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Examination of evidence at the initiative of the court of appeal in criminal proceedings

Oleksandr Drozdov*

Doctor of Law, Professor, Honored Lawyer of Ukraine
Yaroslav Mudryi National Law University
61024, 77 Pushkinska Str., Kharkiv, Ukraine
https://orcid.org/0000-0003-1364-1272

Iryna Basysta

Doctor of Law, Professor
Lviv State University of Internal Affairs
79007, 26 Horodotska Str., Lviv, Ukraine
https://orcid.org/0000-0001-9707-7386

Abstract. Today, the combined chamber of the Criminal Court of Cassation as part of the Supreme Court is trying to solve the problem of the appellate court's initiative in the examination of evidence, since the approaches of individual court chambers, namely the First and Third ones, differ. The purpose of this study was to identify those cases when the appellate authority is entitled to investigate the evidence proactively, without encroaching on the components of the principle prescribed in Article 22 of the Criminal Procedural Code of Ukraine. The formal-logical method helped generalize that the content and form of such a review must comply with the principles of criminal proceedings, including equality before the law and the court, as well as competition between the parties (it has been proven that their absence may indicate a violation of both constitutional and convention rights), freedom in presenting their evidence to the court and in proving their persuasiveness before the court. The results of the deductive method helped formulate the following theses: the legislator, understanding the equality of procedural rights not as their uniformity, normalizes it in the Criminal Procedural Code as equality in terms of the possibilities of exercising the granted rights; the legislator also determines such equality of rights from the functions that a certain participant in criminal proceedings is endowed with. The combination of prosecution, defence, and justice in one guise contradicts the adversarial nature of the judicial procedure. The study revealed that the passivity of the parties forces the court to choose its activity within the limits of the function of justice defined for it, and its initiative is aimed at examining the evidence to make a legal, well-founded, and fair decision. It is proved that these features of judicial proceedings are a priori inherent in the appeal review, along with its inherent features, including the determination of the amount of evidence to be examined, as well as compliance with the limits of judicial review, which are normalized by Article 404 of the Criminal Procedural Code of Ukraine. It was found that the initiative of the court of appeal to examine evidence and their further investigation in this court is permissible in situations where such evidence became known after the adoption of the appealed court decision. Compliance with this rule will protect the court from possible violations of the requirements of Article 22 of the Criminal Procedural Code of Ukraine, and scientific developments in this area are designed, among other things, to pave the way for the unity of judicial practice through doctrinal recommendations

Keywords: activity of the court, proactiveness of the court; judge's discretion; limits of review by the appellate court; deterioration of the situation of the accused

Introduction

As for the problems declared in the title of this paper, doctrinal approaches, as well as judicial practice, are far from an unambiguous answer. And the prerequisite for this state of affairs, evidently, is not quite successful legislative positions, which, according to different initial situational data, are interpreted by participants in criminal proceedings in their own way.

The purpose of this study was an attempt to comprehensively describe the state of affairs in this area, using the existing practice of both the Supreme Court and the European Court of Human Rights (the ECHR), to compare those conventional, constitutional, and criminal procedural arguments that make it possible to prevent possible judicial violation of

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*Corresponding author

the principles of criminal proceedings defined by Article 22 of the Criminal Procedural Code (hereinafter – the CPC) of Ukraine (2012), and to confirm the thesis that only "evidence that was not examined by the court of first instance and that became known after the adoption of the disputed court decision", can be investigated in the appeal proceedings without the corresponding requests of the participants.

