period from the 9th century till the end of the 19th century.

Presentation of the main research material. The article will focus on the analysis of legal regulation of judicial proceedings in criminal proceedings at the legal norms of such documents as the Russka Pravda (Russian Truth) of Yaroslav Mudryi, the Lithuanian Statutes of 1529, 1566, 1588, the Austrian Code of Carolina in 1532, the Austrian Criminal Procedure Code of 1873, the Statute of the Criminal proceedings of the Russian Empire in 1864.

Russka Pravda by Yaroslav Mudryi is the first act where we find the origins of the institute for the trial postponement in criminal proceedings.

It follows From the contents of this original work of the ancient Ukrainian legal science of the beginning of the 9th century that the criminal proceedings of the Kievan Rus was characterized by the prosecution-contest process: the victim's statement as the basis for it (the process) to begin; active

participation of those interested in resolving the conflict and the existence of equal procedural rights; court as an intermediary in the criminal process ("gravity"); veracity and publicity of the trial, etc. The judicial system in Ukraine-Russia was based on democratic principles of equality and adversarialism. In this aspect, our ancestors left far behind states such as Byzantium, Poland, Germany and others [7].

At the same time, humanization (the abandonment of blood revenge, the use of torture, etc.) and the adversarial process of the criminal process did not deprive judges of the task of achieving justice in resolving the conflict: "to punish the guilty, not to blame the guilty", and therefore "the judges must go into the essence of the case". "Find out the perpetrator everything reliably, but firstly find out about the life of a slanderer", – we find this quote in the short variant of the Russka Pravda.

The presented features of the criminal process of Kievan Rus helped the institution of the postponement of judicial review. Despite the fact that in the texts of the Russka Pravda (Short, Spatial, and Reduced) there is no direct mention of the postponement of a court session, their critical analysis gives grounds for discussing cases of expediency of such a detention in the criminal process of Kievan Rus in order to resolve the case in a fair manner.

As we see from the contents of the Short edition of the Russka Pravda, the questioning of witnesses was the main means of proving against many types of crimes:

− the accusation of murder ("slanderous faith") required seven witnesses who would establish faith (guilt). And "when the Varangians, or somebody else, then 2 [witnesses]" (p. 10);

− the testimony of witnesses also established the fact of deliberate causing body harm (p. 19);

− when something stolen bought for bargaining, whether a horse, or clothes, or a livestock, then two innocent men or customs officials could prove innocence, "who must know who they bought, then follow them to witnesses under oath" (p. 28);

− on the vault (at the stake) the land was not sent to another, but the culprit was to give "witnesses or a man who testified to whom he had bought" (p. 30);

− witnesses were obliged to take an oath and in the case when someone wants to "pull from another kuna (money), but he refuses to give" (p. 38);

− to prove that someone was taking cooney (money) or honey for an allowance, or rye for a return with an oath, the plaintiff had to present the witnesses, "since he decided to solve it, so he and his brothers must do it" (p. 41);

− witnesses have argued the necessity of returning monthly interest for coins (money) [7].

Given the human essence of the Old Russian Orthodox ("someone can libel, and someone, on the contrary, in order to protect the perpetrator, say a lie"), provided for the obligation to prove the circumstances of the case by several witnesses. "Let each word be truthful before two or three witnesses", is stated in the Russka Pravda. The number of witnesses depended on the type of crime and the social status of the accused, the victim, the witness.

It should be noted that the law on the one hand required "to ensure the completeness of witnesses", while the other did not observe the clarity regarding their (witnesses) numbers: in some norms the number is indicated, and in others simply mentions the necessity of witnessing (without specifying quantity).

Since the burden of proof and the involvement of witnesses relied on the parties to the criminal proceedings, and in the above requirements in practice, it was not always possible to ensure the participation of all witnesses, therefore, there was a delay in judicial review. At the same time, the True Russian law did not contain norms on the postponement of a trial.

Another means of proving Russka Pravda was considered a vault[1] (confrontation). During this procedural action, the owner of the stolen item was obliged to indicate who he purchased it. The legislator provided for the duty of the plaintiff to be at the end of the vault (opt-outs to prove the crime). When the vault was to take place in the lands of the city (counties), the plaintiff was obliged to go to the third vault (par. 27). Accordingly, failure to appear on the vault also served as the basis for postponing the trial [7].

