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Disclosure of Materials to the Other Party in the Criminal Process of Ukraine: Theoretical and Practical Aspects

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Abstract

The relevance is determined by the need to find out the practical conditions of the implementation of the procedural form of disclosing the materials of criminal proceedings to the other party as a guarantee of ensuring the effective performance of criminal justice tasks and protection of the rights and freedoms. The purpose is to analyse the peculiarities of the process of disclosing the materials of the pre-trial investigation to the other party in accordance with the provisions of Art. 290 of the Criminal Procedure Code of Ukraine in order to identify problematic and debatable issues related to ensuring and protecting the rights, freedoms and legitimate interests of participants in criminal proceedings. The result is definition of basic concepts and terms; analysis of scientific papers, the subject of which was the procedural procedure for disclosing the materials of criminal proceedings to the other party.

Keywords: Disclosure, Familiarization, Prosecutor, Criminal proceedings, Obligations of the parties.

Introduction

Protection of the rights, freedoms and legitimate interests of a person is one of the most important tasks of state bodies. R. Blaguta et al. (2019) appropriately noted that compliance with procedural legislation acts as a guarantee and manifestation of the implementation of the principle of legality and a necessary condition for the adoption of a judicial decision. Criminal procedural activities comprise a set of actions of participants in criminal proceedings and relations that arise and are implemented between them during these proceedings, and the final result of the corresponding criminal proceedings depends on the result of the procedural actions taken (Bandurka, 2018).

Convention on the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights) (1950)

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ratified by Law No. 475/97-VR establishes that everyone accused of committing a criminal offense must have the right to sufficient time and opportunities to prepare their defence. The same applies to the victim of a criminal offence. The Criminal Procedure Code of Ukraine (CPC) (2012) states that the task of criminal proceedings is to protect the rights, freedoms and legitimate interests of the participants in criminal proceedings. In order to fulfil this task, authorized state bodies and officials are obliged to strictly comply with the legislation in order to implement the specified task, as well as to demand the fulfilment of this task from all other participants in the criminal process (Dragos and Przybytniowski, 2022). At the same time, M. Burtovyi (2022) reasonably noted that the implementation of the tasks of the criminal process is impossible without the creation of effective mechanisms for the protection of the rights of the participants in criminal proceedings.

The adoption of the CPC of Ukraine (2012) in 2012 greatly contributed to the change in the very process of pre-trial investigation of criminal offenses. CPC of Ukraine (2012) also introduced a new institute of the criminal procedure of Ukraine – "disclosure of materials to the other side" of criminal proceedings, which significantly developed the provisions of the CPC of Ukraine (2012) approved by the Law dated 28.12.60 (1000-05) VVR, No. 2 of Art. 15, according to which there was only one-sided familiarization by the defence with the materials of the pre-trial investigation. The main idea of institute of criminal proceedings called "disclosure of materials to the other party" is to ensure and at the same time guarantee the principles of competition, procedural equality of the parties to the proceedings, as well as maximum protection of the rights of victims, accused parties and other participants in criminal proceedings. E. Jones and R. Dickman (2022) noted that the process of disclosing case materials by the parties to the proceedings is aimed at the parties "putting their cards on the table" regarding documentary evidence at an early stage.

G. Kret (2020) noted that the procedure for disclosing the case materials established in Art. 290 of the CPC (2012) of Ukraine indicates that the legislator established a procedure that ensures the realization of the right to a fair trial in its procedural aspect as well as provided an opportunity for parties to criminal proceedings to mutually familiarize themselves with the evidence available to them in order to develop their own model of behavior and defence in the process of criminal proceedings. C. Wells (2018) expressed a valid opinion on this matter, namely, that the purpose of disclosing a case file is to get acquainted with the evidence that confirms or undermines the arguments of the respective parties. A. Vasiliev (2018) emphasized that in order to achieve and fulfil the tasks of criminal proceedings, it is necessary to perform procedural actions that contribute to the protection of human rights and interests.

