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THEORETICAL AND LEGAL FOUNDATIONS OF INDEPENDENT EVIDENCE GATHERING BY THE DEFENCE IN CRIMINAL PROCEEDINGS

Problem Statement. In the context of the dynamic development of criminal procedural legislation and the strengthening of human rights guarantees, the independent gathering of evidence by the defense acquires crucial importance as an integral element of the adversarial principle and in ensuring equality of arms in criminal proceedings. Despite this right being enshrined at the legislative level and recognized in international standards, Ukrainian law enforcement practice faces a series of systemic challenges and unresolved issues that hinder its effective implementation.

The existing legal framework, while granting the defense certain powers, exhibits fragmentation and gaps in detailing the mechanisms for gathering, verifying, and using evidence obtained outside the scope of official pre-trial investigations. Specifically, the lack of clear procedures for the defense to interact with state bodies, economic entities, and individuals to obtain necessary information and documents often leads to artificial restrictions on access to potentially vital defense data. This creates an imbalance in the procedural capabilities of the parties, as the prosecution possesses a wide arsenal of tools for compulsory evidence gathering, whereas the defense largely depends on the goodwill of other entities.

Moreover, the issue of admissibility and relevance of evidence collected by the defense becomes particularly acute in the absence of uniform judicial practice and criteria for its evaluation. This creates legal uncertainty and the risk of the court unjustifiably rejecting important defense evidence merely due to procedural shortcomings or subjective interpretation of norms. Thus, a paradoxical situation arises where the right to independent evidence gathering exists de jure, but its effectiveness de facto remains questionable.

Insufficient attention to the theoretical conceptualization of parity in evidence gathering and the lack of a comprehensive analysis of international experience in this area also complicate the development of effective reforms. This necessitates an urgent need for in-depth scientific research aimed at identifying the roots of existing problems, developing practical recommendations, and substantiating legislative initiatives that would ensure a real, and not merely declarative, right for the defense to independently gather evidence in criminal proceedings. Without resolving these issues, there is a risk of nullifying the adversarial principle and limiting an individual's fundamental right to effective defense against accusations.

Analysis of Recent Research and Publications. In contemporary scholarly discourse, the issue of independent evidence gathering by the defense in criminal proceedings is a subject of constant and intense research. Recent years have seen a significant increase in publications reflecting both theoretical developments and practical aspects of realizing this fundamental right. A substantial portion of scholars focus on the conceptual foundations of adversarialism and equality

of arms, viewing independent evidence gathering as a key mechanism to neutralize the asymmetry in procedural capabilities between the prosecution and the defense. In this context, the doctrine of equality of arms, which is fundamental to a fair trial, particularly in light of the practice of the European Court of Human Rights, is actively discussed. Researchers emphasize that an effective defense is impossible without the active role of the defense counsel in forming the evidentiary basis that counters the prosecution's position.

At the same time, despite significant progress in research, many aspects remain debatable and require further scholarly substantiation. These include: the necessity for clear procedures for documenting evidence collected by the defense to ensure its reliability and admissibility; the development of mechanisms for accountability for obstructing defense counsel in evidence gathering; further study of the psychological and ethical aspects of defense counsel's interaction with individuals providing information.

Thus, the analysis of recent research indicates a deep interest in the issue of independent evidence gathering by the defense. However, despite significant achievements, there remains a need for comprehensive, interdisciplinary research that will allow for the development of effective recommendations to improve both legislation and law enforcement practice. These works include, but are not limited to, those by Y.P. Alenina, O.R. Balalatska, Yu.M. Hroshevoy, I.V. Hloviuk, Ye.H. Kovalenko, O.P. Kuchynska, L.M. Loboyko, V.P. Shybilko, and others.

Aim of the Article. The aim of this article is a comprehensive scientific analysis and systematization of the theoretical and legal foundations of independent evidence gathering by the defense in criminal proceedings, as well as the development of concrete recommendations based on these foundations for improving the current legislation and law enforcement practices in Ukraine.

