

CHAPTER 12

MODERN TRENDS IN THE PROCEDURAL FORM DIFFERENTIATION UNDER REFORMING THE CRIMINAL JUSTICE SYSTEM OF UKRAINE

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INTRODUCTION

In 2012, the adoption of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) led to significant changes in the criminal procedure system due to the development and improvement of legal institutions, the procedural form of which should comply with the requirements of European standards in criminal justice. Nowadays, it seems difficult to imagine the regulation of criminal proceedings without numerous differentiated legal proceedings and arrangements for performing procedural activities within them. Therefore, the differentiation of the procedural form determines the systemic and structural organization of modern criminal procedure, which is complex, significantly different from the previous one and requires a thorough scientific analysis.

The expediency and usefulness of the differentiated procedure for criminal justice has been proved by the time; it is recognized not only by the national legislator but also by the international community that has been reflected in the Recommendation no. K (81) 7 of the Committee of Ministers of the Council of Europe to Member States on Measures Facilitating Access to Justice of May 14, 1981, Recommendation no. K (87) 18 of the Committee of Ministers of the Council of Europe concerning the Simplification of Criminal Justice of September 17, 1987 and others.

In general, the study of the unity and differentiation of the criminal procedural form during pre-trial investigation is derived from the definition of the concept of the procedural form. Significant contribution to the theory of criminal procedure on the definition of the essence of the procedural form is made in the works of V. P. Bozhiev, V. M. Horshenov, Yu. M. Hroshevyi, L. M. Loboiko, P. Ye. Nedbailo, V. M. Protasov, D. V. Simonovych, M. S. Strohovych, V. M. Trofymenko and others. Meanwhile, the modern development of criminal procedural legislation

testifies to the introduction of a new paradigm of the criminal procedural form. At the same time, in the domestic criminal procedure study, the issue remains underdeveloped, especially in terms of the current CPC of Ukraine. Development trends of criminal procedure legislation in Ukraine enable to determine its vector not toward the unification, but on the contrary, the differentiation of the criminal procedural form. The occurrence of new procedures and the extension of applying those procedural arrangements that have specific features and significantly differ from the general procedures for criminal proceedings create proper conditions for the effective resolution of criminal proceedings.

12.1. Differentiation of the criminal procedural form: Doctrinal interpretation and types

The concept of the criminal procedural form is one of fundamental definitions in the criminal procedure theory that, despite rather extensive study and research, remains poorly developed at the level of the scientific doctrine. In any case, the study of the procedure for pre-trial investigation is connected with the study of the procedural form. In scientific literature, the doctrinal approaches to the essence of the criminal procedural form are diametrically opposite, indicating the controversy of this issue and the unequal understanding of the problem of unity and differentiation of the criminal procedural form.

The study of the unity and differentiation of the criminal procedural form during pre-trial investigation is a derivative of the definition of the concept of the procedural form. Evidently, in the study, the disclosure of the essence of the sectoral procedural form, namely, the criminal procedural one is of particular interest. M. S. Strogovych, a prominent scientist, argues that the criminal procedural form is the legal form, which is a set of homogeneous procedural requirements for the actions of the participants of the proceedings, aimed at achieving the material and legal result, as well as a set of conditions established by the procedural law for performing actions by the investigating authorities, the prosecutor's office

and the court during investigation and resolution of criminal cases¹. A similar definition is in the works of V. P. Bozhiev².

Moreover, modern scholars' definitions are worth mentioning. For example, Yu. M. Hroshevyi argues that the criminal procedural form is a legal regime of criminal procedural activity, involving the compliance with legal procedures, implementation of certain procedural conditions and insurance of guarantees in criminal proceedings. The concept of the criminal procedural form emphasizes that the activities of operational units, pre-trial investigation bodies, a prosecutor, an investigating judge and a court are formalized. In other words, such activity is organized, regulated, has certain forms, in accordance with a number of requirements for it³.

L. M. Loboiko interprets the criminal procedural form as the procedure established by law for criminal proceedings in general, procedure for certain legal proceedings and procedure for procedural decision adoption. The criminal procedural form is important because it creates a well-defined, legally established regime for criminal proceedings⁴. However, in this definition, the scientist has ignored the procedure for the implementation of the rights and obligations of participants of criminal proceedings, which are not the subjects of authorities.

Though the study does not present all the existing doctrinal approaches regarding the concept of the criminal procedural form, it should be noted that at the present stage of the scientific development, scholars has not come to a single view concerning this issue. However, most scholars advocate the interpretation of the criminal procedural form as a legal phenomenon, complex in its content, which is revealed through the complexity of its constituent components that reflect its different sides.

However, the author cannot agree with the point of view prevailing during the development of the criminal procedure science of the Soviet

¹ Strogovich, M.S. (1939). *Priroda sovetskogo ugolovnogo protsessa i printsip sostizatelnosti* [The nature of the Soviet criminal process and the principle of competition]. M: Legal Publishing house PCJ USSR, P. 32 (in Russian)

² Bozhev, V.P. (Ed.). (1998). *Ugolovnyi protsess: ucheb. dlia vuzov* [Criminal procedure: A teaching manual for higher educational institutions]. M.: Spark, P. 8 (in Russian)

³ Hroshevyi, Yu.M., Tatsii, V.Ya., Tumanians, A.R. et al. (2013). *Kryriminalnyi protses: pidruchnyk* [Criminal procedure: A teaching manual]. V.Ya. Tatsii, Yu.M. Hroshevyi, O.V. Kaplinoyi, O.H. Shylo (Eds.). Kh.: Pravo, P. 14 (in Ukrainian)

⁴ Loboiko, L.M. (2012). *Kryriminalnyi protses: pidruchnyk* [Criminal procedure: A teaching manual]. K.: Istyna, P. 15 (in Ukrainian)

period, in particular that the procedural form should be unified in all criminal proceedings. M. S. Strogovich⁵, T. M. Dobrovolska, P. S. Elkind⁶ advocated such a position in their works.

