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The Court as a Subject of Examination and Evaluation of Evidence in Criminal Proceedings

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■ **Abstract.** The reform of the criminal procedure legislation and the judicial system of Ukraine actualises the need to clarify the boundaries of the court's activity in criminal proceedings, its role in collecting, verifying, and evaluating evidence to establish circumstances relevant to criminal proceedings. The purpose of the study is to investigate the provisions of the current criminal procedure legislation in terms of examination and evaluation of evidence by the court. A system of general scientific and special research methods was used to achieve the goals set, including dialectical, system and structural, statistical, and system analysis methods. It is proved that within the framework of judicial proceedings, a judge, as a subject of examination and evaluation of evidence, carries out certain research activities. It is proved that this activity is aimed at establishing circumstances and reproducing certain fragments of reality that prove or refute the facts, which results in the formation of an internal conviction in the judge and, ultimately, a court decision. The priority importance of such a basis of criminal proceedings as the immediacy of the examination of testimony, items, and documents is emphasised, which contributes to the full clarification of the circumstances of the proceedings and its objective solution. The study results will contribute to the development of the justice system, considering the best international practices in the context of adversarial criminal proceedings, ensuring the correct and timely consideration of criminal proceedings

■ **Keywords**: trial; testimony; pre-trial investigation; evidence; verdict; procedural decision

■ Introduction

Modern practice of implementing judicial procedures and certain judicial powers shows the need to build a scientifically based concept for the further development of legal proceedings in Ukraine, considering both the doctrine of the Ukrainian criminal process and the experience of international human rights practice. Of particular importance is the issue of determining the boundaries of the court's activity in criminal proceedings as an important prerequisite for justice. This, in particular, is confirmed by documents that define priorities for improving legislation on the judicial system, the status of judges, judicial proceedings, and other institutions of justice. Thus, the strategy for the development of the justice system and constitutional court proceedings for 2021-2023 defines the main principles and areas for the development of the justice system, taking into account the best international practices. The document [1] outlines priorities for improving legislation on the judicial system, the status of judges, judicial proceedings, and other institutions of justice, introducing urgent measures to improve the activities of legal institutions. One of the tasks of the strategy is to improve access to justice.

At the same time, data from modern opinion polls show that society has less and less confidence in the courts and judges. Thus, the level of trust in the judicial power of Ukraine among persons who participated in judicial procedures is 40%, and among persons who were not participants in judicial procedures – 13% [2]. One of these factors is the unnecessarily long consideration of criminal proceedings in court. Correct and timely consideration of criminal proceedings that can ensure an adversarial criminal process is a characteristic feature of a modern state governed by the rule of law. This fact should encourage the rethinking of certain forms of functioning of the judicial system, considering measures of a theoretical, legislative, and applied nature.

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The above encourages theoretical and praxeological discussion, actualises the discussion of issues of optimising the court's activities for the study and evaluation of evidence in criminal proceedings. Problematic issues of the court's participation in the examination of the circumstances of a criminal offence and their assessment in criminal proceedings have served as the subject of research by many modern processalists, whose studies are mainly devoted to highlighting the criteria for evaluating evidence, in particular through the prism of the categories "belonging", "admissibility", "reliability of significance" and "sufficiency of evidence" [3], the phenomenon of internal persuasion as a manifestation of personal ideas about justice, duty, correctness, expediency [4], the subject and limits of proof [5], the concept of verbal probabilities [6-7]. A separate block of papers is devoted to the procedure for interpreting evidence in criminal proceedings and related issues of their affiliation, admissibility, and sufficiency, the order of their examination in a court session [8-10], the key principles of this process [11-12]. At the same time, most of these papers relate to the general provisions of evidence in judicial criminal proceedings or other theoretical and practical aspects of the theory of evidence, and therefore, questions about the content of the court's activities in the study and evaluation of evidence in adversarial criminal proceedings remain insufficiently covered.

On the agenda of Ukrainian legislators is the revision of many methodological provisions of the criminal process. This is conditioned by the accelerated pace of increasing the volume of scientific knowledge, which naturally implies the need to improve existing and create new, more effective methods of assimilation and practical application of the acquired knowledge, improve the relevant legislation. The reform of the criminal procedure legislation and the judicial system of Ukraine actualises, in particular, the need to clarify the role of the court in the examination and evaluation of evidence in criminal proceedings.