Presentation of the Main Material. The implementation of the adversarial principle in criminal proceedings is a key condition for ensuring the right to a fair trial and the effective defense of an individual accused of a criminal offense. One of the most important elements of this principle is providing the defense with a real opportunity to gather, present, and examine evidence on par with state prosecution bodies. However, in practice, there is an observed asymmetry in the procedural capabilities of the parties, which calls into question not only equality in access to evidentiary information but also the overall effectiveness of the defense function.

The issue of independent evidence gathering by defense counsel gains particular relevance in the context of modern law enforcement practice, where a significant portion of the evidentiary mass is formed by the prosecution. The defense's limited tools for initiating procedural actions through an investigating judge, as well as the absence of a clear procedural mechanism for independently collecting evidence, leads to significant difficulties in practically ensuring the principle of equality of arms. Furthermore, domestic legislation lacks sufficient detail regarding the legal status of the defense counsel as a subject of proof, which results in ambiguous interpretations of their powers.

In this context, particular attention should be paid to the analysis of the current procedural legislation of Ukraine regarding the powers of the defence to initiate and independently carry out actions related to evidence collection. Specifically, Part 3 of Article 93 of the Criminal Procedure Code of Ukraine [1] provides the defence with the ability to request the conduct of certain procedural actions through an investigating judge. However, this model does not ensure the actual autonomy of the defence in gathering evidentiary information. The absence of adequate guarantees for access to sources of evidence, as well as the lack of legislative regulation of methods for documenting the results of such activities, significantly limits the possibility of fully exercising the right to defence. The issue of judicial evaluation of evidence collected by the defence also requires in-depth examination, particularly in light of the criteria of admissibility, reliability, relevance, and sufficiency. Case law demon-

strates a tendency toward a formalistic approach, whereby evidence obtained by the defence without the involvement of investigative authorities is often deemed to be procedurally deficient. This results in legal uncertainty and hinders the development of a full-fledged adversarial model of criminal proceedings in which both parties have equal opportunities to build their evidentiary positions.

All of the above indicates the necessity of formulating a new, more balanced concept of proof in criminal proceedings – one that incorporates both international standards and the needs of national law enforcement practice. In particular, it is appropriate to consider the legislative recognition of the defence counsel's right to independently collect evidence, provided that such activities comply with specific guarantees of authenticity, respect for the rights of others, and adherence to ethical and procedural safeguards.

Fundamental principles of criminal justice, such as adversariality, equality of arms, and the presumption of innocence, constitute the theoretical foundation of the right of the defence to gather evidence. The principle of adversariality and equality of the parties is enshrined in the Criminal Procedure Code of Ukraine, particularly in Article 22, and provides for the independent advocacy by each party of its legal position [1]. This principle is vital for ensuring fairness and democracy within the judicial system, as it facilitates the establishment of truth and the adoption of well-founded decisions based on the arguments presented by all parties [2].

T.V. Lukashkina expresses the view that independent evidence gathering by the defence may also include filing a motion with the investigating judge requesting the interrogation of a witness or a victim in a court hearing already at the stage of pre-trial investigation [3, p. 263].

According to D.B. Serhiieva, the provisions of the Criminal Procedure Code of Ukraine that grant the defence the right to independently gather evidence – particularly through obtaining temporary access to items and documents or engaging an expert on a contractual basis-serve as a tool for acquiring evidentiary information within a procedurally regulated framework [4, p. 703]. While this position rightly highlights the legal instruments formally available to the defence, it may risk overstating their practical efficacy. In reality, the exercise of these rights is often limited by procedural barriers, delayed judicial responses, or the reluctance of third parties to cooperate without formal compulsion. Moreover, the need to operate strictly within the procedural framework established for investigative authorities places the defence at a structural disadvantage compared to the prosecution, which possesses broader investigatory powers and institutional resources. In our view, although these mechanisms represent an important legal foundation for defence-led evidence gathering, their effectiveness depends not only on the letter of the law but also on its practical implementation. Therefore, we argue that true equality of arms requires not just declarative procedural rights, but also the removal of structural and institutional constraints that hinder the defence's ability to realise them in practice.

