BALTIC JOURNAL OF LAW & POLITICS
A Journal of Vytautas Magnus University
VOLUME 16, NUMBER 1 (2023)
ISSN 2029-0454

sciendo

Cit.: *Baltic Journal of Law & Politics* 16:1 (2023):493-505
DOI: 10.2478/bjlp-2023-0000036

The Institution Of Appeal As A Guarantee Of Compliance With The Rights Of The Person In The Criminal Process

Mark Makarov[1*],
Kira Gorelkina[2],
Ihor IIerusalymov[3],
Iryna Dubivka[4],
Iryna Bovnehra[5],

[1*]Doctor of Law, Associate Professor, Head at the Department of Criminal Procedure in National Academy of Internal Affairs, Kyiv, Ukraine. E-mail: dok.mkmakarov@gmail.com; ORCID: 0000-0003-4515-5033
[2]PhD in Law, Associate Professor of the Department of Public and Private Law in V.I. Vernadsky Tavrida National University, Kyiv, Ukraine. E-mail:cgorelkina@gmail.com;ORCID:0000-0001-9109-9488
[3]Candidate of legal sciences, Associate Professor, Associate Professor at the Department in Law European University, Kyiv, Ukraine. E-mail: igor.ierusalimov@gmail.com; ORCID ID: 0000-0003-3163-982X
[4]Candidate of legal sciences, Associate Professor, Associate Professor at the Department of Criminal Procedure in National Academy of Internal Affairs, Kyiv, Ukraine. E-mail: irinadubivka@ukr.net; ORCID ID: 0000-0002-7189-3630
[5]Administrator partner of Lawyers' union «Buklers», Postgraduate student at the Department of Criminal Procedure in National Academy of Internal Affairs, Kyiv, Ukraine. E-mail: ibovnegra2@gmail.com; ORCID: 0000-0002-9816-3259

***Corresponding Author:** Mark Makarov

*Doctor of Law, Associate Professor, Head at the Department of Criminal Procedure in National Academy of Internal Affairs, Kyiv, Ukraine. E-mail: dok.mkmakarov@gmail.com; ORCID: 0000-0003-4515-5033

Abstract
This study, based on the analysis of criminal procedural legislation and the practice of its application, investigates the institution of appeal as a guarantee of respect for the rights of a person in criminal proceedings in Ukraine at the stage of pre-trial investigation. We emphasize the adversarial nature of considering complaints during a pre-trial investigation under the leadership role of an independent, disinterested subject—an investigating judge—with the aim of restoring violated rights and providing a mechanism for influencing the course of criminal proceedings. Based on analysis of the legislation and law enforcement practice of other countries, we have found certain differences in the mechanism of realization of the complainant's rights in the criminal process at the national level. Relevant proposals of a legislative nature (amendments to the Criminal Procedure Code) and an organizational nature (the introduction of e-justice) are offered, aimed at improving the institution of appeal as an effective means of legal protection of the rights, freedoms, and legitimate interests of a person in the criminal process of Ukraine.

Keywords: The rights of the person, complaint, criminal proceedings, pre-trial investigation, investigating magistrate

INTRODUCTION

In a modern democratic society, human rights are an important institution through which the legal status of a person is regulated, methods and means of influencing a person and the limits of interference in the sphere of personal life are determined, and legal and other guarantees for the protection and realization of rights and freedoms are established. At the same time, one of the most important features of a democratic rule of law is to ensure human and citizen

rights. The project of building such a state in Ukraine involves defining effective mechanisms for this process.[1]

The institution of appeal is becoming increasingly important as a means of protecting human rights and freedoms.[2] The significance of the institution of appealing against decisions, actions, or omissions during the pre-trial investigation is that it is an effective means of legal protection, allowing you to quickly and effectively restore the violated position of the complainant, correct investigative and judicial errors, and prevent their possible admission, as well as ensure the compliance of law enforcement practice with European standards in the field of human rights. In view of the above, it can be argued that the institution of appeal is not only an important tool for protecting the personal rights of participants in criminal proceedings and protecting public and private interests but also a guarantee of the effective work of the entire criminal justice system.[3]

Ensuring the right to appeal against procedural decisions, actions, or omissions is one of the general principles of criminal proceedings (paragraph 17 of part 1 of Article 7 of the Criminal Procedure Code of Ukraine), with which the content and form of criminal proceedings must be coordinated. Thus, it provides that "everyone is guaranteed the right to appeal against procedural decisions, actions or omissions of the court, investigating magistrate, prosecutor, investigator in the manner prescribed by this Code" (part 1 of Article 24 of the Criminal Procedure Code).[4] Chapter 26 of the Criminal Procedure Code of Ukraine during the pre-trial investigation establishes four separate appeal procedures, emphasizing the special importance of this procedure as a guarantee of protection of the rights and legitimate interests of participants in criminal proceedings at this stage of legal proceedings.

1. METHODOLOGY OF THE STUDY

A number of methods were used in this study. The use of the dialectical method made it possible to investigate the development of the institution of appeal regarding decisions, actions, and inaction of the investigator and prosecutor during the pre-trial investigation. Logical-semantic analysis was used to examine the categorical apparatus: "complaint," "procedural action," "procedural inaction," "judicial control." Comparative law was used to disclose the procedural features of appealing against procedural decisions, actions, or omissions of investigative bodies. The formal-logical method was used in the study of procedures for initiating a complaint and its consideration on the merits, including determining the range of subjects entitled to a complaint, the rights of the parties to the proceedings, and their possibilities in proving their positions. The method of system-structural analysis made it possible to analyze the structure of the system of appellate verification of court decisions. The comparative legal method is the basis for comparing the provisions of the Criminal Procedure Code and the norms of criminal procedure legislation of other states in order to determine the common and distinctive features in the legal regulation of the institution of appeal during the pre-trial investigation. Using the sociological method, a survey of people who work in the criminal justice system was conducted, which ensured clarification of their views on the legal regulation of the procedure for filing a complaint and considering it on the merits, as well as their positions on the possibilities of improving the current legislation in this area.