The adoption of the new Criminal Procedure Code of Ukraine in 2012 [13] was marked by a change in the legal regulation of the judicial procedure. The key principles of the normative array were the priority of protecting the rights and freedoms, legitimate interests of a person and citizen, and the introduction of an adversarial model of criminal proceedings and, as a result, changing the functions and role of the court when considering a criminal case.

Considering the above, the doctrine of criminal procedure raises questions about the limits of activity of the court as a subject of examination and evaluation of evidence in criminal proceedings. Thus, some modern researchers [14] quite rightly state the debatable nature of this issue, because theorists and practitioners, on the one hand, consider the court as a key subject of the process of establishing objective reality in criminal proceedings, comprehensive and objective investigation, and on the other – emphasise minimising the level of activity and initiative of the court, which is indicated by the essence of its procedural function in the context of examination and evaluation of evidence.

The purpose of the study is to analyse the provisions of the current criminal procedure legislation and the specifics of its application in terms of clarifying the place and role of the court in the evaluation of evidence, which is achieved by solving problems to clarify the essence of such concepts as "immediacy of the study of testimony, items, and documents", "adversarial criminal process", "internal conviction of a judge".

Materials and Methods

In the process of investigating the problem based on the analysis of the norms of criminal procedure legislation, general scientific and special methods of scientific knowledge were used. The methodological basis of the study is the dialectical approach, which revealed the specifics of the process of examination and evaluation of evidence in criminal proceedings in the dynamics and interrelation of the relevant components of the court's activities. In addition, the main components of the methodological tools were: system analysis, which was applied within the framework of the analysis of legal norms regulating the participation of the court in the examination and evaluation of evidence in adversarial criminal proceedings; system and structural – during the examination of the stages of proof and the role of the court in them, the essence and features of the implementation of such concepts as "immediacy of the examination of testimony, items, and documents", "adversarial criminal process", "internal conviction of a judge"; statistical – for the study and generalisation of judicial practice in this area. These and other general scientific methods (generalisation, comparison, modelling) were used in the study in interrelation and interdependence, which ensured the completeness and completeness of the analysis of the court's activities during the examination and evaluation of evidence in criminal proceedings.

The theoretical basis for this study is the research papers on criminal procedure, civil law, general theory of state and law, other legal sciences, psychology, and sociology. The normative legal basis of the study is the Constitution of Ukraine [15], the Criminal Procedure Code of Ukraine [13], current Ukrainian and international laws and regulations, and decisions of the Supreme Court of Ukraine [1; 16-17].

Results and Discussion

Article 23 of the Criminal Procedure Code of Ukraine [13] defines that "the court examines evidence directly",

and "receives the testimony of participants in criminal proceedings orally". This provision indicates that the oral testimony of participants in criminal proceedings as a result of their direct investigation in the course of judicial proceedings is perceived and evaluated by the court based on the so-called internal conviction of the judge. The legislator repeatedly uses the concept of "examination of evidence" in relation to the stage of judicial proceedings (Art. 319, 322, 339, 349, 352, 357, 358, 359, 386 Criminal Procedure Code of Ukraine) [18]. All subjects of judicial criminal proceedings are endowed with certain powers, rights, and obligations in the field of evidence. The specifics of these powers depend on the procedural function of the relevant subject, its procedural status, and the nature of the powers.

The court, to verify the ownership, admissibility, and reliability of evidence provided by the parties to criminal proceedings, has the following powers: to include questions in the decision to conduct an expert examination (Part 3 of Article 332 of the Criminal Procedure Code); to ask questions during the interrogation of the accused (Article 351), witnesses (Article 352 of the Criminal Procedure Code), the victim (Article 353 of the Criminal Procedure Code) or an expert (Article 356 of the Criminal Procedure Code). Certain provisions of the Criminal Procedure Code of Ukraine also indicate the need for the court to carry out a certain activity in establishing the circumstances of a criminal offence. At the initiative of the court, some investigative (search) actions may also be carried out, in particular: interrogation of an expert (Part 1 of Article 356 of the Criminal Procedure Code); examination of documents (Article 358 of the Criminal Procedure Code); on-site examination (Article 361 of the Criminal Procedure Code); examination in accordance with Part 2 of Article 332 of the Criminal Procedure Code; repeated interrogation of a witness (Part 13 of Article 352 of the Criminal Procedure Code); simultaneous interrogation (Part 14 of Article 352 of the Criminal Procedure Code) [13].

