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Debatable Questions Bound to Reorganization of Separate Procedural Institutes at the Stage of Pre-Judicial Production in the Conditions of Reforming of the Criminal Procedure Code of the Kyrgyz Republic

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Abstract: This study is devoted to complex research of theoretical and applied problems of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic. The theoretical and methodological ideas of reorganization of separate procedural institutes at a stage of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic are considered in this study. In this study, the basic concepts and categories, the principles and building blocks of institute of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic are opened, genesis of a formation and the main tendencies of institute of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic is presented, the analysis of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic is carried out; problems of increase of effectiveness of application of standards of the Criminal Procedure Code of the Kyrgyz Republic at the reforming are investigated. As a result of research, the theoretical provisions and recommendations about perfecting of institute of pre-judicial production in the conditions of reforming of the Criminal Procedure Code of the Kyrgyz Republic are formulated.

Key words: Organized crime, latency of crimes, pre-judicial procedure, legal proceedings, criminal case, procedural guarantees, court, prosecutor's office, investigation verification

INTRODUCTION

Effectiveness of counteraction of organized crime substantially is defined by the quantitative parameters of disclosure of crimes. But today existence of high rates of a latency of crimes on this category of cases can only testify that law-enforcement practice needs perfecting.

Not the last role on permission of the problems arising thus belongs also to reforming of the criminal procedure legislation.

And therefore, it is not incidentally in all former Soviet Union there is a cardinal updating of the criminal procedure legislation. It is not an exception is the Republic of Kazakhstan, Ukraine, Moldova, Azerbaijan, etc. The evidence of reforming of the legislation in Kyrgyzstan is the proceeding today discussion of provisions of the Criminal Procedure Code Project of the Kyrgyz Republic prepared by the working group.

As it is specified in the reference justification to the KR Criminal Procedure Code Project, first of all, the group was guided by the provision of the new constitution of the Kyrgyz Republic of 2010, Decrees of the President, the tasks explained in the concept on judicial and legal reform for 2012-2017 on norms of international law and also other separate fundamental bills of the state (for example, the UK KR project).

It is necessary to notice that the current Criminal Procedure Code of KR repeatedly faced and criticism of numerous international experts who mark out about existence in it of rudiments of past Soviet criminal trial. Especially by experts are focused attention to low effectiveness of pre-judicial and legal proceedings to an apparent accusatory bias, a high share of bureaucracy, weak security with procedural guarantees of the subjects which got to an orbit of criminal prosecution.

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Therefore, the working group at the developing of the bill proceeded also from a position that the new Criminal Procedure Code which would answer on form and content to a spirit of the age to public requirements, scientific approaches, practical experience and also conformed to international legal standards.

In this regard, it is remarkable that the working group, decided to expedient to approach conceptually a stage of pre-judicial production. And, therefore as well as any cardinal innovation is caused discussions among the legal public. And in this case, the speech, first of all, goes about its institutes as: initiation of legal proceedings, express investigative actions, engaging of the person as the accused.

For example, so far there is a question: whether is it necessary to refuse a stage of initiation of legal proceedings or to leave it in a traditional type? This dilemma divided the legal public of the country as into supporters and opponents of the position chosen by developers of the Criminal Procedure Code Project. Namely in the offered bill it is provided rearrangement of a stage of pre-judicial production in general, due to unification of a stage of inquiry and production of a corollary in one uniform and also an exception of institute of initiation of legal proceedings. Proceeding from that it is followed that the beginning of procedural activity is adopted by law-enforcement agencies the statement or the message on a crime which has to be fixed without fail in the Unified register of pre-judicial production.