At present, the reformation and improvement of criminal procedural legislation have led to significant changes in criminal proceedings. Therefore, the approach to the unification of the procedural form does not correspond to the current provisions that regulate the procedure for criminal justice. At the same time, the procedural form differentiation should not be considered as a dominant trend in the development of criminal procedure, since the unity of the form is aimed at ensuring the application of common rules for a certain category of proceedings during pre-trial investigation and trial proceedings. Fundamentally, this contributes to both the compliance with the rights, freedoms and legitimate interests of the participants of criminal proceedings and the legality of criminal justice in general.

The scientific literature argues appropriately that the striving to differentiate criminal justice is a tendency characteristic for almost all modern states of the world, the origins of which are rooted in the distant past. It is based on the determination to apply such forms of legal proceedings that would be adequate to the hard and complex proceedings under review and the legal implications that may result from such proceedings⁷. In this regard, one should agree with the scientific position that the unity of the criminal procedural form does not exclude its differentiation, the idea of which rests precisely on the unity. Any differentiation is derived from the usual (unified) form. The unity and differentiation of the criminal procedural form are two opposites, which are in the dialectical unity⁸. At the present stage of criminal procedure

⁵ Strogovich, M.S. (1974). O edinoi forme ugolovnogo protsessa i predelakh ee differentsiatsii [On the unified form of the criminal procedure and the limits of its differentiation]. *Sotsialisticheskaia zakonnost* [Socialist Legality], 9, 52 (in Russian)

⁶ Dobrovolskaia, T. N., Elkind, P. S. (1977). Printsipialnoe edinstvo ugolovno-protssesualnoi formy – vazhnaia garantiia zakonnosti pravosudiia i prav lichnosti [The fundamental unity of the criminal procedure form is an important guarantee of the legality of justice and the rights of the individual]. *Garantii prav lichnosti v sotsialisticheskom ugolovnom prave i protsesse* [Guarantees of individual rights in socialist criminal law and procedure] (pp. 4-8). Yaroslavl. (in Russian)

⁷ Lazareva, V.A., Tarasov, A.A. (Eds.). (2015). *Ugolovno-protssesualnoe pravo. Aktualnyie problemy teorii i praktiki: uchebnik dlia magistratury* [Criminal Procedure Law. Actual problems of theory and practice: A teaching manual for Master's] (3rd ed.). M. : Publishing House Urait, P. 28 (in Russian)

⁸ Tsyganenko, S.S. (2015). *Differentsiatsiia kak model ugolovnogo protsessa (ugolovno–protssesualnaia strategiia)* [Differentiation as a model of the criminal procedure (criminal procedural strategy)]. Proceedings from International Conference Dedicated to the 160th Birth Anniversary of Prof. I.Ya. Foinitskii. (St. Petersburg,

study, most researchers of this issue advocate this perspective. In addition, in scientific literature, the viewpoint of the necessity to introduce a new principle of criminal procedure, that is, the principle of optimal organization, differentiation and process acceleration is presented ⁹.

In this study, it should be mentioned that V.M. Trofimenko has carried out a systematic analysis of the procedural form of criminal proceedings, revealing that differentiation is a trend towards the development of modern legislation ¹⁰. In view of this, O.H. Shylo states properly that the expediency and usefulness of the differentiated procedure of criminal proceedings are proved by the time, because it has been recognized not only by the national legislator but also by the international community ¹¹.

From the perspective of the criminal procedure study, the «criminal procedural form differentiation» is a method of procedural organization, according to which in the criminal procedure system, individual legal proceedings become autonomous, as well as general and differentiated procedural arrangements to perform them are established ¹². Furthermore, the scientific literature contains other definitions of the concept under study. For example, A. Bardash considers the differentiation of criminal justice as the occurrence of proceedings that differ qualitatively in terms of the degree of complexity of procedural forms within a single criminal procedure ¹³.

Doctrinal approaches to the essence of the procedural form indicate differentiation is possible towards both complication of the form in some categories of criminal proceedings and its simplification in others. According to L.M. Loboiko and O.A. Banchuk, usually the procedure is single (unified) for all criminal proceedings, but in some cases, the

October 11–12, 2007). Retrieved from http://www.iauaj.net/1_oldmasp/modules.php?name=Pages&go=page&pid=225. (in Russian)

⁹ Aleksieiev, N.S., Morshchakova, T.H., Chanhuli, H.I. (1977). Kryminalno-protseualne pravo [Criminal procedural law]. Berlin: Gosizdat GDR, P. 23 (in Ukrainian)

¹⁰ Trofymenko, V.M. (2017). Teoretychni ta pravovi osnovy dyferentsiatsii kryminalnoho protsesu Ukrainy [Theoretical and legal basis of differentiation of the criminal process in Ukraine] (Dissertation of Doctor of Law). Kharkiv, P. 145 (in Ukrainian). Trofymenko, V.M. (2012). Do pytannia shchodo poniattia ta znachennia dyferentsiatsii kryminalno-protseualnoi formy [On the issue of the concept and significance of the differentiation of the procedural form]. Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Serii «Pravo» [Scientific Bulletin of Uzhgorod National University. The Series Law], 18, 140. (in Ukrainian)

¹¹ Shylo, O.H. (2010). Do pytannia shchodo dyferentsiatsii kryminalno-protseualnoi formy [On the question of the differentiation of the criminal-procedural form]. Pravo Ukrainy [The Law of Ukraine], 9, 181. (in Ukrainian)

