

## **ЗАКОНОДАВЧЕ ВРЕГУЛЮВАННЯ ПРАВозАСТОСУВАННЯ**

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### **CURRENT ISSUES OF ENSURING SECURITY OF THE CRIMINAL PROCEEDING PARTICIPANTS**

*The article analyzed the criminal procedural law in terms of regulation of the grounds and procedure to ensure security of the criminal proceeding participants, identifies the defects of this problem regulation and developed proposals to improve the national legislation.*

**Keywords:** measures of ensuring security of the criminal proceeding participants, informed persons, witness, victim.

Despite the fact that the national legislation regulating the issue of security of the criminal proceeding participants was adopted more than twenty years ago, this problem remains one of the most pressing and unresolved until today. After all, the persons knowing the circumstances of the criminal offense often refuse to testify due fear of pressure, threats from suspects and defendants, as well as the absence of confidence in the state's ability to protect them from such illegal activities. Only a person confident in its security can be a reliable witness in the criminal proceeding.

The problem of ensuring security of the criminal proceeding participants used to be relevant to many domestic scholars. V. Boyarov, V. Galagan, M. Kurkin, N. Karpov V. Nazarov and V. Zelenetskyi dedicated their papers to it. However, recently the scientists do not pay enough attention to research of this issue, though there no evidence that the problem of security of the criminal proceeding participants is resolved successfully both at the level of legislation and in the law enforcement practice. On the contrary, the analysis of the Code of Criminal Procedure of Ukraine (hereinafter –

the CCP) 2012 indicates a lack of systematic and comprehensive approach to regulation of this problem.

The purpose of this article is an analysis of legislation regarding the regulation of ensuring the security of the criminal proceeding participants, identification of gaps in legal regulation of this problem and development of proposals to improve the criminal procedural law.

The problem of protecting the criminal proceeding participants has been and remains the focus of international organizations, which have developed common principles and standards for protection and enshrined the same in such documents as the Universal Declaration of Human Rights and Measures to Combat International Terrorism.

In domestic law, the mechanism of protection and ensuring the security of the criminal proceeding participants is regulated by the Constitution of Ukraine, the Code of Criminal Procedure and the Law of Ukraine on Ensuring Security of Persons Involved in Criminal Proceedings, on State Protection of Court Employees and Law Enforcement Officers, as well as the other laws and regulations [1; 2].

However, the legislative regulation of ensuring security of the criminal proceeding participants stipulated by such regulations is not perfect, and therefore it needs to be revised and amended as appropriate. After all, when reforming the criminal procedural law and the law enforcement system, which has been underway during the past five years in Ukraine, the legislator did not pay enough attention to improvement of legal regulation of security of the criminal proceeding participants or regulation powers of authorities, which should ensure security of the criminal proceeding participants.

In particular, the position of the legislator is unclear, since, when adopting a new CCP of Ukraine in 2012, it has paid much less attention as compared to the CCP 1960, to the issue of regulation of procedural forms of security measures for the criminal proceeding participants.

Thus, the CCP Ukraine 1960 contained a group of rules (Article 52<sup>1</sup>–52<sup>5</sup>), which defined the terms of applying the security measures for the criminal proceeding participants. Specific provisions contained in different chapters and sections of the CCP regulated the procedure for use of specific security measures, i.e. presentation for identification outside visual observation; interrogation of persons taken under protection in the absence of the defendant etc.

The current CCP of Ukraine contains no provision that would determine the general procedure for application of security measures

to the criminal proceeding participants. Provisions permitting the use of specific security measures are found in different parts of some regulations of different chapters and sections of the CPC of Ukraine:

- paragraph 5 of part 2 of Article 27 of the CCP of Ukraine stipulates that the investigating judge or court may decide on conduct of the criminal proceeding in closed trial throughout the proceeding or a part thereof when it is required to ensure the security of persons involved in the criminal proceeding;

- paragraph 3 of part 6 of Article 206 of the CCP of Ukraine stipulates that if during any court hearing a person claims that his/he was exposed to violence during his/her arrest or detention by an authorized government agency or public institution, the investigating judge shall record such a statement or accept a written affidavit from such person and take the required measures to ensure security of persons under the law;

- part 4 of Article 228 of the CCP of Ukraine states that to ensure security of the identifying person, identification can be made in the circumstances where a person presented for identification does not see or hear the identifying person, i.e. beyond its visual and audio observation;

- paragraph 2 of part 1 of Article 232 of the CCP of Ukraine stipulates that the need to ensure the security of persons is the basis for the questioning of persons, identification of persons or things during the preliminary investigation at the videoconference when broadcasting from another room;

- paragraph 2 of part 1 of Article 336 of the CCP of Ukraine stipulates that when it is required to ensure security of the persons, the proceedings may be conducted in a videoconference mode during the broadcasting from another premise, including that outside the courthouse [3].

The general list of security measures is contained in Article 7 of the Law of Ukraine on Security of Persons Involved in the Criminal Proceeding, which stipulates that the measures to ensure security are: a) personal protection, protection of housing and property; b) issue of special means of individual protection and warning devices; c) use of means to control and monitor the telephone and other conversations, visual observation; d) change of documents and appearance; e) change of the place of work or study; f) change of the place of residence; g) placement into a pre-school educational

institutions or institution of social protection; h) confidentiality of personal data; i) closed trial [1].

We believe that such legal regulation of security measures of the criminal proceeding participants and the procedure of their use needs to be improved, since the lack of the list of security precautions and general rules for their use in CCP of Ukraine 2012 causes the problems of law enforcement, which does not allow the criminal proceeding participants to exercise their right to ensure their security effectively.