MAIN PART

The analysis was carried out by us was shown that according to arguments of opponents who consider inadmissible to refuse a stage of initiation of legal proceedings, they generally are as follows: so, first, opponents of abolition of a stage of initiation of legal proceedings are afraid that as a result of application of the coercive measures or an assumption of carrying out investigative actions without initiation of legal proceedings, human rights will be violated. They are reasoned that elimination of so important in their opinion, stage of criminal trial will lead to erasing of a necessary barrier between not procedural and procedural activity and because of it there will be a destruction of the barrier protecting the rights of citizens from intervention of authorities. The second, the argument of our opponents is that without this stage, the beginning of production only on the basis of registration of a statement and the message, limits the rights of citizens for ensuring protection of their legitimate interests. Thirdly, the opinion is expressed that thanks to existence of norms in the Criminal Procedure Code KR (Art. 321) "Illegal initiation of legal proceedings", Art. 322 "Engaging obviously innocent to criminal liability", Art. 323 "Illegal refusal in initiation of legal proceedings"), there is interfered with abuses of investigation authorities and prosecutor's office. The fourth argument is that in connection with the offer on refusal of a stage of initiation of legal proceedings on separate aspects of production of investigation the prosecutor are limited in his power that is caused a special complaint from this department. Fifthly, there are statements that statistics will be increased considerably as all statements and messages will be registered. At the same time, we would like to state the own position on this problem aspect.

Certainly, it is not in question, that the stage of initiation of legal proceedings is not the formal procedure as demands pronouncement of the special procedural act defining moment of the beginning of legal proceedings that causes emergence of procedural rights and obligations of the parties, provided by standards of the Criminal Procedure Code of the KR.

But if we look more deeply, a reality is that: as actually and legally procedural actions, including and coercive measures are carried out before a stage of initiation of legal proceedings as the investigator at this stage tries to establish circumstances which could form the basis for initiation of legal proceedings. Though, it is out of the question that such circumstances have to be subject to proof only in the course of full investigation of criminal case.

It is known that both in Kyrgyzstan and in some other the Post-Soviet states for example, before initiation of legal proceedings, it is possible:

- Carrying out detention of the person
- Also at verification of messages on a crime, the prosecutor and the investigator have the right to demand carrying out audits, documentary checks about engaging of experts
- Before initiation of legal proceedings, according to the criminal procedure legislation, it is already possible carrying out of the inspection of the scene, examination, fixing of examination that testifies to a tendency of expansion of the investigative actions which are carried out before initiation of legal proceedings

Therefore in our opinion, refusal of a stage of initiation of legal proceedings, allows to resolve the serious disputes arising concerning carrying out separate investigative actions before initiation of legal proceedings which are procedural facilities prior to official procedural activity.

Here, it is important to note that exactly the unsteady bases attracting insufficiently reasonable initiation of legal proceedings lead to disorder of criminal case in court and it causes ambiguous reaction in society, including charge of illegal initiation of legal proceedings as for the purpose of obtaining the material benefit by the interested departments and elimination of political opponents.

But for such charges from the Kyrgyz society, there are all bases. First of all, statistical data of the persons brought to criminal book in comparison with condemned in court testify to it. Besides, preferred part of political opponents in a consequence appear outside criminal prosecution because of the verdicts of not guilty pronounced by court concerning them or negative materials at a stage of pre-judicial production (for example, when "relevance" was gone in it, for purpose of achievement of goals).

Today important problem is also the current legislation of the Kyrgyz Republic is not forbidden by public servants, including, bodies of prosecutor's office, representatives of other law-enforcement departments by whom investigation on case is conducted, it is expressed publicly out of court session in mass media concerning guilt of this or that person. In this regard, we share opinion that such position of the legislator can be used by law enforcement agencies for the purpose of pressure upon court, including on resonance cases, including with participation of politicians.

Striking example is initiation of legal proceedings by prosecutor's office, upon entering of 24 students on contract form of education for medical faculty of the Kyrgyz-Russian Slavic University named after Yeltsin (KRSU). Even before transferring of the case to court in the "compulsory but made to appear as voluntary" order, the Minister of Education resigned, the rector of KRSU have a "pressure" from bodies of the Prosecutor General's Office about his resigning from a position. The main person involved in criminal case is the Head of Committee on Education and science of the Kyrgyz Republic Zhogorku Kenesh and the deputy K. Osmonaliyev from "Ar-Namys" party where according to a number of parliamentarians opinions, the political component is not excluded. Also the circumstances can be indirectly confirmed about that and on the eve of parliamentary elections, concerning 3 of party members were complained criminal cases upon their professional activity 5-10 years prescription. Also some criminal cases were brought before and concerning certain deputies of parliament of opposition party "Ata-Zhurt", (concerning whom mainly affairs are stopped). Therefore, it is necessary to recognize that the international experts on drugs and crime of UN administration are right who consider necessary the KR Criminal Procedure Code Project to add "provision according to which to investigation authorities, inquiries, prosecutor's offices and court is forbidden to state in any form the position concerning guilt of accused in any mass media and also publicly, except for cases of performance of the party of charge of the course of judicial proceedings".

