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Ensuring the freedom of evidence representation in criminal proceedings of Ukraine

Introduction

Freedom is a complex phenomenon that presupposes the human ability to make one's own choices, to be independent of the influence of various external factors. Freedom is a natural sign that is inherent in a person from the moment of his or her birth and characterizes the state of a person, in which he or she commits certain actions or inactions in accordance with the will, desire and inner conviction.

Human freedom is a good that is guaranteed by all civilized states at the level of legislation. For example, the Constitution of Ukraine enshrines the idea of freedom, stating that “everyone has the right to the free development of personality, provided that the rights and freedoms of others are not violated, and has responsibilities to a society in which free and comprehensive development of the personality is provided” (article 23), “the legal order in Ukraine is based on the principles according to which no one can be forced to do what is not provided by law” (article 19).¹ That is, these norms are based on the generally accepted principle “it is allowed to do everything that is not expressly prohibited by law”.

The concept of freedom is often used in the criminal procedure legislation of Ukraine in relation to various institutions. For example, if we analyze the system of principles of criminal proceedings, we can identify the principles of ensuring the right to freedom and security of person, freedom from self-disclosure and the right not to testify against close relatives and family members, adversarial of parties and freedom to present their evidence and prove before the court of their persuasiveness. The freedom to perform certain procedural actions is also the

¹ Konstytsiia Ukrainy vid 28.06.1996 r., zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [access on: 10.10.2021].

basis of other principles of criminal proceedings, in particular, dispositiveness, ensuring the right to appeal against procedural decisions, actions or omissions, etc.

The **purpose** of this article is to define the concept of freedom of presentation of evidence in criminal proceedings, as well as to identify restrictions on its implementation under the laws of Ukraine.

The works of many scientists, in particular, G. I. Aleinikov, V. D. Arseniev, O. V. Astapenko, D.I. Bedniakov, N. R. Bobechko, Yu. M. Hroshevyi, I. M. Doronin, V. M. Ishchenko, M. I. Kapinus, O. V. Kaplina, I. A. Karlash, L. M. Karneeva, L. D. Kokorev, T. Kh. Kondratieva, S. A. Krushynskyi, A. M. Larin, A. O. Liash, P. A. Lupinskaia, M. M. Mykheenko, V. T. Nor, I. D. Perlov, V. A. Ponomarenkov, V. O. Popeliushko, S. M. Stakhivskyi, Y. I. Stetsovskyi, M. S. Strogovich, V. I. Fedorov, S. A. Sheifer, O. H. Shylo, M. Ye. Shumylo, V. V. Yaselskaia and others deal with the study of certain aspects of freedom of evidence in criminal proceedings.

Methodology

The methodological basis of this research work is a general scientific dialectical method, as well as other scientific methods of cognition: analysis, synthesis, comparison, generalization. The method of analysis was used to carefully study a number of norms of the legislation of Ukraine, which regulate various aspects of the exercise of the right to represent evidence in criminal proceedings. The method of synthesis was used to combine different manifestations of freedom in criminal proceedings and the study of this phenomenon in general. Methods of comparison and generalization made it possible to generalize and compare restrictions on the freedom of evidence at different stages of Ukrainian criminal proceedings.

Research results

In the rules determining the procedural status of the suspect, accused, defense counsel, legal representative, victim, civil plaintiff, civil defendant, their representatives, the applicant, the representative of the legal entity in respect of which the proceedings are conducted (articles 42, 44, 45, 56, 58, 60-63, 64-1 of the Criminal procedural code of Ukraine (hereinafter – „CPC of Ukraine”), the right to present evidence is defined as one of their most important rights. In addition, the article 22 of the CPC of Ukraine states that the parties to criminal proceedings have equal rights, in particular, to submit to court things, documents and other evidence.² These

² Kryminalnyi protsesualnyi kodeks Ukrainy vid 13.04.2012 r., zakon.rada.gov.ua/laws/show/4651-17?find=1&text#Text [access on: 10.10.2021].

participants of criminal proceedings are not obliged to prove, and therefore they can submit evidence only at their own will to defend their interests in court.