¹² Trofymenko, V.M. (2016). Poniattia dyferentsiatsii kryminalnoi protseualnoi formy [The notion of differentiation of criminal procedural form]. Visnyk Natsionalnoi akademii pravovykh nauk Ukrainy [Bulletin of the National Academy of Legal Sciences of Ukraine], 4 (87), 180. (in Ukrainian)

¹³ Bardash A. (2012). Do pytannia shchodo dyferentsiatsii protseualnoi formy [On the issue of differentiation of procedural form]. Yurydychnyi visnyk [Legal Bulletin], 3, 131-136. (in Ukrainian)

legislator provides for special, differentiated procedures. The criminal procedural form differentiation can be related both to the complication and to the simplification of the proceedings¹⁴. In the scientific literature, another point of view is conveyed regarding this issue; in particular, the structure of the criminal procedural form includes two types: accelerated and simplified, which are different phenomena and should be distinguished from each other¹⁵. In this scientific dispute, the classical scholar viewpoint of the procedural form differentiation towards simplification or complication should be supported. Traditionally, the procedural form complication is associated with the introduction of additional guarantees of the rights for participants of criminal proceedings, involving more subjects, while its simplification is related to considering the less gravity of the crime, the obviousness of its commission, the degree of proceeding complexity.

At present, the procedural form differentiation should be considered as the feature of criminal justice, aimed at ensuring its stability through specific and special procedures for pre-trial investigation and judicial proceedings, which differ from the unified procedural form, and thus, due to their specificity, contribute to the rule of law in criminal procedure and the protection of its participants' rights.

The current CPC of Ukraine demonstrates a clear example of the procedural form differentiation in Section VI that provides for special procedures for criminal proceedings. The systematic analysis of the provisions of the CPC of Ukraine enables to conclude that, in addition to the special procedures for criminal proceedings in Section VI of the CPC of Ukraine, several differentiated forms of pre-trial investigation or judicial proceedings are provided for. Therefore, in the framework of differentiated forms of criminal proceedings, two types can be distinguished, namely, specific and special procedures for pre-trial investigation and judicial proceedings.

Section VI of the CPC of Ukraine includes specific procedures for criminal proceedings, such as criminal proceedings based on agreements (Chapter 35); private criminal proceedings (Chapter 36); criminal

¹⁴ Loboiko, L.M., Banchuk, O.A. (2014). *Kryminalnyi protses: navch. posib.* [Criminal procedure: A teaching manual]. Kyiv: VAITE, P. 20 (in Ukrainian)

¹⁵ Slyvych, I.I. (2015). *Pryskoreni ta sproshcheni provadzhennia v kryminalnomu sudochynstvi: vyznachennia ta dotsilnist isnuvannia* [Accelerated and simplified proceedings in criminal justice: Definition and expediency of existence]. *Naukovi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriiia «Pravo»* [Scientific Bulletin of Uzhgorod National University. The Series Law], 31 (3), 98-99. (in Ukrainian)

proceedings with regards to a special category of individuals (Chapter 37); criminal proceedings in respect of underage persons (Chapter 38); criminal proceedings in the matter of application of compulsory medical measures (Chapter 39); criminal proceedings containing state secret (Chapter 40); criminal proceedings in the territory of diplomatic missions, consular posts, the air, sea, or river craft of Ukraine, which navigates outside of Ukraine under the flag or with distinctive sign of Ukraine whenever the home port of such craft is located in Ukraine (Chapter 41).

Special procedures for criminal proceedings include individual provisions for the procedural form differentiation during pre-trial investigation (Chapter 24-1, 25 Section III, Section IX-1 of the CPC) or during court proceedings in the first instance (Art. 323; § 1, 2 Chapter 30 Section IV of the CPC), such as: 1) special pre-trial investigation of criminal offences (Chapter 24-1); 2) pre-trial investigation of criminal misdemeanours (Chapter 25); 3) special judicial proceedings (Part 3, Art. 323); 4) specific regime of pre-trial investigation in conditions of martial law, a state of emergency or in the area of anti-terrorist operation (Section IX-1); 5) simplified procedure for criminal misdemeanours (§ 1 Chapter 30); 6) proceedings in trial by jury (§ 2 Chapter 30).

Under reforming of criminal procedural legislation, new procedures for criminal proceedings tend to occur. Due to specific features, special procedures for criminal proceedings differ essentially from the general procedure for criminal justice towards either complication or simplification.

The specific and special procedure for criminal proceedings shall ensure the basic procedural guarantees for the participants of proceedings. In turn, during simplified or complicated criminal proceedings, the principles of criminal proceedings shall be complied with. Further development of the criminal procedure legislation towards the criminal procedural form differentiation should be scientifically grounded, as well as the achievement of theoretical developments that correspond to the current level of social relations should be taken into account.

Therefore, the development of the criminal procedure study has been demonstrating a tendency to differentiate the procedural form of criminal justice, including pre-trial investigation.

Evidently, to reveal and establish all the specificities of pre-trial investigation in differentiated forms of criminal proceedings go beyond

this study, consequently, the problematic aspects that require the theoretical and practical priority will be under focus.

12.2. Special pre-trial investigation as a manifestation of the criminal procedural form differentiation (according to the current legislation of Ukraine)

Nowadays, the procedural form differentiation is manifested in special pre-trial investigation of criminal offenses. This form of proceedings was introduced to the CPC of Ukraine on October 7, 2014 and is provided for in Chapter 24-1 «Features of special pre-trial investigation of criminal offenses»¹⁶. The necessity of introducing this institute was due to the lack of the procedure for criminal prosecution of persons who refused to come to the bodies of pre-trial investigation, which made it impossible to ensure the inevitability of punishment for such persons.