It is also worth pointing out that the components of the declared dilemma have repeatedly been in the field of view of procedural researchers and, as already shown, the existing judicial practice has developed its own, albeit different, approaches to solving it. Thus, Article 129 of the Constitution of Ukraine (1996) mentions the equality of all participants in the legal process before the law and the court among the fundamental principles of the judicial process. The Constitutional Court of Ukraine, especially its Grand Chamber, has already established the fact that the procedural rights and obligations of participants in criminal proceedings differ, which is conditioned upon different procedural functions (Judgment of the Constitutional Court…, 2020). Therewith, equality of the parties and their adversarial nature is the cornerstone. Analysis of the practices of the ECHR, which researchers investigated in the context of various existing issues (Petryshyn *et al.*, 2021), and understanding of its decisions (Yanovska, 2020; Shchur & Basysta, 2021), as well as their meaning (Kaplina & Tumanyants, 2021; Nadybska *et al.*, 2020) makes it possible to once again make sure of the indisputable truth that a fair trial is impossible without the equality of the parties. The lack of certain criminal procedural rules in the legislation can be a threat to the equality of the parties (Coëme and Others v. Belgium, §102) (European Court of Human Rights, 2022). And it is precisely such rules and features that are covered by separate, analysed norms of the CPC of Ukraine, and their perception and approaches to application were covered by such researchers as V.V. Vapnyarchuk (2014) (considered the commonalities and differences of the active and proactive activity of the court, which the author distinguishes and gives successful arguments, using an activity-based approach, while not focusing his attention on the declared issues in the appellate instance), V.A. Zhuravel and A.V. Kovalenko (2022) (a study of evidence from a forensic perspective, which is very intriguing, but the issues of proactive research of evidence by an appeal from a certain standpoint did not fall into the range of interests of these scientists), O.V. Lytvyn (2016) (substantiated aspects of evidence at the trial stage, which are partly general, but the details and nuances of evidence by appeal are not specified), I.B. Malekh (2022) (analysed judicial discretion, which is inherent in all instances), V.I. Maryniv (2020a; 2020b) (in-depth coverage of the interpretation of appeal proceedings and their limits, which helped continue these reflections from the standpoint of an initiative study of evidence by appeal), O.Z. Khotynska-Nor and M.A. Pohoretsky (2020) (various interpretations of the judge's discretion are proposed, which helped develop the idea of the judge's proactive activity), O.O. Torbas (2020) (examined discretion in criminal proceedings, which is the starting point for the proactiveness, including when reviewing court decisions), M.I. Shevchuk (2015) (investitaged the limits of judicial initiative, but attention is not focused on the study of evidence by the appellate instance without petitions previously submitted by the parties). However, none of the researchers formulated an answer to the complex question, which is decided by the combined chamber of the Criminal Court of Cassation as part of the Supreme Court and declared in the title of this study – the validity and limits of the appeals court's own initiative in the examination of evidence.

Materials and methods

Using systemic analysis, an attempt was made to identify those procedural and other components that are important for the existence of the judge's initiative as such. The deduction identifies the judge's discretion, the principles of criminal proceedings (equality before the law and the court, as well as the adversarial nature of the judicial process), and the limits of appellate review. The formal-logical method was used to formulate the conclusion based on the thesis that the content and form of such review should correspond to the principles of criminal proceedings. To develop the idea of understanding the equality of procedural rights, not as their sameness, the deductive method was also applied. To show the causal relationship between the predicted existence of a quasi-complex process, if incompatible functions, such as justice and prosecution, etc., are combined in one hypostasis, prediction is used. The system analysis helped generalize the belief about the relationship between the passivity of the parties and the court's choice of its own active position. Sampling and modelling contributed to the development of that extreme recommendation, which should protect the appellate instance from violations of Article 22 of the CPC of Ukraine (2012), when it decides the issue of proactive investigation of evidence.

Sampling, comparison, and generalization helped to work with those court decisions that are available in the Unified State Register of Court Decisions and to divide them according to two opposite positions.

Methods of formal logic (analysis and synthesis of legislative provisions, judicial positions and interpretations, as well as author's thoughts and conceptual understandings) helped single out five basic components, which ultimately allow concluding on a single situation, when the appellate court is entitled to examine the evidence without requests from the parties.

