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The reforming of the criminal-procedure low of Ukraine: some practical and theoretical questions

Abstract: The ways of reformation the criminal proceedings of Ukraine are characterized as analysis of programmes for changes. The ways of optimization of the investigation bodies of internal affairs have been suggested in last time. Author characterize as the long run the process of reforming the criminal proceedings of Ukraine – especial pre-trial process. The reform holding of criminal justice officials will assist the effective implementation of state legal policy aimed on protecting human and civil rights.

Keywords: criminal proceedings; pre-trial production; pre-trial investigation; the project of Criminal-Procedure Code; reformation; the investigation bodies; the Investigation Committee.

Ukraine is guided by the procedure of investigating the criminal cases, established by the Criminal-Procedure Code of the Ukrainian Soviet Socialist Republic (CPC), which was adopted in 1961 during the last two decades of its independence. According to the conclusions of international experts the norms of the current Criminal-Procedure Code do not exclude the conditions for violations of the human rights.

It was made lots of attempts to reform the criminal proceedings during the years of independence. It has been already prepared more than a dozen of variants of the «new» Criminal- Procedure Code, but most of these projects did not have a clear vision of the updating of the criminal proceedings, which would ensure its compliance with international standards in the sphere of defending the human rights and effective work of the law enforcement agencies. The necessary qualitative changes have to consider the national features, mentality of the population and traditions of law enforcement in Ukraine.

The authors of the native and foreign judicial science such as A.V. Baulin, Y.I. Barshev, V.I. Galagan, KF Gutsenko, J.V. Deryshev, A.I. Dubinsky, A.V. Ishchenko, N.S. Karpov, A.R. Mikhailenko, M.M. Mikheyenko, N.A. Pogoretskiy, B.V. Romaniuk, R.J. Savonyuk, V.M. Tertyshnik and others devoted a great attention to the problems of reforming the criminal justice system of Ukraine.

But now, when the activities of criminal justice is under a «special control» of the government of the country, there is a necessity to pay additional scientific, theoretical and practical attention to some of the issues related to the reorganization of the law enforcement system in the way of integration into Europe.

It is defined by the Concept of reforming the criminal justice system in Ukraine (2008), which provides «radical» changes in the legal, social, political and other spheres of society, aimed on improving the criminal justice system to ensure the legal rights and freedoms.[1]

In order to prepare the proposals for the reforming of the criminal procedure, proper guarantee of constitutional rights of citizens and the implementation of the admitted democratic standards in this field, ensuring of the execution of the obligations of Ukraine before the Council of Europe, the President of Ukraine V.F. Yanukovych established a Working Group of reforming by the signature of the decree on the 17th of August 2010 № 820/2010.

As a «model» of reforming the criminal justice of Ukraine is considered as the most appropriate the «model» of the criminal justice system in some countries of Western Europe

[1] Концепция реформирования уголовной юстиции Украины, утвержденная Указом Президента Украины от 8 апреля 2008 года № 311/2008.

(Germany, France) and USA[2]. According to some scientists the realization of most of the ideas of a such reform, will have a great difficulty, because Ukraine is not ready to oppose the current model of pre-trial investigation of crime.

Therefore, the reform should be planned, phased, with the scientific and practical grounds and use of the features of the national development of the legal system and international experience. Only then we will achieve truly «qualitative» changes in the criminal proceedings.

As already noted, Ukraine has prepared several projects of the CPC. One of them is a project developed by the Working Group under the President Administration. This project is conceptually different from those that have already been considered and even adopted by the Verkhovna Rada of Ukraine in the first reading.

On the 16th of June 2011 at the meeting of the Working Group of reforming the criminal proceedings under the chairmanship of President of Ukraine Viktor Fedorovich Yanukovych the project of the Criminal-Procedure Code was presented to the public. It should be paid attention that in the development of this project actively participated specialists of the Main Investigation Department of the Ministry of Internal Affairs. Expressed on the basis of the practical activity problems and suggestions were entertained in the bill.

First of all, the «updated» version of the CPC reflects proposals to expand of the procedural powers of investigator (in «first» versions of the project, he could only make suggestions to the public prosecutor of the need for measures to ensure criminal proceedings and investigation (research) operations and apply the public prosecutor with a request for notification of the suspected person).

In this regard, the investigator was allowed to apply their own measures of criminal proceedings, to be responsible for proving the circumstances of a criminal offense, to adopt the main procedural decisions: information a person about a suspicion, treatment with an application to the investigative judge and the forming of the results of an investigation by the indictment, the application of the forcible measures of the educational or medical nature, etc.