Moreover, recently, the number of crimes against basic Ukraine's national security and international legal order, crimes, related to terrorist activities of a high social danger, have significantly increased due to internal and external socio-political factors. In this regard, scientific literature emphasizes that the existing criminal procedural institutes have shown their inability to respond effectively to these transformations. Therefore, the lack of relevant elements in the system has indicated its ineffectiveness in relation to these factors. The need to manage the system from the outside has occurred, in particular, to make appropriate changes to the CPC of Ukraine, to define a mechanism that would contribute to solving system-wide and institutional problems by the system¹⁷.

Special pre-trial investigation should be considered due to insufficient study of this issue in the domestic science. In addition, in practice, a series of problematic issues require consideration and prompt resolution.

At present, to determine the essence of a criminal proceeding in the absence of a suspect or accused (in absentia) different concepts are used, namely: «criminal proceedings in absentia,» «examination of a criminal

¹⁶ Pro vnesennia zmin do Kryminalnoho ta Kryminalnoho protsesualnoho kodeksiv Ukrainy shchodo nevidvorotnosti pokarannia za okremi zlochyny proty osnov natsionalnoi bezpeky, hromadskoi bezpeky ta koruptsiini zlochyny [On amendments to the Criminal and Criminal Procedure Codes of Ukraine regarding inevitable punishment for separate crimes against foundations of national and public security, and corruption offences] (Law of Ukraine no. 1689-VII of October 7, 2014, Art. 2046). Vidomosti Verkhovnoi Rady Ukrainy [Bulletin of the Verkhovna Rada of Ukraine], 46, 3004. (in Ukrainian)

¹⁷ Teteriatnyk, H.K. (2017). Unifikatsiia ta dyferentsiatsiia protsesualnoi formy: synerhetychnyi pidkhid [Unification and differentiation of the procedural form: Synergistic approach]. Verkhovenstvo prava [Rule of Law], 1, 139. (in Ukrainian)

case in absentia,» «trial in absentia,» «justice in absentia» and others. In this regard, scientists raise the question of determining the legal nature and place of special pre-trial investigation in the criminal proceedings system. For this purpose, a differentiated criminal proceeding may be considered as such that: first, contains differences in legislative regulation; second, differs significantly in carrying out all criminal proceedings or its individual stages, including pre-trial investigation. According to A. S. Tukiiev, a special (in absentia) pre-trial investigation is an ongoing proceeding that is carried out: first, with enhanced procedural guarantees; second, in accordance with a special procedure; third, if grounds and conditions provided for by law are present ¹⁸.

A comprehensive analysis of the provisions of the CPC of Ukraine enables to highlight the features of special pre-trial investigation that distinguishes it from the general procedure. These should include the following.

First, special pre-trial investigation shall be conducted following the investigating judge's resolution (para. 2, Art. 297-1 of the CPC of Ukraine). The motion of an investigator, public prosecutor to conduct special pre-trial investigation shall serve as the ground for it (Art. 297-2 of the CPC of Ukraine). However, the CPC of Ukraine does not specify, the investigating judge of which court is authorized to consider such a motion. Only systematic analysis of the provisions of the CPC of Ukraine enables to understand that a motion for special pre-trial investigation shall be filed to a local court, within the territorial jurisdiction of which a pre-trial investigation body is.

Second, special pre-trial investigation is carried out in criminal proceedings on crimes, the clear list of which is provided for in Part 2 of Art. 297-1 of the CPC of Ukraine.

Third, during pre-trial investigation, the suspect (except for underage persons) is hiding from the investigation and judicial bodies with the view of avoiding criminal liability, and if he/she is announced in interstate or international wanted list.

Fourth, participation of a defence counsel shall be mandatory in special pre-trial investigation from the moment of making the

¹⁸ Tukiiev, A.S. (2005). Problemy protsessualnoi formy zaochnogo ugolovnogo sudoproizvodstva [Problems of the procedural form of criminal proceedings in absentia] (Dissertation Abstract of PhD in Law). The Republic of Kazakhstan, Karaganda, 20 p. (in Russian)

corresponding procedural decision (para. 8, Part 2, Art. 52 of the CPC of Ukraine).

Fifth, all procedural actions shall be conducted, and procedural decisions shall be taken in absentia. However, the copies of procedural documents to be delivered to the suspect shall be sent to a defence counsel. (Part 2, Art. 297-5 of the CPC of Ukraine).

Primary, the differences in the procedure of conducting special pre-trial investigation are due to the inability to ensure the appearance of the suspect to the investigator, the prosecutor. Moreover, such a person shall be subject to criminal liability, even in his/her absence. Part 1 of Article 297-1 of the CPC of Ukraine states that special pre-trial investigation is carried out in accordance with the general rules of pre-trial investigation, taking into account the provisions of Chapter 24-1 of the Criminal Procedure Code of Ukraine. However, this chapter does not specify other features of this type of pre-trial investigation, except for its beginning (from the moment of the investigating judge's decision) and the arrangements of delivery of procedural documents to the suspect (Art. 297-5 of the CPC of Ukraine). Mandatory procedural actions in the absence of a suspect, as well as the term of special pre-trial investigation, etc., are not specified. Therefore, the lack of procedural regulation of the institute of special pre-trial investigation testifies to the imperfection of the relevant legislative provisions.

In addressing special pre-trial investigation, the investigating judge must make sure that there are factual grounds for such a decision. Among such grounds are: a) the presence of sufficient evidence to suspect a person in committing an offense provided for in Part 2 of Art. 297-1 of the CPC of Ukraine; b) hiding of a suspect the investigation and judicial bodies with the view of avoiding criminal liability; c) if the suspect is announced in interstate or international wanted list. In the absence of such grounds, the investigating judge refuses to comply with a motion for special pre-trial investigation, and adopts a ruling.