The components that belong both to the current criminal procedural legislation and to the constitutional and conventional requirements and help formulate the final answer to the question of the validity and limits of the appellate court's initiative in the examination of evidence are combined in the text into the following three blocks: 1) Article 2 of the CPC of Ukraine sets general tasks before the criminal proceedings, which, among other things, include proceedings for the review of court decisions in the appellate procedure, which should also be focused on in court proceedings; 2) adversarial nature of the parties, especially in court proceedings, is the basic one among the principles of criminal proceedings, and its non-compliance will have corresponding procedural consequences (section No. 1 "Tasks and principles of appeal proceedings"); 3) violation of the balance of the parties and their equality will also have corresponding procedural consequences (such as recognition of the trial as unfair) (chapter No. 2 "Equality of the parties as a guarantee of a fair trial"); 4) in the current CPC of Ukraine, the legislators make the equality of procedural opportunities for the exercise of granted procedural rights dependent on the functions assigned to a certain participant in criminal proceedings; 5) the court does not belong to any party, but implements the function of justice. Its activity and, to some extent,

initiative are necessary, but the CPC of Ukraine also sets the limits of initiative (chapter No. 3 "Impartiality of the court and its initiative, specifically of the appellate instance").

Results and discussion

Tasks and principles of appeal proceedings

Today, the joint chamber of the Criminal Court of Cassation of the Supreme Court is considering the cassation appeals of three defenders in the interests of the three convicts, respectively, and the cassation appeal of the victim against the verdict of the Poltava Court of Appeal dated May 18, 2022. The appeals, among other things, contain an indication that the appellate court violated the principle of criminal proceedings, such as the adversarial nature of the judicial process, and as a result, there were significant violations of the requirements of the criminal procedural law, since, according to the complainants, in the submitted appeal the prosecutor did not request the examination of the evidence, and therefore, from their arguments, it should be understood that the court of appeal examined the evidence on its own discretion. On October 19, 2022, the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court stated in its decision that one of the arguments used by the defenders in their cassation appeals is the non-observance of the principle of competition by the judges during the review in the appellate instance, which is further interpreted by the defenders as substantial procedural violation. Because the court, without receiving a request from the prosecutor, decided on an initiative investigation of the evidence, and as a result of such an investigation, the situation of the accused worsened (according to a separate episode) (Judgment of the panel of judges…, 2022). In addition, the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court summarized in its decision that the prosecutor did not submit a request for the court to examine the evidence during the appeal (Judgment of the panel of judges…, 2022).

As of today, there is a legal position of the Supreme Court regarding the possibility of an appellate court examining evidence at its own discretion without a corresponding request from a party to the proceedings, which is set forth in the Judgment of the First Judicial Chamber of the Criminal Court of Cassation of the Supreme Court in the case No. 183/2033/21. (2022). In turn, the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court did not agree with the stated approach of their colleagues (Judgment of the panel of judges…, 2022), and therefore, by the decision dated October 19, 2022, the criminal proceedings were referred to the joint chamber of the Cassation Criminal Court within the Supreme Court. Based on this state of affairs, the Court appealed to the Scientific Advisory Council (Appeal from the judge of the Criminal Court…, 2022), so the authors of this publication offer the scientific community, as well as practising lawyers, their approaches to solving the declared problem, which formed the basis of that joint scientific conclusion (Drozdov & Basysta, 2023), which was sent to the Supreme Court in response to the aforementioned judge's appeal. Considering all the above, we can trace both the relevance of the declared issue and its practical significance.

Review of court decisions in the appellate procedure must, among other things, fulfil the tasks set before it by Article 2 of the CPC of Ukraine (2012), and the principles of criminal proceedings are decisive for its content and form (Part 1 of Article 7). This conclusion follows from the fact that criminal proceedings are "pre-trial investigation and court proceedings", which, among other things, include "appellate review of court decisions" (items 10, 24, part 1 of Article 3 of the CPC of Ukraine). Criminal proceedings are not implemented in any way, without clearly defined tasks and purpose, which in no way depend on the qualification, jurisdiction, priority of the crime, or the reaction of society to the committed illegal act. The main "pillars" of any criminal proceedings are, first of all, to protect a certain society, individual, and the state from illegal, criminally punishable and socially dangerous behaviour. Criminal proceedings generally serve as a guarantor to establish the truth under the conditions of a committed criminal offence, since in its course it should be established, although not all scientists and practitioners share this purpose: there is a position that establishing the truth cannot be the purpose of the proceedings because there is a contradiction to the philosophical understanding of the purpose as a result, since the activity is not a purpose (Nor *et al.*, 2021). It is designed to ensure an impartial investigation, and as a result, only a certain legal procedure should be applied (Article 2 of the CPC of Ukraine, 2012). Due to encroachment on one of the principles of criminal proceedings, such as the adversarial nature of the judicial process, as well as due to incorrect approaches and understanding of the equality of the parties, as well as other components of the principles of criminal proceedings, which are prescribed in Article 22 of the CPC of Ukraine, there were, are, and will be grounds for appeal in the final as a result of court decisions before the ECHR.

