UDC 343.13:347.963:347.965(477)
DOI https://doi.org/10.32782/yuv.v4.2025.22

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INVESTIGATING JUDGE AS A GUARANTOR OF THE DEFENCE COUNSEL'S RIGHT TO COLLECT EVIDENCE: CONCEPTUAL APPROACHES AND LEGAL PRACTICE

Problem Statement. In the modern criminal process, which is based on the principles of adversariality, equality of arms, and the guarantee of the right to a fair trial, one of the key conditions for the effective exercise of the defence function is the ability to collect evidence independently. Despite the legislative provisions enshrined, in particular, in Articles 22 and 93 of the Criminal Procedure Code of Ukraine, the mechanisms for implementing this right by the defence remain fragmented, unstandardized, and often dependent on the discretion of other procedural actors. Particular attention in this context must be given to the procedural figure of the investigating judge, who, at the pre-trial stage, is intended not only to ensure judicial oversight over the observance of rights and freedoms, but also to act as a guarantor of procedural balance between the parties. However, in practice, there is a tendency to interpret the role of the investigating judge in a formalistic manner when it comes to defence-initiated motions, which effectively undermines the defence counsel's ability to exercise their evidentiary powers. The absence of clear legislative provisions defining the duties of the investigating judge in ensuring effective access to evidentiary information for the defence, the formalistic approach to assessing defence motions, and the procedural asymmetry between prosecution and defence create substantial barriers to the full realization of the right to defence in its substantive dimension. This situation necessitates a doctrinal reconsideration of the investigating judge's role as an active guarantor of evidentiary parity between the parties, and the development of a coherent conceptual and legal-practical approach to this institution.

Analysis of Recent Research and Publications. These works include, but are not limited to, those by Y. P. Alenina, O. R. Balatska, Yu. M. Hrosheva, I. V. Hloviuk, Ye. H. Kovalenko, O. P. Kuchynska, L. M. Loboyko, V. P. Shybilko, and others, whose contributions have helped shape the theoretical framework of evidentiary rights and the procedural status of the defence and the judiciary in criminal proceedings.

Aim of the Article. The aim of this article is to identify and substantiate the conceptual foundations of the investigating judge's role as a guarantor of the defence counsel's right to collect

evidence during the pre-trial stage of criminal proceedings. The study seeks to analyze the current legal framework and its practical application in Ukraine, to evaluate doctrinal approaches and judicial practices related to defence-initiated motions, and to propose directions for enhancing the procedural mechanisms that ensure equality of arms in the evidentiary process. Special attention is paid to the need for a doctrinal rethinking of the investigating judge's function not merely as a passive reviewer of procedural requests, but as an active safeguard of the adversarial process and the defence's access to evidence.

Presentation of the Main Material. In criminal proceedings based on the principles of adversariality and equality of procedural opportunities, the defence's right to collect evidence is one of the key guarantees of the right to a fair trial. This right implies not only the ability to challenge the prosecution's evidence but also the active participation in building an evidentiary base in favour of the accused.

According to paragraph 3 of Article 6 of the European Convention on Human Rights [2], every accused person has the right to an effective defence, which includes the ability to collect, present, and examine evidence on an equal footing with the prosecution. What matters here is not only the formal recognition of such rights in law but also the existence of effective procedures ensuring their realisation in practice.

Articles 22 and 93 of the Criminal Procedure Code of Ukraine [1] declare the equality of parties and provide for the possibility of evidence collection by both the prosecution and the defence. However, Ukrainian legal practice reveals serious difficulties in the implementation of these rights by the defence. The defence has no access to operational-search tools, coercive mechanisms for obtaining evidence, and often encounters non-cooperation or reluctance from third parties and institutions when requesting necessary information.

In this context, it is important to distinguish between the initiation of procedural actions (e.g., filing motions for the interrogation of witnesses or for searches through the investigating judge) and independent evidence gathering (e.g., collecting documents, photographs, video recordings, written explanations, expert opinions). The former depends on the court's discretion, while the latter presupposes the autonomous procedural activity of the defence counsel. However, this distinction is often blurred in practice, which significantly narrows the actual scope of the right to defence. Therefore, establishing an effective mechanism for the defence to exercise its right to collect evidence requires both a rethinking of existing approaches in legal practice and legislative reinforcement of the defence counsel's role as a full-fledged evidentiary actor.