An analysis of judicial practice shows that in some cases the investigator, the prosecutor does not properly substantiate the motion for special pre-trial investigation. For example, on November 11, 2016, the investigating judge of the Suvorovskiy District Court of Odessa refused to comply with the prosecutor's motion to conduct special pre-trial investigation on suspicion of the OSOBA_3 in committing a criminal

offense under Part 1 of Article 115 of the Criminal Code of Ukraine for such reasons: the motion for special pre-trial investigation did not contain information on the announcement of the OSOBA_3 in the interstate or international wanted list, investigatory actions had not been carried out since 2013, therefore, measures taken were not enough to conclude that the suspect OSOBA_3 is hiding from the investigation and judicial bodies with the view of avoiding criminal liability¹⁹.

During pre-trial investigation, only the ruling of investigating judge, related to refusal to conduct special pre-trial investigation, may be challenged in appeals procedure, while the ruling related to conduct special pre-trial investigation may not be challenged, the objection in respect of it may be filed during preparatory proceedings in court (para. 12, Part 1, Art. 309 of the CPC of Ukraine). Therefore, the question arises: why did the legislator provides for the inequality of the defence and the prosecution in respect of the possibility of appealing a court decision? After all, the defender, who actually represents the absent suspect, may have certain objections to the investigator's ruling and the need to insist on the legality. Therefore, not only the ruling of the investigating judge related to refusal to conduct special pre-trial investigation (which may be appealed by the investigator, the prosecutor), but also the ruling related to special pre-trial investigation (which may be appealed by the defender).

Therefore, *the author proposes the insertion of clause 12 of Part 1 of Article 309 of the Criminal Code of Ukraine into the following wording: 13) conducting special pre-trial investigation or denying it.*

It should be noted that Part 3 of Article 323 of the CPC of Ukraine provides for the possibility of conducting a special judicial proceeding, that is, a trial in criminal proceedings concerning crimes specified in Part 2 of Article 297-1 of the CPC of Ukraine, which takes place in the absence of the accused, except for minors, who is hiding from the investigation and judicial bodies with the view of avoiding criminal liability, and if he/she is announced in interstate or international wanted list. However, the systematic analysis of the CPC of Ukraine enables to understand that the legislator has not specified the procedure for «special court proceedings.»

¹⁹ Ukhvala slidchoho suddi Suvorovskoho raionnoho sudu m. Odesy [The ruling of the investigating judge of the Suvorovskiy District Court of Odessa] (Case no. 523/14421/16-k of November 11, 2016). Baza danykh "Yedynyi derzhavnyi reyestr sudovykh rishen" [Database Unified State Register of Court Decisions]. Retrieved from <http://www.reyestr.court.gov.ua/Review/63766402>.

Moreover, the problems of conducting this type of court proceedings go beyond the scope of our study and require separate study and resolution.

For that reason, the procedural arrangements for conducting special criminal proceedings should be provided for in a separate chapter of the CPC of Ukraine to specify the features of carrying out both pre-trial investigation and judicial proceedings in the absence of the suspect, the accused. In view of this, the CPC of Ukraine should be supplemented with the chapter «Special Criminal Proceedings».

Therefore, special pre-trial investigation should be considered as the procedural form differentiation that provides for a specific procedure for investigating crimes, an exclusive list of which is specified in the criminal procedural law, with respect to the suspect, who is hiding from the investigation and judicial bodies with the view of avoiding criminal liability, and if he/she is announced in interstate or international wanted list. In addition, the study of the theoretical aspects and practices of special pre-trial investigation leads to the conclusion that its introduction is conditioned by the necessity of criminal prosecution of persons who evade their arrival to the bodies of pre-trial investigation and aimed at achieving the principle of criminal punishment inevitability. Moreover, the study shows that the legislative provisions regulating the institute of special pre-trial investigation is imperfect, accordingly, the need for further improvement exists.

12.3. The institution of agreements as the criminal procedural form differentiation

Another manifestation of the procedural form differentiation during the conduct of both pre-trial investigation and judicial proceedings is criminal proceedings on the grounds of agreements. This institute is relatively new for criminal procedural law since it was introduced in 2012 with the adoption of the current CPC of Ukraine. These circumstances require focusing on the theoretical and practical aspects of its implementation.

Primarily, this institute formation is aimed at resolving the social conflict and achieving consensus among the participants of criminal proceedings. It should be emphasized that, although in the national procedural law, this institute is relatively recent, in the legal systems of developed countries, it has been actively functioning for quite a long time. For example, the institution of agreements is applied in the criminal

proceedings of England, the United States of America, Spain, Portugal, Italy, Poland and France²⁰.

According to D.V. Simonovych, criminal proceedings based on agreements should be considered as the procedural form differentiation aimed at simplifying the procedure for resolving criminal legal conflicts and implemented by achieving a compromise between the prosecutor or the victim and the person who committed the criminal offense²¹.

The court statistics on the number of agreements approved by judgements of courts of first instance during 2013-2018 requires separate analysis. Therefore, according to the State Judicial Administration of Ukraine, in 2013, courts of first instance considered 22 926 proceedings with agreements, (including 21 367 passed a judgement with the approval of the agreement); in 2014, 21 568 proceedings with agreements were considered (including 8 455 passed a judgement with the approval of a reconciliation agreement, 11 803 – a plea agreement); in 2015, 16 928 proceedings with agreements were considered (including 7 681 passed a judgement with the approval of a reconciliation agreement, 8 323 – a plea agreement); in 2016, 13 206 proceedings with agreements were considered (including 6 358 passed a judgement with the approval of a reconciliation agreement, 6 145 – a plea agreement); in 2017, 15 622 proceedings with agreements were considered (including 6 648 passed a judgement with the approval of a reconciliation agreement, 8 162 – a plea agreement). During the first half of 2018, 8691 proceedings were considered by courts with the approval of the agreement. Therefore, during 2013-2017, the number of criminal proceedings with the agreements brought to the court of first instance gradually decreased, from 22 926 to 15 622 proceedings.