An important group of issues to be resolved by the court consists of those that are related to the provision and examination of evidence in the course of judicial proceedings. In the context of this, the authors share the opinion of researchers from the University of California, B. Thompson and E. Schumann, who define the examination of evidence in court proceedings as "the mental and practical activity of the court regulated by the Criminal Procedure Code with the active involvement of participants in court proceedings and the assistance of other participants in criminal proceedings" [19]. At the same time, Ukrainian researchers [20, p. 731] argue that this activity provides for establishing the ownership, reliability, and admissibility of evidence by analysing each of them, comparing them with other evidence, and obtaining evidence that confirms or refutes the ownership, reliability, and admissibility of the examined evidence.

The importance of such a areas of judicial activity as the administration of justice requires the creation of such conditions for studying the actual circumstances of a criminal offence that would ensure the adoption of an informed court decision. Considering the principle of adversarial proceedings as one of the key principles of judicial proceedings defined in paragraph 4 of Part 3 of Article 129 of the Constitution of Ukraine [15], participants of criminal proceedings are endowed with equal rights to examine evidence and prove its credibility in the criminal proceedings in court. Instead, the court must create the necessary conditions for the participants in the proceedings to exercise their procedural rights.

According to Part 1 of Article 23 of the Criminal Procedure Code of Ukraine, "the court receives the testimony of participants in criminal proceedings orally" [13]. Part 2 of this Article states that "information contained in statements, items, and documents that were not the subject of direct research by the court, except in cases provided for by this Code, cannot be recognised as evidence". Thus, this refers to the "immediacy of the examination of testimony, items, and documents" as a general basis of criminal proceedings, which is defined in paragraph 16 of Part 1 of Article 7 [13].

It is important in the context of establishing the circumstances of criminal proceedings, and its objective solution. This refers to the ability of the court to properly investigate and verify, evaluate them according to the criteria provided for in Part 1 of Article 94 of the Criminal Procedure Code of Ukraine [13], on the basis of which to form a complete and objective idea of the actual circumstances of certain criminal proceedings. Thus, paragraph 18 of the Resolution of the Supreme Court of Ukraine of 01/21/2016 in case No. 5-249ks16 States: "the immediacy of the examination of evidence means the requirement of the law addressed to the court on the examination of all evidence collected in a particular criminal proceeding by interrogating accused, victims, witnesses, an expert, examining material evidence, announcing documents, playing audio and video recordings, etc." [16].

Determining the limits of the court's participation in the examination of evidence in court proceedings, the conclusions of V. Nor regarding the inadmissibility of the perception of the court purely as a passive observer of the legal duel of the parties are relevant [21, p. 358-359]. After all, it is indisputable that the court should not only monitor compliance with a certain procedure for further making an informed decision, but also conduct investigative and judicial actions regarding the study of evidence provided by the parties.

The most common procedural means of examining evidence in judicial criminal proceedings are

investigative (search) actions, in particular, interrogation in court. The general procedure and sequence of interrogation of witnesses, victims, suspects, and accused persons, features of interrogation of minors of different procedural status, conducting interrogation in video conference mode, etc., are defined in Articles 351-354, 356 of the Criminal Procedure Code of Ukraine [13]. In case of non-compliance with the procedural rules for conducting an investigative (search) action, it is considered invalid.

Persons who have information about the circumstances of a criminal case give evidence in court, which is actually considered a judicial interrogation. And this method is not limited only to the process of voicing the testimony of the person being interrogated in court, and its essence consists in questioning the person being interrogated, giving oral testimony (in the form of a free story or answers to questions asked), perception (listening) to the testimony by a subject who procedurally or situationally conducts the appropriate type (stage or phase) of judicial interrogation.

The person being questioned may be prompted to give evidence by the court, prosecutor, defence lawyer, the victim themself, or other participants in the trial. The evidence provided allows proving or refuting the facts consolidated in the procedural sources of evidence, based on which the court forms an internal belief about the facts of objective reality that have become the subject of examination in court. N. Maksymyshyn statements [22, p. 136] regarding the fact that during interrogation the person should be given an opportunity to express themself exhaustively without interfering or making comments, after which additional questions can be asked to detail what has been said and to establish the circumstances that are essential to the case are appropriate. This is the essence of forensic investigation as a cognitive and verification operation.