Freedom to present evidence means that the submission of an object or document, in contrast to their demand, is not at the initiative of bodies and officials conducting criminal proceedings, but at the will of participants in the process, citizens, officials of enterprises, institutions, organizations at their disposal is a relevant subject or document. In other words, the presentation of evidence is the voluntary transfer by a person of objects or documents which, in their opinion, are relevant to criminal proceedings. Representation of evidence is the right of a party to criminal proceedings, but not its duty.

In the scientific literature it is rightly noted that for the manifestation of such an initiative by participants in the process, as well as officials, members of the public, citizens who are not participants in the process, there are different legal grounds (procedural rights, duties, public duties, moral obligation of a society member).³

At the same time, we should agree with I. L. Petrukhin that the representation of evidence is a voluntary transfer by a person of objects or documents related to the case, and there is no reason to say that a person is forced into certain behavior, because their actions are based on conscious need.⁴

Thus, the freedom to represent evidence in criminal proceedings presupposes the voluntary transfer by the participants of the process and the subjects not participating in it, to the bodies conducting the criminal proceedings, of the objects and documents belonging to it, carried out in order to defend their own or representative interests and to establish the truth in criminal proceedings.

However, the question arises as to the limits of freedom of evidence representation and restrictions on the exercise of this right. Such restrictions are provided by the legislator for certain judicial stages of criminal proceedings.

1. Stage of preparatory proceedings in the court of first instance

One of the novelties of the criminal procedure law is the deprivation of influence on the court of factual data collected by the prosecution during the pre-trial investigation. The CPC of Ukraine has determined that the prosecutor send to the court for consideration not the materials of the pre-trial investigation, but only the indictment with the relevant annexes. Submission of

³ *Teoriia dokazatelstv v sovetskom ugovnom protsesse*, otv. red. N. V. Zhogin, Moskva 1973, p. 378.

⁴ I. L. Petrukhin, *Svoboda lichnosti i ugovno-protsessualnoe prinuzhdenie*, Moskva 1985, p. 12.

other documents to the court before the trial is prohibited (part 4 article 291 of the CPC of Ukraine).

Thus, prior to the commencement of the court proceedings, the court has no information on who should be questioned as a witness at the court hearing, what material evidence and documents are available to the parties to the criminal proceedings. Only in preparatory court proceedings when the court decides issues related to preparation for trial, both the prosecutor and the defense may request the summons of certain persons to court for questioning, as well as the demand of certain things or documents (article 315 of the CPC of Ukraine).

Judicial practice also considers violation of the norm provided by part 4 of article 291 of the CPC of Ukraine, as a restriction of equality of arms and adversarial proceedings. Thus, the Bar district court of Vinnytsia region, having considered the materials of the criminal proceedings in the preparatory hearing, in its decision of November 14, 2013 indicated that the court was provided with the materials of the pre-trial investigation and material evidence before the preparatory hearing. The court concluded that the provision of pre-trial investigation materials, i.e. evidence obtained by the prosecution during the pre-trial investigation, prior to the trial was a gross violation of the CPC's requirements and the rights of the defense. Therefore, the court returned the indictment, as well as the materials of the pre-trial investigation, material evidence to the prosecutor.⁵

According to some scholars, this rule is a positive novelty to the new CPC, which guarantees the implementation of the principle of directness of the study of the parties evidence.⁶ Instead, other scholars consider that restrictions cited in article 291 of the CPC of Ukraine are not in accordance with the constitutional principle of justice – the freedom of the parties to represent their evidence (part 3 of article 129 of the Constitution of Ukraine), which means, of course, freedom of place and time of their representation.⁷

The inability of the parties of criminal proceedings to represent their evidence to the court before a trial raises some problems. After all, if we analyze the content of articles 314–315 of the CPC of Ukraine, the activities of the court and participants in criminal proceedings in the preparatory hearing are aimed at: 1) checking the existence of grounds for approval of the plea agreement or conciliation agreement, if it was submitted by the prosecutor; 2) checking the

⁵ Ukhvala Barskoho raionnoho sudu Vinnytskoi oblasti vid 14 lystopada 2013 r. (sprava № 125/2690/13-k). Yedynyi derzhavnyi reiestr sudovykh rishen, reestr.court.gov.ua/Review/34642260 [access on: 12.10.2021].

