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PARTIES OF CRIMINAL PROCEEDINGS AS THE SUBJECTS OF CRIMINAL PROCEDURE PROVING

Автором статті, на підставі проведеного аналізу наукових джерел та положень кримінального процесуального законодавства України, досліджено питання щодо обсягу процесуальних повноважень участі сторін кримінального провадження в процесі доказування, а також визначено проблемні питання їх нормативної регламентації. Запропоновано науково обґрунтовані пропозиції щодо їх вирішення.

Ключові слова: *сторони кримінального провадження, доказування, прокурор, захисник, слідчий.*

Автором статьи, на основании проведенного анализа научных источников и положений уголовного процессуального законодательства Украины, исследованы вопросы объема процессуальных полномочий участия сторон уголовного производства в процессе доказывания, определены проблемные вопросы их нормативной регламентации. Предложено научно обоснованные предложения по их решению.

Ключевые слова: *стороны уголовного производства, доказывания, прокурор, защитник, следователь.*

Criminal procedure evidence which takes place in a statutory procedural form during the pretrial investigation and criminal proceedings is the main content of criminal procedure. Criminal procedure proving is carried out by the authorized entities as well as any other action. The current Criminal Procedure Code of Ukraine [1] (hereinafter – the CPC of Ukraine), compared with the CPC of 1960 [2], has greatly expanded the range of subjects of criminal procedure proving, having given the power to the parties of the criminal proceedings to participate in the process of proving. However, the results of practice analysis of the principles application of the current CPC of Ukraine, including those that involve the parties of criminal proceedings in the criminal procedural proving, indicate a number of problems that make it impossible to properly secure the process of proving in criminal proceedings.

Taking into consideration the relevance of the problem, the following scientists of legal profession studied the issues about the subjects of criminal procedural proving such as Y. Alenin, I. Gloviuk, V. Gmyrko, V. Goncharenko, V. Grynyuk, Y. Groshevіy, E. Kovalenko, M. Myheyenko, V. Nor, M. Pogoretskyi, V. Popelyushko, O. Rybalka, D. Sergeyeva, N. Siza, S. Stahivskiy,

M. Strogovich, L. Udalova, M. Shumilo, O. Yanovska and other specialists.

The aim of the article is to find out the scope of procedural powers of criminal proceeding parties in the proving process and problematic issues of their normative regulation as well as providing scientifically based proposals for their solution.

Investigating the issue of participation of the parties of criminal proceeding in the criminal procedural proving, first of all, we should clarify what is meant by the notion of the subject of proving in criminal proceedings. In our opinion, the definition of the concept such as subjects of proving in criminal proceedings, it is important to establish their essential features, which we consider are the following:

1) they carry certain procedural rights and obligations, defined by the CPC of Ukraine; 2) the presence of an active role in the criminal procedural proving. By the active role of the subject of proving, in our opinion, it should be understood his procedural obligation or right for the participation in the process of proving in criminal proceedings. The presence of such a feature as the active role of the subject of criminal procedure proving, makes it possible to distinguish him from the other participants in criminal proceedings; 3) the existence of procedural interest, depending on the function performed by the subject in criminal proceedings – the prosecution and defense. Procedural interest is a need, expressed in a particular participant's behavior, to obtain a proper result as a summary of criminal procedural activity. So, the procedural interest of the subject of proving is to obtain evidence, to check and evaluate the obtained evidence and use this evidence to justify judicial decisions in criminal proceedings.

As it follows from the mentioned above, we believe that the subjects of proving in criminal proceedings are persons, who in the manner prescribed by the CPC of Ukraine, endowed with the responsibilities of the implementation of the process of proving in criminal proceedings (taking evidence, checking and evaluating the obtained evidence and using the evidence for justifying procedural decisions), or have the right to take active part in the process of proving, realizing their procedural interests.

According to the principles of art. 22 of CPC of Ukraine criminal proceeding is based on competition, which involves self assertion by the prosecution and the defense of their legal positions, rights, freedoms and legitimate interests by means defined in CPC of Ukraine (p. 1). Parties of criminal proceedings have equal rights to the collection and submission to the court things, documents and other evidence, petitions, complaints, as well as to the implementation of other procedural rights defined by the CPC of Ukraine.

