UDC 343.1:342.7

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PROBLEMS OF ENSURING THE RIGHT TO AN EFFECTIVE REMEDY IN CRIMINAL PROCEEDINGS IN THE COURT OF FIRST INSTANCE

The article is devoted to the study of practical problems of exercising the right to an effective remedy in criminal proceedings in a court of first instance. An analysis of the case law of the European Court of Human Rights has made it possible to state that the right to an effective remedy is enshrined in the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, which in turn obliges the State parties to introduce mechanisms for effective legal protection of human rights and freedoms at the national level. An analysis of the domestic regulatory framework suggests that the ineffectiveness of the right to an effective remedy is due to the failure of the criminal procedure legislation of Ukraine to fulfil one of its main tasks - ensuring due process of law. The absence of proper regulation of the procedure for appealing against decisions, actions or omissions during the preparatory proceedings by the participants of the court proceedings is the main cornerstone that falls apart the entire mechanism for exercising the right to an effective remedy at this stage of the proceedings, as provided for in part 2 of Article 303 of the CPC.

Based on the theoretical works of scholars and analysing the doctrinal provisions on the interpretation of the concept of "effective remedy", the author offers her own solution to the identified gaps and shortcomings in the practical implementation of the right to an effective remedy at the stage of preparatory court proceedings and court proceedings on the merits of criminal proceedings. The first way is to regulate at least a certain list of issues which may be subject to appeal at the stage of preparatory court proceedings at the level of law, based on the analysis of case law, scientific developments, the essence of the issues which may be subject to appeal, the consequences and expediency of their resolution at this stage of proceedings, and to leave all other complaints for consideration by the court. The second way is to provide for issues that cannot be appealed at this stage of the proceedings, such as, for example, the issue of appealing against procedural actions that entail inadmissibility of evidence, since this issue will be the subject of consideration in the trial on the merits, and all other complaints filed should be considered without delay. The article also draws attention to the urgent need to address the problem of appealing against the denial of a motion to close criminal proceedings, as this leads to a violation of the rights of the accused, since he or she is unable to effectively defend his or her interests. To solve this problem, it is proposed to amend the legislation, namely: to supplement Article 380 of the CPC of Ukraine with a provision that would allow a separate appeal against the refusal to satisfy the motion to close the criminal proceedings, and to clearly define the terms and procedure for appealing against such a refusal.

***Keywords**: criminal proceedings, court proceedings, remedy, effective protection of rights, protection of rights, human rights, legal protection.*

DOI 10.34079/2226-3047-2023-14-27-26-32

Statement of the problem. The establishment and functioning of the rule-of-law state depends directly on the implementation of high international standards of observance and

protection of human rights, particularly those enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, into its legal system. Among them, the right to an effective remedy plays a special role. Ensuring the right to an effective remedy in Ukraine is crucial for the development of our transitional society, including the reform of the judicial system. At the current stage of formation of our state, the right to an effective remedy is characterised by certain shortcomings and obstacles caused by both internal problems and external threats that Ukraine is currently facing, which limits the availability and effectiveness of the remedies provided for by national legislation.

In this context, the issue of exercising the right to an effective remedy in criminal proceedings in the court of first instance becomes relevant and requires immediate resolution.

Analysis of recent research and publications. In legal science, the issue of the effectiveness of legal remedies has not been the subject of separate monographic studies. However, due to the increasing number of applications to the European Court of Human Rights by persons whose right to an effective remedy has not been fulfilled, these issues have aroused some scientific interest. In particular, it is worth mentioning the research of the following scholars on this topic in the sectoral literature: Y. Barabash, G. Baturov, T. Bryn, M. Vorobyov, V. Glazyrin, A. Golovin, V. Gribanov, P. Gureev, I. Dzer, O. Ivanov, N. Kuznetsova, N. Malein, M. Morshchakova, V. Nikitinsky, V. Nora, A. Pashkov, I. Petrukhin, O. Petryshyn, B. Puginsky, Z. Romovska, M. Sibilov, A. Selivanov, M. Teslenko, P. Tkachuk, Y. Todyka, V. Fedosova, G. Khairova and many others. However, the exercise of the right to an effective remedy, especially at certain stages of criminal proceedings, remains poorly understood and therefore requires additional comprehensive theoretical, legal and practical research.