⁶ L. V. Karabut, *Kryminalna protsesualna diialnist iz bezposerednoho doslidzhennia v sudi pershoi instantsii pokazan, rechei i dokumentiv za novym KPK*, “Visnyk Zaporizkoho natsionalnoho universytetu” 2012, № 3, p. 274.

⁷ *Novyi Kryminalnyi protsesualnyi kodeks Ukrainy: komentari, roziasnennia, dokumenty*, vidp. red. V. S. Kovalskyi, Kyiv 2013, p. 61.

existence of grounds for closing of criminal proceedings, including in connection with the release from criminal liability; 3) verification of the indictment, petition for the application of coercive measures of an educational nature or petition for the application of coercive measures of a medical nature for compliance with the requirements of the CPC of Ukraine; 4) verification of compliance with the rules for determining the jurisdiction of criminal proceedings; 5) creating conditions for a successful trial.⁸

The logical question is whether the court can resolve these issues in the preparatory proceedings without examining the materials of the pre-trial investigation that are available to the prosecution and the materials that the defense and other participants in the criminal proceedings managed to collect? In my opinion, this is impossible.

Substantiating this position, it should be noted that at the stage of preparatory court proceedings, the final decision of the criminal proceedings is possible on the merits: 1) sentencing on the basis of a conciliation agreement or a guilty plea; 2) closure of criminal proceedings in connection with the release from criminal liability.

The CPC of Ukraine regulates in sufficient detail of the procedure of court proceedings on the basis of the agreement, including a list of circumstances in which the court must refuse to approve the agreement (part 7 of article 474 of the CPC of Ukraine). In particular, an agreement cannot be approved if there are no factual grounds for a guilty plea. And how can the court determine whether there are factual grounds for the accused to admit the guilt in committing a criminal offense, if, at least, it does not read the materials (evidence) of the pre-trial investigation? Making a decision based solely on the information contained in the indictment and the plea agreement, which is not substantiated by the relevant evidence, is undoubtedly a false practice.⁹

Considering the prosecutor's petition to close the criminal proceedings and release the person from criminal liability, the court must find out the fact that the person committed a crime of some gravity and other circumstances that are grounds for such release, which is inconceivable without comprehensive, complete and impartial clarification of all the circumstances of such criminal proceedings with the help of evidence.¹⁰ If the court finds unfounded the petition to release a person from criminal liability, the court by its decision refuses to satisfy it and returns

⁸ S. A. Krushynskiy, *Podannia dokaziv u kryminalnomu sudochynstvi Ukrainy: monohrafiia*, Khmelnytskyi 2017, p. 180.

⁹ Idem, *Problemy podannia dokaziv u stadii pidhotovchoho provadzhennia v sudi pershoi instantsii*, "Slovo natsionalnoi shkoly suddiv" 2015, № 2, p. 115.

¹⁰ V. O. Popeliushko, *Formuvannia kryminalnoi spravy na stadii sudovoho provadzhennia*, "Yurydychnyi chasopys Natsionalnoi akademii vnutrishnikh sprav" 2013, № 1, pp. 46–47.

the petition to the prosecutor for criminal proceedings in the general order (part 4 of article 288 of the CPC of Ukraine).¹¹ A “unfoundedness” means nothing more than improper confirmation of the circumstances set forth in the petition by the relevant evidence.

2. Stage of trial in the court of first instance

A prerequisite for exercising the right of the parties and other participants in the proceedings to represent evidence (objects and documents) is the procedure of disclosing of materials by the parties of the criminal proceedings, which is another novelty of the CPC of Ukraine of 2012. Accordingly, part 12 of article 290 of the CPC of Ukraine provides, if the party to the criminal proceedings does not disclose the materials in accordance with the provisions of this article, the court has no right to admit the information contained in them as evidence.¹² That is, without disclosing the materials to the other party, their submission in the court proceedings loses all meaning, because the court cannot include them in the evidence base.

