COLLECTION OF EVIDENCE BY THE DEFENSE IN UKRAINIAN CRIMINAL JUSTICE: AN ATTEMPT TO ACHIEVE EQUALITY OF ARMS

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Summary

The article examines the procedural opportunities available to the defense party for evidence collection in Ukraine's criminal process.

It is emphasized that despite the declared equality of rights of the parties to collect and submit items, documents, and evidence to the court under Article 22 of the Criminal Procedure Code of Ukraine, during pre-trial investigation, the prosecution party has a number of advantages over the defense party in terms of available means of evidence. The procedural opportunities available to the defense party for evidence collection have been analyzed, comparing them with the actual evidentiary capabilities of the prosecution party.

The author underscores that the current Ukrainian criminal procedural legislation contains precedents granting the defense party certain powers traditionally associated with the activities of the prosecution party.

It is proposed to grant the defense party, the victim, and the representative of a legal entity, subject to criminal proceedings, the right to perform certain procedural actions during the pre-trial investigation stage, which currently can only be carried out by the prosecution party. According to the author, expanding the evidentiary powers of the listed subjects is possible provided that some principles are adhered to, including verifiability of procedural actions' results, creating no obstacles for the prosecution party, the usefulness of such expansion, and coercion is avoided. The mentioned participants in the criminal proceedings may be granted the opportunity to conduct inspections of computer data, interrogate witnesses and suspects, undergo voluntary inspections of a person (including medical ones), extract data from technical devices and technical means, and so forth.

Key words: criminal proceedings, equality of arms, adversarial, evidence collection, defense party, investigative (search) actions, temporary access to items and documents.

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1. Introduction

Since the implementation of current Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine), alongside the bolstering of adversarial and dispositivity principles within criminal proceedings, the role of the defense party as a participant in evidence proceedings has been significantly strengthened. In particular, the actual opportunity for the defendant to participate in evidence gathering is an indispensable component of the rights to defense and access to justice. In accordance with Article 20 of the CPC of Ukraine, a suspect, accused, acquitted, or convicted individual has the right to defense, which includes providing them with the opportunity to give oral or written explanations regarding suspicion or accusation, the right to gather

and submit evidence, participate personally in criminal proceedings, receive legal assistance from a defense attorney, as well as exercise other procedural rights provided for by the CPC of Ukraine *(CPC of Ukraine, 2012)*. This idea finds further expression in other general principles of criminal proceedings and in specific provisions of criminal procedural legislation.

Despite the provisions outlined in Article 22 of the CPC of Ukraine regarding the equality of parties' rights to collect and submit items, documents, and evidence to the court, it is widely acknowledged by researchers that in practice, the evidentiary opportunities of the parties are not equal (*Kaplina, 2013: 223; Myroshnychenko, 2015: 134; Kostiuchenko, 2015: 42; Krushynskyi, 2017: 298; Shepitko, 2021: 13, etc.*). The systematic interpretation of paragraphs 2 and 3 of Article 93 of the CPC of Ukraine, as well as the provisions of Chapters 10, 20, 21 of the CPC of Ukraine and other norms of criminal procedural legislation, shows that during the pre-trial investigation the prosecution party has several advantages over the defense party in terms of available means of evidence collection, examination, and utilization *(CPC of Ukraine, 2012)*. In particular, the investigator, interrogator, and prosecutor have unique opportunities to request original documents, conduct overt and covert investigative (search) actions, apply procedural coercion during evidence gathering (with or without the permission of the investigating judge), etc., which are not endowed to the defense.

Thus, the **purpose** of the article is to analyze the procedural opportunities of the defense party to collect evidence in the criminal process of Ukraine and to formulate proposals for enhancement of such opportunities in order to realize the principles of equality of arms and dispositivity.