The normative basis of the work was the following: the Constitution of Ukraine; criminal and criminal procedural legislation of Ukraine and other countries; international legal treaties

---

[1] Myroslava Kulyanda, "Peculiarities of Appeal Proceedings in the Order of Judicial Control in the Criminal process of Ukraine," (dissertation, Lviv Polytechnic National University of the Ministry of Education and Science of Ukraine, 2021), 23.

[2] Nataliia Brovko, Liudmyla Medvid, Ihor Mahnovskyi, Vusal Ahmadov, and Maksym Leonenko, "The Role of the Constitutional Complaint in the Legislative Process: Comparative Legal Aspect," *Cuestiones Políticas* 39, no. 69 (2021): 832–850. // DOI: https://doi.org/10.46398/cuestpol.3969.51.

[3] Daria Klepka, "Appeal against Decisions, Actions or Omissions during the Pre-trial Investigation as a Separate Type of Proceedings," abstract (dissertation, Yaroslav the Wise National Law University, 2017), 8–9.

[4] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.

ratified by the Verkhovna Rada of Ukraine; judgments of the European Court of Human Rights; resolutions of the Plenum of the Supreme Court; and departmental regulations.

2. ANALYSIS OF RECENT RESEARCH

The effectiveness and quality of criminal proceedings depend on the proper regulation of the procedures for appealing against decisions, actions, or omissions of bodies and officials that carry out legal proceedings. On the one hand, the institution of responsible criminal procedures is the key to the realization of the basic rights of a person in criminal proceedings; on the other hand, these procedures should not create unnecessary obstacles to the completeness and speed of investigation and trial. Therefore, consideration of urgent problems regarding the development and improvement of criminal procedures should remain in the field of view of scholars and practitioners.

Scholars have conducted a great deal of research on issues of procedural regulation of appeals against decisions, actions, or inaction of the subjects of criminal proceedings. However, despite numerous studies and a significant level of theoretical development related to these issues, there is still a shortage of academic research on the current Criminal Procedure Code of Ukraine and the practice of its application in adversarial conditions. In particular, the scholarly literature did not develop a clear understanding of the category of "appeal in criminal proceedings" and, accordingly, the category of "appeals in the pre-trial stages of the criminal process." In investigative and judicial practice, there are violations of compliance with the adversarial procedure for consideration of complaints during pre-trial investigation; there are problems with the regulation of certain procedures of the institution of appeal; and so forth. Further study of this type of judicial control is also needed due to the scale of its legislative regulation and its multidimensionality.

The choice of this research topic was determined by the foregoing, as well as the direct and special significance of the above for the construction of an adversarial criminal process of Ukraine—that is, an appropriate and sufficient mechanism for exercising a person's right to appeal against decisions, actions, and omissions of authorized subjects of criminal proceedings at the stage of pre-trial investigation.

The purpose of this article is to determine, on the basis of analysis of regulatory legal acts, academic literature, and investigative and judicial practice, the characteristic features of the formation of an institution for appealing against procedural decisions of authorized subjects of criminal process at the stage of pre-trial investigation in Ukraine and other countries, to single out procedural measures that ensure the consideration of the complaint, and to determine the directions for optimizing the rights of participants in pre-trial criminal proceedings during consideration and resolution of complaints on the merits.

3. RESULTS AND DISCUSSION

3.1. REGULATION OF ENSURING THE RIGHT TO APPEAL CRIMINAL PROCEDURAL DECISIONS UNDER THE LEGISLATION OF UKRAINE

Appealing against decisions, actions, or omissions of the court, investigating magistrate, prosecutor, or investigator is one of the means of ensuring the achievement of the tasks of criminal proceedings. Part 1 of Article 303 of the Criminal Procedure Code of Ukraine contains a list of decisions, actions, and omissions of the investigator or prosecutor that may be appealed during the pre-trial investigation: inaction of the investigator or prosecutor, which consists in (1) the failure to include information about the criminal offense in the Unified Register of Pre-Trial Investigations after receiving an application or notification of a criminal offense, (2) the non-return of temporarily seized property in accordance with Article 169 of the Criminal Procedure Code of Ukraine, or (3) the failure to carry out other procedural actions that one is obliged to perform within the period specified by law; the decision of the investigator or prosecutor to suspend the pre-trial investigation; the decision of the investigator to close criminal proceedings; the prosecutor's decision to close criminal proceedings and/or proceedings against a legal entity; the decision of the prosecutor or the investigator to refuse to recognize the victim; decisions, actions, or omissions of the investigator or prosecutor in applying security measures; the decision of the investigator or