Analyzing article 290 of the CPC of Ukraine, we can distinguish two components of the procedure for opening materials by the prosecution:

1. Notice of access to pre-trial investigation materials. Thus, recognizing the evidence gathered during the pre-trial investigation as sufficient for drawing up an indictment (or a corresponding petition), the prosecutor or investigator on their behalf are obliged to inform the suspect, their defense counsel, legal representative about the completion of the pre-trial investigation and access to pre-trial investigation materials;

2. Direct provision of an opportunity to get acquainted with the materials of the pre-trial investigation. The prosecutor or investigator on their behalf shall provide access and opportunity to copy or otherwise fix any material evidence or parts thereof, documents or copies, as well as provide access to the premises or place if they are owned or controlled by state, and if the prosecutor intends to use the information contained therein as evidence in court. Also the prosecution is obliged to provide access to any evidence that, alone or in combination with other evidence, can be used to prove the innocence or a lesser degree of guilt of the accused, or to help mitigate a punishment.

A similar procedure is provided for the defense. However, the legislator provided an important guarantee for the defense – the right not to provide for the prosecutor an access to any materials that may be used by them to prove the guilt of the accused in committing a criminal offense. Thus, the defense may deny the prosecutor access to evidence that, alone or in combination

¹¹ Kryminalnyi protsesualnyi kodeks...

¹² Ibidem.

with other evidence, may worsen the situation of the accused. In this case, the defense may postpone the decision to grant or deny the prosecutor access to materials that can be used by the prosecutor to confirm the guilt of the accused in committing a criminal offense, until the review of the materials of the pre-trial investigation.

Assessing the importance of the procedure of disclosing of materials by the parties of criminal proceedings, the progressive nature of such novelty should be noted. The disclosure of materials should be considered as part of the consistent implementation of the principle of adversarial proceedings in criminal procedure of Ukraine, as adversarial proceedings include the right of the parties to acquaint themselves in advance with the evidence to be used by other participants in the proceedings, to be informed of this before the trial.¹³

Given the importance of such information, the legislator provided that the court has no right to admit the information contained in the materials of the proceedings as evidence if the party of the criminal proceedings does not disclose these materials. Thus, the disclosing of the materials by the parties of the criminal proceedings is a reasonable precondition for the further representation of these materials to the court and the admission of the information contained therein as evidence.

3. Stage of appeal proceedings

In accordance with part 1 of article 404 of the CPC of Ukraine, the appellate court reviews the decisions of the court of the first instance within the appeal. That is, the judicial investigation in the appellate proceedings should not completely duplicate the examination of the evidence carried out in the court of the first instance. It is carried out to the extent necessary to verify the legality and validity of the sentence or another decision of the court of the first instance, taking into account the arguments and requirements set forth in the appeal. According to I. Yu. Miroshnikov, the trial in the appellate instance is new and independent, because it is possible to examine new evidence that was not the subject of consideration in the court of the first instance.¹⁴ Indeed, according to part 3 of article 404 of the CPC of Ukraine, the appellate court may examine evidence that was not examined by the court of the first instance, only if the examination of such evidence was requested by the participants of the trial during the trial or if they became known after the adoption of judgment that has been appealed.

That is, there are conditions under which new evidence can be represented to the court of appellate instance: 1) if the participants in the proceedings filed a petition for examination of

¹³ S. A. Krushynskyi, *Podannia dokaziv u kryminalnomu...*, p. 177.

¹⁴ I. Yu. Miroshnykov, *Sudove slidstvo v apeliatsiinii instantsii: monohrafiia*, Kharkiv 2007, p. 119.

such evidence during the trial in the court of the first instance, but it was not satisfied; 2) if they became known after the adoption of judgment that has been appealed. In this case, the person who represents new evidence, when filing a petition to join them to the materials of criminal proceedings, must indicate for the establishment of which circumstances this evidence is submitted. At the same time, participants in criminal proceedings may voluntarily represent new evidence to the appellate court at various stages of the appellate proceedings.

First of all, this is possible at the stage of filing an appeal. In accordance with the requirements of part 2 of article 396 of the CPC of Ukraine in the appeal states, in particular, the list of materials that are attached to the appeal. Therefore, if a party of criminal proceedings appeals against a decision of the court of the first instance, substantiating the requirements set out in the appeal with new evidence, it may add relevant evidence to the appeal. However, if the appeal indicates evidence that was not submitted to the court of the first instance, it shall state the reasons for this.