Equality of the parties as a guarantee of a fair trial

"Procedural rights and obligations of participants in criminal proceedings differ, which is conditioned upon different procedural functions" that must be performed by these participants during criminal proceedings (Judgment of the Constitutional Court…, 2020). Therewith, the legislator gives participants in criminal proceedings "equal rights and equal obligations (but not the same) to take part in criminal proceedings and defend their position" (Judgment of the Constitutional Court…, 2020).

Only the Constitution and laws of Ukraine determine the grounds, boundaries, method of their activity and powers for officials of state bodies (Article 19 of the Constitution of Ukraine, 1996). It is evident that these requirements apply equally to courts and judges. In turn, Article 129 of the Constitution of Ukraine (1996), among other principles of judicial proceedings, makes provision for such a basic one as the fact that "all participants in the judicial process are equal before the law and the court". Therewith, by presenting their arguments before the court, the parties thus compete and prove their positions. The Constitutional Court of Ukraine emphasizes that it is not necessary to equate "equal rights", "equal duties" with "identical rights", "identical duties" (Judgment of the Constitutional Court…, 2020). The procedural status and functions performed by law determine a set of certain rights and obligations, so they cannot be identical for different participants in criminal proceedings. The legislation defines a particular list of rights and obligations for the procedural status of a participant.

Article 10 of the CPC (2012) mentions equality before the law and the court in procedural rights, but, again, it does

not refer to their identity. The law prohibits any privileges or restrictions in this regard.

Violation of the equality of the parties may create grounds for doubting the fairness of the trial: Article 6 of the European Convention on Human Rights (1950) defined the right to a fair trial. The established lack of equality of the parties may indicate a violation of both constitutional and conventional rights. Therefore, it is worth taking care of the procedural equality of the parties, establishing a balance (Shapovalova & Rohalska, 2020).

In fact, the ECHR stated that there cannot be a fair trial without the equality of the parties, the parties must be given the same favourable position ("Ocalan v. Turkey", "Fouchet v. France", "Bulut v. Austria", "Faig Mammadov v. Azerbaijan", "Brandstetter v. Austria", "Borgers v. Belgium", "Ibrahim and others v. United Kingdom", "Coeme and others v. Belgium" (European Court of Human Rights, 2022). Admittedly, the defence party is the most vulnerable (European Court of Human Rights, 2022).

Instead, the lack of certain criminal procedural rules in the legislation can serve as a threat to the equality of the parties, e.g., in the case of Coëme and Others v. Belgium, § 102) (European Court of Human Rights, 2022).

Impartiality of the court and its initiative, specifically the appellate instance

The court, exercising the function of justice (deciding on the case), does not belong to any of the parties to the criminal proceedings. The principle of adversariality has as its purpose "the construction of criminal proceedings wherein the function of justice (deciding on the case) is separated from the function of the parties (prosecution and defence), which compete in the legal field" (Nor *et al.*, 2021). The court, among other things, is responsible for providing the parties with equal opportunities to defend their legal positions. The adversarial nature of the judicial process means a strict distinction between these three functions (Nor *et al.*, 2021). Therewith, the court is assigned a guiding position and is charged with the duty to verify the evidence submitted by the parties, and it is for this purpose that it is endowed with initiative in understanding the conduct of judicial actions not only at the request of the parties (but it does not have the obligation to collect additional evidence of guilt or innocence). The activity of the court is necessary to establish the circumstances of the criminal offence, and in the end – to make a legal, justified, and fair decision (because partly the passivity of the parties does not allow this) (Nor *et al.*, 2021).

In turn, one of the features of appellate proceedings is the determination of the amount of evidence to be examined (Maryniv, 2020a). In addition, Article 404 of the CPC of Ukraine (2012) establishes "the limits of review by the court of appeal", compliance with which is necessary.