prosecutor to refuse to grant the request for investigative (inquiry) actions or covert investigative (inquiry) actions; the decision of the investigator or prosecutor to change the procedure for pre-trial investigation and its continuation; the prosecutor's decision to dismiss the complaint for noncompliance with reasonable deadlines by the investigator or prosecutor during the pre-trial investigation; notification of the investigator or prosecutor of suspicion after the expiration of one month from the date of notifying the person of suspicion of committing a criminal offense or two months from the date of notifying the person of suspicion of committing a crime, but not later than the closure of criminal proceedings by the prosecutor or appeal to the court with an indictment; refusal of the investigator or prosecutor to grant a request to close criminal proceedings on certain grounds, that is, if there is an undisclosed decision of the investigator or prosecutor to close criminal proceedings on certain grounds provided for in paragraph 1 of part 1 of Article 303 (established the absence of an event of a criminal offense, established the absence of a criminal offense in the act; the law came into force, which abolished criminal liability for an act committed by a person; or regarding the tax obligations of the person who committed the actions provided for in Article 212 of the Criminal Code of Ukraine, a tax compromise was reached in accordance with Subsection 9-2 of Chapter XX, "Transitional Provisions," of the Tax Code of Ukraine) in criminal proceedings for the same act, which was investigated in compliance with the requirements for jurisdiction.[5]
According to the analysis of the practical activities of law enforcement agencies, properly ensuring the fulfillment of the tasks of criminal proceedings is impossible without the existence in the criminal procedural legislation of such an institution as appealing against decisions, actions, or omissions of the investigator or prosecutor during the pre-trial investigation. Consideration of these complaints by the current criminal procedural legislation of Ukraine designates the investigating judge as an authorized person to exercise judicial control over the protection of the rights, freedoms, and legitimate interests of the participants in criminal proceedings. The list of relevant decisions, actions, or omissions that may be appealed during the pre-trial investigation is established by Article 303 of the Criminal Procedure Code of Ukraine. In addition, the Criminal Procedure Code of Ukraine determines the procedure and conditions for consideration of individual complaints and, in Chapter 26, "Appeal against decisions, actions or omissions during the pre-trial investigation," regulates the powers of the investigating magistrate, which can be exercisedbased on the results of such consideration.

These constitutional provisions fully comply with international standards and practices of the European Court of Human Rights, the structure of which is dominated by the consideration of complaints regarding violations of human rights during criminal proceedings. In international law, a complaint is generally considered the most common remedy.[6] In the case of *Amann v. Switzerland,* the European Court of Human Rights noted that Article 13 of the Convention for the Protection of Human Rights requires that anyone who considers himself or herself a victim as a result of an event that he or she believes was contrary to the Convention on Human Rights has the right to a remedy in the relevant national authority to resolve this dispute and, in the case of a positive decision, to receive compensation for damages.[7]

According to O. Yanovska, it should be borne in mind that Article 24 of the Criminal Procedure Code of Ukraine guarantees everyone the right to appeal against procedural decisions of the court in the manner prescribed by the Criminal Procedure Code of Ukraine. Guided by the principle of ensuring access to justice, the only criterion for determining which court decisions can be appealed to the court and who has the right to such an appeal should be a restriction of the constitutional rights and freedoms of citizens.[8] S. Slynko believes that the provisions of the Criminal Procedure Code of Ukraine on appealing not only the decisions, actions, or omissions of the investigator and prosecutor but also of the investigating magistrate are fully democratic. The peculiarity of this procedure, in his opinion, is that it is carried out only on

[5] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[6] Yuri Korobko, "Procedural Powers of the Prosecutor in the Pre-trial Investigation (dissertation, Academy of the Prosecutor's Office, 2016), 47.
[7] *Amann v. Switzerland,* Judgment of the European Court of Human Rights (2000), 16.02.2000. // http://www.eurocourt.in.ua/Article.asp?AIdx=176.
[8] Oleksandra Yanovska, "Institute of Appeal at the Stage of Pre-trial Investigation," *Lawyer* 1, no. 148 (2013): 10–13.

appeal.[9]

Legislation in part 1 of Article 303 of the Criminal Procedure Code of Ukraine defines the circle of persons who have the right to appeal against decisions, actions, or omissions of the investigator or prosecutor during the pre-trial investigation. The question of the compliance of this provision with constitutional regulations has been the subject of discussion in academic circles. D. Valigura believes that the formation of a list of persons entitled to appeal is a limitation of the constitutional right of each person to judicial protection of his or her rights.[10] The right to appeal is a subjective right, the grounds for the implementation of which arise in the presence of certain legal facts with which the emergence of legal relations is associated. Consequently, a person has the right to appeal against actions (or inaction) and decisions of officials that infringe on his or her personal rights and freedoms or otherwise affect his or her personal interests but has no right to file a complaint in the interests of third parties, unless otherwise expressly provided by law. The complaint against the decisions, actions, or omissions of the investigator or prosecutor during the pre-trial investigation must necessarily be written, set out in the sequence in which the complainant considers it necessary, but with the obligatory indication of the justification, in strict accordance with the law, the formulated requirement. Of course, it must contain all the necessary details.
It should be noted that given the norm of part 1 of Article 303 of the Criminal Procedure Code of Ukraine, which reflects the content of inaction in the pre-trial investigation, the legislator does not disclose the very essence of "inaction" but to a certain extent only emphasizes its subject, from which it is possible to determine its extent. In order to be appealed, inaction must have the following three features, according to paragraph 1 of part 1 of Article 303 of the Criminal Procedure Code of Ukraine: the investigator or prosecutor is obliged to perform a certain procedural action; such a procedural action must be committed within the period specified by the Criminal Procedure Code of Ukraine; the relevant procedural action by the investigator or prosecutor was not committed within the prescribed period.

Therefore, this rule allows you to apply to the court with a complaint not for any inaction but only for duties, a term that is clearly regulated by the criminal procedural legislation. At the same time, it should be borne in mind that the inaction may be caused not only by the failure to perform a procedural action within the time limits established by the specified norm but also by improper consideration of the petition, in particular, leaving it without a procedural response or with an improper procedural response.

