

CHAPTER 13

ENSURING THE SAFETY OF WITNESSES: UKRAINIAN DIMENSION

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INTRODUCTION

Research of person's legal status, protection of its rights and legitimate interests is one of the most urgent questions in modern conditions of Ukrainian state development. Studies on legal status of witnesses whose testimony is one of the most widespread sources of evidence in criminal proceedings deserve special attention. In connection with that witnesses' protection has to become a priority sphere in law enforcement bodies' reforming in Ukraine.

Such famous domestic legal scholars as V.I. Halahan, V.V. Hevko, O.O. Hryn'kiv, V. S. Zelenets'kyi, B.M. Kachmar, Ye.Ye. Kondrat'yev, V.S. Kuz'michov, Ye.D. Luk'yanchykov, A.O. Lyash, V.T. Malyarenko, M.A. Pohorets'kyi, S.M. Stakhiv'skyi, V.M. Tertyshnyk, L.D. Udalova, V.Yu. Shepit'ko, M.Ye. Shumylo and others paid attention to the question of ensuring the safety of witnesses as participants of criminal process in Ukraine, but mentioned authors highlighted this issue episodically and fragmentally in frames of complicated and thorough theoretical researches, what raises urgency of further development of this scientific problem.

According to the Art. 2 of current Criminal Procedural Code of Ukraine (hereinafter – CPC of Ukraine) “assignments of criminal proceedings is defense of individual, society and the State from crimes, protection of criminal proceedings participants' rights, freedoms and lawful interests as well as ensuring quick, full and impartial investigation and judicial examination for everybody who committed a crime to be brought to justice to the extent of his guilt, any innocent was not accused or convicted, any person was not subjected to unreasonable procedural enforcement and so that due process of law was applied to any participant of criminal proceedings”¹.

¹ Kryminal'nyy protsesual'nyy kodeks Ukrayiny: zakon vid 13.04.2012 № 4651-VI. Vidom. Verkhovnoyi Rady Ukrayiny. 2013. № 9–10, № 11–12, № 13. St. 88

It is worth to mention that fundamental rights of Ukrainian citizens are enshrined in Art. 27 of Constitution of Ukraine where it is said that “any person has inalienable right to life. No one shall be arbitrarily deprived of life. The duty of the State is to protect human life. Everyone has the right to protect his or her life and health, the lives and health of other persons against unlawful encroachments”². At the same time rules of Fundamental law establish safeguards of these rights’ ensuring as well. One of the main of these safeguards is ensuring the safety of participants of criminal proceedings, including witnesses. Along with that the problem of ensuring the safety of criminal justice’s participants, courts’ officials and law enforcement officials according to international standards and principles is still urgent in Ukraine.

13.1. Definition of the term «enduring of safety of witnesses» in criminal justice

From O. Yu. Kyrychenko point of view «consideration of safety question as well as any other independent scientific problem, foresees necessity to develop a term (category) of this phenomena. Category “safety” may and above all has to be developed as jeneral academic category that is still not adequately included in category-conceptual system of science. Terms of certain security types, in particular national, international, state, social etc. has to be developed as well, taking into consideration this widest possible in scope and deep on the content category³.

In this aspect we fully agree with V. S. Zelenets’kyi position that “successful consideration of whole complex of methodological problems that value for theory as well as for practice of crime’s countering greatly depends on right definition of outbound theoretical provisions⁴.

In connection with that we consider appropriate and necessary to determine terminological content of the issue in question because clear understanding and clear interpretation of such terms’ content as “safety measures”, “ensuring”, “justice”, “safety” etc. depends directly on actual

² Konstvtutsiya Ukrainy: zakon vid 28.06.1996 № 254k/96-VR. Vidom. Verkhovnoyi Rady Ukrainy. 1996. № 30. St. 141

³ Kyrychenko O. Katehorial’no-ponyatiynny aparat u sferi operatyvno-rozshukovoyi protydyi zlochynam proty hromads’koyi bezpeky: EUROPEAN POLITICAL AND LAW DISCOURSE, 2015. Volume 2 Issue. S. 316.

⁴ Zelenetskyi V. S. Obschaya teoriya bor’by s prestupnost’yu. Kontseptual’nye osnovy. Khar’kov: Osnova, 1994. S. 170.

solution of the problem of ensuring the security of witnesses as participants of criminal proceedings in Ukraine.