The purpose of the article is to identify the main problems of exercising the right to an effective remedy in criminal proceedings in a court of first instance and to formulate the ways of their solution based on theoretical works of scholars, analysing the doctrinal provisions on the interpretation of the concept of "effective remedy" and based on the analysis of case law.

Summary of the main material. The constitutional provision guaranteeing everyone the right to appeal to the court against decisions, actions or omissions of public authorities, officials and employees (Article 55 of the Constitution of Ukraine) (Конституція України, 1996) is one of the main manifestations of the right of everyone to an effective remedy guaranteed by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, according to Article 13 of the Convention, "everyone whose rights and freedoms as set forth in this Convention have been violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in their official capacity" (Рада Європи, 1950). In turn, the right to an effective remedy also actually stems from the provisions of the Treaty on European Union (1992) (Договір про Європейський Союз, 1992) which states that "Member States shall fully preserve the Acquis Communautaire" to ensure the effectiveness of the relevant mechanisms and institutions.

Taking into account the case-law established by the ECtHR, a remedy is recognised as effective when, firstly, the remedy is able to directly remedy the situation (Pine Valley Developments Ltd and Others v. Ireland 1989); secondly, the state authorities at the national level must consider the complaint on the merits (Peck v. the United Kingdom 2003, §§§ 5 and 6).); secondly, the national authorities must examine the complaint under the Convention on the merits (Peck v. the United Kingdom, 2003, §§ 105-106); thirdly, the effectiveness of the remedy is assessed on a case-by-case basis (Colozza and Rubinat v. Italy, Commission judgment, 1982, pp. 146-147), etc;

Another essential feature of the effectiveness of a remedy is its accessibility. The remedy must be accessible to the person concerned and available to all persons regardless of their social and financial status or other external circumstances (Petkov and Others v. Bulgaria 2009, § 82).

In addition, such a remedy must be clear and transparent for use by all parties to legal relations, including clear procedures and rules, as well as information on those that are accessible to the public, and must be appropriate to the human rights violations in question, i.e. national remedies must be adapted to the relevant types of human rights violations.

Given the objectives of criminal proceedings, the peculiarities of legal procedures used in criminal proceedings, and the degree of restriction of human rights and freedoms in this process, the issue of ensuring the right to an effective remedy in criminal proceedings is particularly acute in procedural science and practice.

From the point of view of the effectiveness of the right to an effective remedy, one of the most problematic is the stage of preparatory court proceedings. First of all, this is due to the failure of the criminal procedure legislation of Ukraine to fulfil one of the main tasks - ensuring due process of law. The absence of proper regulation of the procedure for appealing against decisions, actions or omissions during the preparatory proceedings by the parties to the court proceedings is the main cornerstone that falls apart the entire mechanism for exercising the right to an effective remedy at this stage of the proceedings, as provided for in part 2 of Article 303 of the CPC.

Unfortunately, it should be noted that in the domestic court practice, the aforementioned right to file complaints against other decisions, actions or omissions of the investigator, detective or prosecutor that are not considered during the pre-trial investigation and may be subject to consideration during the preparatory proceedings in court in accordance with the rules of Articles 314-316 of the CPC (part 2 of Article 303 of the CPC), without mandatory regulation of the procedure for consideration and resolution of such complaints in Articles 314-316 of the CPC, was not enough to ensure effective consideration of such complaints. This is also emphasised in the scientific literature, in particular, V.I. Shestakov notes: "One of the important problems in this regard is the existence of a significant gap in the CPC of Ukraine, which is the absence of an effective mechanism for appealing decisions, actions or inaction of the pre-trial investigation body or prosecutor that were made at the pre-trial investigation stage, but could not be appealed in accordance with Part 2 of Article 303 of the CPC of Ukraine" (Shestakov, 2019, p. 299).