In academic circles, it is reasonable to point out the expediency of distinguishing between the abstract term "action" used in the legislation of Ukraine, which can mean actions regulated by existing forms of social relations, and the actual "procedural action" within the framework of procedural relations.[11] The current Criminal Procedure Code of Ukraine does not establish an exact definition of such terms, and therefore the provisions of Chapter 26, "Appeal against decisions, actions or omissions during pre-trial investigation," may be enforced differently and and have different procedural consequences as a result of different approaches to the interpretation of terms. In view of the above, we propose to supplement Article 3 of the Criminal Procedure Code of Ukraine with the terms "procedural action" and "procedural inaction."

It is generally recognized in judicial practice that the largest category of complaints is complaints about the inaction of the pre-trial investigation bodies or the prosecutor, that is, the failure to perform certain actions or the non-acceptance of decisions. Inaction takes place in a situation where the observance of the rights and interests of the participants in criminal proceedings implies the need for an official to perform a certain action or make a specific

---

[9] Sergey Slynko, Appeal against Decisions, Actions or Omissions during the Pre-trial Investigation (2014). // https://advokate-kiev.com/uk/oskarzhennya-rishen-diy-chi-bezdiyalnosti-pid-chas-dosudovogo-rozsliduvannya.
[10] Dmitry Valigura, "The Genesis of the Institute of Appeal in Criminal Procedure," *Entrepreneurship, Economy and Law* 4 (2013): 39–42.
[11] Denis Bialkovsky, "Implementation of the Constitutional Principles of Criminal Proceedings in the Activities of the Investigating Magistrate," (dissertation, International Humanitarian University, 2021), 159–160.

decision, but this person does not act, and as a result, the decision is not made or the procedural action is not performed. Such inaction significantly affects the rights and interests of a person in criminal proceedings and therefore may be the subject of a complaint. The right to appeal acquires special attention at the stage of pre-trial investigation, which is the most vulnerable to violation of human and citizen rights, in which the interests of the individual, society, and the state are intertwined but may not coincide. The features of this procedure will be investigated in the next subsection of the article.

In the modern context of reforming the judicial system in Ukraine, the problem of exercising judicial control over the protection of the constitutional rights, freedoms, and interests of persons is becoming increasingly important, especially in the field of criminal procedural law, which cannot be implemented without a system of measures and actions that provide regulation. Criminal procedural legislation establishes, as one of the ways of ensuring the rights and freedoms of participants in criminal proceedings, the institution of appealing to the investigating magistrate decisions, actions, or omissions of the investigator or prosecutor during the pre-trial investigation.

Scholars have observed that the right of a person to appeal against the decisions, actions, or omissions of the investigator or prosecutor, in particular at the initial stage of the pre-trial investigation, is rather ambiguous and incomplete in the current Ukrainian legal code. For example, O. Kaplina notes that in criminal proceedings, participants are deprived of the right to appeal a number of important decisions and, above all, those made at the initial stage of criminal proceedings.[12]
Criminal procedural legislation of Ukraine, in part 1 of Article 303, establishes an exhaustive list of cases in which decisions, actions, or omissions of the investigator or prosecutor may be appealed at pre-trial proceedings, such as inaction of the investigator or prosecutor that consists in failure to include information about a criminal offense in the Unified Register of Pre-Trial Investigations after receiving an application or notification of a criminal offense, the non-return of temporarily seized property in accordance with the requirements of Article 169 of the Criminal Procedure Code of Ukraine, or the failure to carry out other obligatory procedural actions within the period specified by the Criminal Procedure Code of Ukraine; the decision of the investigator or prosecutor to suspend the pre-trial investigation; the decision of the investigator to close criminal proceedings; the prosecutor's decision to close criminal proceedings and/or proceedings against a legal entity; etc. In accordance with part 2 of Article 303 of the Criminal Procedure Code of Ukraine, complaints about other decisions, actions, or omissions of the investigator or prosecutor are not considered during the pre-trial investigation and may be the subject of consideration during the preparatory proceedings in court.[13]

Part. 1 of Article 304 of the Criminal Procedure Code of Ukraine establishes a ten-day period for a person to file a corresponding complaint, which is calculated from the moment of making a decision or committing an action or inaction. The scholarly literature is dominated by the opinion the legislative limitation of the subject of appeal during the pre-trial investigation is inexpedient. We hold a similar position. We consider it impossible and fundamentally wrong to enshrine in the law an exhaustive list of actions and decisions that require judicial control, since such attempts can turn into a restriction of the right of a participant in criminal proceedings to judicial protection.

In accordance with part 2 of Article 306 of the Criminal Procedure Code of Ukraine, the complaint must be considered no later than 72 hours from the date of its receipt by the court, except for a complaint against the decision to close criminal proceedings. The law sets a five-day period for consideration of this complaint.[14].

---

[12] Oksana Kaplina, "Is the Decision of the Constitutional Court of Ukraine a 'Legal Beacon' in the Turbulent Sea of Criminal Justice Reform," *Law of Ukraine* 11 (2013): 17.
[13] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[14] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.

Compliance with the deadlines established by the criminal procedural legislation, according to many experts, will be greatly facilitated by the project of the "electronic court." One of the goals of the project for the transition of court workflow to electronic format is to accelerate the passage of cases and the exchange of information. The features of the e-court provide an opportunity for the participants in the process to significantly reduce the time for carrying out procedural actions and, therefore, the proceedings as a whole. However, most of its options cannot fully function due to the lack of legislative support for this innovation. It should be considered indisputable that in order for electronic document management to be systemic and not require duplication in paper form, comprehensive legislative changes are necessary.