Thus, following the competitive principles of criminal proceedings, as well as the author understanding of the concept of subjects of proving in criminal proceedings we can conclude that the process of proving in criminal proceedings is carried out by the prosecution and the defense.

The subjects of proving from the side of prosecution is the investigator, the head of pretrial investigation, the prosecutor, and in some cases defined by the CPC of Ukraine, the victim, his representative and legal representative (p. 19, p. 1, art. 3 of CPC of Ukraine).

According to p. 2, art. 93 of Code of Ukraine, the prosecution collects evidence by the investigation (search) operations and covert investigative (detective) actions, demanding and receiving belongings, documents, information, expert opinions, findings of audits and inspections acts from state agencies, local governments, enterprises, institutions and organizations, officials and individuals. The prosecution also conducts other proceedings defined by the CPC of Ukraine.

If necessary, the prosecutor (p. 4 p. 2, art. 36 of CPC of Ukraine), investigator (p. 3 p. 2, art. 40 of CPC of Ukraine) have the right to authorize the investigation (search) operations and covert investigative (detective) actions to relevant operational departments of internal affairs, security, National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigation, the bodies that monitor compliance with tax and customs legislation, the State

Penitentiary Service of Ukraine, the State Border Guard Service of Ukraine. Taking into account the above mentioned information, in our opinion, we can make a mistaken conclusion that the staff of the operational units also are the subjects of proving from the prosecution. To our mind, the employees of operational units should not be attributed to the subjects of proving because they, according to p. 2, art. 41 of the CPC of Ukraine during the realization of investigator's and prosecutor's orders, use the investigator powers and have no right to conduct any proceedings in the criminal proceedings on their own initiative or handle petitions to the investigating judge or prosecutor, which in its turn, will prevent them from pursuing the process of proving in criminal proceedings (obtaining evidence, inspection and evaluation of the obtained evidence and the use of this evidence to justify judicial decisions).

The prosecution, being the subject of proving in criminal proceedings, according to p. 2, art. 93 of CPC of Ukraine has the right to obtain evidence through other proceedings defined by CPC of Ukraine. The proceedings are the following:

1) the application of some measures to ensure criminal proceeding: the call of the person, if there are reasonable grounds to believe that he can give testimonies relevant to the criminal proceeding (p. 2, art. 133 of CPC of Ukraine); the implementation of decisions of the investigating judge to grant temporary access to objects and documents, the prosecution is authorized to exclude objects and documents (p. 1, art. 159; p. 7, art. 163 of CPC of Ukraine); in the decisions of the investigating judge for permission to conduct a search (p. 1, art. 166 of CPC of Ukraine); in the temporary seizure of property of the suspect during the search, examination, detention (art. 168 of CPC of Ukraine); property arrest of the suspect, accused (art. 170 of CPC of Ukraine);

2) international cooperation in criminal proceedings (p. 4. art. 93 of CPC of Ukraine, section IX of CPC of Ukraine).

It should be noted that according to p. 1, art. 92 of CPC of Ukraine the burden of proving of circumstances defined by p. 1, art. 91 of CPC of Ukraine, is relied only on the investigator, prosecutor and in a set of cases determined by CPC of Ukraine – on the victim. Simultaneously, as we have already mentioned, the subjects of proving from the prosecution is the investigator, the head of pretrial investigation, the prosecutor, and in some cases defined by the CPC of Ukraine, the victim, his representative and legal representative. Taking into consideration the mentioned above information, we consider it appropriate to bring the principles of p. 1, art. 92 of CPC of Ukraine in accordance with the principles of p. 19 p. 1, art. 3 of CPC of Ukraine.