The analysis of project of the Criminal-Procedure Code allows to say that it reflects the most progressive and democratic positions. First of all this applies to the real rights of citizens by securing the adversarial principle in criminal proceedings. In particular, the provision of equal opportunities for collecting and submitting to the court petitions, complaints, things, documents and other evidences as well as realization of other procedural rights (Articles 23, 92 of the project).

It will be contributing in realization the adversarial principle and rules forwarded to the effective ensuring of human rights on its defense. Particularly, mandatory of participation in the proceedings only «professional» defender (the defender can be only a counsel - art. 48 of the project). The settlement of positions on participation of the defense counsel in criminal proceedings will improve the speed of its implementation, because the absence of a counsel in the procedure action will not be the basis for the recognition of this action as illegal (Article 49 of the project).

It is also important position on the refusal of the institute of opening the criminal proceedings. In a such conditions, citizens can realize their right on protection immediately after reception of an application or report of a crime. But now in a significant number of claims it is adjudicated the decision to refuse of the opening the criminal case and, accordingly, excluded a remedy of citizens. At the same time a large part of decisions to refuse are not justified and in the future they are canceled. So, just for the 1st half of 2011 the

[2] Геда Е. Все в суд: Глава государства Янукович взялся за реформу уголовной юстиции / Е. Геда // Коммерсантъ. – Киев, – 2010. – № 115 (1163). – 9 июля. – С. 1–2.

prosecutor's office canceled more than 66 840 orders to refuse of opening the criminal case, made by investigators of the Interior.

According to the project of the CPC pre-trial investigation will commence from the date of entry in the Unified Register of pre-trial investigations, that is immediately (no later than one day) after filling the application, report of criminal offense (Article 212 of the project). And from this moment you can spend the whole package of measures to uncover the crime. This will eliminate «conflicts» between the law enforcement and citizens. So, it has become very actual the problem of the development a such Register.

Is absolutely correct position of the project developers to optimize the individual forms of pre-trial proceedings in the simplified procedure («in the form of inquiry») in all criminal offenses (criminal offenses includes the acts that are in the current Criminal Code of Ukraine belong to the crimes of minor gravity, and acts provided by the current Code of Administrative Offences, which have judicial jurisdiction and not administrative in their nature (eg. disorderly conduct, petty theft of another's property).

Now it is over such a short forms is seen the «future» of criminal proceedings. Their implementation will improve the efficiency of proceedings due to approximation of the moment of committing the offense to the sentence, respectively, reducing the amount of time to participate in the conduct of too formalized, in most cases «not necessary» procedure arts («the receiving of explanations » - «interrogation»). It will also reduce duplication of pre-trial investigation, and accordingly, staff time and funds. In fact, today there are a lot of cases when the damage was caused offense is less than the cost of the investigation.

It is essential for the criminal justice system the reducing of the terms of criminal offences since the establishment of a person: misconduct – until one month, crime – until two months (Article 217 of the project Criminal-Procedure Code), which will reduce the moment of committing the offence to the undertaking the decision by a court.

The revolutionary step of developers of the project of CPC has been the implementation in criminal proceedings the institute of « deal-making » (about reconciliation between the victim and the suspect, accused, on conviction among suspects, accused and the prosecutor) (Article 461 of the project) This will allow to direct the materials to court for decision at the beginning of the investigation with a person and not to carry out the huge investigation of a criminal offenses, where the losses are ten times less than the cost of the investigation. The rights of either part will not be violated due to the clearness of the «deal-making» scheme.

The decriminalization of certain offenses and establishing a commission for their committing high fines will also contribute the simplification of the pre-trial proceedings. The Main Investigation Department of the Ministry of Internal Affairs of Ukraine supported the position on the decriminalization of more than 190 offenses (particularly, Part 1 of Article 309 of the Criminal Code), which do not represent a significant danger to society and do not require the use of criminal responsibility. Having excluded this acts from the Criminal Code of Ukraine and transformed them into the category of criminal offenses (or «anti-social misconduct»), is necessary to establish the administrative responsibilities for their committing, which will determine the simplified procedure in this category of criminal offenses (the type of «protocol form»). There are some progress in this area – it is registered the law project of Ukraine «On Amending Certain Legislative Acts of Ukraine (concerning the humanization of the responsibility for violations in the field of economic activity) » in the Verkhovna Rada of Ukraine

The possibility of using economic penalties to the subjects of criminal proceedings «for non-procedural obligations» (Article 141 of the project), «not appearance on a call » (Article 136 of the project), and in cases of non-compliance of the measure suppression of «personal commitment» (Article 176 of the project) will also bring the positive economic

effect. However, it is more than necessary to provide in the CPC and the responsibility for failure of the defenders their procedural obligations.