Scholars note that the disadvantage of the Criminal Procedure Code of Ukraine is that the participants in criminal proceedings are deprived of the opportunity within Article 303 to appeal to the investigating magistrate the decision of the prosecutor to extend the term of the pre-trial investigation. Regarding this issue, we support the proposal of T. Ileva to supplement the provisions of Article 303 of the Criminal Procedure Code of Ukraine on appealing to the investigating magistrate, the suspect, the suspect's defense lawyer, the victim, and the victim's representative the decision of the prosecutor to extend the term of pre-trial investigation.[15]

3.2. IMPLEMENTING THE PRINCIPLES OF ADVERSARIALITY WHEN CONSIDERING COMPLAINTS ABOUT DECISIONS, ACTIONS, AND OMISSIONS OF PRE-TRIAL INVESTIGATION BODIES OR THE PROSECUTOR

Based on the definition of criminal proceedings enshrined in paragraph 10 of part 1 of Article 3 of the Code of Criminal Procedure and the overarching principle of the adversarial nature of the parties, the procedure for consideration of complaints by the investigating judge is adversarial. Involving an independent and disinterested subject—the investigating magistrate—in solving important procedural issues is designed to provide an opportunity for participants in criminal proceedings who are not part of the prosecution to restore their violated rights, as well as to provide them with a mechanism of influence on the course of the investigation.

At the same time, D. Kryklyvets notes that adversariality is not fully respected when the consideration of the complaint takes place in the absence of the investigator or the prosecutor, which means the absence of one of the independent parties to the proceedings, as a constitutive feature of the principles of adversariality. The absence of a party to the proceedings makes it impossible to clarify its legal position, which is one of the conditions for adversariality. The Criminal Procedure Code also does not regulate the obligation of the investigator or prosecutor to provide the investigating magistrate with the materials of criminal proceedings for review and evaluation at the court session, although the investigating judge, within the framework of the principles of adversariality, must assess the legal positions of the parties through the prism of the specific circumstances of the case. Based on the foregoing, it should be noted that there are no necessary prerequisites for the organization of adversarial consideration of complaints by the investigating judge.[16]

The investigating judge, without going beyond the principles of criminal proceedings, especially the principles of adversariality and dispositivity, may be active in collecting evidence. In particular, the investigating magistrate may examine additional circumstances that were not mentioned by the parties but require clarification in order to properly resolve the procedural requirements set forth in the complaint. In these circumstances, the investigating judge should be clearly guided by the rule of law and accurately identify possible violations of the rights of the subject of criminal proceedings and restore them, and it can be concluded that this also applies to the consideration of complaints as an optional component

[15] Tatyana Ilyeva, "The Function of Judicial Control in Criminal Proceedings," abstract (dissertation, National Academy of Internal Affairs, 2014), 9.
[16] Dmytro Kryklyvets, "Implementation of the Principle of Competition during the Examination of Complaints by the Investigating Judge (dissertation, Lviv National University named after Ivan Franko, 2016), 57.

of the stage of pre-trial investigation.

The expediency of equal participation of the parties in the process of proof and the independence of the parties' defense of their own legal positions should be pointed out. In this regard, note the prescriptions of part 3 of Article 306 of the Criminal Procedure Code, according to which the absence of an investigator or prosecutor is not an obstacle to the consideration of the complaint, while the participation of the person who filed the complaint or his or her defense lawyer or representative in the consideration of complaints about decisions, actions, or omissions during the pre-trial investigation is mandatory. Some scholars crticize this provision because the absence of a prosecutor "does not meet the requirements of clause 3 of Art. 121 of the Constitution of Ukraine on supervision of the observance of laws by the bodies conducting pre-trial investigation" as well as the adversarial nature of the parties as the main basis of legal proceedings.[17]

When deciding a complaint, it is important for the investigating magistrate to understand the need for a decision by the investigator or prosecutor, and although the decisions of the investigator or prosecutor, according to the paragraph 2 of part 5 of Article 110 of the Code of Criminal Procedure, must be motivated, in practice they do not always state fully and in detail all the circumstances that led to their adoption. In addition, during the trial, the subject may, quite logically, need to ask the investigator or prosecutor questions about the validity of their decisions, actions, or omissions, and the investigator or prosecutor, based on the principle of adversariality, should also be able to express their reasoning regarding the arguments of the opposite party. In such circumstances, the court decides the complaint (dispute) solely in accordance with the requirements and materials of the party who has exercised the burden of proving his or her claims in good faith.

The presence of the complainant or the complainants' defense lawyer or representative in the court session is mandatory. At the same time, Section 26 of the Criminal Procedure Code does not resolve the issue of how the investigating magistrate should act in case of failure to appear at the court hearing without good reason or without giving the reasons of the duly notified complainant. The literature expresses the opinion that it is advisable to give the investigating magistrate the authority to leave the complaint without consideration in case of nonappearance of the complainant, which will not deprive him or her of the right to refile the complaint or to consider the complaint in the absence of the complainant, if the court session is attended by a defense lawyer or legal representative of the complainant.[18]

In our opinion, the practical implementation of this proposal may lead to a situation where the investigating magistrate, seeing the legal grounds for satisfying the complaint, will leave it without consideration only because of the complainant's failure to appear. It seems that when resolving any controversial issues, one should proceed from the principles of criminal proceedings. Part 2 of Article 55 of the Constitution of Ukraine guarantees everyone the right to appeal in court against decisions, actions, or omissions of state authorities, local self-government bodies, and officials,[19] and part 1 of Article 24 of the Criminal Procedure Code regulates the right to appeal against procedural decisions, actions, or omissions of the court, investigating magistrate, prosecutor, or investigator. In addition, according to part 2 of Article 22 of the Code of Criminal Procedure, the parties have equal rights, among other things, to exercise other procedural rights provided for in this Code.[20] Therefore, the procedural possibility of the prosecution to be absent during the consideration of complaints by the investigating judge must correspond to a similar possibility for the defense party. Only in this case will competitiveness be ensured.