During pre-trial investigation in a criminal proceeding based on agreements, the manifestation of differentiation consists primarily in the possibility for the victim and the suspect to conclude a reconciliation agreement throughout pre-trial investigation and for the prosecutor and the suspect to conclude a plea agreement.

²⁰ Fisher, G. (2003). *Plea bargaining's triumph: A history of plea bargaining in America*. Stanford, CA: Stanford University Press, P. 31. Bagirov, A.R.O. (2008). Technical paper on Plea bargaining and issues related to its implementation in Azerbaijan. Support to the anticorruption strategy of Azerbaijan (AZPAC), P. 7. Ma, Y. (2002). Prosecutorial discretion and plea bargaining in the United States, France, Germany and Italy: A comparative perspective. *International Criminal Justice Review*, 12, 37. Kozachenko, V.I. (2016). Realizatsiia zasady zakonnosti pid chas ukladennia uhod u kryminalnomu provadzhenni Ukrainy ta Nimechchyny [Realization of the principle of legality when concluding agreements in the criminal proceedings of Ukraine and Germany]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriya «Pravo»* [Scientific Bulletin of Uzhgorod National University. The Series Law], 38 (2), 108–109. (in Ukrainian)

²¹ Simonovych, D.V. (2016). *Doktrynalni zasady struktury ta systemnosti kryminalnoho protsesu Ukrainy: stadii ta okremi provadzhennia* [Doctrinal principles of the structure and system of the criminal procedure in Ukraine: stages and individual proceedings] (Monography). Kharkiv: V spravi, P. 295 (in Ukrainian)

In addition, the corresponding agreement is concluded in certain types of criminal proceedings, depending on the complexity of the criminal offense committed. Therefore, a reconciliation agreement may be concluded in criminal proceedings: 1) in respect of criminal misdemeanours; 2) crimes of minor or medium gravity; 3) in the form of private prosecution (Part 3, Art. 469 of the CPC of Ukraine). The reconciliation agreement in criminal proceedings in respect of the authorized officer of a legal person that has committed a criminal violation in relation to which proceedings are taken in respect of the legal person is inadmissible. The plea agreement can be concluded in the proceedings in respect of: 1) criminal misdemeanours, crimes of minor or medium gravity, grave crimes; 2) crimes of especially grave severity, referred to the investigative jurisdiction of the National Anti-Corruption Bureau of Ukraine provided that the suspect or accused expose another person's commission of a crime, referred to the investigative jurisdiction of the National Anti-Corruption Bureau of Ukraine, if information on commission of a crime by such person is proved by evidence (Part 4, Art. 469 of the CPC of Ukraine).

Therefore, due to concluding the agreement, arrangements, most favourable for the parties of the agreement, are made: for the victim – compensation for damage, for the prosecutor – the exposure of the perpetrators and the exposure of grave crimes, for the suspect, the accused – softening of the punishment imposed by the court.

However, the implications of concluding the agreements, provided for the victim, the suspect, the prosecutor in Article 473 of the CPC of Ukraine, should be taken into account, in particular, restriction of their right to appeal against a sentence, waiver from some procedural rights.

The doctrinal study of scientific literature and the practice of applying agreements in criminal proceedings reveals problematic issues that require legislative resolution.

One of the aspects to be considered is the definition of the subjects of initiation and concluding a reconciliation agreement. For example, Part 1 of Article 469 of the CPC of Ukraine specifies that arrangements in respect of the reconciliation agreement may be made independently by victims, suspects or accused or with the assistance of another person as agreed between the parties to criminal proceedings (except for the investigator, prosecutor or judge). However, the investigator, public prosecutor or judge are prohibited to assist the victim and the suspect or accused in making arrangements in respect of the reconciliation agreement. Some scholars

disagree with the statutory prohibition on investigators, prosecutors, judges to participate in making arrangements²².

Judicial practice should be taken into consideration in solving this issue. For example, checking the reconciliation agreement compliance with requirements of the CPC of Ukraine and the Criminal Code of Ukraine, the court detected that the agreement was concluded on the initiative of the investigator, that is, the person who cannot be its initiator. Given the doubts regarding the compliance of the agreement with the factual circumstances and in the presence of reasonable grounds to believe that the conclusion of the agreement was not voluntary, the court justified the ruling on the refusal to approve the reconciliation agreement (the ruling of the Menskyi District Court of Chernihiv Oblast of March 12, 2013)²³.

Considering the provisions of Part 1 of Article 469 of the CPC of Ukraine, as well as the practice of applying these provisions, it becomes clear that the investigator, the prosecutor should not assist the victim and the suspect in the conclusion of the reconciliation agreement. Arrangements of all issues to be identified in the reconciliation agreement shall be made independently.

In order to solve this problem, the legislator has provided for the possibility of involving another person, agreed by the parties to the criminal proceedings (Part 1, Art. 469 of the CPC of Ukraine). However, the procedural status of this person is not defined legally. For now, scientists have already raised this issue and made proposals regarding the list of requirements for the professional level of such person (mediator)²⁴. Moreover, nowadays a draft law «On Mediation» no. 3665 of December 17, 2015 is submitted to Verkhovna Rada of Ukraine, adopted in the first reading and the second reading is under consideration²⁵. According to Article 2 of this draft law, the mediator is an independent moderator, who

²² Lapkin A.V. (2014). Uchast prokurora v kryminalnomu provadzhennia na pidstavi uhody pro pryemyrennia [Participation of the prosecutor in criminal proceedings based on a reconciliation agreement]. Forum prava [Law Forum], 2, 442-447. (in Ukrainian). Domin, Yu. (2013). Instytut uhod u kryminalnomu provadzhenni: vazhlyvi aspekty pravozastosuvannia [Institute of agreements in criminal proceedings: Important aspects of law enforcement]. Visnyk natsionalnoi akademii prokuratury Ukrainy [Bulletin of the National Academy of Public Prosecutor of Ukraine], 4, 13. (in Ukrainian)