[1] The vault – the collation of conflicting parties, the steady rate for the proof of the crime, was that the owner of the stolen thing was obliged to indicate who he bought it, the second one to show the third. The third vault ended. The third was considered the culprit and had to pay damages.

In practice, postponement of the trial took place in order to carry out a study on material evidence of their location, despite the fact that this ground was also not mentioned in the texts of the Russka Pravda.

The next confirmation of the formation in Kyiv preconditions for the establishment of the institute of the trial postponement in criminal proceedings is the legislatively determined liability of the plaintiff for non-appearance to the court session: "If the plaintiff does not appear in court, then it is forcibly tried to test it with iron if he had to pay half-grams of gold. When he had to pay up to two hryvnias (silver), then he would be subjected to torture with water, when he was even less, then oath him to go to his coons" (p. 13 of the Short Russka Pravda) [7]. At that time, nothing was mentioned about the responsibility for not bringing others to court.

Subsequently, the text of Russka Pravda became one of the sources of Lithuanian statutes of 1529, 1566, 1588 (hereinafter referred to as the First, Second and Third Lithuanian statutes) where the provisions on the trial postponement have become significant.

In contrast to the Russka Pravda, the terms of the Lithuanian statutes used the term "postponement" of the trial: "<…> if the party could not immediately set up a witness, then the court may postpone the next day <…>", – for example, we find in article 52 of section II of the Second Lithuanian Statute [1].

Each of the three Lithuanian statutes strictly regulated the issues related to the postponement of the trial (reasons, deferral, subjects of the application for deferral, penalties for non-compliance with the rules of deposition, etc.), since at that time the court was obliged to adhere to the principles the reasonableness of the terms of consideration of the case: "that the court of public sentences should not be postponed, desiring to have that, so that justice without delay would be applied to every perpetrated person" (article 38 of the Third Lithuanian Statute) [4]. And therefore the Statutes required the plaintiff to prepare for court hearings effectively.

The Lithuanian statutes singled out reasonable and unreasonable grounds for postponing the trial.

So, for example, the reasonable grounds include:

− "for reasons of death and disease, or the performance of our economic service, or illness" (article 12 of Section VIII of the First Lithuanian Statute) [6];

− if the defendant, "for the short time that was set up by the claim, could not really have any proper cause of the decent and well-known letters or witnesses, and I would have been imprisoned for such years and articles in the second years" (article 4 section IV of the other Lithuanian Statute) [1];

− participation of the defendant in another court session (also in the status of the defendant) (Section IV of the Second Lithuanian Statute) [1];

− if during the court hearing the party (the plaintiff or defendant) heard the new information concerning the case and they need time in order to "understand and advise" about it (information). For this reason, the parties have the right to ask the court twice in the same case for the trial postponement: "and when it is repeated that the same party extends the term for the advice to ask, and that judge does not have to re-defend, so the defendant can ask twice on one day and that is not forbidden by the court" (article 30 of Chapter IV of the Second Lithuanian Statute) [1];

− absence of witnesses or other persons: "if the party could not immediately find a witness, then the court may be postponed to the next day" (article 52 of Chapter IV of the Second Lithuanian Statute) [1].

Unreasonable grounds for the trial postponement were:

a) failure to secure a witness by the plaintiff or other persons (Section VI of the First Lithuanian Statute) [6];

b) failure to prepare the plaintiff for a court hearing of evidence and other facts (Section VI of the First Lithuanian Statute) [6].

Along with the grounds for the trial postponement Lithuanian Statutes provided for the terms of such a deferral. Thus, in the case when the defendant participated in a different court session, and not in the one where he did not appear, he is obliged to inform the court "of the truthfulness of the importance" of the case in which he preferred his presence.

For example, the court provided the defendant with the right not to appear in the case with the subsequent submission of new evidence (witnesses, letters) in the event that they had already passed the time limit, provided that the postponement of the trial (for the purpose of preparation and filing in the next court session evidence) is necessary to ensure that the proceedings are conducted and the evidence is fully examined in court.