The rules of the project, that are regulating the procedure of interrogation, a video identification (Article 229 of the project), review of the indictment in simplified proceedings (Article 298 of the project) and others will be assisting the procedural economy. The significant progress has been already done. On the 16th of June 2011 it was amended the Criminal-Procedure Code of Ukraine - it is supplemented by the article 85-3 «The use of the telephone conferences and video conferences during the investigative procedure».

It should be also noticed that the establishment of clear procedure for the carrying out of the secret investigation (research) actions and the fixation of results (Article 248 of the project), the use of its results during the proving of guilt (Article 252 of the project) are also established in the Criminal-Procedure Code. In order to protect the rights and the interests of citizens it is identified the measures of protecting the information received as a result of the secret investigation (research) actions (Article 250 of the project), the order of intervention of the private communication (§ 2 of Chapter 21 of the project) and others. The presence of these and other rules will eliminate the violations of rights during the secret investigation (research) operations. It is also a positive rule of the article 242 of the project, that determines that the duration of the secret investigation (research) may be prolonged by the head of the pre-trial investigation (in cases where the secret investigation (research) act is carried out on its decision or the decision of the investigator).

At the same time, some rules of the Criminal-Procedure Code project need to be completed, and this can be done after the returning the bill from the expertize and its discussion.

It is considered as reasonable to supplement the project by rules which will govern the procedure of «telephone interview», determine the order of the Unified Register of pre-trial investigation, provide real procedural independence and the independence of the investigator, extend the authority of the investigator in deciding of closing the criminal proceedings, etc. Such rules in legislation must be properly «balanced» to bring the criminal justice in a condition that will sort with the democratic standards and international requirements.

The reforms identified by the state aimed on a trend-quality reconstruction of the whole criminal justice system will provide an appropriate balance between the defense and prosecution and will provide an opportunity to enhance the protection of human rights and improve investigation of crimes in Ukraine in future.

However, the main problem of the project is an elimination of the functions of pre-trial investigation in its current form, empowering them just an inquiry functions. The project does not provide the right of investigator to conduct the pre-trial investigation, to indict, etc. All of this is delegated to the authority of the prosecutor.

The similar views of organization the investigation of crimes in Ukraine has already taken place. In the 20s of the XIX century, known criminal procedure scientist P.M. Lublinski after the detailed research of the project of CPC Germany expressed the idea of merger investigation and the previous (pre-trail) investigation to a prosecutor's investigation[3]. In some post-Soviet countries they have fond the reflection in legislation. In particular, this applies to the Republic of Moldova, where the procedural figure involved in pre-trial investigation is officer of a criminal prosecution (article 57 of the CPC of the Republic of Moldova), which is empowered to conduct investigative and research acts (however, criminal proceedings, the persons indictment, the choosing of a restraint, the composition of the indictment is the

[3] Люблинский П. Н. Гарантии прав подозреваемого при производстве дознания / П. Н. Люблинский // Вестник советской юстиции. – 1924. – № 15. – С. 57-61.

exclusive competence of the prosecutor). This project provides a similar structure of pre-trial investigation, which is empowered only with the functions of inquiry.

There were also attempts to organize such a system of pre-trial proceedings in Russia. Since the adoption of the «new» Criminal-Procedure Code of Russian Federation (2001) the investigating practice demonstrated that investigation of crimes has become much difficult. It was mainly due to a significant expansion of powers of the public prosecution in the field of criminal proceedings. It was «leveled» the procedural independence of the investigator and the quality of pre-trial investigation has become worse. The investigator has become a «technical» assistant of the prosecutor.

It should be noted that the guidance of the Investigative Committee of the Russian Federation and investigators find it necessary to «maximize the returning to the old order of investigation», which is more effective. The adoption of such rules (under the Project of CPC) in Ukraine is considered as premature and the doubts that it would help the achievement of aims of criminal proceedings are not excluded.

One of the main issues, perhaps the most important - the procedural independence of the investigator, that, according to the project, essentially limited by the prosecutor and is manifested in the need of obtaining permission for the investigator a significant number of legal proceedings. The restriction of the independence of the investigator in making procedural decisions can reduce some of its functions to a «technical work» in fact.

The changing of the criminal procedure in Ukraine can not be achieved without the fundamental researches, developments of the scientists and practitioners, studding the experience of organization of criminal justice system.

With the development of the CPC it is in need to reform and criminal justice system. The main aim should become the saving of the existing effect of investigating subsections without destruction of their professional core.