---

[17] Larisa Udalova, Dmitry Savitsky, Victoria Rozhnova, and Tatyana Ilyeva, *The Function of Judicial Control in Criminal Proceedings* (Kyiv: Center for Educational Literature, 2015), 144.

[18] Stanislav Pshenichko, *Authority of the Investigating Judge to Consider and Resolve Complaints in Pre-trial Proceedings,* abstract (Odessa, 2014), 13.

[19] Constitution of Ukraine June 28, 1996, 254k/96-VR. // https://zakon.rada.gov.ua/laws/show/254.

[20] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.

It is worth noting that the judicial practice interprets the complainant's participation in the court session to consider the complaint filed by him or her as his or her right. The failure of the duly notified complainant to appear at the court hearing does not prevent the consideration of the complaint on the merits and its lawful resolution. Having acquired the status of a party to the defense, such persons use all procedural means and can participate in the evidence as well as representatives of the defense party within the meaning of paragraph 2 of part 5 of Article 110 of the Code of Criminal Procedure. There are also other elements of the principles of competitiveness provided for in Article 22 of the Criminal Procedure Code, namely, the existence and clear separation of the functions of state prosecution, defense, and trial and the existence of an objective and impartial court.[21] The function of judicial review is performed by the investigating magistrate, who, as a judge, must meet the requirements of objectivity and impartiality.

It should be noted that the Criminal Procedure Code does not provide for the possibility of submitting written objections to the complaint by the investigator or prosecutor whose actions are being appealed, although at the stage of appeal and cassation proceedings, the prosecutor has such an opportunity among other participants. Although the idea of granting the investigator or prosecutor this right has gained many supporters, it cannot be supported for the following reasons: first, there are shortened time limits for consideration of complaints, which significantly complicates the time aspect of exercising this right, as well as the appellant's ability to familiarize himself or herself with the objection and formulate counterarguments before the start of the trial; second, there is no doubt that the investigator or prosecutor will not support the complaint, otherwise they can independently correct the procedural shortcomings made (both before filing the complaint and at the time of its consideration); third, the investigator or prosecutor, being participants in the adversarial proceedings, are given the opportunity to personally argue all objections during the trial.

It should be emphasized that the procedural law does not determine which of the participants in the proceedings is obliged to prove the circumstances set forth in the complaint, nor does it establish the range of circumstances to be proved. Article 22 of the Code of Criminal Procedure determines that one of the characteristic features of criminal procedure is that the parties have their own legal positions, which they independently defend.[22] We believe that presenting the evidence during the consideration of complaints is not identical to proving the range of circumstances provided for in Article 92 of the Code of Criminal Procedure but is one of the ways of doing so and is a guarantee of a certain clarification of the circumstances. The appointment of the procedural institution of proof indicates that it is insufficient for the participant in the proceedings to express, through a complaint, only allegations about the illegality of the decision, action, or omission of the investigator or prosecutor. The complainant is obliged to provide evidence to support his arguments stated in the complaint. Based on part 1 of Article 22 of the Criminal Procedure Code, this obligation is imposed on the participant of criminal proceedings who filed a complaint with the investigating magistrate in the manner prescribed by law.

It will not be a violation on the part of the investigating magistrate to assist the relevant participant in the criminal proceedings in proving his or her position, under certain conditions: (a) receiving an oral or written request from this participant; (b) the participant's justification of the impossibility of independently providing certain evidence; (c) justification of the need for such evidence. In this case, the investigating magistrate will not replace the relevant participants in the criminal proceedings with his or her activities.

During the consideration of the complaint, the investigating magistrate presides over the court session. One of the duties of the presiding officer, in accordance with Article 321 of the Criminal

[21] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.
[22] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.

Procedure Code of Ukraine is the direction of the trial to ensure the exercise by the participants of criminal proceedings of their procedural rights and the performance of their duties. He must act within the framework of the issues submitted for its consideration by the parties, which partially outlines the boundaries of the inspection of the complaint. At the same time, the investigating magistrate should check and give a legal assessment of the arguments set forth in the complaint of the participant in the proceedings regarding the illegality in his or her opinion of the decision, action, or omission of the investigator or prosecutor. The investigating magistrate must comprehensively check the relevant circumstances and make a legal decision. This obliges the investigating judge, by notification, to provide the investigator and prosecutor with the opportunity to be present during the trial and express their position on the complaint and to oblige them to submit to the investigating magistrate the necessary materials of criminal proceedings in order to study them and legally evaluate them in the context of the complaint. The need to choose between the conflicting positions of the parties gives rise to the duty of the investigating magistrate to study and analyze them exhaustively. To do this, the investigating judge conducts a set of organizational measures that serve to ensure the adversarial consideration of the complaint.

The investigating magistrate is obliged to be guided by the principle of the rule of law, which is enshrined in part 1 of Article 8 of the Constitution of Ukraine and at the same time is the basis of criminal proceedings. Part 1 of Article 8 of the Code of Criminal Procedure provides that a person and his or her rights and freedoms are recognized as the highest values and determine the content and orientation of the state’s activities. It seems that if the party to the proceedings believes that his or her right has been violated and files a complaint because of this, this is sufficient for the investigating magistrate to check for the presence of such a violation and, if necessary, eliminate it.[23]

Another important issue is the correlation of the procedural activities of the parties with each other and with the procedural activities of the investigating magistrate. The parties influence the course of the proceedings through participation in the evidence. This statement is also relevant for the process of consideration of complaints by the investigating judge, since from the definition of the concept of evidence enshrined in Part 1 of Article 84 of the Criminal Procedure Code, it appears that the investigating magistrate, the investigator, the prosecutor, and the court establish the presence or absence of facts and circumstances that are relevant to the criminal proceedings. From this, we can conclude that when considering procedural issues by the investigating judge, the process of proof takes place. The legislator, as follows from Articles 92 and 93 of the Code of Criminal Procedure, does not impose on the court the duty of proof and does not recognize it as the subject of the collection of evidence. Simultaneously, Article 94 of the Criminal Procedure Code assigns this assessment specifically to the investigating magistrate and the court.