Also topical issue demanding special attention in this direction is procedure of investigation verification. Today it is out of the question that investigation verification being a constituent of criminal trial, actually is not regulated by standards of the Criminal Procedure Code. Such situation formed peculiar "vacuum" of criminal trial.

And today refusal of a stage of initiation of legal proceedings excludes investigation verification of statements and messages which is carried out outside criminal trial and therefore, it is made an attempt of an extra procedural form to control procedural facilities. Current situation gives the chance to give with undoubted advantage the party of charge. Refusal of investigation verification is actual and for other reasons today: it is not a secret that exactly at a stage of investigation verification it is possible to observe the greatest number of violations in the field of the rights and legitimate interests of citizens. On this stage the participants of criminal trial who are carrying out investigation verification act are out of a legal framework as they do not possess the procedural status allowing exercise such rights. Representatives both the legal public and the civil human rights and international organizations, repeatedly are spoken about it. They also specify that exactly at this stage of criminal trial the illegal detentions, tortures and ill treatment with persons which got to an orbit of criminal prosecution are allowed.

Also, this position is shared by the Attorney-General of Kyrgyzstan A. Salyanova who considers that "there is no sphere of activity of society where there would be so many human rights violations as in the sphere of bound to activity of law enforcement agencies" and "application of tortures became nearly part of professional activity of law enforcement officers". About same it is noted in the report of the Special reporter of the UN on tortures, following the results of mission in Kyrgyzstan 2011 that "tortures are usually applied by police officers during the first hours after detention and interrogation for obtaining confession". Besides, results of monitoring of the closed establishments, carried out by government bodies and Nongovernment Organizations (NGO) of Kyrgyzstan and the international organizations within the Memorandum of cooperation in the sphere of observance of the rights and freedoms of the person, are confirmed by the mentioned above conclusions. The following data testify to it: so

in 2011-83.3% in 2012-89.5% and in 2013-90.4% prisoners from among earlier declared about tortures were confirmed that tortures were applied to them from the field officers of Department of Internal Affairs for the purpose of obtaining confession in commission of this or that crime which actually they did not commit. Besides such situation:

- Involve to shelter of crimes
- To a tightening and red tape to decision-making where creation of conditions for corruption manifestations is not excluded
- Low-quality research of circumstances of the occurred event is observed
- It is also necessary to consider that as a rule, the investigator is compelled after acceptance of criminal case to the production duplicate in procedural documents the separate materials received during investigation verification, differently they can not be used at proof of facts of the case in court
- Gaps of the current criminal procedure legislation also favor to that bodies of prosecutor's office as the supervising body can not do this control in such situation

All above confirms a position that for today the available considerable gap in the criminal procedure legislation create conditions for a number of abuses which can be overcome, having refused a stage of initiation of legal proceedings.

The following problem which is bounded with the stage of initiation of legal proceedings is the institute of negative materials.

And as the Criminal Procedure Code developers of the Republic of Kazakhstan correctly specified, neither the prosecutor nor the judge especially do not influence on legitimacy and validity of refusal in initiation of legal proceedings; the prosecutor as he is the party of charge and is often solidary with the investigator himself; the judge as he has not a direct relation with negative materials and it does not enter to his competence.