It is necessary to mention that although Chapter 4 of CPC of Ukraine does not provide a principle according to which, the prosecution has a duty to establish the circumstances justifying the suspect or the accused, at the same time, p. 2, art. 9 of CPC of Ukraine stipulates that the prosecutor, the head of pretrial investigation, the investigator must thoroughly, fully and impartially investigate the circumstances of the criminal proceedings, to identify both – the circumstances that expose and those that justify the suspect, the accused and as well as the circumstances that mitigate or aggravate his sentence, give them proper legal assessment and ensure the adoption of legal and impartial judicial decisions. However, after receiving evidence during the investigation (search) actions that may indicate the innocence of a person in a criminal offense, the investigator, the prosecutor must conduct the proper investigation in full, attach composed procedural documents to the preliminary investigation materials and provide them to the court in case of indictment, request about the imposition of compulsory measures of medical or educational nature or petition of exemption from criminal liability (p. 5, art. 223 of CPC of Ukraine). Thus, we can conclude that the prosecution's responsibility is not only to get incriminating evidence during the preliminary investigation of the criminal proceedings, but also to get the exculpatory evidence.

In some cases the victim acts as the subject of proving from the prosecution.

Thus, according to the art. 340 of CPC of Ukraine, the victim, who agreed to support the prosecution in court, has all the rights of the prosecution during the trial. In this case, the criminal proceeding under the relevant prosecution takes the form of private and is carried out by the procedures of private prosecution. Implementing his powers defined by art. 56 of CPC of Ukraine, the victim has the right to present evidence to the investigator, prosecutor, investigating judge, the court of law; to submit evidence in support of his application; to participate in investigation (search) and other proceedings, during which to ask questions, give comments and objections to the order of actions that are recorded in the minutes, as well as get acquainted with the records of investigative (detective) and other proceedings made by his participation. In some cases, being the subject of proving in a criminal proceeding, the victim interests may be represented by his representative (art. 58 of CPC of Ukraine) and legal representative (art. 59 of CPC of Ukraine).

As we have already noted, the burden of proving of circumstances provided by art. 91 of CPC of Ukraine, in some cases is relied on the victim. Analyzing the status of the victim, including the proceedings in the form of a private prosecution, by the assertion of I. Gloviuk, the victim can never be the subject obliged with the burden of proving of circumstances provided by art. 91 of CPC of Ukraine. Thus, in the pre-trial investigation, including the proceedings in the form of private prosecution, this duty is assigned to the investigator, the head of a preliminary investigation, the prosecutor (p. 2, art. 9 of CPC of Ukraine) [3, p. 182].

It should be mentioned that p. 3 p. 1, art. 56 of CPC of Ukraine defines the principle according to which the victim has the right to present evidence to the investigator, prosecutor, investigating judge, the court of law, through demanding and receiving the copies of documents, data, expert opinions, the findings of audits and inspections acts (p. 3, art. 93 of CPC of Ukraine) from public authorities, local governments, organizations, individuals and officials. So, in these cases, the victim will not possess evidence but relevant documents or things. A status of evidence will be directly provided by the investigator or the prosecutor, after the victim appeal to them with a request for accession of available things or documents to the criminal proceeding materials. Thus, the burden of proving of circumstances provided in chapter 91 of CPC of Ukraine relies only on the investigator, the head of pretrial investigat on and the prosecutor.

The aggrieved party will take only the burden of proving of affiliation and admissibility of evidence, data on the size of the procedural costs and circumstances that characterize the accused (p. 2, art. 92 of CPC of Ukraine).

In the theory of proving of the Soviet era, in our opinion, the emphasis was made on that fact that the evidence is the main content of criminal procedure only in pretrial investigation bodies, the prosecutor and the court [4, p. 6]. However, the current CPC of Ukraine, which is based on the principles of competition, optionality and equality, has greatly expanded the range of persons who are authorized to carry out the proving in criminal proceedings, having granted powers to obtain evidence for the defense.

From the defense the subjects of proving are the suspect, the accused, the convicted, the acquitted, the person concerning whom the use of coercive measures of medical or educational nature is assumed or a question about their use was discussed, their defenders and legal representatives (p. 19 p. 1, art. 3 of CPC of Ukraine).

According to p. 3. art. 93 the defense collects evidence by requesting and receiving things, copies of documents, data, expert opinions, findings of audits, inspections acts from state agencies, local governments, enterprises, institutions, organizations, officials and individuals; initiation of the investigation (search) actions, covert investigation (detective) actions and other proceedings, as well as making other activities that can provide adequate evidence representation in the court of law.