At the end of the subsection, it is stressed that in the trial, the active role should belong to the court as the body responsible for the correct resolution of the case, and therefore the court should retain the role of the organizer of the proof process, which stimulates the activity of the parties to provide and examine evidence during the trial, but its initiative in collecting new evidence should be significantly limited. In our opinion, the court has the right to collect evidence only if it is necessary to verify the propriety and admissibility of the evidence provided by the parties or to establish accurate data on the identity of the accused (circumstances that aggravate and mitigate the punishment).

3.3. FOREIGN EXPERIENCE IN LEGAL REGULATION OF THE APPEAL PROCEDURE DURING PRE-TRIAL INVESTIGATION

At the end of the study, we analyzed the experience of other countries regarding the introduction and functioning of the institution of appeal at the stage of pre-trial investigation in order to understand whether the Ukrainian legal system should adopt procedures for resolving certain issues that arise in connection with the initiation of a complaint during the

---

[23] Criminal Procedure Code of Ukraine, April 13, 2012, 4651-VI. // https://zakon.rada.gov.ua/laws/show/4651-17#Text.

investigation of a criminal offense as well as procedures for its consideration and resolution. The Criminal Procedure Code of the Republic of Moldova defines the procedure for appealing at the stage of pre-trial investigation, giving the leading role to a criminal prosecution judge, who, in paragraph 24 of part 1 of Article 6 of the Criminal Procedure Code, is defined as a judge endowed with the functions of criminal prosecution and judicial control over procedural actions carried out during criminal prosecution. In accordance with Article 313 of the Criminal Procedure Code of the Republic of Moldova, the following are subject to appeal: (1) refusal of the criminal prosecution body to accept a complaint or notification of the preparation or commission of a crime, to grant petitions in cases established by law, or to initiate criminal prosecution; (2) a resolution on the termination of criminal prosecution or the termination of criminal proceedings or on the withdrawal of a person from criminal prosecution; (3) other actions affecting the constitutional rights and freedoms of the person. The court also considers applications to expedite criminal prosecution.[24]

According to the Criminal Procedure Code of Georgia, in district (city) courts, the magistrate judge (Part 2 of Article 20) is authorized to consider the accused's complaints in connection with the use of torture and inhumane treatment against him or her, as well as other complaints in connection with the violation of his or her rights (Part 1 of Article 197). It also provides for a procedure for the head of the court to consider complaints about illegal decisions or actions of the presiding judge in the session on the selection of jurors (Part 3 of Article 221). Appeals against court decisions during the pre-trial investigation are considered solely by the judge of the investigative panel of the Court of Appeal (Part 4 of Article 22).[25] We are critical of the removal from the sphere of judicial control of the discretionary powers of the prosecutor to start and stop criminal prosecution, in connection with the implementation of which a complaint can be filed only once to a higher-level prosecutor, which, in particular, significantly worsens the legal situation of the victim.

The Criminal Procedure Code of the Republic of Kazakhstan, in part 1 of Article 109, contains a more specific list of actions (or omissions) and decisions of the prosecutor or bodies of investigation and inquiry to be appealed in court. These include decisions to refuse to accept an application for a crime, as well as violations of the law, made in case of refusal to initiate a criminal case, initiate, stop, and close a criminal case; decisions on forced placement in a medical institution for a forensic examination; violations of the law committed during a search, or a seizure of property; decisions on the application of collateral or violation of the law when committing other actions (inaction) and decision-making, if postponing the verification of the legality of such actions (inaction) and decisions until the stage of judicial proceedings makes it difficult or impossible to restore the violated rights and freedoms of a person and citizen. Complaints against the above-mentioned decisions in accordance with Part 5 of Article 109 of the Criminal Procedure Code of the Republic of Kazakhstan are considered by the district court at the location of the body conducting the criminal process.[26]

Complaints about the actions (inaction) and decisions of the person conducting the inquiry, the investigator, the prosecutor in the Federal Republic of Germany are reviewed by the investigating judge,[27] in Latvia (Article 40 of the Code of Criminal Procedure of the Republic of Latvia)[28] and in Estonia (Article 2021 of the Code of Criminal Procedure of the Republic of

[24] Criminal Procedure Code of the Republic of Moldova, March 14, 2003, 122. // http://lex.justice.md/viewdoc.php?action=view&view= doc&id=326970&lang=2.
[25] Criminal Procedure Code of Georgia, October 9, 2009, 1772. // https://matsne.gov.ge/ru/document/view/90034?publication=144.
[26] Criminal Procedure Code of the Republic of Kazakhstan, July 4, 2014, 231-V. // http: //online. zakon.kz /Document/ ?doc_id=1008442.
[27] Judges of the Supreme Court of Ukraine Got Acquainted with the Practice of Application of the Convention for the Protection of Human Rights in Germany (2012) // https://www.viaduk.net/clients/vsu/vsu.nsf/(print) /C20BE9CA26CF8B76C2257AEF003D9E07
[28] Judges of the Supreme Court of Ukraine got acquainted with the practice of application of the Convention for the Protection of Human Rights in Germany // http:// www. scourt. gov.ua/ clients/ vs.nsf/ 0/F671704 742F70FA 8C2257 A330027 D642?