Thus, Explanatory dictionary of Ukrainian language defines term “ensuring” as “providing with material means sufficient for living and necessary for activity, functioning of something; guarantee of anything”⁵.

On O. Yu. Kyrychenko’s point of view “there are two main approaches to understanding of term “safety”. From one side, safety is defined as condition of any medium of danger that does not contain possible for environment threat, from the other – feature of safety is inherent in the object securely protected from bad influence. At the same time, in both cases there is a direct relationship with such characteristic of social system as safety that is active focused activity on support of social relations in certain quality state. “Safety” category is a common outbound category on which national security in whole and its certain types in particular is based⁶.

The term “safety” is interpreted in Ukrainian language dictionaries as: 1) security, technical specifications and means that eliminate danger, prevent danger⁷; 2) as a state when there is no danger for anybody or anything⁸.

There is no coherence in this term’s understanding and interpretation among Ukrainian academics at the moment. If we look into current CPC of Ukraine, we see that the definition “ensuring the safety” is not defined there, although in CPC as revised in 1960 such term was determined in Art. 52¹, 52² and others.

From A. A. Yunusov’s point of view “ensuring the safety of participants of criminal proceedings and other persons is an activity of competent bodies that is aimed on creation of conditions in which there is no danger for life and health of these persons or address the risk”⁹. V. S. Zelenets’kyi and M. V. Kurkin consider that “it necessary to understand under ensuring the safety of subjects of criminal proceedings a set of special measures that are taken by competent law enforcement bodies, realization of which leads to address the risk that existed earlier

⁵ Tlumachnyy slovnyk ukraïns’koyi movy // Uklad. Koval’ova T. V., Kovryha L. P. Kharkiv, 2005. S. 202.

⁶ Kyrychenko O. Mentioned work. S. 316.

⁷ Russko-ukraïns’kyi slovar’ terminov po teoryi hosudarstva y prava. Pod obshch. red. N. Y. Panova. Khar’kov, 1993. S. 34.

⁸ Tlumachnyy slovnyk ukraïns’koyi movy. S. 435.

⁹ Yunusov A. A. Oberezhenye uchastnykov uholovnoho protsessa y ykh blyzhnykh: dys. ... kandydata yuryd. nauk. N. Novhorod, 1998. S. 16.

and thus ensures its removal, as well as prevents damage to certain persons, objects or other values, protected by the State in accordance with legal procedure”¹⁰. From O. O. Hryn’kiv’s point of view “ensuring the safety of participants of criminal justice is realization of a complex of necessary actions (measures) by law authorized (competent) bodies, aimed on prevention of possible damage to participants of criminal justice, in order to do proper justice”¹¹.

As we see there is no unity and coherence in interpretation of basic terms of these problematic and urgent issues among Ukrainian academics at the moment that caused a broad discussion on pages of legal periodicals regarding mentioned category-conceptual system of this problematic.

Supreme Court in its case-law Compilation on mentioned issue noted that “the term “ensuring the safety” includes execution of legal, organization-technical and other measures, aimed on protection of life, health and property of individuals that had been taken under state protection against unlawful assaults, by law enforcement bodies, to create necessary conditions in order to do proper justice”¹².

In the Law of Ukraine “On Ensuring the Safety of Individuals that Take Part in Criminal Justice” of 23 December 1993 No. 3782-XII the definition of this term is given. According to the Art. 1 “Definition of ensuring the safety of individuals that take part in criminal justice” ensuring the safety of individuals that take part in criminal justice that means in exposing, prevention, termination, solution or investigation of crimes as well as in judicial examination of criminal proceedings, is taking legal, organization-technical and other measures, aimed on protection of life, housing, health and property of these individuals against unlawful assaults, by law enforcement bodies, to create necessary conditions in order to do proper justice (Art. 1 amended by the Law of Ukraine of 13 April 2012 No. 4652-VI)¹³.

¹⁰ Zelenets’kyy V., Kurkin M. Osnovni polozhennya vchennya pro zabezpechennya bezpeky sub’vektiv kryminal’noho protsesu, shcho vedut’ borot’bu z orhanizovanoyu zlochynnistyuu // Prokuratura. Lyudyna. Derzhava. 2004. № 4 (34). S. 38.