It is also important the question about the place of investigative apparatus in the system of government, as well as determining the legal status of the investigator (with the real achievement of his procedural independence).

The imperfection of procedural safeguards of the investigator creates significant barriers to the implementation of its procedural powers in investigating crimes and contributes the becoming of various points of view regarding its role and place in the law enforcement system.

You should also consider how to address the issues related to the fact that the heads of the Interior is still given the administrative power with respect to the investigators, «decides» question of bonuses, assigning the special ranks, promotions, etc.

It is obvious the need of institutional reform of the «old» structures of pre-trial investigation in Ukraine. There are different ideas[4] such as: the removing the structure of the investigating from the police unit and its concentration in the Investigative Committee in the Ministry of Interior, the establishment of the investigative staff in the judiciary, the creation of an independent from other law enforcement investigatory, the creation of the courts of general jurisdiction court of the Institute of court investigators, etc.

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[4] Щербинский Е. О месте следственного аппарата / Е. Щербинский // Соц. законность – 1988. – №11. – С. 22-23.; Гуценко К. Следственный комитет – благо ли? / К. Гуценко // Соц. законность. – 1991. – №3, С. 18-20.; Дубинский А. Нужен единый следственный аппарат / А. Дубинский // Именем закона. – 1992. – № 23. – июнь, С. 10.; Приказ МВД Украины «О проведении эксперимента из апробации новой системы подчинения следственных подразделений органов внутренних дел Украины» от 26 марта 2002 года № 295. С. 22.

It should be established independent from the other subdivisions of the investigative unit, but at the present stage of reforming the criminal justice system, such a move would be premature and would not give the expected results.

Ukraine has the long formed of pre-trial investigation agencies in the Interior Ministry, which have been investigating more than 95% of all criminal cases for almost 50 years, it is logical that they have become «the base» for the formation of a «single investigative unit of the state». Just they can really interact with the inquiry to ensure operative, knowledgeable and impartial investigation of crimes.

The investigative unit of MIA of Ukraine has the experience to investigate all categories of crime, including against lives and health of the person (since 2007). In the «first» stage of reforming the criminal justice it would be the best decision to create the Investigative Committee of the Ukrainian Interior Ministry. By the way, there were the steps of reforming in 2002-2003, when the experiment was conducted with the approbation of the «new» chain of command of investigators[5]. The investigative units were withdrawn from the direct subordination to the heads of city, district, linear bodies, which remained the only function of coordinating the interaction of investigators and employees of units of inquiry. It has significantly limited the involvement of investigators to carry out no inherent functions (public safety, on-duty law-enforcement bodies, escorting the detainees and persons). The analysis of the investigative units in 2002 indicates that the implementation of organizational and practical measures has significantly improved the quantity and quality of investigative practice in areas of experimentation. It has increased to 43.1% (+2.1% compared to 2001) the number of cases in which pre-trial investigation is completed. It has also increased the quality of pre-trial investigation - 33% less cases returned to court and the prosecutor for further investigation comparatively to the 2001.

With the mistakes and defects, as well as the experience of past years in starting a new chain of command, the Ministry of Internal Affairs in 2011, decided to conduct a new experiment of testing the vertical chain of command of investigative units of the internal affairs of Ukraine. It has been provided to change the existing chain of command investigators during the experiment. Since the 1st of July 2011 and till the 30th of June 2012 the investigators are derived from the «submission» of chiefs of the city, district, and line unit of the Interior, for which stays only function of interaction between investigators and operative subdivisions, and other services. This will significantly increase the possibility of independence of investigators, as well as the quality and effectiveness of pre-trial investigation.

At the same time, it will be «lost» the well-established intercom of investigators and operatives, without which, is impossible the effective combating with crime.

So, in the long run, such a reform holding of criminal justice officials will assist the effective implementation of state legal policy aimed on protecting human and civil rights.

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Súhrn

V tomto článku sa hovorí o smerovaní reforiem kriminálnych procesov Ukrajiny. Skúmajú sa smery optimalizácie vyšetrovania trestov orgánmi vnútorných vecí. Cesty reformy trestného konania Ukrajiny sú charakterizované ako analýza programov zameraných na zmeny. Spôsob optimalizácie činnosti a štruktúry vyšetrovacích orgánov vnútorných vecí boli navrhnuté len nedávno. Autor charakterizuje zmeny ako dlhodobý proces reformy trestného stíhania – osobitne predprípravného konania – na Ukrajine. Tak reforma trestného konania a súdnictva, ako aj reforma redislokácie úradníkov pomôže k zefektívneniu vykonávania štátnej právnej politiky zameranej na ochranu ľudských a občianskych práv.

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