Estonia Republic) is a judge of preliminary investigation.[29]

So, in accordance with Article 40 of the Criminal Procedure Code of Latvia, the investigating magistrate is empowered to consider complaints of authorized subjects of pre-trial investigation. At the same time, performing this function, the magistrate has no right to consider criminal cases on the merits. The Criminal Procedure Code of Latvia provides for both non-devolutive (to the court that decided to appeal) and devolutive (to the highest court) ways of appealing against interim court decisions.[30]

Similar in nature to the Ukrainian procedure is the procedure for appealing against pre-trial investigation bodies in the Republic of Lithuania. According to Article 64 of the Criminal Procedure Code of the Republic of Lithuania, the prosecutor or the judge of the pre-trial investigation is obliged to consider the complaint filed during the pre-trial investigation and adopt a resolution or ruling within seven days from the date of receipt of the complaint and the necessary materials for its verification. If the complaint is satisfied, the resolution or ruling indicates the violations committed by the investigator of the pre-trial investigation or the prosecutor and proposes to eliminate them. If the complaint is rejected, there must be grounds for recognizing it as unfounded. During the consideration of the complaint, the prosecutor or the judge of the pre-trial investigation has the right to familiarize himself or herself with the documents of the pre-trial investigation and demand explanations from the investigator or prosecutor, if they have not been submitted earlier. The decision of the judge of the pre-trial investigation is final and is not subject to appeal, except in cases where this Code provides for the possibility of appealing against it.[31] In addition, in accordance with Article 65 of the Code, the prosecutor, participants in the process, and persons to whom procedural coercion has been applied may challenge the procedural actions committed by the judge of the pre-trial investigation and the rulings made by the judge.[32]

The study of the experience of a number of other countries on the legal regulation of the procedure for consideration of complaints at the stage of pre-trial investigation shows that in some countries there are trends regarding the inexpediency of distinguishing the investigating magistrate as a special entity, since these functions must be performed by any judge who receives relevant petitions or complaints for consideration in the general order, the consideration of which is currently within the competence of the investigating magistrate. At the same time, we must state that the existing structures of appeal procedures in the world and the functions of judicial control that are performed are not ideal, as evidenced by the number of court decisions that are canceled or changed annually by higher courts, as well as the number of citizens' appeals to the European Court of Human Rights. At the same time, some experience may be useful for Ukraine, especially within the framework of the plan for the distribution of duties of each particular court (Germany) and to establish the scope of powers of the investigating magistrate during the consideration of complaints at the stage of pre-trial investigation as an independent subject of criminal procedure (Georgia, Republic of Kazakhstan, Republic of Moldova).

CONCLUSIONS

The subject of appeal during the pre-trial investigation in the criminal process consists of decisions, actions, or omissions of the investigator or prosecutor, that is, the authoritative expression of the will of these authorized officials or their failure to fulfill a certain procedural obligation during the pre-trial investigation, resulting in failure to ensure proper implementation, noncompliance, unreasonable restriction or violation of procedural or constitutional rights, freedoms, and legitimate interests of the participant of criminal proceedings, and about which the participant officially filed a complaint. The procedure for

---

[29] Code of Criminal Procedure of the Republic of Estonia, June 6, 2001. // https://www.riigiteataja.ee/en/eli/530012017002/consolide.
[30] Criminal Procedure Code of the Republic of Latvia, June 17, 1998. // https://likumi.lv/ta/id/107820-kriminalprocesa-likums.
[31] Criminal Procedure Code of the Republic of Lithuania, March 4, 2002. // https://legal-tools.org/doc/70b7df.
[32] Criminal Procedure Code of the Republic of Lithuania, March 4, 2002. // https://legal-tools.org/doc/70b7df.

consideration of complaints during the pre-trial investigation provides for an adversarial procedure, since by involving an independent and disinterested entity—the investigating magistrate—in resolving important procedural issues, it is designed to provide an opportunity for participants that do not belong to the prosecution to restore their violated rights, as well as to provide them with a mechanism of influence on the course of criminal proceedings. Deviations from compliance with the principles of adversariality during the consideration of complaints can be traced in cases where this procedure takes place in the absence of the investigator or prosecutor, which obliges the investigating judge to assess the legal positions of the parties through the prism of the specific circumstances of the case and to be active in collecting evidence—in particular, to check additional circumstances that were not mentioned by the parties but require clarification in order to properly resolve the procedural requirements set forth in the complaint—identify possible violations of the rights of the subject of criminal proceedings, and restore them.

Criminal procedural legislation in terms of the procedure for exercising the right to appeal against decisions, actions, or omissions of pre-trial investigation bodies needs further improvement, since the existing shortcomings may lead to improper implementation of the tasks of criminal proceedings. It is proposed to make appropriate amendments to Article 3 of the Criminal Procedure Code of Ukraine in terms of defining the terms "procedural action" and "procedural inaction." The list of decisions, actions, or omissions of pre-trial investigation bodies and the prosecutor that may constitute the subject of appeal during the pre-trial investigation, including the legal consequences of their commission or adoption, needs to be clarified. Also, the presence of numerous cases of noncompliance with the deadlines for consideration of complaints established by the criminal procedural legislation at the stage of pre-trial investigation encourages the acceleration of the implementation of the "electronic court" project.

Properly ensuring the fulfillment of the tasks of criminal proceedings is impossible without the existence in the criminal procedural legislation of such an institution as appealing against decisions, actions, or omissions of authorized entities at the stage of pre-trial investigation. Having analyzed and compared the procedure for challenging the actions (inaction) and decisions of the person who conducts the inquiry, the investigator, or the prosecutor in criminal proceedings of individual states, it should be stated that the differences in the mechanism of their implementation by the complainant are due to the complex nature of these rights reflected in the relevant legislation at the national level.