

ЗАКОНОДАВСТВО УКРАЇНИ: СТАН, ПРОБЛЕМИ, ШЛЯХИ РЕФОРМУВАННЯ



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PROCEEDINGS AT THE JURY TRIAL

Розглянуто питання про порядок провадження в суді присяжних.

Ключові слова: кримінальне провадження; суд присяжних.

Рассмотрен вопрос о порядке производства в суде присяжных.

Ключевые слова: уголовное производство; суд присяжных.

The issue of proceedings at the jury trial is considered.

Keywords: criminal proceedings, a jury; trial.

The Constitution of Ukraine establishes as follows: the people shall participate in administration of justice directly through the people's assessor and jury (Clause 124.4); the justice in Ukraine is administered by the professional judges, and in cases established by law – by the people's assessors and jury (Clause 127.1); the justice is administered by the sole judge, a panel of judges or a jury trial (Clause 129.2).

The problem issues of the organizational legal provision and operation of the jury trial were considered by such scientists as V. D. Bryntsev, A. B. Vovnarovych, P. I. Repeshko, O. O. Rysin, N. S. Yuzikova etc. However, their studies were conducted before adoption of the new Code of Criminal Procedure of Ukraine (hereinafter – the CCP), which entered into force on November 20, 2012. One of the novelties thereof is the implementation of the jury trial.

The jury participation in the criminal proceedings is a proven necessity, since pursuant to Clause 5.2 of the Constitution of Ukraine, people are the only source of power in Ukraine and exercise the same directly through the public authorities, one of the branches of which is the judicial power [1, p.119].

The jury trial consists of two professional judges and three jurors consolidated in the panel of judges. The competence of the jury trial is defined in Clause 31.3 of the CCP. The jury trial shall consider the case by petition of the defendant in the criminal proceedings for the crimes punished by life sentence.

The conducting of criminal proceedings by the jury trial shall be governed by Clauses 383 to 391, paragraph 2, chapter 30 of the CCP. These clauses describe: the proceedings before the jury trial; prosecutor's or court's obligation to explain the right to recourse to the jury trial to the defendant; summoning of the jurors appointed by the automated file-keeping system of the court from among the persons included in its list; juror's rights and obligations; selection of jurors in the court after opening of the court hearing; swearing in a jury; inadmissibility of improper influence of the parties to the criminal proceedings onto the juror; juror's withdrawal from subsequent participation in the court hearing; procedure of conference and voting at the jury trial.

The objective of this article is to study the issue on regulation of the procedure of criminal proceedings before the jury trial in the CCP.

Clause 383 of the CCP establishes that the jury trial shall conduct the criminal proceedings in accordance with the general rules of this Code with peculiarities established by paragraph 2 of chapter 30. The jury trial shall be formed at the local common court of the first instance. All issues related to the court hearing, save for the issue stipulated by Clause 331.3 of the CCP shall be commonly solved by the judges and jurors.

From Clause 383 of the CCP it proceeds that upon passing of a sentence the judges and jurors shall jointly solve the issues specified in Clause 368.1 of the CCP, namely: whether the action of which the person is accused did take place; whether the action contains the essence of the criminal offence and which clause of the law of Ukraine on criminal liability provides for the same; whether the defendant is guilty of commitment of such criminal offence; whether the defendant is liable to punishment for the criminal offence committed by the same; whether there are the circumstances alleviating or aggravating the defendant's punishment, and if they are, what are they; what punishment shall be attached on the defendant and whether it shall serve the same; whether the filed civil claim shall be redresses and, if so, for whose benefit, in what amount and according to which procedure; whether the defendant committed the criminal offence in the condition of limited suability; whether there are the grounds for application of forced medical measures to the defendant who committed the criminal offence in the condition of limited suability as stipulated by Clause 94.2 of the Criminal Code of Ukraine; whether the defendant shall be subjected to forced treatment as stipulated by Clause 96 of the Criminal Code of Ukraine; how shall the seized property, exhibits and documents be disposed of; who shall incur the legal costs and in what amount; how shall the criminal proceedings security be disposed of.

There is an exception to the general rule on common discussion by judges and jurors of all issues related to the court hearing, as stipulated by Clause 331.3 of the CCP. The chairman shall solve the issue of feasibility of

keeping the defendant under custody until expiration of the two months' term upon receipt of the bill of indictment by court.

Pursuant to Clause 391 of the CCP, the conference of the jury trial shall be managed by the chairman, who shall consecutively raise the issues stipulated by Clause 368 of the said Code for discussion, hold the open voting and count the votes. All issues shall be solved by simple majority of votes. The chairman shall be the last to vote. None of the jurors shall be entitled to withhold from voting, unless the issue of the punitive measure is solved, and the judge or juror voted for justification of the defendant. In this case the vote of the one who withheld shall be added to the votes given for the resolution, which is the most favorable for the defendant. In case of doubt as regards the resolution, which is the most favorable for the defendant, the issue shall be solved by voting. Each juror shall be entitled to state a separate opinion in writing, which shall not be disclosed at the court hearing, but shall be enclosed to the case files and shall be open for review. If the majority of the panel of judges which passed a resolution doesn't contain the professional judges, the chairman shall assist the jurors in drawing up of the court resolution.