Parts 1, 2, 3, 6 of Article 22 of the CPC of Ukraine (2012) regulate "the competitiveness of the parties and their freedom in presenting their evidence to the court and in proving their persuasiveness before the court". Therewith, equal rights relate to "collecting and submitting to the court things, documents, other evidence, motions, complaints, as well as to the realization of other procedural rights prescribed by the CPC of Ukraine". It also focuses on differentiating the functions of prosecution, defence, and trial. Furthermore, Article No. 26 (Dispositivity) of the current CPC of Ukraine states that it is the parties who submit issues to the court for consideration, and the court, if it has the authority to do so, decides them (part 3). It is evident that if the court manipulates and makes its own innovations on this issue, it will obviously not adhere to these requirements of the CPC of Ukraine.

In turn, the question arises about the limits and possibilities of activity and initiative of the court, including the appellate instance. It is worth emphasizing that in the criminal procedural doctrine, some studies are devoted to the issues of activity and initiative. The corresponding analysis and synthesis helped track a situation when two opposite trends have developed. The first is that quite often both scientists and practitioners, when discussing the activities of the court, use adjectives such as "active" and "proactive" in relation to it, using them as synonymous words. The second trend is argued by its supporters by the fact that the concepts of "active" and "proactive" activity cannot be considered synonymous. And this is given a corresponding substantiation, the essence of which is logical and boils down to the fact that any "proactive activity is active" (Vapnyarchuk, 2014), but we cannot apply the adjective "proactive" to every active activity. The dispositive method of regulation implies the possibility of proactiveness. "The form of implementation of the court's initiative powers in criminal proceedings is judicial discretion (or court discretion)" (Vapnyarchuk, 2014).

A separate dissertation is devoted to the issues of the court's initiative and its limits in clarifying the circumstances of a criminal offence. Based on its results, M.I. Shevchuk (2015) suggests what exactly should be understood as the proactive activity of the court. And what is most relevant is its approach to such a situation that if we consider the proactive activity of the court through the lens of legislative regulation, then it is necessary to understand direct and indirect terminological indications of it in the CPC of Ukraine; therewith, the right of the court to take procedural actions on its own the initiative should not be prescribed by "other norms of the criminal procedural law as its duty". Direct instructions on the proactive activity of the court in the CPC of Ukraine should be interpreted as the following "phrases of a terminological nature": "on the initiative of the court", "the court on its initiative", "the court on its own initiative". The CPC of Ukraine also uses indirect terminological instructions for "proactive activity of the court", which should be interpreted as follows: "the court is entitled", "the court can" (Shevchuk, 2015). The thesis candidate also quite reasonably claims that the role of the court in the study of evidence has changed from relatively active to relatively passive. When finding and establishing the optimal limit of the court's activity in the examination of evidence, both the factor of inverse interdependence between the court's activity and the parties' passivity in general, as well as the correlation of the court's powers and the capabilities of the participants in the court proceedings, who are not endowed with powers, must be considered at the stage pre-trial investigation. To neutralize the inequality in the possibilities of forming the evidence base of the prosecution and the defence, this researcher offers some relevant initiatives, which he supplies with a certain justification. Specifically, the aforementioned scientist brought to the attention of the scientific community the issue of regulating in the criminal procedural law of Ukraine some procedural provisions that would allow the defence party to feel more confident in the adversarial process (favor defensionis), forming an evidence base (Shevchuk, 2015). It appears that the proposals themselves are conceptually

noteworthy, and it is worth having a closer look at the procedural structures themselves. Other scientists also provide their recommendations on this issue, considering the existence of a defence petition and an unambiguous (having satisfied it) and timely response of the court to it to be fateful and decisive in their own project norms (Lytvyn, 2016).