A review of the judicial practice of investigating judges in first-instance courts in recent years shows that, in most cases, when considering motions, applications, or complaints, they analyzed the evidence on which such procedural documents were based and also took into account objections submitted by the opposing party. This indicates the existence of a practice of actual examination of evidentiary material even within the framework of resolving procedural matters. At the same time, certain rulings contain no references to the examination of evidence, which is typically due to the failure of the initiating party to provide the necessary supporting materials [3; 4]. From the perspective of ensuring the right to defence, this trend has a dual significance. On the one hand, it confirms that investigating judges do not perform their functions in a merely formal manner but genuinely evaluate the materials submitted by the parties, reflecting the principle of adversariality.

On the other hand, situations in which the lack of an adequate evidentiary basis prevents the full consideration of motions highlight the responsibility of the defence to properly substantiate its requests or objections with appropriate documentation.

From the defence's standpoint, it is particularly important that in most cases, investigating judges do engage with the evidence supporting submitted motions, applications, or complaints. This demonstrates a tendency toward adherence to the principle of adversarial proceedings and the exercise of meaningful judicial oversight over the pre-trial investigation. However, the minority of cases in which the examination of evidence is not conducted raises concerns, as even a seemingly well-founded decision may fall short of the requirements of a fair trial if it lacks a thorough evidentiary assessment. For the defence, this underlines the critical need to carefully prepare materials for judicial review and to submit a complete and timely set of evidence to ensure the effective protection of the rights of the suspect or accused.

From the perspective of the defence, this empirical material holds particular importance. The high percentage of rulings that reference examined evidence indicates a genuine effort by investigating judges to uphold the principle of adversarial proceedings and to exercise meaningful judicial oversight over pre-trial investigations. At the same time, recurring instances of a formalistic approach to evidence assessment present risks to the effectiveness of the defence. This highlights the critical importance of the defence thoroughly preparing case materials and submitting a complete set of evidence to the court in a timely manner. Only through an active evidentiary position by defence counsel can the right of the suspect or accused to a fair trial be effectively safeguarded.

The existing practical difficulties in evidence gathering by the defence reveal a procedural imbalance between defence counsel and the prosecution, which possesses a significantly broader range of legal and factual tools. Under such conditions, ensuring justice in criminal proceedings requires not only the formal declaration of equality but also the creation of real mechanisms to implement it. In our view, one of the most effective ways to address this imbalance is to expand the procedural rights of the defence particularly by legislatively affirming the right of defence counsel to independently file motions with the court for temporary access to items and documents without the participation of the investigator or prosecutor, and by simplifying the procedures for involving experts and conducting independent expert examinations during the pre-trial stage. Overall, there is a need for institutional support for the defence, which could include the establishment of specialized evidence collection centers under bar associations or public human rights institutions, as well as the development of unified standards and procedural guidelines for conducting evidentiary activity by the defence. In addition, state authorities, enterprises, and institutions should be legally obligated to respond to defence counsel’s requests, with the introduction of real legal liability for unjustified refusals or deliberate non-compliance. Furthermore, it is essential to revise the current approach to evaluating evidence collected by the defence. In practice, such evidence is often treated with skepticism by investigators or judges solely because it was not obtained by official investigative bodies. This tendency directly violates the principle of equality of arms and contradicts the case law of the European Court of Human Rights, which has repeatedly emphasized that evidence submitted by the defence must carry the same procedural weight as that of the prosecution, provided legal requirements are met.

Within the scope of the investigating judge's proceedings, not only evidence directly related to the elements of a criminal offense may be examined, but also other materials that are of significant importance for resolving specific procedural issues. Such evidence, although not directly connected to establishing the guilt or innocence of the person, may play a key role in making a well-reasoned interim decision.