There is a question how to assess the procedure of conference and voting in the jury trial as defined in Clause 391 of the CCP. It should be noted that after adoption of the new CCP the first publications appeared, giving assessment to the legal regulation of criminal proceedings before such court. The scientists mainly express the critical observations.

For example, V. M. Shcherba notes that «...from the content of Clauses 383 to 391 of the CCP it may be concluded that the proceedings before the jury trial are defined rather fully. However, the approach to regulation of this proceeding, in our opinion, is not correct. It is explained by the fact that pursuant to Clause 383.3 of the CCP, all issues related to the court hearing shall be jointly solved by the judges and jurors. Such proceedings have nothing in common with the classic jury trial. The similar procedure, established by the CCP in 1960, used to be applied for consideration of criminal cases by the professional judges with involvement of people's assessors» [2, p. 605].

S. Tenkov notes that despite all the novelties introduced by the new CCP, the long-promised implementation of the jury trial in Ukraine actually didn't take place. From Clauses 31, 383 to 391 of this Code «...it may be concluded that it goes not about the jurors in the classic understanding of this notion but about the people's assessors of yet Soviet epoch» [3, p. 10].

V. T. Tertyshnyk writes that the attempt to determine the procedural form of operation of the jury trial is made in the new CCP. «However, the very idea of the jury trial here suffered a significant mimicry and is disgusted to the limit» [4, p. 529]. The scientist criticizes the CCP regulations, pursuant to which all issues related to the court hearing shall be jointly solved by the professional judges and jurors. «According to such concept, the jurors do not pass any independent resolution (verdict) and, therefore, bear hardly any responsibility for the case destiny or their resolutions. Suggesting that they should solve all issues of the legal proceedings together with the judges, the legislator pave the way to the collective irresponsibility of the jurors and

professional judges who, in such circumstances, may put their errors and abuse down to the inexperienced jurors. Such jurors can easily become a blind for the judicial absurd» [4, p. 530].

Yet before the adoption of the new CCP, upon discussion of its draft Y. A. Chornobay drew attention to the drawbacks of the joint administration of justice by the panel consisting of three jurors and two professional judges. The scientist noted that «...based on such modern of arrangement of the alternative form of justice it is not a jury trial any more, since according to the established practice the jurors shall personally pass resolutions on the case without interference of the professional judge, and the latter shall only put the resolution of the people's representative in the legal form. The model proposed by the draft looks rather like another modern of people's representation in court, i.e. people's assessors, and, as we see, it has nothing in common with such institution as the jury trial» [5, p. 587].

We completely share the expresses critical remarks. We can't agree to solving of all issues related to the court hearing jointly by the jurors and professional judges. Such proceedings do not comply with the classic model of the jury trial.

The laws on criminal proceedings of the other countries in which the jury trial operates governs the proceedings differently.

For example, Clause 339.1 of the CCP of the Russian Federation establishes that the people's assessors shall answer three key questions: 1) whether it is proven that the action did take place; 2) whether it is proven that the action was committed by the defendant; 3) whether the defendant is guilty of commitment of the crime. Pursuant to Clause 343.2 of the said Code, the damning verdict shall be deemed passed if the affirmative answers to each of these questions were voted for by the majority of the people's assessors [6].

Pursuant to Clause 331-16 of the CCP of the Republic of Kyrgyzstan, the people's assessors shall answer one key question, whether the defendant is guilty of commitment of the action. Besides, the questions on such circumstances which affect the degree of the guilt or change its nature and result in release of the defendant from liability can be posed. In some cases the questions on the degree of actualization of the criminal intention, the reasons for which the action wasn't completed, the degree and nature of co-participation of each defendant to the case are posed too. The questions allowing to establish the defendant's guilt of commitment of a less grave crime are allowed, if it doesn't aggravate the defendant's position and doesn't infringe its right to defense [7, p. 510].

In the CCP of the Republic of Kazakhstan, the content of issues to be solved by the people's assessors is described in Clause 566 of the said Code [8, p. 817-818]. The following three key questions are posed in relation to each question ascribed to the defendant: 1) whether it is proven that the action did take place; 2) whether it is proven that the action was committed by the defendant; 3) whether the defendant is guilty of commitment of the crime. After the key question about the defendant's guilt the same questions as stipulated in Clause 331-16 of the CCP of the

Republic of Kyrgyzstan can be brought to consideration by the people's assessors.

In the CCP of the Republic of Azerbaijan the issues to be solved by the panel of people's assessors are defined in Clause 369 thereof [9]. The key issue is whether the defendant is guilty under the relevant accusation paragraph. If its guilt is recognized, the issue whether the defendant deserves an indulgence is compulsory.

In view of the aforesaid, we think that the wording of paragraph 2, chapter 30 of the CCP requires fundamental amendment. All issues related to the court hearings shall not be solved jointly by the professional judges and jurors. In our opinion, the criminal proceedings shall be adjusted so that the jurors themselves answered the key question whether the defendant is guilty of the commitment of criminal offence. If so, the professional judge shall solve all other issues stipulated by Clause 368 of the CCP, approve the accusation and determine the penalty.

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