The second and third Lithuanian statutes provided for the fine as a sanction for non-disclosure without a valid reason of the party to the court trial. This was another important point in the development of the national institute for the trial postponement. The defendant was obliged to pay a fine in the event that he could not prove that the trial in another case (which he had preferred to appear before) was more important than the one that was postponed.

The court, in resolving the question of postponing the trial due to the failure of the person to appear before the court, also proceeded from its legal status. The absence of good reasons for a lawyer in a court session obliged the court to postpone the trial. Instead, the appearance of the prosecutor's court was not a consequence of replacing the prosecutor, but rather postponing the trial.

Having read the contents of the texts of the three Lithuanian statutes, we see that for the respondent and the plaintiff, the grounds and conditions for the trial postponing were different. In our opinion the legislator envisaged more than a good number of good reasons for the trial postponing for the defendant, while for the plaintiff it was supposed less of them.

The party is obliged to pay a fine in case of unjustified omission of the trial: "being called but not appeared, and there was no reason enough, expressed in this statute; the party did not explain or did not report about it, it has to pay for the failure to produce four piles of money and a pile of money for each claim, that is, forty coins for the judge and twenty coins for his assistant" (article 22 of Section IV of the Third Lithuanian Statute) [4].

The Lithuanian statutes provided for oath as confirmation by the party who requested the postponement of the trial, the fact that he did not abusive the deadlines, did not delay the case, but for objective reasons: "<…> if, in those years and in the short time, he was appointed for , could not really have any, for a valid and simple reason, letters and witnesses, and would have tolerated (postponed) in such cases and articles until the next years, then the court should allow him to <…>" (article 24 of the Section III of the Third Lithuanian Statutes); "<…> the defendant if <…> could not really have any proper reason to have a decent and well-known reasons, letters or witnesses, and would have been imprisoned for such years and articles in the second years; then the court should allow him to do so, however, in those other years he will have to be ready with everything and before the court clearly show that he received and asked for that year not for the delay of the plaintiff but (that is), that without it (the court)" (article 14 of Section IV of the Second Lithuanian Statute) [1]. If the party refused to swear an oath, it was obliged to pay a fine, determined by the court.

"Carolina" (Constitutio Criminals Karolina) 1532 (according to its norms, criminal proceedings were carried out during the period of the Galician lands within the Austrian Empire), did not contain a direct mention of the trial postponing in a criminal case, let alone the existence of a special norm or section that would have been (postponed) devoted to it. Nevertheless, it contained an important imperative norm: "We resolve and punish that all criminal cases contribute to the speedy implementation of justice and avoid harmful procrastination" (LXXVII "On the rapid implementation of justice") [2, p. 44]. Although, with a thorough examination of other provisions of this legal document we can say about the absence of the law cases that would be considered "harmful procrastination" in a criminal case, or, conversely, – harmless (venerable).

As you can see, even in the 16th century in "Carolina" one of the general provisions of trial i. e. continuity is stated.

According to "Carolina", the victim was obliged to provide the court with information about the place of his stay and about not leaving this place. This was done so that the court could send a court summons to the victim: "After placing the accused in the prison, the plaintiff should not move away from the judge until he tells him his place in a safe city or settlement, where the judge could send him the necessary litigation in the future" [2, p. 12].

The legislator demanded that the court announced the start of a trial. "The court must be declared in accordance with the good practices accepted in each country" (LXXX "Announcement of the court") [2, p. 45] and the court "on the day of judgment, at a certain time, let us tell you how to call a criminal court. Following good practices, the judge and court judges must gather in the court where the court should sit. The judge must invite court assessors to sit down and he must also sit holding his rod or naked sword in the hands according to the local custom of the country and must sit together with them until the end of the case" (XXXII "Announcement of the bell on the final court hearing" – we find it in the Criminal Procedure Act of 1532) [2, p. 46].

The court also had the duty to inform the accused of the day of the court session and to provide his case to the court: "Anyone who wishes to punish the plaintiff at the request of a final criminal sentence must be warned about it in three days so that he can think about their sins in advance, repent and confess them" (article LXXIX) [2, p. 44].