¹¹ Hryn’kiv O. O. Ponyattya zabezpechennya bezpeky osib, yaki berut’ uchast’ u kryminal’nomu sudochynstvi // Formuvannya pravovoyi derzhavy v Ukrayini. Problemy i perspektyvy: materialy KH Vseukr. nauk.-prakt. konf. (kvit. 2008 r.). Ternopil’, 2008. S. 522.

¹² Praktyka zastosuvannya zakonodavstva, shcho peredbachaye derzhavnyy zakhyst suddiv, pratsivnykiv sudu i pravookhoronnykh orhaniv ta osib, yaki berut’ uchast’ u sudochynstvi // Visn. Verkhovnoho Sudu Ukrayiny. 1999. № 6(16).

¹³ Pro zabezpechennya bezpeky osib, yaki berut’ uchast’ u kryminal’nomu sudochynstvi: zakon vid 23.12.1993 № 3782-XII // Vidom. Verkhovnoyi Rady Ukrayiny. 1994. № 11. St. 51.

From O. O. Zaytsev's point of view "ensuring the safety of participants of criminal justice is a part of state policy that is why the term "ensuring the safety" need to be complemented by identification "state" as namely the state acts as the main institute that is obliged to ensure protection of rights and lawful interests of all individuals that maintain criminal proceedings that is aimed on achievement of criminal justice's tasks"¹⁴. We support this position.

According to international legal standards in this sphere right to ensuring the safety is enshrined in Universal Declaration of Human Rights of 1948 "everyone has the right to life, liberty and security of person" (Art. 3)¹⁵. International Covenant on Civil and Political Rights of 1966 also establishes that "Everyone has the right to liberty and security of person" (para. 1 Art. 9)¹⁶. It is also laid down in para. 3 Art. 13 of Declaration on the Protection of All Persons from Enforced Disappearance, para. 1 Art. 12 of International Convention for the Protection of All Persons from Enforced as well as in the Set of principles for the protection and promotion of human rights through action to combat impunity according to which effective remedies for ensuring the safety, physical and psychological well-being shall be taken¹⁷.

Respect for human rights, development and implementation of optimal system of witnesses' safety in Ukraine together with other state authorities is also established among strategy priorities in the Strategy of bodies' development of MIA's system on the period till 2020¹⁸.

13.2. Legal (procedural) status of witnesses as a guarantee of their safety during criminal justice

In this regard we support O. M. Kalachova's opinion that "establishment of legal guarantees of protection and realization of participants' of criminal justice rights is among the most urgent questions

¹⁴ Zaytsev O. O. Teoretycheskye v pravovye osnovy gosudarstvennoy zashchyty uchastnykov uholovnoho sudoproizvodstva v Rossyyskoy Federatsyy: dys. ... d-ra yuryd. nauk. M., 1999. S. 24.

¹⁵ Universal Declaration of Human Rights, adopted by Resolution 217 A (III) of General Assembly of UNO of 10.12.1948. URL: <https://www.un.org/en/universal-declaration-human-rights/> (date of request: 02.04.2019).

¹⁶ International Covenant on Civil and Political Rights, adopted by Resolution 2200 A (XXI) of General Assembly of 16.12.1966. URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (date of request: 02.04.2019).

¹⁷ Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. E/CN.4/2005/102/Add.1 URL: https://digitallibrary.un.org/record/541829/files/E_CN.4_2005_102_Add.1-EN.pdf?version=1 (date of request: 02.04.2019).

¹⁸ Pro zatverdzhennya Stratehiv rozvytku orhaniv systemy MVS na period do 2020 roku: rozporядzhennya Kabinetu Ministriv Ukrainy vid 15.11.2017 №1023-r. URL: http://mvs.gov.ua/ua/pages/strategiya_2020.htm (date of request: 02.04.2019).

of modern science and practice of criminal procedural activity. One of the most important of them is individual's timely acquisition of procedural or legal status that meets its legal situation. Its real possibilities to acquire procedural rights and to realize them as well as timely and legally understand and execute its procedural obligations depend on how adequacy individual's procedural status is defined. Nonetheless discrepancy of individual's procedural status in criminal justice to de facto situation and circumstances of criminal proceedings creates contradictions in criminal process theory and law enforcement activity of pre-trial investigation bodies¹⁹.