Such complaints are often left without proper attention of the court, without consideration on the merits, precisely because of the lack of a procedure for their consideration. Sometimes the courts argue that it is inexpedient to consider such complaints at the preparatory stage based on the very issues challenged in them, for example, the issue of the illegality of certain procedural actions, which entails the inadmissibility of the evidence obtained, since the issue of the admissibility of evidence will be the subject of consideration in the trial. And this is essentially correct. However, based on the variety of complaints that may be filed at this stage, I believe it is unacceptable to leave the question of the expediency or inadvisability of considering such complaints to the discretion of the court. Without claiming incompetence or bias of the court, and vice versa, since the judicial system of any state is not perfect, it should be assumed that sometimes the moment of restoration of violated rights and freedoms during the pre-trial investigation is decisive for the participants of the court proceedings. And since the legislator has prohibited appealing of issues other than those specified in part 1 of Article 303 of the CPC during the pre-trial investigation, taking care primarily of conducting a prompt and effective investigation in compliance with the investigation time limits, as well as preventing the delay of proceedings due to systematic

appeals by the parties to the proceedings, the participants are guaranteed the opportunity to file all other complaints as soon as the court proceedings, which are not limited by strict time limits, begin. And the sooner the complaint is considered, the presence of certain violations is established, a decision is made to eliminate the negative consequences, and the violated rights of individuals are restored, the more effective this mechanism will be in ensuring the right to a remedy in criminal proceedings. We consider this to be a logical axiom that is in the interests of both private and public.

The analysis of court practice shows that sometimes the subject of such complaints is the essential issues of criminal proceedings that significantly restrict or violate the rights and freedoms of participants in the proceedings, the resolution of which may be of great importance for a particular person or the proceedings as a whole. Such complaints include complaints about unlawful detention, unlawful search, etc. The statement of the fact of such violations may be the basis for the suspect or accused to claim compensation for damage caused by illegal detention in accordance with the requirements of Article 2 of the Law of Ukraine "On the Procedure for Compensation for Damage Caused to a Citizen by Illegal Actions of Bodies Conducting Operational and Investigative Activities, Pre-trial Investigation Bodies, Prosecutor's Office and Court" of 01.12.1994 (Закон України № 266/94-ВР, 1994). Issues of violation of the presumption of innocence during the pre-trial investigation, violation of the procedure for extending the pre-trial investigation are also often challenged at this stage and may be of some importance to the participants in the proceedings.

In general, taking into account the realities of domestic law enforcement practice, we believe that based on the analysis of judicial practice, scientific achievements, the essence of the issues that may be the subject of appeal, the consequences and expediency of their resolution at this stage of the proceedings, it is necessary to regulate at least a certain list of issues that may be the subject of appeal at the stage of preparatory court proceedings. All other complaints should be left to the court. This is one possible way to address this legislative gap. The second way is to provide for issues that cannot be appealed at this stage of the proceedings, such as, for example, the issue of appealing against procedural actions that entail the inadmissibility of evidence, since this issue will be the subject of consideration in the trial on the merits. All other complaints filed should be considered without delay.

I would like to note that during the trial in the court of first instance, problems arise with the denial of a motion to close the proceedings, which cannot be separately appealed at the trial stage. Indeed, there are situations when the court of first instance denies the motion to dismiss the criminal proceedings, and it is impossible to appeal this decision separately at the trial stage. This happens for the following reasons: Pursuant to Article 380 of the CPC of Ukraine, a court decision to close criminal proceedings may be appealed only on appeal after a court decision has been rendered in the case. Denial of a motion to close a case is not a decision to close criminal proceedings. It is an interim court decision that does not have the features of a court act that entails legal consequences. It is worth noting that this issue is a subject of debate among scholars.

Some experts believe that the denial of a motion to dismiss a case should be appealed on appeal simultaneously with the appeal against a court decision.

Others believe that such a court decision is not subject to a separate appeal and can only be challenged as part of an appeal against a court decision. Currently, the court practice on this issue is not unambiguous.

In our opinion, solving the problem of appealing against the denial of a motion to close criminal proceedings is an urgent need, as this leads to a violation of the rights of the accused, as he or she is unable to effectively defend his or her interests. To solve this problem, it is proposed to amend the legislation, namely: to supplement Article 380 of the CPC of Ukraine with a

provision that would allow a separate appeal against the refusal to satisfy the motion to close the criminal proceedings, and to clearly define the terms and procedure for appealing such a refusal.

Resolving the problem of appealing against the denial of a motion to close criminal proceedings is one of the important steps towards ensuring the rule of law and fair trial in Ukraine.