2. Main part

According to Part 3 of Article 93 of the CPC of Ukraine, the main methods of evidence collection available to the defense party in Ukrainian criminal proceedings include the requisition and receipt of documents, information, expert opinions, audit findings, inspection reports from state authorities, local self-government bodies, enterprises, institutions, organizations, officials, and individuals of items, copies. According to A. V. Krushenitskyi, requisitioning involves the criminal proceeding party making a demand to a specific subject for the voluntary provision of certain objects or documents that carry information (data) relevant to the criminal proceedings *(Krushenitskyi, 2023: 84)*. Reception, as a method of evidence collection in criminal proceedings, has been explained by O. V. Kaplina as the acceptance by an authorized person of certain objects voluntarily provided, sent, delivered, or otherwise transmitted by their owner or custodian *(Kaplina, 2013: 223)*.

In the context of receipt of certain objects (at the initiative of the person voluntarily providing them), the opportunities of the parties to the proceedings are, in fact, equal. At the same time, the procedural tool of "requisitioning" for the defense party and other subjects of evidence collection is less effective compared to the prosecution party. According to current legislation, requests from private individuals (suspects, accused persons, victims) for the provision of items and documents that may serve as evidence in criminal proceedings are not obligatory for the recipient to fulfill. Exceptions to this rule are only requests made in accordance with the Laws of Ukraine "On Citizens' Appeals" (*1996*) and "On Access to Public Information" (*2011*), but the scope of information that can be obtained in this way is limited.

Defense attorneys have somewhat more procedural opportunities to requisition evidence in criminal proceedings. Article 24 of the Law of Ukraine "On Advocacy and Legal Practice"

(*2012*) grants these individuals the procedural tool of an "advocate's request," defined as a written appeal by an attorney to state authorities, local self-government bodies, their officials and employees, enterprises, institutions, and organizations regardless of ownership and subordination, public associations for the provision of information, copies of documents necessary for the attorney to provide legal assistance to the client. Such entities to whom the attorney's request is addressed are obliged to provide the attorney with the corresponding information, copies of documents no later than five working days from the date of its receipt, except for information with restricted access. For unjustified refusal to provide information, untimely or incomplete provision of information, provision of information that does not correspond to reality in response to attorney's request, Article 212-3 Part 5 of the Code of Ukraine on Administrative Offenses (*1984*) provides for administrative liability.

With the aim of balancing the evidentiary opportunities of the parties to the proceedings, the legislator has granted the defense party (as well as the victim, the representative of a legal entity, subject to criminal proceedings) the right to submit relevant motions and initiate certain procedural actions by the prosecution party, as well as to challenge unjustified refusals to satisfy such motions. However, even if the motions are granted and certain procedural actions are carried out by the investigator, interrogator, or prosecutor at the initiative of the defense party, ensuring due diligence, tactical skill, and thus effectiveness in their conduct may be challenging. Therefore, it is worth agreeing with S. A. Krushinskyi that in the described cases, the investigator, interrogator, or prosecutor who granted the relevant motion and conducted a particular procedural action will act as the subject of evidence collection, but not the defense party (*Krushinskyi, 2017: 299*).

The current criminal procedural legislation of Ukraine also provides for several cases in which the defense, the victim, and the representative of a legal entity, subject to criminal proceedings are authorized to perform certain procedural actions, traditionally recognized as the prerogative of the prosecution party.

For example, the appointment of a forensic examination by the prosecution party, as defined in the relevant provisions of Chapter 20 of the CPC of Ukraine, is considered an investigative (search) action. Conducting investigative (search) actions, in turn, according to the content of paragraphs 2, 3 of Article 93 and Article 223 of the CPC of Ukraine, is a unique power of the prosecution party. At the same time, Articles 242–244 of the CPC of Ukraine provide mechanisms for initiating forensic examinations by both the prosecution and the defense parties, as well as by the victim. Additionally, the defense, on par with the prosecution, has the right to obtain samples for examination under the provisions of paragraphs 1 and 2 of Article 245 of the CPC of Ukraine.

It is also worth mentioning that Part 1 of Article 229 of the CPC of Ukraine stipulates that before presenting an item for identification, the investigator, prosecutor, or *defense attorney* must first inquire of the person identifying whether they can recognize said item, question them about its characteristics and the circumstances under which they saw it, and record this information in the protocol. However, as correctly pointed out by V. A. Zhuravel, implementing this provision in practice is impossible, as the defense attorney is not authorized to conduct the interrogation preceding the presentation for identification, nor to draw up a protocol for such investigative (search) action *(Zhuravel, 2013: 25)*. It is uncertain whether the provisions of Part 1 of Article 229 of the CPC of Ukraine represent an unsuccessful attempt by the legislature to grant the defense party the opportunity to conduct presentations of items for identification, or if they simply stem from a technical error made by the Code's authors.