For the correct perception of the court's initiative and its possible manifestations, it is impossible to do without clarifying the issue of the judge's discretion. In the science of criminal procedure, the discretion of a judge (judge's discretion, judicial discretion) is a complex, collective concept that depends on the subject of investigation and can appear as "an element of the law enforcement activity of the court, which consists in choosing an option for solving a legal issue that arises during judicial review of the case, within the limits established by the rule of law…"; "the starting principle of the administration of justice…"; "the legislatively prescribed ability of a judge to evaluate the situation from the perspective of his or her own judgment…"; "intellectual-volitional activity of the judge" or "an element of procedural independence of the judge…" (Khotynska-Nor & Pohoretskyi, 2020). Other researchers advise operating only with the term "judicial discretion" and offer their variation of its understanding, which is generally close to one of the components of the complex encyclopedic approach defined above. Therewith, the author focuses on "judge's own will to choose from several equally legitimate alternatives" (Vapnyarchuk, 2014). The researchers also proposed a term "judicial discretion" (Malekh, 2022). Therewith, scientists are not unanimous in the benefits of the described intellectual and volitional activity. For instance, it is not a priority for criminalistics, because it gives preference to algorithmization trends (Konovalova, 2007). Scientists also focused on the permissibility of discretion when subjects implement the norms of procedural law, including criminal procedure. As a result, noteworthy conclusions were formed, specifically, that algorithmization of any activity, including criminal procedural activities, reduces the probability of discretion. As a positive result of this state of affairs, unjustified discretion of the subjects of criminal proceedings is minimized (Kasapoglu, 2018). In this area, the subject matter of the body that administers justice also plays a certain role (Horodetska, 2022). In turn, speaking of the discretion of the court, O.O. Torbas (2020) concludes that it is endowed with extensive capabilities in this area. However, such discretion concerns either the procedure for examining evidence or the actual procedure for conducting the trial. Along with the fact that the court is granted the right to determine the amount of evidence to be examined; however, it is limited to the set of evidence that was provided by the participants in the criminal proceedings. Scientists consider the discretion of the court from several other positions, namely, as a discretion in the course of judicial law-making. And here an interesting warning is expressed about excessive discretion when the prerequisites for the creation of a new norm arise, e.g., by the Supreme Court (Kopytova, 2020).

It is also necessary to factor in cases when the question of insufficient impartiality of the court may arise. There are two of them – see the case of Kyprianou v. Cyprus (Judgment of the European Court… 2005), and considering the question raised, such a case as the performance of various functions is of practical interest. Because here it will be, pursuant to Article 6 § 1 of the Convention, among other things, a violation of the requirement of impartiality, as in the case "Karelin v. Russia" (European Court of Human Rights, 2022). The court, unlike the parties (Nor & Kryklyvets, 2017), does not compete in the course of legal proceedings.

One of the features of appellate proceedings is the determination of the amount of evidence to be examined (Maryniv, 2020a). In addition, Article 404 of the CPC of Ukraine (2012) establishes "limits for review by the court of appeal", compliance with which is necessary.

In general, according to the rule regulated by Part 1 of Article 404 of the CPC of Ukraine (2012), "the appellate court reviews the court decisions of the first instance court only within the scope of the submitted appeal". This approach has been repeatedly reflected in the practice of the Supreme Court; the latest example is the Decision of the Supreme Court of Ukraine in the case No. 720/1277/20 (2022). "The limits of review by the appellate court are understood as the scope wherein the challenged court decision is reviewed. If the consideration of an appeal gives grounds to decide in favour of individuals in whose interests appeals were not received, the court of appeal is obliged to make such a decision" (Kaplina & Shylo, 2018).

"That is, the court of appeal first of all considers the claims of the person who filed the appeal, and their justification, indicating what is the illegality or groundlessness of the court decision" (Maryniv, 2020b). Notably, the court of appeal does not have a mandatory link between them. Therefore, following the instructions of the CPC of Ukraine, observing the rule on non-violation of the legal status of the accused and fulfilling the tasks of criminal proceedings, the court of appeal is entitled to "verify the relevant decision of the court of first instance in full", even going beyond the requirements of the appeal when making its own decision (Maryniv, 2020b). This conclusion is also confirmed by judicial practice. Thus, there is a court decision dated January 21, 2016, where the judicial chamber in criminal cases found a list of violations, the essence of which was the refusal of the "appellate court to hear a witness, contrary to the lawyer's request in this regard, and another assessment of the testimony of this and another witness without their direct interrogation, which substantially limited the accused's right to defence" (Decision of the Judicial Chamber…, 2016).