Having been acquainted with the meaning of "Carolina", one can distinguish the following cases of compulsory participation of the victim in court:

1) during the declaration of witness testimony. "First of all, the indicated commissars <…> must set a day for the declaration of witnesses to the parties. On this appointed day, the two parties involved in the case, for a moderate fee, issue copies and appoint a certain time, depending on the nature of the case, for the necessary review and acquaintance" [2, p. 42];

2) during the declaration of the person charged with the commission of a crime. If the accused is found not guilty because the plaintiff did not wish to prosecute, and the accused however requires justice, then no ad will be required (LXXXVII "On the announcement of the accused") [2, p. 47];

3) during the announcement of the sentence [2, p. 52].

Each court clerk of the criminal courts was obliged to record all judicial actions performed on official duty, or private prosecution, as stated above, with thorough diligence, legible, consistent, and competently. And in any case, during each legal action must be indicated year, day and hour, when it happened, and who was present at this (LXXXIX "On the protocol") [2, p. 100].

As we see, "Carolina" contained norms that included the participation of participants in criminal proceedings in court sessions, but did not foresee the consequences (in the case of "harmful" or "harmless" delays) of their failure to appear in court, including the grounds for trial postponement in criminal proceedings.

In the context of the problem we have been investigating, it is worthwhile to focus on the Austrian Criminal Procedure Code of 1873, which worked on the territory of Galicia.

The suspect and the accused were guaranteed the right to protection. In adopting the principle of the right to protection, the Austrian legislator proceeded from the fact that the police, prosecutors and the court were to be as objective as possible in the performance of their professional duties, establishing an objective truth in each criminal case, to investigate and clarify not only the circumstances, who accuse, but also those who justify or mitigate the guilty person [3, p. 167].

The right to protection was to ensure that there were no abuses by law enforcement officials so that no innocent person was accused of a wrong action.

The participation of a lawyer in the criminal proceedings was divided into compulsory and optional. Obligatory participation of the defender took place in the following cases: when considering a criminal case by a jury; when considering a criminal case in the absence of the accused, in the so-called correspondence process; when considering the case by the Military Court; when the accused had not reached the age of 17; when there were sufficient grounds for doubting the accountability of the accused [3, p. 168].

In all other cases, the defense counsel's participation in the case was not mandatory, but entirely depended on the wishes of the accused. The reason for the participation of a defense counsel in the case was the client's agreement with the counsel or the decision of the investigating judge, prosecutor or court to involve the counsel in the cause of appointment [3, p. 168].

A significant amount of legislative provisions on the trial postponement of contained the Statute of Criminal Proceedings 1864 (hereinafter referred to as the Statute of 1864). First of all, the Charter of 1864 clearly distinguished between two concepts – "postponement" and "suspension" of the trial: depending on the form of criminal proceedings. Due to the fact that in district courts, unlike the peace courts, the court session was held continuously (article 633). The delay in the trial was considered by the court as a compulsory measure along with ways of avoiding criminal prosecution [5, p. 23].

The failure of the accused and his attorney (representative) is one of the grounds for postponing the trial, which was envisaged by the Statute of 1864. The court could postpone the trial for the purpose of seeking a person, or to order an extrajudicial sentence.

The absence of witnesses or "knowledgeable people" (specialists) is the following reason, which delayed the trial. However, in the absence of "knowledgeable people" (specialists), they were also subjected to a pecuniary punishment: "depending on the importance of the case and the state of the witness" (articles 69, 114). The decision on the pecuniary penalty could be revoked if the "knowledgeable person" (specialist) later provided evidence of valid reasons for non-appearance before the court (article 70) [5, p. 24].

The failure to appear in the prosecutor's court (article 135) was due either to a "refusal of a complaint" or a postponement. In the latter case, the prosecutor was subjected to a pecuniary charge [5, p. 30].

The impossibility of providing the parties with all the evidence in the case also served as the basis for postponing the trial. The statute obliged the world judge to postpone the consideration and provided such a right "at his own discretion, if he finds it necessary or to make a review, or instruct the parties to deliver or the police to gather any necessary information in the case" (article 74).