The issue of disclosing the materials of criminal proceedings and familiarization with them, the problems related to them, are constantly at the center of discussions, since the violation of the procedure for disclosing the materials of criminal proceedings often leads to a violation of the rights, freedoms and legitimate interests of the participants in the proceedings. Within the framework of the study, a list of tasks to be solved is defined, in particular:

- justification of the introduction of a component of the procedural action and the specifics of its implementation;
- clarification of the content of the provisions of Art. 290 CPC of Ukraine (2012);
- determination of the scope of rights and obligations of the parties to the criminal proceedings and other participants in the disclosure of materials;
- identifying and solving the main problems, that occur in the process of disclosing the materials of criminal proceedings.

Materials and Methods

The methodological basis is a set of general scientific and special legal methods that are used, complementing each other taking into account the topic of the study, which in turn contributes to conducting an objective analysis. Among the research methods of this topic of the Article, it is necessary to single out:

1. Systemic structural method was used for the purpose of researching subjects whose powers include the discovery and familiarization with the materials of criminal proceedings.
2. Analogy method was used to study the legal nature of the process of criminal proceedings under the name “disclosure of materials to the other party”.
3. Formal legal method helps with the main problems and gaps that occur during the disclosure of materials of criminal proceedings to the other party were identified.
4. Dialectical method is the effective method, with the help of which the theoretical and practical significance of the aspects of disclosing the materials of criminal proceedings to the other party in their interrelationship and dynamic development were analysed, as well as the main problems that arise when familiarizing with the materials of criminal proceedings were identified, and ways of solving them are proposed.
5. Logical method was used to determine and justify the role of the prosecution and the defence during the implementation of Art. 290 of the CPC of Ukraine (2012) and to determine the extent of their rights and obligations at this stage of criminal proceedings.

Results

Part 1 of Art. 290 of the CPC of Ukraine (2012) establishes that the disclosure of the materials of the pre-trial investigation precedes the process of applying to the court with an indictment or a request for the application of coercive measures of a medical or educational nature. Having recognized the evidence collected during the pre-trial investigation as sufficient for drawing up an indictment, a request for the application of coercive measures of a medical or educational nature, the prosecutor or an investigator on their behalf is obliged to notify the person, to whom the abovementioned measures may be applied, or their defender or legal representative about the completion of the pre-trial investigation, and provide access to the materials of proceedings and evidence, including those that may contribute to mitigating responsibility, recognizing a person's innocence or establishing a lesser degree of criminal responsibility (Torbas, 2020). The introduction by the legislator of the criminal-procedural institute of disclosure and familiarization with the materials of criminal proceedings at the end of the pre-trial investigation by drawing up a petition for the application of coercive measures of a medical or educational nature contributed to the improvement of the procedural situation of a number of participants in criminal proceedings. This especially affected the strengthening of the procedural position of the victim, who, in particular, got a real opportunity to find out why the indictment was not drawn up against the person who, in their opinion, was guilty (Burtovyi, 2022).

Provisions on the procedural order for the disclosure of the materials of proceedings on the part of the prosecution are established in Parts 2, 3, 4 and 5 of Art. 290 of the CPC of Ukraine (2012). Thus, the prosecutor or the investigator on their behalf are obliged to disclose and provide access to the materials of the pre-trial investigation to the defence, which are at their disposal and which can be used to prove the innocence of the accused person or grounds for mitigating the punishment (Drozd, 2017; Sinaj and Robert Dumi, 2015). About the disclosure of criminal proceedings by the parties, the prosecutor is obliged to inform the victim, the representative of the legal entity, in respect of which the proceedings are being conducted, after which the latter has the right to familiarize themselves with them according to the rules set forth in Art. 290 of the CPC of Ukraine (2012). Scientists who studied the issue of disclosing materials of criminal proceedings to the victim drew attention to the impracticality of disclosing all available materials of criminal proceedings to the victim, in particular, in cases where there is a set of criminal offenses committed against different persons (Vasiliev, 2018).

The civil plaintiff and defendant are notified of the disclosure of the materials by the parties to the criminal proceedings, after which these persons have the right to familiarize themselves with them in the part that relates to the civil claim according to the rules set forth in Part 8 Art. 290 of the CPC of Ukraine

(2012). According to Part 6 of Art. 290 of the CPC of Ukraine (2012), the defence is obliged to provide access and the opportunity to copy or display in an appropriate manner any material evidence or their parts, documents or copies thereof, as well as to provide access to housing or other property, if they are in the possession or under the control of the defence, if the defence intends to use the information contained in them as evidence in court.