It should be noted that the implementation of the right of the defense for independent collection of evidence in criminal proceedings, provided by p. 3. art. 93 of CPC of Ukraine, raises a number of issues in practice. Thus, the legislator, having defined the ways of the collection of evidence by the defense, has not provided the appropriate procedural form of their getting and fixing (besides expert opinion, defined in art. 243 of CPC of Ukraine). We should mention that according to p. 1, art. 86 of CPC of Ukraine the evidence is considered admissible if it is received in the manner prescribed by the CPC of Ukraine. Thus, we can conclude that requested and received evidence from state agencies, local governments, enterprises, institutions, organizations, officials and individuals would be recognized in criminal proceedings as inadmissible because they were received not in the manner provided by the CPC of Ukraine.

In our opinion, the existence of such a gap in the criminal procedural law is unacceptable for competitive purposes of the criminal justice system and practice itself. In our opinion, D. Sergeeva's suggestions concerning amendments to chapter 4 of the CPC of Ukraine in this context is relevant. Thus, according to the scientist, it is necessary to supplement art. 86 of CPC of Ukraine «Admissibility of evidence» p. 2 as follows: «If the procedure for obtaining proof is not set by this Code, then the evidence must be confirmed by a set of other admissible evidence.» Accordingly, p. 2, art. 86 of CPC of Ukraine in current edition becomes p. 3. art. 86 of CPC of Ukraine [5, p. 705].

Adoption of the new CPC of Ukraine, not only extended the rights of a defender in evidence collecting by requesting and receiving things, copies of documents, data, expert opinions, audits conclusions, acts of inspections from state agencies, local governments, enterprises, institutions, organizations, officials and individuals; initiation of the investigation (search) actions, covert investigation (detective) actions and other proceedings, as well as the other activities that can provide adequate representation of admissible evidence to the court of law (p. 1, art. 93 of CPC of Ukraine), in particular – the application of specific measures of criminal providing of the criminal proceedings.

According to art. 160 of CPC of Ukraine the defender, being the subject of proving shall has the right to handle request to the investigating judge or the court of law during the preliminary investigation about the ensuring of application of criminal proceedings – temporary access to objects and documents that gives him the opportunity to get acquainted with them, make copies and, in the case of a making a decision by the investigating judge, court, delete them (seize them) (art. 159 of CPC of Ukraine), i.e. to receive evidence during the preliminary investigation that could be used in the court.

Considering such a request for assessment the needs of a preliminary investigation, the investigating judge must take into account the possibility of getting things and documents that can be used at trial for establishing the circumstances in the criminal proceedings without applying the measures of criminal proceedings ensuring (p. 4. art. 132 of CPC of Ukraine). That is, the defender may apply to the investigating judge or court of law with an appropriate request if: a) information contained in the documents and things can be used as evidence; b) if you can not prove by other means the circumstances that are intended to be proved with the help of these things and documents; c) there is a real threat of alteration or destruction of documents and things, and d) if they can not be obtained by other means (by lawyer request or otherwise).

In addition, the defender in his petition should prove sufficient reasons to consider that things and documents: 1) are or may be in the possession of the individual or legal entity; 2) are alone or in combination with other things and documents of the criminal proceedings in respect of which the petition is filed, are essential to establish important circumstances in criminal proceedings; 3) do not constitute either exclude things and documents containing secrets protected by law (p. 5, art. 163 of CPC of Ukraine).

According to p. 7, art. 163 of CPC of Ukraine the investigating judge in pre-trial investigation has the right to enable defender to remove belongings and documents in the case if: 1) the defender will prove sufficient reasons to believe that without such exclusion there is a real threat of alteration or destruction of documents or things, or 2) such with drawal is necessary for achieving the purpose of accessing objects and documents.

Defender, as a party of criminal proceeding, in the course of the preliminary investigation the investigating judge can be given temporary access to the objects and documents that contain secrets protected by law, if in addition to the above circumstances, he proves the use of information as evidence contained in these things and documents, and the impossibility to prove circumstances by other ways that are intended to be proved through these things and documents (p. 6 art. 163 of CPC of Ukraine).

It is necessary to mention that p. 6. art. 163 of CPC of Ukraine states that access to individual objects and documents containing secrets protected by law, is carried out in the manner prescribed by law. Thus, access to objects and documents containing information which constitutes a state secret, can not be given to the person who does not have the admission in accordance with law.