The delay in the trial was also foreseen "due to the absence of one of the parties". The opposite side, in this case, could "request that the expenses incurred by her once again appear before the court, were turned to the defective party, if

the latter does not prove the reputation of the reasons for non-appearance" (articles 75, 196). The application of this norm depended only on the person whose fault was the reason for the court session, regardless of the recognition of whether or not the accused was guilty of committing the incriminated act [5, p. 30].

In cases of illness, a witness that prevented the appearance of a court, as well as in the case of the need to interrogate a large number of witnesses who lived in one place, was subjected to questioning during the on-site court sessions at their place of residence.

Article 388 of the Statute of 1864 contained a list of the importance of the reasons for not appearing in the investigation or in court: imprisonment; cessation of informing during an infection spreading, enemy invasion, unusual river sinking and other similar ineluctable obstacles; sudden damage from an accident; a disease that deprives you of being away from home; death of parents, husband, wife or children, or severe illness that threatens death; unsecure or untimely receipt of a summons.

In the courts of appellate jurisdiction (peaceful congress), the trial was conducted "in the same manner as in the world court <…>, but for the failure to submit evidence and witnesses to the time of the hearing of the case, its consideration is postponed, if from the side asked for the call of witnesses that are not appeared and the congress (Court of Appeal) did not see the obstacles" [5, p. 31].

When considering the cases in the "general court places" adhered to the imposition of immediacy, so "opening of the court" was allowed only after the study of the issue of witnesses and the possibility of starting a trial without their participation (article 583).

"An obstacle to the opening of a court session" could also serve as a defender's disease, but only if "it is not possible to prepare a newly appointed defender for the short time remaining before the term of the meeting" (article 591) [5, p. 32].

The defendant, who had not appeared before the court without reasonable grounds, was accused. The failure of the private prosecutor or his representative was recognized as "abandonment of a criminal lawsuit" and "had consequences of termination" of criminal proceedings. The absence of a civil plaintiff did not prevent the opening of a court session, "but civil action was not considered in a criminal court" (article 594) [5, p. 32].

"In case of a trial postponement due to the failure of any of the witnesses whose testimony is significant in the matter of significance, the court shall make an order or a repetition of the call for a witness who did not appear or about the reason for his established order" (article 641) [5, p. 31].

In addition to the serious reasons for not coming to court, established by art. 388 of the Statute, art. 642 dismissed the following categories of persons from the appearance in court:

a) "military officers who are in active service when their military authorities consider it impossible to allow them to be absent from the place of service,

b) in general, witnesses who live in another judicial district, and in addition to such a distance that it is not possible for them to appear in court without a special difficulty" [5, p. 31].

A witness who did not appear in court without a valid reason was subjected to a pecuniary charge four times larger than that of a magistrate, as well as the payment of legal expenses incurred as a result of persons brought to trial and if his absence (witness) was a consequence of the postponement of the meeting [5, p. 31].

Conclusions. The norms of the national criminal-procedural legislation of the period from the 9th century till the end of the nineteenth century were much ahead of the legislation of the European states in matters directly related to the institute of the trial postponing in criminal proceedings, since they were already infused with the ideas of the competitive process, the principles of reasonableness of terms and immediacy, the provisions of the continuity of the criminal case. The criminal procedural law contained provisions that disclosed the reasons, procedure and subjects of appeal for the trial postponement.

Meanwhile, in the legal documents there is a real blend of the concepts of "postponement" and "stopping" of a trial (for example, in the Lithuanian Statutes, in the Statute of the Criminal Procedure 1864). For example, when the trial was postponed, the proceedings in the case always started from the very beginning. As a result, the postponement of the trial in the Statute of the criminal proceedings in 1864 was due to the suspension of the court session, with the restoration of which the meeting began with the action on which it stopped. This, in turn, gives grounds for asserting that it is impossible to assess the meaning of a criminal-procedural concept, based only on its word-formation and everyday understanding.

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INFORMATION ABOUT THE AUTHOR

Senyk Taras Bogdanovich – Post-graduate Student of the Department of Criminal Procedure and Criminalistics of Ivan Franko National University of Lviv;

ИНФОРМАЦИЯ ОБ АВТОРЕ

Сеник Тарас Богданович – аспирант кафедры уголовного процесса и криминалистики Львовского национального университета имени Ивана Франко;

tarassenyk1993@gmail.com