For example, during the consideration of a motion to allow a suspect who is subject to a preventive measure in the form of personal recognizance (including the obligation not to leave the Kyiv region without the permission of the investigative body or the court) to travel, the investigating judge examined the original of an invitation to an expert meeting addressed to the suspect. Based on this document, the motion was granted [5]. In another case, when considering a motion to change the preventive measure, the judge took into account documents submitted by the defence, including an email from the suspect's mother requesting a visit and accompanying medical documentation. However, in this case, the motion was denied [6]. Although these documents are not related to the subject matter of the criminal prosecution and do not constitute evidence in the classical sense for proving the commission of a crime, they may directly or indirectly confirm the existence of circumstances relevant to a specific procedural decision. In such instances, they acquire the status of admissible evidence within the framework of the investigating judge's jurisdiction, once again highlighting the flexibility and multidimensionality of judicial evaluation at the pre-trial stage of criminal proceedings.

The scope of the investigating judge's powers regarding the examination, verification, and assessment of evidence as well as the legal consequences of such procedural actions remains a matter of academic and practical debate. In particular, investigating judges of the High Anti-Corruption Court, in their rulings issued following the consideration of motions for the application or extension of preventive measures, consistently emphasize the limited nature of judicial evidence assessment at this stage of criminal proceedings. As noted in a number of decisions: "At this stage of criminal proceedings, the investigating judge must only assess whether the available information and examined evidence are sufficient to permit the possibility that the person in respect of whom the preventive measure is being considered may have committed the criminal offense of which they are suspected. The issue of assessing evidence in terms of its sufficiency and admissibility for determining a person's guilt or innocence in committing a specific crime falls exclusively within the competence of the court during the substantive review of the case" [7]. At the same time, the practice of the High Anti-Corruption Court demonstrates a tendency toward expanded analysis of evidentiary materials, even at this early stage. For example, in the reasoning sections of some rulings, investigating judges include dedicated blocks titled "On the Reasonableness of the Suspicion," in which they analyze materials gathered by the prosecution and also consider the arguments presented by the defence [8]. This suggests that, although the investigating judge does not formally determine the question of guilt, their assessment of evidence in practice influences the shaping of legal positions in the case and creates a precedent for preliminary judicial control over the reasonableness of suspicion.

Conclusions. The right of the defence to collect evidence in criminal proceedings, which are based on the principles of adversariality and equality of procedural opportunities, is one of

the key guarantees of a fair trial. This right must not remain merely a formal declaration in the law, but must be ensured through effective practical mechanisms for its implementation. Although the law provides for the possibility of collecting evidence by both the prosecution and the defence, in practice there exists a significant imbalance in procedural capabilities. Defence counsel is deprived of access to operational-search tools, lacks coercive mechanisms for obtaining information, and often encounters refusal to cooperate from third parties, which significantly complicates the performance of their procedural role. An analysis of the practice of first-instance courts shows that in the majority of cases, investigating judges, when considering motions, applications, or complaints, examine the evidence that supports such submissions, as well as objections from the opposing party. This demonstrates a genuine application of the adversarial principle, even at the preliminary procedural stage. At the same time, isolated cases in which rulings lack references to the examination of evidence are usually due to the failure of the party submitting the request to provide supporting materials. This highlights the necessity for the defence to carefully prepare its evidentiary base and promptly submit it for judicial review. Particular attention should be paid to the approach of investigating judges to evidence that does not directly relate to the substance of the accusation but is important for resolving specific procedural issues (e.g., the modification or relaxation of a preventive measure). Even documents that are not considered traditional forms of evidence (such as invitations, medical certificates, or letters) may be accepted by the court as admissible in the relevant context, provided they confirm circumstances relevant to the procedural decision. In view of the above, it can be concluded that the effective exercise of the defence's right to collect evidence requires not only an active stance by defence counsel, but also legislative and institutional strengthening of their status as a full-fledged participant in the evidentiary process. This includes simplifying procedures for filing motions with the court, enabling independent expert examinations, ensuring appropriate responses to defence requests, and reviewing the approach to evaluating evidence submitted by the defence, which must be recognized as equal in procedural value to that of the prosecution, provided that legal requirements are met. Only under such conditions can true equality of the parties in criminal proceedings be achieved, and the individual's right to a fair trial guaranteed.