Not agreeing with statement of some scholars that the general provisions on application of security measures of the criminal proceeding participants in the CCP of Ukraine will essentially duplicate the provisions of the Law of Ukraine on Security of Persons Involved in the Criminal Proceeding [4, p. 9], we believe that the CCP of Ukraine should contain the following provisions.

This statement is completely justified by the subject of legal regulation. In particular, paragraphs 10 of part 1 of Article 3 of the CCP of Ukraine states that the criminal proceedings is a pre-trial investigation and court proceeding, proceedings related to commitment of offense under the law of Ukraine on criminal liability, and because of the need to ensure appropriate conditions for the criminal proceeding, collect evidence and establish the circumstances of a criminal offense, it is required to apply the security measures to persons involved in these proceedings.

Thus, the general rules of applying security measures to the criminal proceeding participants should be included in the structure of the CCP of Ukraine, and occupy a particular place in the system of its rules.

To this end, we suggest supplementing Chapter 2 of the CCP of Ukraine, «The court, the parties and other criminal proceeding participants» with paragraph 5<sup>1</sup> «Security of the criminal proceeding participants», which shall define the general provisions of applying security measures to the criminal proceeding participants and determine:

- a list of security measures, which can be used in the course of a criminal proceeding;
- a list of the criminal proceeding participants eligible for security and the rights of persons to which the security measures shall be applied;

- definition of the general procedure of initiating security measures, the procedure of making and implementation of the decision;
- general rules of change, cancellation or challenging the decision on application of security measures to the criminal proceeding participants.

It should be borne in mind that all security measures are generally subdivided into the following groups: criminal legal (establishing responsibility for attempt on the life, health and property of protected persons); purely procedural (improving the procedure for obtaining of information from informed people); socioeconomic (enabling to change the biographical data, place of residence and work) and physical (provision of guard, technical protection of residential and office space etc.).

The entities subject to state protection during the criminal proceeding are also different. They are commonly subdivided into two groups: basic – those directly involved in the criminal proceeding, and additional – close relatives of these persons.

Among those eligible to security, the so-called «informed persons», i.e. witnesses, victims, suspects, and defendants deserve special attention. The law enforcement agencies are interested primarily in securing these participants of the criminal proceedings in order to create favorable conditions for them to provide reliable information about the circumstances to be proved in the criminal proceeding.

After all, if these people are not sure of their security, remaining vulnerable to a real danger to their life or health, they will not agree to testify even under a threat of criminal prosecution for refusing to testify. A person is naturally, first and foremost concerned about saving of her/his own life and lives of his/her family members, and then performance of the obligation to testify in the criminal proceeding.

This issue becomes of particular relevance due to introduction of the institute of agreements, in particular an agreement between the prosecutor and the suspect or accused on recognition of guilt, in the CCP of Ukraine.

Thus, part 4 of Article 469 of the CCP of Ukraine states that the agreement on recognition of guilt between the prosecutor and the suspect or the accused may be concluded in the proceeding concerning: 1) criminal offenses, crimes of small or moderate gravity, and serious crime; 2) heinous crimes attributed to the jurisdiction of the National Anti-Corruption Bureau of Ukraine provided that the

suspect or the accused exposes another person of a crime, attributed to the jurisdiction of the National Anti-Corruption Bureau of Ukraine, if information about that person's commitment of the offense is confirmed by evidence [3].

Accordingly, in addition to general information (on Parties formulation suspicions or accusations, her legal qualifications relevant to criminal proceedings may be), the agreement on recognition of guilt shall indicate an unconditional recognition by the suspect or accused of his/her guilt of a criminal offense and his/her obligation to cooperate in exposing the criminal offense committed by another person and establish a punishment (Article 472 of the CCP of Ukraine).

Therefore, if an agreement on recognition of guilt and cooperation regarding exposure of the other persons who have committed a criminal offense is made, the suspect or the accused must be defended from retaliation by persons whom s/he helps to expose.

Analysis of laws of the other countries and practice of its enforcement shows that during the criminal proceedings' protection is often provided to persons who cooperate with the investigation. In some European countries, even special penitentiary institutions are created for such people.

Especially rich experience in the field of protecting the criminal proceeding participants is possessed by Italy, despite the fact that regulations on cooperation with the investigation have been in place only since the early 90s.

The need for adoption of relevant laws by the Parliament of Italy was due to the need to encourage the former members of organized criminal groups to cooperate with law enforcement bodies. It thus became possible in Italy to destroy the criminal networks from within, getting information about the same from their own members. Realizing that criminal organizations are able to take revenge of witnesses, there was an urgent need to ensure security and protection of these persons.

In order to ensure a real protection of witnesses who cooperate with the investigation, many countries introduced special programs financed separately from the budget. To implement the same, the relevant departments usually subordinated to the Ministry of Justice are establishing. This practice of ensuring security of the criminal proceeding participants is quite effective.

The problem of security of the criminal proceeding participants in Ukraine requires a comprehensive approach to its solution both at the legislative level and at the level of law enforcement. Improvement of the criminal procedural law and development of effective mechanisms of protecting «informed persons», i.e. suspects, accused (cooperating with the investigation), victims, witnesses, experts and specialists should become a new focus. In this regard, it is required support the initiative of establishing a separate state body, i.e. Witness Protection Bureau, since today's realities indicate that bring a person who has committed a criminal offense to criminal liability in many cases depends on completeness and objectivity of testimony to be given by a witness or victim only subject to availability of guarantees of his protection against physical violence.

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