The most problematic issues are the determination of the scope of the duties of the defence party during the disclosure of materials to the other side of the criminal proceedings, as well as the direct implementation of the corresponding duties (Yaroshenko et al., 2018). In practice, it happens, for example, that the defence in court is denied the summons and questioning of witnesses, which, in turn, limits the rights of the defence. Such a refusal is justified by the fact that the defence did not inform about the relevant witnesses during the fulfilment of the requirements of Art. 290 of the CPC of Ukraine (2012), i.e., during the process of disclosure of materials (Mohonko, 2020). Proceedings No. 51-305km17 (2018) can be cited as an example, in which the court ruled as follows:

> The local court justifiably refused to grant the defence's request for questioning witnesses Person 4 and Person 5 at the court session on June 27, 2017, given that information about these witnesses was not disclosed to the prosecution in accordance with Part 11 of Art. 290 of the CPC of Ukraine (2012) during the pre-trial investigation and trial.

The recognition by the court of the testimony of the witnesses of the defence, which were not disclosed to the prosecution side, in accordance with the procedure provided for in Art. 290 of the CPC of Ukraine (2012), as inadmissible, contradicts the requirements of Part 6 of Art. 290 of the CPC of Ukraine (2012):

> any physical evidence or parts thereof, documents or copies of them, as well as provide access to housing or other property, if they are in the possession or control of the defending party, if the defending party intends to use the information contained in them, as evidence in court.

I. Hloviuk (2020) refers to the resolution of the Supreme Court of Appeals of Ukraine dated March 17, 2020 (case No. 691/1358/15-k):

> As for the prosecutor's arguments about the non-disclosure by the defence during the pre-trial investigation of the testimony of the witness Person 1 and their recognition as inadmissible evidence, they also do not deserve attention.

According to the provisions of Part 6 of Art. 290 of the CPC (2012), the materials to which the defence, at the request of the prosecutor, is obliged to provide access and the opportunity to copy or display accordingly, are only any physical evidence or their parts, documents or copies thereof.

The provisions of Part 8, Art. 95 of the CPC of Ukraine (2012) do not grant the defence the right to interrogate persons, but only the right to receive explanations from participants in criminal proceedings and other persons with their consent, which, as a general rule, are not a source of evidence. The Law distinguishes two stages, at which the defence discloses its materials, namely, the stage of pre-trial investigation and the stage of judicial review of the case. At the stage of the pre-trial investigation, the defence discloses its materials to the prosecutor. All other subjects of the prosecution – investigators, detectives, service officers are not proper persons in the process of disclosing criminal proceedings by the defence (Voitenko, 2023). Before the process of disclosing its files, the defence must establish the identity of the relevant prosecutor and check their credentials.

The position regarding the non-disclosure of witness statements to the other side of the criminal proceedings was the subject of consideration by the Criminal Cassation Court (CCC) of the Supreme Court (2018). In the resolution of the CCC of the Supreme Court (2018) was noted that the defence's failure to disclose the testimony of witnesses during the pre-trial investigation and the refusal to admit them in the trial do not deserve attention (Hloviuk, 2020).

In practice, the disclosure of the materials of criminal proceedings and the familiarization with them of a party or other participant in criminal proceedings is recorded in the protocol of the corresponding procedural action. Art. 290 of the CPC of Ukraine (2012) does not contain any provisions that the protocol serves as a form of recording the disclosure of materials to the other party. Y. Alenin (a) notes, that it would be expedient to provide in Art. 290 of the CPC of Ukraine the obligation to present to the parties to the criminal proceedings the materials of the criminal proceedings in a bound and numbered form.

An important aspect is also the confirmation by the other party of the fact of familiarization with the relevant materials. Art. 290 of the CPC of Ukraine (2012) does not establish or in any way regulate either the procedure or the form of confirmation by the other side of the criminal proceedings of the fact of familiarization with the materials of the criminal proceedings. M. Stoyanov and I. Hloviuk (2022) note, confirmation of the disclosure of the materials of the criminal proceedings is an important procedural condition for the protection of the rights and legitimate interests of the parties to the proceedings.