²³ Uzahalnennia Vyshchoho spetsializovanoho sudu Ukrainy z rozhliadu tsyvilnykh i kryminalnykh sprav sudovoi praktyky zdiysnennia kryminalnoho provadzhennia na pidstavi uhod vid 22.01.2014 [Brief of the High Specialized Court of Ukraine for consideration of civil and criminal cases of judicial practice in conducting criminal proceedings based on agreements of January 22, 2014]. Zakon i Biznes [Law and Business], 28 (1170). Retrieved from https://zib.com.ua/ua/print/92557-uzagalnennya_vssu_sudovoi_praktiki_zdiysnennya_kryminalnogo_.html (in Ukrainian)

²⁴ Novak, R.V. (2015). Kryminalne provadzhennia na pidstavi uhod v Ukraini [Criminal proceedings based on agreements in Ukraine] (Dissertation for the degree of Candidate of Juridical Sciences (Ph.D.). Kharkiv, P. 10 (in Ukrainian)

²⁵ The Verkhovna Rada of Ukraine. (2015). On mediation (Draft Law of Ukraine no. 3665 of January 17, 2015). Zakonodavstvo Ukrainy [Legislation of Ukraine]. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=3665&skl=9. (in Ukrainian)

assists the parties to resolve the dispute through mediation, while Article 16 provides for requirements for obtaining the status of a mediator, in particular, the mediator may be an individual who has attained twenty five years of age, has higher or vocational education and has passed professional mediation training of 90 academic hour initial training, including at least 45 academic hours of practical training.

From the scientific perspective, the institution of mediation is the most promising form of alternative regulation of criminal-legal conflicts²⁶. Moreover, many scholars consider solving the problem issues regarding the introduction of mediation in criminal justice of Ukraine. In order to support this novelty, it should be emphasized that generally mediation or restorative justice is an alternative method of resolving disputes. Nevertheless, precautions should be stated regarding the activities of mediators in the criminal proceedings, as provided for in Article 3 of the draft law «On Mediation,» if the mediation party has committed a grave crime or a crime of especially grave severity, mediation may be conducted solely in relation to the amount and manner of compensation for the damage caused by this crime.

Therefore, the introduction to the national legislation of such a special form as criminal proceedings based on agreements is an expedient and necessary step. However, the legal regulation of this institution is imperfect; therefore, the provisions of criminal procedural legislation need to be improved. Nowadays, the judicial practice demonstrates the existence of violations of the CPC of Ukraine on the issues of initiation and conclusion of the reconciliation agreement, since in some cases, this kind of agreement is concluded on the initiative of the investigator, that is, a person who is not allowed to interfere in the process of establishing agreements. In order to solve the problem the procedural status of the mediator (another person agreed by the parties to the criminal proceedings) in respect of participation in criminal proceedings shall be clearly specified. Therefore, the Law of Ukraine «On Mediation» should be adopted, as well as appropriate amendments to the CPC of Ukraine should be made.

²⁶ Frych, V. Komarnytska, O. (2013). Mediatsiia (prymyrennia) yak alternatyva sudovomu rozhlidu kryminalnykh provadzhen [Mediation (reconciliation) as an alternative to judicial review of criminal proceedings]. *Visnyk natsionalnoi akademii prokuratury Ukrainy* [Bulletin of the National Academy of Public Prosecutor of Ukraine], 3, 25. (in Ukrainian). Tiurin, H.Ye. (2015). Orhanizatsiyno-pravovi osnovy uchasti prokurora u kryminalnomu provadzhenni na pidstavi uhod [The organizational and legal basis for participation of the prosecutor in criminal proceedings based on agreements] (Monography). Kh.: Pravo, P. 230 (in Ukrainian)

12.4. Criminal proceedings in respect of underage persons

Another manifestation of the differentiation procedural form is the conduct of criminal proceedings in respect of underage persons. The relevance of the issue is evidenced by the dynamics of juvenile delinquency, which remains significant today. However, V. Nazarov emphasizes that age specificities of minors also require strengthening of their legal protection to general justice, application of certain specific rules that create additional guarantees for juveniles in the investigation and in court proceedings without changing or overturning the general procedural form of criminal proceedings²⁷.

Considering the psychological and physiological specificities of underage persons who committed a criminal offense, the legislator paid special attention to the realization and protection of their rights. Therefore, a special procedure for both pre-trial investigation and judicial proceedings in respect of underage persons is logical and manifested in provisions of separate Chapter 38, “Criminal Proceedings in Respect of Underage Persons,” of the CPC of Ukraine.

The legislative establishment of the specificities of conducting pre-trial investigation in respect of juveniles confirm the special concern for underage persons who committed a criminal offense. However, such circumstances indicate the need for continuous improvement of the national legislation and compliance with international legal standards.

The importance of applying some international legal acts in the conduct of criminal proceedings in respect of underage persons should be emphasize. According to paragraph 1 of the letter of the High Specialized Court of Ukraine for Civil and Criminal Cases «On certain issues of conducting criminal proceedings in respect of underage persons,» when conducting criminal proceedings in respect of underage persons, courts shall ensure the exact and steady application of the current legislation, timely and proper consideration of them, be guided by the Constitution of Ukraine, the Criminal Code of Ukraine, the Criminal Procedure Code of Ukraine, international treaties, to which the Verkhovna Rada of Ukraine consented to be bound, such as the UN Convention on the Rights of the Child of 20 November 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice of November 29, 1985 (the Beijing Rules), as well as take into account the practice of the European Court of

²⁷ Nazarov, V.V. (2013). *Kryminalnyi protses Ukrainy: navch. posibnyk* [The Criminal Procedure of Ukraine: A teaching manual]. K.: IE Lipkan, P. 461 (in Ukrainian)

Human Rights, introduce their provisions in national law enforcement practice²⁸.