After interrogating a witness, victim, or expert by the parties to criminal proceedings, they may be asked questions by the presiding judge and judges (Part 1 of Article 351, Part 12 of Article 352, Part 2 of Article 353, Part 2 of Article 356 of the Criminal Procedure Code of Ukraine) [13]. The presiding judge interrogates the accused last, which does not deprive them of the right to clarify and supplement the answers of the accused to ask them questions throughout their interrogation by participants in court proceedings (Part 1 of Article 351 of the Criminal Procedure Code of Ukraine) [13]. Such powers of the presiding judge to examine evidence during an interrogation in court are much broader than those of other participants in it.

The study suggests that such a procedure for interrogating persons does not create obstacles for the court to take an active position in clarifying the circumstances of criminal proceedings during the interrogation. It is necessary to clarify this position through the prism of research into categories of "activity" and "initiative". It is appropriate to consider the concept by V. Vapniarchuk, according to which these terms are similar in content, although they have different shades of value. The researcher's conclusions regarding the fact that initiative activity is implemented on its own impulse and "is not mandatory for the subject who carries it out" are valid [23, p. 237]. At the same time, this activity is usually determined by the leadership of a particular body and corresponds to its functional load, while activity serves as its essential characteristic. In addition, within the framework of the above conceptual vision, it is also necessary to consider the interdependence of these categories, because the initiative activity is a manifestation of a certain degree of activity, while a high degree of activity will encourage appropriate initiatives. In this context, initiative activity is a narrower category, that is, a component of the court activity.

If during the trial there are contradictions between the already interrogated participants in criminal proceedings, according to Part 15 of Article 352 of the Criminal Procedure Code of Ukraine, "the court has the right to appoint a simultaneous interrogation of two or more already interrogated participants in criminal proceedings (witnesses, victims, accused) to find out the reasons for the discrepancy in their testimony, which is carried out according to the rules established by Part 9 of Article 224 of the Criminal Procedure Code of Ukraine" [13].

It is worth paying attention to the procedural procedure defined by the Criminal Procedure Code of Ukraine for clarifying the circumstances of criminal proceedings in the examination of written and physical evidence. Before starting the examination of material evidence, the presiding judge explains to the participants of the court proceedings their right "to draw the court's attention to certain circumstances related to the item and its inspection" (Part 1 of Article 357 of the Criminal Procedure Code of Ukraine), and "the right to ask questions about material evidence to witnesses, experts, specialists who examined them" (Part 3 of Article 357 of the Criminal Procedure Code of Ukraine) [13]. At the same time, Part 1 of Article 363 of the Criminal Procedure Code of Ukraine States: "after clarifying the circumstances established during criminal proceedings and verifying them with evidence, the presiding judge at the court session is obliged to find out from the participants in the court proceedings whether they want to supplement the trial and what exactly" [13].

The provisions of the Criminal Procedure Code of Ukraine define general rules for determining the reliability of testimony, items, and documents. For example, to verify the authenticity of documents, participants in criminal proceedings are granted the right to: "ask questions about documents to witnesses, experts, specialists"; "ask the court to exclude it from

the list of evidence and decide the case on the basis of other evidence or appoint an appropriate expert examination of this document" (Parts 2 and 3 of Article 358 of the Criminal Procedure Code of Ukraine) [13].

Investigating this issue, A. Dekhtiar emphasises the importance of such a method of establishing the reliability of evidence (documents as the appointment by the court of various types of examinations (authorship, handwriting, phototechnical, etc.) [24, p. 324]. Under these conditions, participants in criminal proceedings have the right to ask the expert questions that are subject to inclusion in the court's decision on the appointment of an expert examination. At the same time, "the court has the right not to include in the decision questions raised by participants in court proceedings, if the answers to them do not relate to criminal proceedings or are not relevant for the trial, justifying such a decision in the resolution" (Part 3 of Article 332 of the Criminal Procedure Code of the Russian Federation) [13].