There is judicial practice on this controversial issue. Thus, the Supreme Court considered Case No. 752/3929/15-k. 2019. Resolution. Proceedings No. 51-6541km18 (2019):

> The law does not define a certain form of procedural document that would confirm the fact of providing access to and familiarization with the materials of the proceedings, but only establishes that this fact must

> be confirmed in writing by the participant in the criminal proceedings, to whom the access has been granted. Such written documents must be attached to the materials of the criminal proceedings as confirmation that each of the parties has fulfilled its obligations and has not violated the rights of the participants in the criminal proceedings.

Art. 290 of the CPC of Ukraine (2012) does not fully regulate the issue of the calculation and duration of the disclosure and familiarization with the materials of the pre-trial investigation, which endangers the violation of a number of principles of criminal proceedings, namely, the principles of competition between the parties, reasonableness of the terms, ensuring the right to defence and ensuring other rights of participants in criminal proceedings. So, Clause b of Art. 6 of the European Convention on Human Rights (1950) ratified by Law No. 475/97-VR dated 07/17/97 (1950) establishes two components of legal defence in this regard – "having enough time and opportunities to prepare one's defence", and in paragraph 66 of the decision in the European Court of Human Rights (2011) states:

> The Court reiterates that Article 6(3) (b) (995_004) guarantees the accused "to have the time and opportunities necessary to prepare his defence", and therefore this guarantee means that the preparation of the defence in his interests, covers everything that is "necessary" for the preparation of the main consideration of the case by the court. The accused must have the opportunity to organize his defence properly and without restrictions on the possibility of providing the court hearing the case with all relevant defence arguments and, thus, influencing the outcome of the proceedings.

The current CPC of Ukraine (2012) does not provide for the right of the parties to a criminal proceeding, after reviewing the proceedings' materials, to submit motions – to supplement the pre-trial investigation or change the qualification of the committed criminal act. Y. Alenin (2013) noted:

> that it would be expedient to provide for the corresponding right (to supplement) after familiarization with the materials, since such motions are filed after familiarization with all the materials of the criminal proceedings, when the parties and the victim have already formed a complete picture of the evidentiary basis, could contribute to the elimination of shortcomings in the investigation, the realization of the rights and legitimate interests of the participants in the criminal proceedings, and the implementation of the provisions of Part 2 of Art. 9 of the CPC of Ukraine (2012).

Therefore, with the aim of improving the institute of disclosing materials to the other party and improving the criminal proceedings in general, it would be

expedient to establish the possibility of conducting additional investigative, covert investigative (search) and other procedural actions at the request of the participants in the process, stated by them when familiarizing themselves with the materials of the criminal proceedings. In the United Kingdom, in particular, in the criminal process of England and Wales, where the police have a monopoly at the investigation stage, in order to ensure the necessary balance between the parties in court, to compensate for such an advantage, there is the so-called institute of "disclosure", which manifests itself in the process, according to which the prosecution, during the preparation for the trial, is obliged to "share" with the defence the evidence it has, including those that can contribute to proving the innocence of a person or protecting the rights of participants in the criminal process (Jones & Dickman, 2022). In Crown Court cases, for example, the obligation to disclose has two aspects:

- notification of the defence about the evidence, on which the prosecution intends to base its arguments in court, by handing copies of relevant documents before the case is transferred to court or after it;
- provision of defence of any materials that are relevant to the case, but the prosecution does not intend to use them.

This obligation acts as a guarantee of a fair trial, i.e., as a guarantee of achieving "equality of arms" in court between the Crown and the accused, as far as possible.

Discussion

Y. Alenin (2013) emphasized that:

> "the end of the pre-trial investigation is the final stage of the pre-trial proceedings, which is a complex of procedural actions related to the final analysis and presentation of the results of the investigation, ensuring the rights of participants in criminal proceedings and making final decisions in criminal proceedings".

The right to access the case materials is important, and even decisive, for ensuring the equality of the rights of the parties and justice during the trial, as well as for guaranteeing and protecting the rights and interests of the participants in the proceedings (Pivaty & Soo, 2019; Anatoliy, 2021).