T.M. Miroshnychenko takes a critical stance regarding the empowerment of the defence to gather evidence, asserting that such activity cannot be equated with evidence collection by the prosecution. She argues that the prosecuting authority not only discovers, seizes, records, and stores factual data, but also carries out its procedural formalisation, legal evaluation, and incorporation into the case file. In contrast, according to her position, the defence and the victim are not vested with the legal authority to make procedural decisions on the legal status of the collected information. Therefore, from her perspective, no evidence gathering in the legal sense is conducted by the defence [5, pp. 135–136]. While this viewpoint reflects a traditional and formalistic understanding of evidentiary powers, it arguably underestimates the evolving role of the defence in adversarial proceedings. The essence of adversarial justice lies precisely in enabling each party to independently develop and substantiate their

legal position. The absence of procedural powers to officially "recognise" evidence should not invalidate the defence's role in discovering, documenting, and presenting information relevant to the case. Indeed, modern comparative practice acknowledges that evidence obtained by the defence – if verified, reliable, and submitted in accordance with procedural safeguards – may possess full evidentiary value and be duly assessed by the court. In our view, the assertion that only the prosecution performs "legal" evidence gathering reinforces a hierarchical and accusatory bias inconsistent with the principles of equality of arms and fair trial. The defence may not have the same coercive tools, but this does not preclude it from engaging in lawful and meaningful evidence-building. Therefore, the legal doctrine should recognise the functional equivalence of defence-collected materials when they meet criteria of admissibility, relevance, and credibility.

As D.V. Davydova rightly points out, the modern model of criminal procedure in Ukraine entails not only the formal expansion of the defence's powers to initiate and collect evidence but also fundamentally transforms the logic of procedural balance, wherein the court – acting as an impartial arbiter – assumes a central role in the evaluation of evidence [6, p. 55]. This observation underscores a pivotal shift from an investigative model dominated by prosecutorial discretion toward a more balanced adversarial system, where the legitimacy and value of evidence are determined not by its source but by its compliance with procedural standards and substantive credibility. In such a system, the emphasis moves from the monopoly of state investigative bodies toward the principle of procedural parity, allowing the defence to contribute meaningfully to the formation of the evidentiary base. In our view, this approach should be further reinforced in both doctrine and practice, as it strengthens judicial impartiality and protects the accused from potential abuses of investigatory power. Recognising the court as the primary evaluator of evidence – regardless of which party collected it – enhances the integrity of the criminal process and promotes adherence to the principles of fairness and the rule of law.

Despite the valuable contributions of certain scholars to the study of evidence in criminal proceedings, their approaches predominantly reflect a traditional conception of the state's dominant role in the formation of the evidentiary base. Specifically, the reduction of the defence's activity to merely initiating procedural actions through the investigating judge – rather than engaging in autonomous evidence gathering or the denial of the legal nature of defence-obtained materials due to the absence of official procedural authority, exemplifies a formalistic and legalistic paradigm. In our view, such interpretations require doctrinal reconsideration. The modern adversarial model of criminal justice is grounded in the principle of procedural equality, which necessitates recognition of the defence as a full-fledged evidentiary actor. The defence's evidentiary activity should not depend on requests to state authorities for permission, but rather on professional autonomy and the effective use of legal and factual tools available in a democratic justice system.

Importantly, the evidentiary value of information should not derive from the status of the party that obtained it, but from its compliance with the criteria of admissibility, relevance, credibility, and sufficiency as evaluated by an impartial court. In this context, it is essential to establish a normative framework that affirms the procedural standing of the defence counsel as an active and independent participant in the evidentiary process.

It should be emphasized that the right to defence, within the context of the 1950 European Convention on Human Rights [7], constitutes an integral part of the right to a fair trial. Subparagraph (c) of paragraph 3 of Article 6 of the Convention states that everyone charged with a criminal offence has the right to defend themselves in person and/or through legal assistance of their own choosing. This right can be meaningfully exercised only if there is