The authors of this study agree with the position of M. Shevchuk, that legitimate and permissible is also the activity of the court regarding the examination of evidence, which is manifested in its ability to independently fill in the incompleteness of the study of specific evidence, which is caused by the passivity of the parties in its presentation in the court session, by a more thorough, comprehensive examination of the evidence [25, p. 108]. For example, the court may examine in more detail the objects and documents provided to it by the party or other participants in the proceedings; ask the interrogated witness additional clarifying questions; consider it necessary to conduct an inspection of the scene of the incident; in addition, the court may ask questions to the participants of the criminal proceedings who participate in it at the place of inspection.

The unconditional organisational influence of the presiding judge in the court session, because the judge, according to Article 321 of the Criminal Procedure Code of Ukraine, "directs the course of the court session, ensures compliance with the sequence and procedure for performing procedural actions, the exercise of their procedural rights by participants in criminal proceedings and the performance of their duties, directs the trial to ensure clarification of all the circumstances of criminal proceedings, eliminating from the trial everything that does not matter for criminal proceedings" [13].

At the same time, according to Part 1 of Article 94 of the Criminal Procedure Code of Ukraine, "the court, according to its internal conviction, which is based on a comprehensive, complete, and impartial study of all the circumstances of criminal proceedings, guided by the law, evaluates each evidence in terms of belonging, admissibility, reliability, and the totality of collected evidence – in terms of sufficiency and interrelation for making an appropriate procedural decision". In addition, Part 2 of this Article states: "no evidence has a pre-established force" [13].

The assessment of evidence is final in nature for resolving issues that arise during the movement of criminal proceedings [26-27], and the Criminal Procedure Code of Ukraine provides for the appropriate procedure for the activities of participants in criminal proceedings in identifying inconsistency of factual data with the criteria of belonging, admissibility, and credibility. Evaluation of evidence is actually the mental activity of a judge aimed at establishing evidence, its affiliation, and admissibility.

In the process of developing the theory of evidence as one of the areas of the criminal process, various approaches to defining the concept of evaluating evidence were outlined. The positions of those authors, according to whose research, the assessment of evidence is not limited to the purely mental work of the subject of knowledge, should be recognised as appropriate. Thus, for example, A. Stoian substantiates the two-component structure of the process of evaluating evidence, that is, the presence of internal (logical) and external (legal). This refers to logical and psychological, and legal aspects [28]. Considering the above, the assessment of evidence can be defined as the practical and mental activity of authorised subjects of criminal proceedings regulated by law to determine the affiliation, admissibility, sufficiency, reliability of evidence, and their relationship for making an appropriate procedural decision.

One of the most important criteria for evaluating evidence should be considered its admissibility. The inadmissibility of evidence is the opposite of its admissibility. The inadmissibility of evidence is determined by the following criteria: obtaining evidence by unauthorised subjects; obtaining evidence from an improper source; violation of the procedure for obtaining evidence established by law. Clearly inadmissible evidence is evidence that is: obtained by the pre-trial investigation body in accordance with the procedure not provided for by the procedural law; obtained by the pre-trial investigation body in violation of the procedure provided for by the procedural law; evidence obtained as a result of a significant violation of human rights and freedoms. Part 2 of Article 89 of the Criminal Procedure Code of Ukraine states: "if an obvious inadmissibility of evidence is established during the trial, the court recognises this evidence as inadmissible, which entails the impossibility of examining such evidence or the termination of its evaluation in a court session, if such examination was initiated" [13].

In the research literature, it has been repeatedly noted that the court in no case can independently initiate the procedure for declaring evidence inadmissible during the trial, arguing that otherwise the

principle of adversarial parties will be violated. The court must decide on the admissibility of evidence in the sentencing process, determining the reasons for which it recognises this or that evidence as inadmissible.

The final evaluation of the admissibility of evidence is carried out by the court when passing a sentence. According to the Criminal Procedure Code of the Russian Federation, it is the court that decides the issue of admissibility of evidence during its assessment in the consultation room when making a court decision (Part 1 of Article 89).

The law requires that the court consider all the circumstances of criminal proceedings in aggregate and on this basis develop its internal conviction to assess evidence based on an objective vision of what has been done, that is, the results of an impartial knowledge of the circumstances of a criminal case in exact accordance with reality. Only then a complete conviction that certain factual circumstances actually occurred in the past can be developed.