It is rather reasoned on the matter one of the developers of the bill Criminal Procedure Code KR A.K Kulbayev stated his opinion who specifies the following: "According to statistical data for 2012 on statements for crimes 24569 criminal cases are brought. It is refused initiation of legal proceedings of 66876 materials. In recent years there is sharp rise of negative materials and investigating authorities refuse initiation of legal proceedings on 73% of petitions from citizens, access to justice thereby is limited. It means that investigation verification, this is the investigator on the basis of explanatory, references and some materials which according to the Criminal Procedure Code can not be proofs, gives the decision on refusal in initiation of legal proceedings though this crime was officially registered in the Registration book of crimes. Where from did such sharp rise of negative materials come? The dominating departmental doctrine when it is considered that to bring criminal case and to stop it then is a serious defect of the investigative device. In this regard, investigating authorities try to know whether initiation of legal proceedings will come to court that contradicts the constitutional principles. In practice, there are refusal cases in initiation of legal proceedings on not rehabilitating circumstances on points 4, 12 of Art. 28 of the Criminal Procedure Code of KR when it is absent the complaint of the victim or there is reconciliation. The analysis of investigative practice of the Department of Internal Affairs of the Sverdlovsk area was showed that there was refused in initiation of legal proceedings on 41 facts of a plunder and 2 robberies, thus crimes were committed. How is it done? the citizen writes the application, it is registered as a crime, then there is taken a counter claim and after the material about refusal of initiation of legal proceedings is made. It once again testifies that in the Criminal Procedure Code it is necessary to reconsider a stage of initiation of legal proceedings".

DISCUSSION

Besides from our point of view first, the investigator in this case assigns to himself a role of the judge as he makes the decision on refusal in initiation of legal proceedings by himself. Secondly, emergence of numerous negative materials where it is not excluded the large part of a corruption component which along with their low significance are demanded larger on volume basis labor expenses from bodies of inquiry. Thirdly, thus the termination of criminal case does not eliminate the harm done to the person which was unreasonably excited. Fourthly, it testifies about the considerable facts of illegal and unreasonable initiation of legal proceedings (at the same time, there is no criminal proceedings which is initiated according to Art. 321, 322, 323 of Criminal Procedure Code KR).

It should be noted that the analysis of provisions of the criminal procedure legislation shows that practically all procedural activity is directed on protection accused but not the victim in any way. And at the present situation, refusal of a stage of initiation of legal proceedings will allow to provide protection of the rights of the victims from crime as according to the KR Criminal

Procedure Code project, refusal in reception and registration of statements is not allowed and in case of not execution of this requirement, it will cause the responsibility established by the law. Such approach will exclude concealment of crimes and a latency of the made encroachments. We agree with opinion of Professor V.Sh. Tabaldiyeva that exactly existence of obstacles to "the beginning of production according to the received statements and messages on a crime and the decision about refusal in initiation of legal proceedings not only limits constitutional rights of citizens on access to justice but also considerably breaks current laws. Every third decision in such way admitted bodies of prosecutor's office illegal and unreasonable" that proves need of cancellation of institute of negative materials and refusal of the stage of initiation of legal proceedings.

Proceeding from that the statement, the message on a criminal offense (where there are given signs about crimes) so is the basis for criminal proceedings on case, investigation verification in this case is illogical and such approach is internally inconsistent and not corresponding idea of the constitutional state.

Real providing tasks of criminal procedure is conceptual and not statistics which certainly will be raised in any way.

Besides in this case, it is necessary to consider that from the moment of registration in the Unified register of statements and messages on a crime, participants of criminal trial are given the rights for protection and opportunity to defend lawful materials. And the rights of the suspect are considerably expanded.

It is also necessary to note that in the offered edition of the criminal procedure legislation of Kyrgyzstan, pre-judicial production has to include also Operational Search Activity (further OSA) as a form of united process where its situation are incorporated in law of criminal procedure in the form of special (according to the Criminal Procedure Code of KR) or secret (according to the Criminal Procedure Code of RK) investigative actions. All above testifies that legal proceedings can be made from the beginning of criminal proceedings on case.

It should be noted that quite often poor informational and analytical work of investigating authorities with the initial focusing information leads to omissions and mistakes at a tentative stage of investigation of any crime, including the organized. For example in the presence of information on possible counteraction to investigation from an organized criminal group as a rule the attention is not paid and it means that the appropriate measures on its counteraction are not taken.

As a rule, the investigator receives initial information on commission of an organized crime both from operatives and when carrying out investigative actions. The investigator checks the initial versions which are put forward by him about a crime event as a result of their carrying out, further collects, investigates and fixes the facts and circumstances which are subject to proof in the subsequent. Therefore in the last 10 years the legal public often brings up a question of need of active use of results of OSA for criminal procedure in particular about opportunities of transformation of these data to judicial evidences.