The defense party, on par with the prosecution, is also authorized in exceptional cases to initiate questioning of individuals before the investigating judge in accordance with Article 225 of the CPC of Ukraine. However, this provision may be interpreted as transferring a specific judicial procedure to the pre-trial investigation stage. In the judicial proceedings stage the principles of equality of arms and adversarial are generally more fully realized the compared to the pre-trial investigation stage.

Another procedural means of collecting evidence available to both the defense and the prosecution is obtaining temporary access to items and documents based on a ruling by the investigating judge. The mentioned procedural action is a measure to ensure criminal proceedings and therefore does not fall under the category of investigative (search) actions. Its essence lies in granting the parties to the criminal proceedings the opportunity to familiarize themselves with items or documents, make copies, or seize them (conduct a seizure) based on the decision of the investigating judge *(Great Ukrainian legal encyclopedia, 2020: 856)*.

At the same time, the characterization by I. V. Glovyuk and S. V. Andrusenko of temporary access to items and documents as "a measure to ensure criminal proceedings aimed at gathering and verifying evidence" illustrates well the dual nature of this method of evidence collection *(Glovyuk & Andrusenko, 2013)*. V. A. Zhuravel pointed out that the procedural action formerly known as "Seizure" under the 1960 Criminal Procedure Code of Ukraine and considered an investigative action has been categorized as a measure to ensure criminal proceedings in the current Code and was given the somewhat contentious designation of "temporary access to items and documents". In this regard, the cited scholar rightfully notes that within the framework of this procedural action, it is possible to collect (obtain) direct evidence, not just samples for expert examination, which associates it with investigative (search) actions *(Zhuravel, 2013: 24)*. It is also worth noting that under the 1960 Criminal Procedure Code of Ukraine (*1960*), seizure was only available to the prosecution. In modern conditions, the parties to the proceedings are practically equal in their ability to use this procedural method of evidence collection, which enhances the of equality of arms and adversarial principles in the current Criminal Procedure Code of Ukraine compared to the 1960 Code.

All the aforementioned possibilities for evidence gathering by the defense party are unable to neutralize the real advantages in proving guilt that are available to the prosecution. The existence of such a "prosecutorial bias" in criminal procedural adversarial can lead to the limitation of the rights of the suspect, accused, victim, or legal entity undergoing proceedings regarding access to justice and legal defense. One possible solution to the mentioned problem is to expand the evidentiary capabilities of the defense party and other subjects of proof in criminal proceedings. Domestic scholars have repeatedly addressed this issue. For example, V. O. Popelyushko considered the option of expanding the evidentiary powers of the defense attorney within the framework of the institute of defense attorney investigation *(Popelyushko, 2008)*; O. Y. Kostyuchenko proposed granting the victim the status of a "private prosecutor" with corresponding expansion of their evidentiary powers, and suggested that requests for initiating procedural actions from the defense side should be directed to the investigating judge rather than the prosecution (*Kostyuchenko, 2015*: *42*); O. V. Malakhova substantiated the possibilities for strengthening the institution of defense facilitation in Ukrainian criminal proceedings *(Malakhova, 2016: 13–14)*; researchers have also explored the prospects of involving private detectives (detective agencies) in the process of collecting evidence in criminal proceedings *(Akhtyrska, 2011; Rybalka, 2017)*, and the Verkhovna Rada of Ukraine even supported a relevant bill in the first reading *(Draft Law on Private Detective Activities, 2020)*, etc.

All the approaches listed have their own pros and cons. However, at the current stage of development of Ukrainian criminal justice, we believe that the optimal way to strengthen the equality of arms and adversarial principles in criminal proceedings is to grant the defense party, the victim, and the representative of a legal entity, subject to criminal proceedings, the right to perform certain procedural actions during the pre-trial investigation stage, which currently only the prosecution side is entitled to undertake. At the same time, it seems that the evidentiary capabilities of these mentioned participants in criminal proceedings can be expanded only on the condition of adhering to the following principles.