an effective mechanism in place to ensure the proper functioning of all necessary components. The right to defence encompasses, among other things, the freedom to choose legal counsel, timely access to legal aid, the effectiveness of representation, proper notification of the right to legal assistance, restrictions on waiving legal counsel, attorney-client privilege, and the ability to communicate privately with one's lawyer [8, pp. 9–11]. Adherence to these guarantees is critically important for ensuring fair trial standards and safeguarding the rights of the accused. The existence of an effective legal defence mechanism helps to prevent abuses by law enforcement and judicial authorities and ensures equality of arms between the parties. The right to defence covers multiple dimensions, including access to a lawyer, equality of procedural rights, and guarantees for a fair adjudicative process. One of its key components is access to professional legal assistance. In many countries, including Ukraine, a system of free legal aid exists for those unable to afford private counsel. However, in practice, this system frequently encounters financial and organizational difficulties, which diminish its effectiveness. A shortage of qualified defence attorneys, delays in legal appointments, and limited access to consultations pose substantial obstacles to the realisation of the right to defence [9].

Failure to acknowledge this trend within procedural theory and practice perpetuates an imbalance between the parties, in direct contradiction to both the Constitution of Ukraine and international standards of fair trial. Moreover, it creates conditions for procedural discrimination against the defence, significantly limiting its ability to influence the outcome of the case through active evidentiary engagement.

Accordingly, the issue lies not only in expanding the formal procedural rights of the defence but also in rethinking the very concept of proof as a comprehensive process in which each party enjoys equal opportunities to construct, submit, and substantiate evidence. The legislature must recognise that the defence's role is not auxiliary but equal in the pursuit of truth, including the capacity to gather evidence independently of state prosecutorial institutions. Equally important is the creation of institutional and technical conditions to realise this right such as access to public registers, the ability to commission independent expert assessments, the use of OSINT technologies, and judicial safeguards for defence-led initiatives. Only under these conditions can the adversarial model of criminal justice function not merely as a declarative framework but as a living mechanism for the protection of individual rights.

Conclusions. This study confirms that the right of the defence to independently gather evidence is a fundamental component of the adversarial model of criminal justice and a necessary condition for ensuring fairness, equality of arms, and the effective protection of human rights in criminal proceedings. While the Criminal Procedure Code of Ukraine provides formal mechanisms for the defence to initiate procedural actions, it does not ensure sufficient autonomy or practical effectiveness in collecting evidence independently. The research highlights a significant discrepancy between the declarative procedural rights of the defence and their real-world implementation. The current legal framework imposes structural limitations that prevent the defence from functioning as a fully empowered evidentiary actor. These constraints are compounded by ambiguous legislation, institutional dependency on state authorities, and limited access to practical tools of evidence gathering.

Doctrinal positions that downplay the evidentiary role of the defence by equating its function to passive participation or excluding it from legal qualification of materials fail to reflect modern standards of adversarial justice. Such views contradict the European Convention on Human Rights, comparative jurisprudence, and the principles of fairness and procedural parity. In practice, evidence obtained by the defence if collected lawfully, verified, and submitted with due procedural safeguards should be treated with equal probative value to that of the prosecution.

The role of the court as an impartial evaluator must be further emphasized. The evidentiary process should not be monopolized by the prosecution; rather, it must be a balanced system in which both parties are equally capable of influencing the outcome through their own initiative, argumentation, and proof. Therefore, the reform of the Ukrainian criminal procedure system should be directed toward: legislatively affirming the defence counsel's status as an autonomous evidentiary subject; expanding the practical tools for defence-led investigations (including digital methods, open-source intelligence (OSINT), and independent expert assessments); ensuring access to institutional and informational infrastructure, including public registries and expert databases; safeguarding the admissibility and credibility of defence-collected evidence in judicial practice. Only through such a transformation can the adversarial model become a fully functioning mechanism of justice one that guarantees the real, not merely formal, equality of parties and upholds the right to defence in accordance with European and constitutional standards.

Summary

In contemporary criminal proceedings, the defense's role in ensuring a fair trial is crucial. One key aspect of effective defense is the independent gathering of evidence, which helps balance the procedural capabilities of the prosecution and the defense. This article provides a comprehensive analysis of the theoretical and legal foundations of such evidence gathering, highlighting its significance, mechanisms, and the challenges encountered in practical implementation.