If we analyse the problems of the court's examination of evidence in general, then as early as 2018, I.I. Shepitko stated that not enough attention has been paid in the legal literature to this issue, as well as to its components, such as the volume of such evidence and the order of their investigation (Shepitko, 2018). Although there are modern authors' scientific reflections on these components, namely Basysta *et al.* (2022), but still, they are not enough to form a complete picture with different visions of scientists. V.A. Zhuravel and A.V. Kovalenko (2022) reasonably assert that investigating evidence is one of the operations with it. Firstly, the subject examining the evidence must be familiar with the source of evidentiary information, and they must also obtain and establish the content of the factual data contained in such a source. In the future, such a subject would have to evaluate it, as well as the evidence in their totality. Part 3 of Article 404 of the CPC of Ukraine (2012) prescribes two situations regarding the examination of evidence by an appellate court, namely: 1) re-examination of circumstances that have already been "established during criminal proceedings" and investigated by the court of first instance (here the legisla-

tor speaks of the obligation court and establishes a mandatory condition for the specified re-examination, specifically "provided that they were investigated by the court of first instance incompletely or with violations"), as well as 2) "examination of evidence that was not examined by the court of first instance". Part 3 of Article 404 of the CPC of Ukraine stipulates the existence of a request by the participants of the court proceedings for this as a common condition for both situations regarding such an examination of the evidence by the appellate court. It follows from part 3 of Article 404 of the CPC of Ukraine that there is also a requirement for the time frame for filing the specified appeal, specifically, for the first situation, it is an appeal of the participants in the court proceedings, and for the second, the appeal should be filed "during the hearing in the court of first instance". Therewith, an exception to the latter quoted wording is established, namely: "…if they became known after the adoption of the contested court decision" (CPC of Ukraine, 2012) (apparently, judging from the above legislative wording, only in such a state of affairs, it is possible to discuss the possibility of examining the evidence by the appellate court without the appropriate request of the party to the proceedings. In addition, judging from Letter of the High Specialized Court of Ukraine for Consideration of Civil and Criminal Cases No. 10-1717/0/4-12 (2012), it should be borne in mind that "such evidence can be submitted by the participants in the court proceedings or demanded by the court in the presence of a corresponding request of the participant in the criminal proceedings in preparation for the appeal proceedings"). Moreover, part 4 of the analysed article of the Criminal Code of Ukraine (2012) establishes a prohibition for the appellate court, specifically, it "is not entitled to consider charges that were not brought in the court of first instance".

Furthermore, Article 396 of the CCP of Ukraine (2012) contains requirements for an appeal. Its second part has six points, among which, in terms of the declared issues, we will focus on the following two: "…4) requirements of the person who files an appeal and their substantiation, indicating what constitutes the illegality or unreasonableness of the court decision; 5) request of the person who files an appeal to examine the evidence".

That is, a systematic analysis of the provisions of the second part of Article 396 of the CPC of Ukraine, parts 1 and 3 of Article 404 of the CPC of Ukraine and considering the provisions of Article 26 of the CPC of Ukraine, suggests that the examination of evidence by the appellate court (except for the situation "…when they became known after the adoption of the contested court decision", which has already been analysed above) along with compliance with the requirements of part 3 of Article 404 of the CPC of Ukraine, must be in a causal relationship with the petition of the person who files an appeal for the examination of evidence, which, judging by from Item 5 of Part 2 of Article 396 of the CPC of Ukraine, should be determined by a separate position in the appeal.

Conclusions

Therefore, based on the correlation of form and content, the principles of criminal proceedings with the provision of the probability of their procedural violations, due to the selection of five basic components that belong both to the current criminal procedural legislation and to constitutional and conventional requirements and tracking their correlation In connection with the problem mentioned in the title of the article, the authors of this study managed to get an answer to the question of the validity and limits of the appellate court's own initiative in the examination of evidence.