1. Verifiability of procedural actions' results. Considering the obvious interest of the defense party, the victim, and the representative of a legal entity, subject to criminal proceedings, in the results of the pre-trial investigation and court proceedings, as well as the potential lack of necessary technical and tactical criminalistic knowledge among these individuals, it is advisable to implement legal mechanisms that would allow the prosecution to effectively verify the evidence collected by these parties. For this purpose, the CPC of Ukraine should establish minimum procedural requirements for conducting and documenting the progress and results of relevant procedural actions.

Creating no obstacles for the prosecution party. The conduct of procedural actions by the defense party and other evidence-collecting entities should not limit the prosecution's ability to fulfill its obligation under Part 1 of Article 92 of the CPC of Ukraine to establish and prove the circumstances of the criminal offense. Specifically, according to this criterion, the defense party cannot conduct presentations for identification, as it would prevent the prosecution from subsequently carrying out this procedural action.

The usefulness of such expansion. The defense party and other evidence-collecting entities should have a real opportunity to use the results of their procedural actions in evidentiary process. During the pre-trial investigation, such utilization is possible by submitting the results of the procedural action to the prosecution (in support of motions and for use as evidence) and by presenting them to the investigating judge when addressing matters within their jurisdiction. In the event that evidence formed in this manner is submitted to the prosecution, the investigator, interrogator, or prosecutor will be obligated to verify the results of the procedural action, including, if necessary, by repeating it, and to use such information as evidence. During the court proceedings, the defense, the victim, and the representative of a legal entity, subject to criminal proceedings, will have the opportunity to use the results of the procedural actions they have conducted at their discretion within the framework of the current procedure for judicial examination of evidence.

Avoiding coercion. We believe that utilizing the procedural coercion should remain the unique prerogative of the state, represented by the prosecution, and therefore, the defense party and other evidentiary subjects cannot be empowered to apply coercive measures and restrict the rights of other individuals at their discretion. According to this criterion, the defense party cannot be granted the authority to conduct searches, compel inspections of a person, covert investigative (search) actions, and so forth.

Provided that the criteria mentioned are adhered to, the defense party, the victim, and the representative of a legal entity, subject to criminal proceedings, potentially could be granted the authority to conduct inspections of computer data (including web resources), interrogations of witnesses and suspects with mandatory full audio and video recording, voluntary inspections of a person (including medical ones), the extraction of data from technical devices and tools, and so forth. The legal regulation of this issue and the development of tactical recommendations for conducting the mentioned procedural actions could become subjects of scientific interest for proceduralists and criminalists.

3. Conclusions

Thus, the ability to conduct evidentiary activities is an indispensable component of the rights to defense and access to justice guaranteed by the Constitution of Ukraine, international treaties, and criminal procedural legislation. Despite the provisions outlined in Article 22 of the CPC of Ukraine regarding the equality of parties' rights to collect and submit items, documents, and evidence to the court, in practice, the evidentiary opportunities of the parties are not equal. Specifically, during the pre-trial investigation, the prosecution has a range of unique and unavailable to the defense means of evidence collection, examination, and utilization. In order to ensure the full realization of the right to defense, as well as the principles of adversarial proceedings, dispositivity and equality of arms in criminal proceedings, it is advisable to consider the prospect of expanding the range of available means of evidence for the defense party. The legal regulation of new evidentiary capabilities for the defense party should be based on principles of verifiability of procedural actions' results, creating no obstacles for the prosecution party, the usefulness of such expansion, and coercion avoidance.

Provided that the criteria mentioned are adhered to, the defense party, the victim, and the representative of a legal entity, subject to criminal proceedings, potentially could be granted the authority to conduct inspections of computer data, interrogations of witnesses and suspects, voluntary inspections of a person (including medical ones), the extraction of data from technical devices and tools, and so forth.

Therefore, the prospects for further scientific research in this area are associated with the legal consolidation of the proposed ideas and the development of tactical recommendations for conducting the mentioned procedural actions.

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