The research begins by examining the concepts underlying the right to defense, particularly the principles of adversarialism, equality of arms, and the presumption of innocence. It analyzes the evolution of perspectives on the defense attorney's role in criminal proceedings, from a passive observer to an active participant endowed with broad powers. Special attention is given to the concept of parity in evidence gathering, which entails providing the defense with tools commensurate with those available to the prosecution, ensuring the completeness and objectivity of the investigation into the case's circumstances.

The legal regulation of independent evidence gathering by the defense is central to this article. A detailed analysis is conducted on national legislative norms that enshrine the defense attorney's rights to gather and present evidence, specifically through interviewing individuals, requesting documents, conducting their own investigations, and engaging specialists. The forms and methods of evidence gathering available to the defense are identified and systematized, taking into account their admissibility and relevance from the perspective of criminal procedural law.

Significant attention is paid to the problematic aspects of exercising the right to independent evidence gathering. Issues related to limitations on access to information, the difficulty of obtaining data from state bodies and private individuals, and the uncertainty of the legal status of certain types of information collected by the defense are discussed. The article analyzes conflicts of norms that may arise when the defense's interests clash with those of other participants in the process, particularly concerning the non-disclosure of investigative secrets or private life. It also explores the evaluation of evidence collected by the defense by the court and pre-trial investigation bodies, as well as the mechanisms for their legitimization and use in judicial proceedings.

Key words: criminal proceedings, defense side, evidence gathering, theoretical foundations, legal bases, adversarial principle, equality of arms, right to defense, admissibility of evidence, procedural powers, implementation challenges, comparative legal analysis, legislative improvement, criminal procedural law.

Андрєєв І.П. Теоретико-правові засади самостійного збирання доказів стороною захисту у кримінальному провадженні

Анотація

У сучасному кримінальному процесі роль сторони захисту в забезпеченні справедливого судового розгляду є визначальною. Одним із ключових аспектів ефективного здійснення захисту є самостійне збирання доказів, що дозволяє зрівноважити процесуальні можливості сторін обвинувачення та захисту. Ця стаття присвячена комплексному аналізу теоретичних і правових засад такого збирання доказів, висвітлюючи його значення, механізми та проблеми, що виникають у практичній реалізації.

Дослідження починається з розгляду концепцій, що лежать в основі права на захист, зокрема принципів змагальності, рівності сторін та презумпції невинуватості. Аналізується еволюція поглядів на роль захисника в кримінальному провадженні, від пасивного спостерігача до активного учасника, наділеного широкими повноваженнями. Особлива увага приділяється концепції паритетного збирання доказів, яка передбачає надання стороні захисту інструментів, що є співмірними з тими, що доступні стороні обвинувачення, для забезпечення повноти та об'єктивності дослідження обставин справи.

Центральне місце в статті займає правова регламентація самостійного збирання доказів стороною захисту. Проводиться детальний аналіз норм національного законодавства, які закріплюють права захисника на збирання та подання доказів, зокрема шляхом опитування осіб, витребування документів, проведення власного розслідування та залучення спеціалістів. Виокремлюються та систематизуються форми та методи збирання доказів, доступні стороні захисту, з урахуванням їх допустимості та належності з точки зору кримінального процесуального права.

Значна увага приділяється проблемним аспектам реалізації права на самостійне збирання доказів. Розглядаються питання, пов'язані з обмеженнями доступу до інформації, складністю отримання даних від державних органів та приватних осіб, а також невизначеністю правового статусу деяких видів інформації, зібраної захистом. Аналізуються колізії норм, що можуть виникати при зіткненні інтересів захисту та інших учасників процесу, зокрема щодо нерозголошення таємниці слідства або приватного життя. Досліджуються питання оцінки доказів, зібраних стороною захисту, судом та органами досудового розслідування, а також механізми їх легітимізації та використання в судовому провадженні.

Ключові слова: кримінальне провадження, сторона захисту, збирання доказів, теоретичні засади, правові основи, принцип змагальності, рівність сторін, право на захист, допустимість доказів, процесуальні повноваження, проблеми реалізації, порівняльно-правовий аналіз, вдосконалення законодавства, кримінально-процесуальне право.

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