Conclusions. Thus, the problem of ensuring the right to effective remedies at the stage of criminal proceedings in the court of first instance requires immediate correction at the legislative level, considering the scientific developments on this issue and the existing national judicial practice of resolving these issues. We see two main ways to solve the existing problems: 1) to regulate at least a certain list of issues that may be subject to appeal at the stage of preparatory court proceedings, based on the analysis of court practice, scientific developments, the essence of the issues that may be subject to appeal, the consequences and expediency of their resolution at this stage of proceedings, and leave all other complaints for consideration by the court; 2) to regulate issues that cannot be subject to appeal at this stage of proceedings, such as the issue of appealing procedural actions that entail the inadmissibility of evidence, as this is a It is important to note that the right to an effective remedy is one of the fundamental principles of criminal proceedings. Compliance with this principle is a guarantee of a fair trial and protection of the rights and legitimate interests of all participants in criminal proceedings.

Thus, it is urgent to resolve the problem of appealing against the denial of a motion to close criminal proceedings during the trial in the first instance. To solve this problem, it is proposed to amend the legislation, namely: to supplement Article 380 of the CPC of Ukraine with a provision that would allow a separate appeal against the refusal to satisfy the motion to close the criminal proceedings, and to clearly define the terms and procedure for appealing against such a refusal.

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Стаття надійшла до редакції 2 травня 2024 р.

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ПРОБЛЕМАТИКА ЗАБЕЗПЕЧЕННЯ ПРАВА НА ЕФЕКТИВНИЙ ЗАСІБ ПРАВОВОГО ЗАХИСТУ ПІД ЧАС РОЗГЛЯДУ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ В СУДІ ПЕРШОЇ ІНСТАНЦІЇ

Стаття присвячена дослідженню практичних проблем реалізації права на ефективний засіб правового захисту під час розгляду кримінального провадження в суді першої інстанції. Аналіз прецедентної практики Європейського суду з прав людини, дозволив констатувати, що право на ефективний засіб правового захисту знаходить своє закріплення в положеннях Конвенції про захист прав людини і основоположних свобод, що в свою чергу, зобов'язує держав-учасниць запровадити механізми ефективного правового захисту прав і свобод людини на національному рівні. Аналіз вітчизняної нормативної бази дозволяє стверджувати, що неефективність реалізації права на ефективний засіб правового засобу обумовлено невиконанням кримінально-процесуальним законодавством України одного з основних завдань – забезпечення належної правової процедури. Відсутність належної регламентації процедури оскарження учасниками судового провадження рішень, дій чи бездіяльності під час підготовчого провадження є основним краєуголним камінцем, що розвалює весь, передбачений ч. 2 ст. 303 КПК, механізм реалізації права на ефективний засіб правового захисту на цьому етапі провадження.

Ґрунтуючись на теоретичних доробках науковців та аналізуючи доктринальні положення щодо тлумачення поняття «ефективного засобу правового захисту» запропоновано авторське вирішення виявлених прогалин та недоліків практичної реалізації права на ефективний засіб правового захисту на етапі підготовчого судового провадження та судового розгляду по суті кримінального провадження. Перший шлях полягає у необхідності на рівні закону регламентувати хоча б певний перелік питань, що можуть бути предметом оскарження на етапі підготовчого судового провадження, виходячи з аналізу судової практики, наукових доробок, сутності питань, які можуть стати предметом оскарження, наслідків та доцільності їх вирішення на цьому етапі провадження, а всі інші скарги залишити на розгляд суду. Другий шлях зводиться до того, щоб передбачити питання, які не можуть бути предметом оскарження на цьому етапі провадження, як то наприклад, питання оскарження процесуальних дій що тягне недопустимість доказів, оскільки це питання буде предметом розгляду у судовому розгляді справи по суті, а всі інші подані скарги повинні бути розглянуті без зволікань. Також, в статті звертається увага щодо вирішення проблеми з оскарженням відмови в задоволенні клопотання про закриття кримінального провадження є нагальною потребою, оскільки це призводить до порушення прав обвинуваченого, адже він не має можливості ефективно захищати свої інтереси. Для вирішення цієї проблеми пропонуються внесення змін до законодавства, а саме: доповнити статтю 380 КПК України положенням, яке б дозволяло окремо оскаржувати відмову в задоволенні клопотання про закриття кримінального провадження, та чітко визначити строки та порядок оскарження такої відмови.

***Ключові слова**: кримінальне провадження, судове провадження, засіб правового захисту, ефективний захист прав, охорона прав, права людини, правовий захист.*