A similar principle is in p. 3 p. 1, art. 20 of the Law of Ukraine «On Advocacy» according to which, the lawyer in the course of advocacy has the right to get acquainted with documents and materials necessary for advocacy at enterprises, institutions and organizations besides of those ones that contain information with limited access [6] to which the law include confidential, service and secret information (art. 21 of the Law of Ukraine «On information») [7].

According to M. Pogoretskyi statements, registration for admission to state secrets for the lawyer who is a counsel in criminal proceedings is problematic, speaking even about the timing of its setting. The solution needs the procedure to be improved by simplifying getting the admission of a defense counsel to state secrets, as well as procedural form of temporary access to his belongings and documents [8, p. 482].

Another problematic issue, in our opinion, is the participation of the defense in the conduct of the investigation (search) actions. It should be noted that unlike the prosecution, which is endowed with procedural rights on the investigation (search) actions (p. 2, art. 93 of CPC of Ukraine), the defense is authorized only to initiate the investigation (search) actions by giving appropriate applications to the investigator, prosecutor (p. 3, art. 93 of CPC of Ukraine). In this case, the investigator, the prosecutor may deny the defense's motion on the need for the investigation (search) actions because of their specificity (p. 6. art. 223 of CPC of Ukraine). However, the legislator does not explain what is meant by the concept of specificity of inquiry (investigation) action. Due to this, in practice there are cases when investigators, prosecutors intentionally abuse that principle, and refuse the defense to conduct an appropriate investigation (search) action, which in its turn, makes it impossible for the defense to obtain relevant evidence that can refute the suspicion or accusation, commute or exclude criminal liability of the suspect, accused or this is a ground for terminating the criminal proceeding.

The core difference between a lawyer in the process of proving is that on a certain participant of a criminal proceeding the CPC of Ukraine does not impose the burden of proving. In our opinion, taking into consideration the principles of competition and freedom in presenting their evidence to the court and their prove of credibility in a court of law in criminal proceedings, the burden of proving of circumstances should be relied on the defense counsel which refute the suspicion or accusation, mitigate or eliminate criminal responsibility of the suspect, accused or they are grounds for terminating the criminal proceedings. In support of the above mentioned thesis, art. 47 of CPC of Ukraine determines that the defender must use the protection measures provided by the CPC and other laws of Ukraine in order to

ensure the rights, freedoms and legitimate interests of the suspect, accused and clarify the circumstances that refute the suspicion or accusation, soften or exclude criminal responsibility of the suspect, the accused.

Summarizing everything, we can conclude that certain principles of the current CPC of Ukraine, which are directly related to the institute of proving in criminal proceedings, require improvements. As it follows from the mentioned above, we consider appropriate to complement art. 92 of CPC of Ukraine with the following content: 1. The obligation of proving the circumstances provided by chapter 91 of the CPC rests with the investigator, the head of the pretrial investigation and the prosecutor. 2. The burden of proving of circumstances which refute the suspicion or accusation, mitigate punishment or exclude criminal responsibility of the suspect, accused or they are grounds for terminating the criminal proceedings rests on the prosecution and defense counsel. Accordingly, p. 2, art. 92 of CPC of Ukraine in current edition becomes p. 3. art. 92 of CPC of Ukraine. P. 1, art. 93 of CPC of Ukraine should be supplemented as follows: «Collection of evidence is carried out by the parties of criminal proceedings.»

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Starenkyi O. Parties of criminal proceedings as the subjects of criminal procedure proving.

The author of the article, based on the analysis of scientific sources and the criminal procedure law of Ukraine, studied the issue of the amount of procedural powers of parties in the criminal proceedings of evidence and identified areas of normative regulation. A science-based proposals for their solution. Determined that the subject of proof in criminal proceedings are persons in the manner prescribed by Code of Ukraine, endowed with the responsibility for the implementation of the process of proof in criminal proceedings (taking evidence, checking and otsinyky obtained evidence and use this evidence to justify judicial decisions) or are eligible to participate actively in the process of proof, realizing their procedural interests.

Keywords: *party criminal proceedings, proof, prosecutor, defender, investigator.*

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