Therefore, in the end, the conviction is formulated that the initiative of the court of appeal to examine the evidence and its further investigation by this court is permissible in a situation where the court of first instance did not examine this evidence, because it did not have information about it at the time of making its own decision. This approach can ensure the balance of the parties (they should be provided with the same favourable conditions) to the criminal proceedings, including judicial proceedings on appeal. In addition, with this approach, it will be possible to discuss the existence of criminal procedural rules and their compliance. Otherwise, there is nothing to say about the fairness of the trial.

It is proved that there are two options for the court to obtain such evidence, the first of which is to directly request it by the court in preparation for the appeal hearing. Another option is to provide them to one of the participants in the court proceedings. For the first situation, it should be typical to have a corresponding request from one of the participants for a request.

It has been established that under other initial conditions and situations, specifically when there is an appeal, which refers to the worsening of the situation of the accused, it is necessary to have a petition from one of the parties to avoid a violation by the court of the principles of criminal proceedings prescribed in Article 22 of the CPC of Ukraine when showing initiative regarding the examination of evidence.

Considering those issues that require further scientific attention in the area under study, they remain and primarily relate to the development of proposals and further normalization of the exclusive procedure of initiation and receipt by the appellate court of those evidence that can be examined by it without the parties' requests.

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None.

Conflict of interest

None.

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Дослідження доказів за власною ініціативою суду апеляційної інстанції в кримінальному провадженні

Олександр Михайлович Дроздов

Доктор юридичних наук, професор, заслужений юрист України.
Національний юридичний університет імені Ярослава Мудрого
61024, вул. Пушкінська, 77, м. Харків, Україна
https://orcid.org/0000-0003-1364-1272

Ірина Володимирівна Басиста

Доктор юридичних наук, професор
Львівський державний університет внутрішніх справ
79007, вул. Городоцька, 26, м. Львів, Україна
https://orcid.org/0000-0001-9707-7386

Анотація. Сьогодні об'єднана палата Касаційного кримінального суду в складі Верховного Суду робить спробу вирішити проблему власної ініціативи апеляційного суду в дослідженні доказів, оскільки підходи окремих судових палат, зокрема Першої та Третьої, – різняться. Дослідження має на меті з'ясувати ті випадки, за існування яких апеляційна інстанція має право ініціативно дослідити докази, не зазіхнувши на складники тієї засади, що передбачена статтею 22 Кримінального процесуального кодексу України. Застосованим формально-логічним методом удалося узагальнити, що зміст та форма такого перегляду повинні відповідати засадам кримінального провадження, серед яких рівність перед законом та судом, а також змагальність сторін (доведено, що їх відсутність може свідчити про порушення як конституційних, так і конвенційних прав), свобода в поданні суду своїх доказів і в доведенні перед судом їхньої переконливості. Результати дедуктивного методу дали змогу сформулювати такі тези про: законодавець, розуміючи рівність процесуальних прав не як їхню однаковість, унормовує її у Кримінальному процесуальному кодексі як рівність щодо можливостей реалізації наданих прав; також законодавець узалежнює таку рівність прав від тих функцій, якими наділений певний учасник кримінального провадження. Поєднання обвинувачення, захисту та правосуддя в одній іпостасі протирічить змагальності. У статті розкрито, що пасивність сторін змушує суд обирати власну активну діяльність у межах визначеної для нього функції правосуддя, а його ініціативність направлена на перевірку доказів для ухвалення законного, обґрунтованого і справедливого рішення. Обґрунтовано, що ці риси судового провадження апріорі притаманні й апеляційному перегляду, поряд із властивими йому особливостями, серед яких визначення обсягу доказів, які підлягають дослідженню, а також дотримання тих меж судового перегляду, котрі унормовано статтею 404 Кримінального процесуального кодексу України. Виявлено, що ініціатива суду апеляційної інстанції щодо дослідження доказів та їх подальше дослідження в цьому суді допустимі за ситуації, коли такі докази стали відомі після ухвалення судового рішення, що оскаржується. Дотримання цього правила убезпечить суд від імовірних порушень вимог статті 22 Кримінального процесуального кодексу України, а наукові напрацювання в цій царині покликані, серед іншого, проторувати шлях для єдності судової практики завдяки доктринальним рекомендаціям

Ключові слова: активність суду; ініціативність суду; угляд судді; межі перегляду судом апеляційної інстанції; погіршення становища обвинуваченого