It is obviously that further ignoring of results of OSA in conditions when modernization of activity of criminal formations is observed and it is inadmissible. It is known that the most valuable information at the investigation of crimes with participation of organized criminal groups in particular about the planned and made criminal acts it is possible to receive as a result of the carried-out by OSA. Activity of operational structure of bodies of inquiry is one of the main methods of getting of important information on a number of heavy and especially, serious crimes but thus it is remained not procedural so far and therefore, it could not be used as the proof on case.

In this regard, the Legislator of Kazakhstan and the Criminal Procedure Code developers of Kyrgyzstan as it was stated above, thought expedient to incorporate provisions OSA in the criminal procedure legislation that allowed to unite OSA and a corollary in a united form of criminal trial in pre-judicial proceeding. Therefore, now in the specified states all OSA and the investigative actions which are the procedural are made and will be made after the beginning of criminal proceedings on case in difference for example from the Russian Federation and Republic of Belarus. The staff of body of inquiry who are assigned by investigating authorities, the carrying out some or other special (called still as secret, secret) investigative actions are obliged to be guided by provisions of Criminal Procedure Code of Kazakhstan or Kyrgyzstan, respectively.

It is necessary to notice, positive aspect of these innovations are: suddenness of the carried-out special investigative actions as a result of which will be received ways, first to reduce the counteraction to extortion investigation from criminal groups, secondly, to prevent the destruction of traces of their criminal activity, thirdly, the results received thus can be used as proofs on case.

Also fundamental positions by preparation and carrying out such investigative actions is the accounting by officers of the operational staff and investigating authorities that the sources used thus, facilities and methods and also the organization and tactics of their

carrying out are the state secret (for example, about the persons introduced in the organized criminal groups which are engaged the extortion, about plans and results of the carried-out special investigative action on fact of the establishment of a corruption component of bound to "covering (protection from criminal structure)", etc.).

Protocols of the carried-out special actions according to the new Criminal Procedure Code are sources of proofs that thus it does not create any obstacles on use of results of OSA in proof.

CONCLUSION

In case of leaving a stage of initiation of legal proceedings at the present level, we have to refuse from introduction of new institute as "special investigative actions" as well which was offered by the Criminal Procedure Code developers. In this case, production of a consequence and OSA will be carried out further in various legal regimes and authorized bodies will continue to collect proofs in circumvention of the criminal procedure legislation and therefore, will not be sources of proofs on case. It should be noted that carrying out OSA before initiation of legal proceedings, they remain out of sight of supervisory authorities that sometimes it is attracted the violation of legality and serious fears on emergence of elements of corruption manifestations at permission of the single questions concerning initiation of legal proceedings.

But, further ignoring of results of OSA in conditions when modernization of criminal activity of an organized criminal group is observed, it is inadmissible.

In this regard, the essential part is assigned to a role of judicial monitoring. The modern approaches to reforming of the criminal procedure legislation of a number of the CIS countries, testify that developers of bills pay special attention also to such aspect as strengthening of a role of judicial monitoring. And, it is natural as judicial monitoring is urged to provide by pre-judicial production an observance of the constitutional rights and freedoms of the citizens who got under a corollary orbit by bodies of prosecutor's office, corollaries and inquiries. And as it is correctly noted, only the court represents judicial authority and from this it is followed all its powers. Not incidentally many works are devoted to questions of judicial monitoring of such scientists as: Gavrilov (2003), Kanafin (2012) and Kolokolov (2004). Despite importance of institute of judicial monitoring so far neither in the legislation of RK nor in regulations of KR it is not present its terminological concept. Also Orolbayev writes: "In the most common comprehension, judicial monitoring at pre-judicial stages of criminal legal proceedings is the special self-contained type of judicial activity regulated by the criminal procedure law which is carried out on ensuring protection of the rights, freedoms of the person and citizen and also protection against illegal and unreasonable charge, restriction of their rights and freedoms from bodies of preliminary investigation in a pre-judicial stage of manufacture".

As the analysis of various sources is shown which was carried out by us that we have not the united point of view on a ratio of the concepts "judicial monitoring" and "public prosecutor's monitoring", the mechanism is not developed, bound to realization by court of function and limits of its realization and also a question concerning independence of court at realization by it of the control functions is not solved.

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