The disclosure of case materials must be treated responsibly, as this has a significant impact on the results of the criminal proceedings in the case, as well as on making a decision on its merits. There may also be negative consequences for the party to the proceedings who failed to provide or did not fully provide the materials available to the other side of the case. This, in turn, creates mistrust of this party on the part of the court and affects the proper judicial protection of the violated rights and legitimate interests of the opposing party to the proceedings

(Borysova et al., 2019). Disclosure of materials to the other party in criminal proceedings plays an important role both for the parties and for the court, namely:

- enables the parties to the process to fully and in advance prepare for the trial, in particular: gives the parties the opportunity to know the opposing evidentiary base and, on this basis, to decide in general terms the strategy, tactics and methodology of their work in court; collect the necessary additional evidence in advance and/or prepare a petition to the court to collect additional evidence (Tatsyi et al., 2010);

- contributes to the early identification of the strengths and weaknesses of the evidence base of the opposing party, including in the part of evaluating the evidence for its appropriateness, admissibility, credibility and sufficiency for making certain procedural decisions;

- in the event that the accused pleads guilty, the parties' knowledge of the existing mutual evidence base of the case enables the court to consider the case according to a simplified procedure and thereby achieve significant savings in the criminal process;

- allows in many cases to settle the criminal legal dispute of the parties without examining the incriminating and exculpatory evidence, i.e., without examining the criminal case on its merits;

The realization of the right to review the materials of criminal proceedings, provided that the parties fully comply with the procedural obligations arising from the procedure for such disclosure of materials, contributes to the detection of violations of the rights and legitimate interests of the parties to criminal proceedings, contributes to the detection of existing violations in the evidence base and, if possible, their early correction, makes it possible to assess the legality, fairness and effectiveness of the conducted pre-trial investigation in the case (Lysenkova, 2016).

The cases when the parties to the proceedings hide from each other the materials of the criminal proceedings in their possession, including those that they intend to use as evidence in court in the future. The court, having established the fact of concealment of certain materials at the stage of their discovery, must be guided by the provision enshrined in Part 12 of Art. 290 of the CPC (2012)

> If the party to the criminal proceedings does not disclose the materials in accordance with the provisions of this Article, the court does not have the right to admit the information contained in them as evidence

This state of affairs mostly has a negative effect on the effectiveness of the trial, since the hidden evidence belonging to the proceedings can and often has a significant probative value, both in terms of proving or refuting the accusation, and in terms of determining the degree of criminal responsibility of a person.

K. Lysenkov (2016) remarked, that the disclosure of the case materials, which provides for the possibility of making copies or displaying the materials, clearly contributes to the realization and securing of the right to familiarize with the case materials, because after receiving copies of the materials, which in the end result is positively reflected as the level of protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as on the effectiveness of justice itself.

Based on the results, the defence attorney acquires a real opportunity to foresee certain procedural situations in advance, and therefore thoroughly prepare for them, prepare all the necessary procedural documents, think through and plan the algorithm of their actions in response to certain actions of the prosecutor. Y. Alenin (2013), having investigated the issue of confirmation by the parties of the fact of familiarization with disclosed materials of criminal proceedings, proposed the need for written confirmation by the relevant party and the attachment of this confirmation to the materials of criminal case.

S. Krushynskyi (2017) noted that the law does not prohibit the defence counsel from collecting and presenting the evidence obtained by them in the case, hiding some evidence, not showing it to the investigator during the pre-trial investigation, but doing it at the court hearing in order to refute the accusation. At the same time, the only condition must be observed – the defender in this case must comply with the provisions of Art. 290 of the CPC of Ukraine (2012) regarding the disclosure of materials to the prosecution. This is definitely true, because if the defence attorney does not comply with the prosecutor's demand to disclose the evidence collected by them during the pre-trial investigation at the stage of disclosure of the materials, such evidence will certainly be declared inadmissible by the court (Bibikova, 2022; Drozdov and Basysta, 2023). In the process of disclosing the materials of criminal proceedings by the prosecution, two components can be distinguished: 1) notification of the disclosure and provision of access to the materials of criminal proceedings; 2) direct provision by the prosecution of access to the materials of proceedings available to it (Cherniei et al., 2022).