Having systematised and analysed the opinions of researchers, it can be concluded that internal belief is an element of mental activity for the examination and evaluation of evidence, formed during the consideration of criminal proceedings in essence, the judge's idea of how to resolve a dispute.

The court remains solely responsible for resolving issues under Article 368 of the Criminal Procedure Code. A guilty verdict cannot be based on assumptions, it is accepted only if during the court session the defendant's guilt in committing a criminal offence is proved [29, p. 78].

When administering justice, a judge is obliged to form an internal belief based not on personal, subjective ideas or preferences, but based on value judgments that are the result of proving or refuting the facts available in procedural sources. Internal persuasion, on the one hand, appears as a method of evaluating evidence, and on the other – as a result of this assessment, formed based on confidence in the reliability of evidence, the correctness of the conclusions reached by the court in the framework of criminal proceedings.

Conclusions

Summing up the results of studying the issues of examination and evaluation by the court of evidence in criminal proceedings, it can be stated that during the trial, the judge carries out research activities, examining and evaluating the available evidence, the result of which is the reproduction of a particular fragment of reality, the reconstruction of all the circumstances necessary for the court to make a court decision. Moreover, one of the key foundations of this process is the immediacy of the study of testimony, items, and documents in judicial criminal proceedings, which structurally consists of two elements: personal perception of evidence by participants who examine it, and substantiation of the decision by evidence that has been examined and evaluated personally.

Evaluation of evidence as one of the stages of proof is a type of mental activity. At the stage of judicial proceedings, the basic factor in the establishment of the assessment of evidence by the judge, along with the procedural conclusions obtained in the course of judicial proceedings, is the so-called internal belief, which is the perception and understanding of perceived information through the prism of knowledge of substantive and procedural law, the judge's categorical confidence that they give a correct assessment of all the evidence available in the proceedings and that the conclusion that they made based on studying all issues is correct, meets the requirements of the law, justice and in no way restricts human rights.

Internal conviction of the judge, which makes allows forming in the consultation room conclusions about the guilt/innocence of a person, which are the basis of the verdict based on appropriate, permissible, reliable, and sufficient evidence in their relationship. The conviction of judges is based primarily on their legal awareness, the whole set of views, ideas, a sense of justice (as a subjective factor in forming the internal conviction of judges), on their direct examination of evidence during criminal proceedings, oral hearing of the testimony of participants in criminal proceedings (as an objective factor).

These conclusions encourage further study on the limits of the court's activity as a subject of examination and evaluation of evidence in criminal proceedings, optimisation of the criteria of this process to build a scientifically based concept for the further development of legal proceedings in Ukraine.

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Суд як суб'єкт дослідження та оцінки доказів у кримінальному провадженні

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■ **Анотація**. Реформування кримінального процесуального законодавства та судової системи України актуалізує необхідність з'ясування меж активності суду в кримінальному процесі, його роль у збиранні, перевірці й оцінці доказів з метою встановлення обставин, що мають значення для кримінального провадження. Метою наукової роботи є вивчення положень чинного кримінального процесуального законодавства в частині дослідження й оцінки судом доказів. Для досягнення поставленої мети використано систему загальнонаукових і спеціальних методів дослідження, серед яких діалектичний, системно-структурний, статистичний та метод системного аналізу. Обґрунтовано, що в межах судового розгляду в кримінальному провадженні суддя як суб'єкт дослідження та оцінки доказів провадить певну дослідницьку діяльність. Доведено, що зазначена діяльність спрямована на встановлення обставин і відтворення певних фрагментів дійсності, які дають змогу довести чи спростувати факти, результатом чого є формування в судді внутрішнього переконання та зрештою ухвала судового рішення. Наголошено на пріоритетному значенні такої засади кримінального провадження, як безпосередність дослідження показань, речей і документів, що сприяє повному з'ясуванню обставин провадження та його об'єктивному вирішенню. Одержані результати дослідження сприятимуть розвитку системи правосуддя з урахуванням кращих міжнародних практик у контексті змагального кримінального процесу, забезпечуючи правильний та своєчасний розгляд кримінальних проваджень

■ **Ключові слова**: судовий розгляд; показання; досудове розслідування; доказування; вирок; процесуальне рішення