Adjusting the criminal procedural legislation of Ukraine to international legal acts is aimed at bringing national provisions, including for criminal proceedings in respect of underage persons, in compliance with international and European standards, as well as improving the status of underage persons in criminal proceedings. The relevance of these issues are supported by many grounds, from the public danger of mercenary and violent offenses committed by underage persons to the moral component of the general participation of underage persons in criminal procedure.

The procedural status of an underage suspect is regulated by both general international and special legal documents. General documents are international acts such as the Universal Declaration of Human Rights of 1948, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the International Covenant on Civil and Political Rights of 1966. Special documents are the Declaration on the Rights of the Child (Geneva Declaration) of 1924, the Declaration of the Rights of the Child of 1959, the UN Standard Minimum Rules for the Administration of Juvenile Justice of 1985 (the Beijing Rules), The UN Guiding Principles on the Prevention of Juvenile Delinquency (the Riyadh Guidelines) of 1990, the UN Rules for the Protection of Juveniles Deprived of their Liberty of 1990, the UN Convention on the Rights of the Child of 1989, etc.

International standards for the protection of the rights of the child occur gradually in the legislation of Ukraine. Therefore, *differentiation during pre-trial investigation in the criminal proceedings in respect of underage persons is expressed as follows.*

The specialization of the investigator, who is authorized to conduct pre-trial investigation against underage persons, is determined in Part 2 of Article 484 of the CPC of Ukraine and the specialization of the prosecutor, who is in charge of pre-trial investigation in criminal proceedings against underage persons, is determined in paragraph 3 of the Order of the

²⁸ Pro deiaki pytannia zdiisnennia kryminalnoho provadzhennia shchodo nepovnitnikh [On certain issues of conducting criminal proceedings in respect of underage persons] (Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases no. 223-1134/0/4-13 of July 18, 2013). Retrieved from <http://zakon.rada.gov.ua/laws/show/v1134740-13>. (in Ukrainian)

Prosecutor General of Ukraine “On the organization of prosecutors’ activity in criminal proceedings” no. 4 hn of December 19, 2012²⁹.

The current CPC of Ukraine provides for additional guarantees of the rights of an underage person: a) the mandatory participation of the defender (para. 1, 2, Part 2, Art. 52, Part 3, Art. 499 of the CPC of Ukraine); b) the participation of the legal representative (Art. 44, 488 of the CPC of Ukraine); c) the participation of a pedagogue, psychologist or a medical practitioner in interviewing an underage suspect or defendant (Art. 491 of the CPC of Ukraine).

The procedures for applying certain measures for ensuring criminal proceedings, such as summoning (Art. 489 of the CPC of Ukraine), measures of restraint (Art. 492, 493 of the CPC of Ukraine) are specified.

The differences in the procedure for pre-trial investigation in criminal proceedings against underage persons are established: a) a special subject of proving (Art. 485 of the CPC of Ukraine); b) investigative (detective) actions conducted with involvement of an underage person are carried out in accordance with the requirements provided for in Articles 226, 227, 490 of the CPC of Ukraine; c) possibility of disjoining proceedings in respect of a criminal offense committed by an underage person (Art. 494 of the CPC of Ukraine); d) a special form of the termination of pre-trial investigation (Art. 497, Part 5, Art. 499 of the CPC of Ukraine).

Paragraph 2 of Chapter 38 of the CPC of Ukraine provides for application of compulsory educational measures on underage persons who have not attained the age of criminal discretion.

CONCLUSIONS

Therefore, it should be emphasized that in view of ensuring the rights of participants to criminal proceedings, in particular an underage suspect, the importance of compliance with not only legal regulations of the legislation of Ukraine, but also with international treaties shall be provided for in regulations of the CPC of Ukraine. Moreover, providing a legislative framework will contribute to frequent application of these provisions by the courts of Ukraine in the future. However, as practice shows, Ukraine is only at the stage of bringing its legislation in compliance with ratified international legal acts in the field of human rights protection. Both

²⁹ Pro orhanizatsiiu diialnosti prokuroriv u kryminalnomu provadzhenni [On the organization of prosecutors’ activity in criminal proceedings] (Order of the Prosecutor General of Ukraine no. 4 hn of December 19, 2012). Retrieved from http://www.gp.gov.ua/ua/gl.html?_m=publications&_t=rec&id=94102. (in Ukrainian)

positive trends, such as the introduction of international standards in the national legislation, and certain discrepancies exist.

SUMMARY

The article reveals topical issues of the criminal procedural form differentiation. The analysis of scientific approaches to this concept enables to state constant development of this definition, which cannot be stable, because it undergoes changes due to modern processes in connection with the current legal reform. The author indicates two directions of the criminal procedural form differentiation, such as complication and simplification. The article reveals that the necessity of introducing special pre-trial investigation institute is caused by the lack of the procedure for criminal prosecution of persons who refuse to come to the bodies of pre-trial investigation, which makes it impossible to ensure the inevitability of punishment for such persons. The author gives the original definition of special pre-trial investigation as well as proposes some amendments to the CPC of Ukraine. The article analyses some topical issues on the procedure for criminal proceedings based on agreements and in respect of underage persons as differentiation manifestations of pre-trial investigation and judicial proceedings. The features of these types of specific procedures for criminal proceedings are specified and analysed, enabling to reveal problematic aspects the CPC provisions implementation in this part. The ways to improve the CPC of Ukraine regarding problems stated are suggested.

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