In the future, the right to represent evidence can be exercised at the stage of opening an appellate hearing, when the judge-rapporteur resolves the stated petitions of the participants of the criminal proceedings. Therefore, if a participant of the proceedings wishes to represent new evidence, he or she must make a corresponding petition to attach this evidence to the materials of the criminal proceedings. Article 405 of the CPC of Ukraine which regulates the procedure for appellate proceedings does not prohibit the representation of evidence at later stages. In view of this, in my opinion, the participants of the proceedings may apply for the attachment of new evidence to the materials of the criminal proceedings directly during the examination of the evidence by the appellate court.

It should be emphasized that the right to represent new evidence is enjoyed not only by persons who have appealed the decision of the court of the first instance, but also by all other participants in criminal proceedings who have the right to appeal. The refusal of a participant of criminal proceedings to exercise the right to appeal indicates only his or her consent with the decision of the court of the first instance. However, such a refusal does not deprive him or her of the opportunity to represent to the appellate court new evidence for confirmation or, conversely, for refutation the arguments presented in the appeal by another person.

4. Stage of cassation proceedings

The CPC of Ukraine of 2012 determined that, unlike criminal proceedings in the court of the first and appellate instances, the court of cassation in examining the correctness of the courts application of substantive and procedural law, as well as their legal assessment is limited in

establishing of the facts of the proceedings. It is not endowed with the right to examine evidence, to establish and recognize proven circumstances that were not established in the court decision that has been appealed, to decide on the reliability of the evidence (part 1 of article 433 of the CPC of Ukraine).¹⁵

From the above it follows an obvious conclusion that the participants of the criminal proceedings do not have the right to represent to the court of cassation new evidence, which were not in the materials of the proceedings. To be more precise, there is no sense at all in the representation of new evidence to the court of cassation, because it is not empowered to examine them. And the factual data, which were not the subject of direct examination in the court, cannot be recognized as evidence (part 2 of article 23 of the CPC of Ukraine) and, accordingly, cannot be the basis of the court decision. As N. R. Bobechko rightly emphasizes, the cassation instance is not able to independently eliminate gaps in the evidence and operates only on the facts that were established by the court of the first or appellate instance. Not having the advantages of direct examination of evidence the court of cassation, if necessary to clarify certain circumstances to be proved, to supplement the subject of evidence, to examine a particular evidence, must overturn the court decision and appoint a new trial in the court of the first or appellate instance.¹⁶

Conclusions

Thus, the freedom to represent evidence in criminal proceedings presupposes the voluntary transfer by the participants of the proceedings of objects and documents belonging to them, which enables them to defend their own interests or the interests of other persons, as well as to create conditions for establishing the truth in criminal proceedings.

However, the freedom to represent evidence in criminal proceedings is not absolute. The legislation of Ukraine in some cases provides for restrictions (prohibitions, conditions) for the exercise of this right. These restrictions are related to the implementation of other principles of criminal proceedings, in particular, the principle of adversarial proceedings and equality of arms, the directness of the examination of evidence, and so on. In some cases, the existence of such restrictions is not indisputable and raises doubts about the validity of court decisions.

¹⁵ Kryminalnyi protsesualnyi kodeks...

¹⁶ N. R. Bobechko, *Dokazuvannia u stadii kasatsiinoho provadzhenia zghidno KPK Ukrainy*, "Mytna sprava" 2013, № 6 (90), part 2, book 1, p. 111.

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Keywords: criminal proceedings, human, freedom, criminal law

Summary

Some problems of ensuring the freedom of evidence representation in criminal proceedings are investigated in article. Emphasis is placed on differences in the representation of evidence at the stages of preparatory proceedings in the court of first instance, trial in the court of first instance, appeal proceedings, cassation proceedings, as well as differences in the representation of evidence by different participants in the proceedings. Emphasis is placed on the restrictions connected with evidence representation in court proceedings which exist in the legislation of Ukraine. The procedure of disclosure of materials by the parties of criminal proceedings as a precondition for further representation of this evidence in court is considered. The imperfections of the legislative regulation of evidentiary activity at the stage of preparatory proceedings in the court of first instance are determined.