The disclosure of materials takes place according to a slightly different procedure, namely: in order to familiarize with the defence materials, the prosecutor must submit a corresponding request, and only in the presence of such a request, the defence is obliged to give the prosecutor access to its proceedings materials by Clause 1, Part 6 of Art. 290 of the CPC of Ukraine (2012):

> provide access and the ability to copy or display accordingly any physical evidence or parts thereof, documents or copies thereof, and to provide access to housing or other possessions, if they are in the

> possession or control of the defence, if the defence intends to use information in them as evidence in court.

At the same time, the defence has the right not to give the prosecutor access to any materials that can be used by the prosecutor to prove the guilt of the accused in committing a criminal offense (Nekliudov, 2022). Clause 2, Part 6 of Art. 290 of the CPC of Ukraine (2012):

> Resolving the issue of classifying specific materials as those that can be used by the prosecutor to prove the guilt of the accused in the commission of a criminal offense and, as a result, making a decision on whether or not to grant the prosecutor access to such materials may be postponed until the end of the defence's review of the materials of the pre-trial investigation.

As for the representative of the victim, if the victim does not have the conditions to familiarize themselves with the materials of the case, then, according to S. Kovalchuk (2013), they have the right to familiarize themselves with the materials of the relevant criminal proceedings in accordance with Art. 290 of the CPC of Ukraine (2012).

One of the problems is the prolongation of the terms given to the participants of the process for familiarizing themselves with these materials. As a countermeasure to such abuse of procedural rights, Part 10 of Art. 290 of the CPC of Ukraine (2012) states that in case of delay by the parties in the criminal proceedings, the victim, the representative of the entity, in respect of which the legal proceedings are being conducted, it is necessary to establish a time limit for familiarization with the materials, after which the party to the criminal proceedings or the victim, the representative of the person against whom the proceedings are being conducted, are considered to have exercised their right for access to materials.

T. Babchynska (2020) noted, that in the event that the court sets a deadline for familiarization with the case materials, the person or party to the proceedings who delayed familiarization with the case materials is considered to have exercised their right to access the materials. When verifying the circumstances of the abuse by the participants of the criminal process of the right to discovery and familiarization with the proceedings, as well as prolongation of the terms of familiarization, the investigating judge, as noted by K. Shyroka (2020), a judge of the High Anti-Corruption Court, must find out the following:

- whether the parties properly disclosed the materials for familiarization (the pre-trial investigation body can also abuse);
- complexity of materials, their volume, number of accused persons;

- behavior of the participants in the process is taken into account, and it should be evaluated together with any objective reasons for the impossibility of familiarization.

At the same time, the recognition of the fact of delay in reviewing the investigation materials does not always mean that the period that was given for the relevant review was reasonable.

Conclusions

The Criminal Procedure Code of Ukraine (2012), introduced a number of changes and additions to the process of pre-trial investigation of criminal offenses and trial of criminal cases, which significantly strengthened the rights, freedoms and legitimate interests of participants in criminal proceedings, their judicial protection and opportunities for implementation. In particular, the Criminal Procedure Code of Ukraine (2012) made it possible for both the prosecution and the defence to familiarize themselves with the materials of the pre-trial investigation. The criminal procedural institute of disclosing the materials of the pre-trial investigation to the other party acted as an important guarantee of ensuring and realizing the rights, freedoms and legitimate interests of the participants in the criminal proceedings, and at the same time an effective mechanism for the performance of its tasks.

It was established that both the prosecution and the defence are today endowed by law with optimal powers for mutual disclosure of materials of criminal proceedings available to them. But the procedure for disclosing the materials of the pre-trial investigation by these parties is somewhat different: if the prosecutor, upon completion of the pre-trial investigation, is obliged to disclose their materials to the defence in all cases, then the defence gives access to their materials to the prosecutor only in the event that the prosecutor turns to it with a corresponding request. Also, it was established that in the case of non-presentation or concealment of certain materials from familiarization by one or another party, the court has the right, on the grounds and under the conditions established by law, to recognize the information contained in such materials as inadmissible as evidence.

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