This article examines the procedural and conceptual role of the investigating judge as a guarantor of the defence counsel's right to collect evidence during criminal proceedings. The study is grounded in the premise that the implementation of the adversarial principle, enshrined in Ukrainian criminal procedural legislation and international legal standards, requires not only formal recognition of the parties' equal rights, but also the creation of real mechanisms for their enforcement. Although the Criminal Procedure Code of Ukraine grants the defence the right to gather evidence and initiate certain procedural actions, in practice this right is significantly limited by institutional dependencies, procedural barriers, and judicial formalism. Special attention is given to Article 93 of the Criminal Procedure Code of Ukraine, which regulates the defence's ability to request the performance of investigative or procedural actions through the investigating judge. The author highlights the gap between the formal legal framework and its application in practice, particularly the passive

role often played by investigating judges when considering defence motions. As a result, the defence's evidentiary function is frequently reduced to an auxiliary status, despite the legal principle of equality of arms. The article analyzes the criteria used by investigating judges in deciding whether to grant such motions, including the relevance, admissibility, and sufficiency of the proposed evidence. It also explores judicial tendencies toward rejecting defence motions on overly technical or procedural grounds, which undermines the adversarial nature of the proceedings and the right to an effective defence. The author argues that the investigating judge should not serve merely as a formal reviewer of requests but must act as an active procedural safeguard, ensuring that the defence has meaningful access to the tools and information necessary to build its evidentiary position. To this end, the article proposes conceptual and procedural improvements, including clearer legislative provisions regarding the obligations of the investigating judge to facilitate evidentiary equality, better training for judges on defence rights, and enhanced judicial oversight over the fairness of the pre-trial phase. Ultimately, strengthening the functional role of the investigating judge as a guarantor of the defence's right to collect evidence is essential for the development of a fair, balanced, and human-rights-oriented criminal justice system in Ukraine.

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

Андрєєв І. Слідчий суддя як гарант права захисника на збирання доказів: концептуальні підходи та правозастосовна практика

У статті досліджується процесуальна та концептуальна роль слідчого судді як гаранта реалізації права захисника на збирання доказів у межах кримінального провадження. Основна увага зосереджена на тому, що впровадження принципу змагальності, закріпленого у кримінальному процесуальному законодавстві України та міжнародних правових стандартах, потребує не лише формального визнання рівності сторін, а й створення реальних механізмів для її забезпечення. Попри те, що Кримінальний процесуальний кодекс України надає стороні захисту право на збирання доказів і ініціювання певних процесуальних дій, на практиці це право суттєво обмежується інституційною залежністю, процесуальними бар'єрами та формалізмом у судовій практиці. Особливу увагу приділено аналізу положень статті 93 КПК України, яка регламентує можливість сторони захисту ініціювати проведення слідчих чи інших процесуальних дій через слідчого суддю. Автор акцентує на розриві між формальною нормативною базою та її фактичним застосуванням, зокрема на пасивній ролі, яку часто відіграють слідчі судді при розгляді клопотань сторони захисту. Унаслідок цього доказова діяльність захисника зводиться до допоміжної, хоча принцип змагальності вимагає рівноправного процесуального статусу. У статті проаналізовано критерії, які використовують слідчі судді для вирішення питання про задоволення клопотань, зокрема допустимість,

належність та обґрунтованість запропонованих доказів. Розглядається тенденція до відхилення клопотань захисту з формальних або надмірно процедурних підстав, що підриває як змагальний характер процесу, так і право на ефективний захист. Автор стверджує, що слідчий суддя не повинен обмежуватись формальним розглядом подань, а має виступати як активний процесуальний гарант, який забезпечує реальний доступ сторони захисту до доказової інформації та необхідних інструментів. У цьому контексті пропонуються концептуальні й процесуальні зміни: чітке законодавче визначення обов'язків слідчого судді щодо сприяння процесуальній рівності, підвищення рівня підготовки суддів щодо забезпечення прав сторони захисту та посилення судового контролю за справедливістю досудової фази. Зміцнення функціональної ролі слідчого судді як гаранта права захисника на збирання доказів розглядається як ключовий чинник у розвитку справедливого, збалансованого та орієнтованого на права людини кримінального судочинства в Україні.

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

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Дата надходження статті: 07.07.2025
Дата прийняття статті: 28.08.2025
Опубліковано: 22.09.2025