Obviously, that originally correctly defined individual's status as a witness in criminal process depends on its further safety as a participant of criminal justice. In fact Criminal Procedural Code of Ukraine (CPC of Ukraine) reduced procedural aspect of mentioned institute, left its regulation by basic laws and numerous, including departmental, legislation of Ukraine. Thus, several articles of current CPC of Ukraine normatively enshrine the possibility to ensure the safety of these individuals, in connection with that witnesses that need ensuring of their personal safety, do not duly notified that they have such procedural status and about means of its realization in criminal process.

Witness as one of the most important participants of criminal proceedings and according to rules of para. 1 Art. 65 CPC of Ukraine is an individual that knows or may know circumstances that are subjects to proof during criminal proceedings, and that had been called to give evidence. While international legal definition of witness differs from its legal definition in CPC of Ukraine and interprets according Art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms and Recommendations of Council of Europe No. R (97) 13 concerning intimidation of witnesses and the rights of the defense, adopted by the Committee of Ministers of September 1997²⁰. Thus, according to mentioned Recommendations of Council of Europe witness is means any person, irrespective of his/her status under national criminal procedural law, who possesses information relevant to criminal proceedings. This

¹⁹ Kalachova O. M. Vyznachennya slidchym protsesual'noho statusu osib, shcho berut' uchast' u dosudovomu provadzhenni: dys. ... kand. yuryd. nauk. Luhans'k, 2008. C. 5.

²⁰ Recommendations of Council of Europe No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, adopted by the Committee of Ministers of 10.09.1997. URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c4a0f> (date of request: 02.04.2019).

definition also includes experts as well as interpreters acquiring broader understanding and does not consistent with rules of para. 1 Art. 65 of CPC of Ukraine, in connection with what the last has to be amended according to the demands of the EC.

Based on the analysys of CPC's of Ukraine rules witnesses in criminal justice of Ukraine, along with individuals stated in para. 1 Art. 65, may be also officers of law enforcement bodies , individuals engaged to criminal proceedings in witnesses of search' status (para. 7 Art. 223); individual that knows or may know circumstances that are subjects to proof during criminal proceedings from hearsay (Art. 97); individuals that act undercover in criminal enviroment by operational units of Ukraine (Art. 256, 272, 275) etc.

We share V. M. Lushpiyenko's opinion that "it is more appropriate to use category "legal status" that defines subject's situation in legal relations to analyze witness's status"²¹.

Legal status of witnesses as subjects to whom safety measures may be applied in criminal justice shall be defined as a system of their rights and obligations, enshrined in legislation of Ukraine, that allow them to realize their functions as effectively as possible during application personal safety measures to them.

Important element of criminal process that is broadly discussed on pages of legal periodicals is a moment of obtaining by the witness as a participant of criminal justice, its legal (procedural) status, because possibility to apply safety measures to him/her is connected exactly with this moment. From our point of view, this moment is possible to identify, based on legaly defined term "witness", because in the CPC of Ukraine it is used in two meanings: firstly, as individual that knows or may know circumstances that that are subjects to proof during criminal proceedings; secondly, as individual that is called to testify on factual circumstances of the case that are known to him/her²². The term "witness" may also be used is such meaning: "as individual that may know any facts that matter for investigation and solution of criminal, administrative or civil case that that is called o testify"²³.

²¹ Lushpiyenko V. M. Pravovyy status svodka u kryminal'nomu protsesi Ukrayiny ta inozemnykh derzhav // Derzhava ta rehiony. 2017. № 1 (55). S. 120. (Seriya: Pravo).

²² Slovnyk ukrayins'koyi movy. Akademichnyy tлумachnyy slovnyk URL: <http://sum.in.ua/s/neghlasnyj> (date of request: 02.04.2019).

²³ Bazhanov M. Y. Svydetely, ykh prava y obyazannosty po sovet'skomu uholovno-protsessual'nomu zakonodatel'stvu. M.: Hosyuryzdat. 1955. S. 27.

From O. P. Kuchyns'ka's point of view, "a person becomes a witness right after he/she is officialy called for questioning. And exactly from this moment he/she obtains rights as well as obligations, foreseen in current criminal procedural legislation are imposed on him/her"²⁴. We consider that mentioned opinion is not undeniable and unconditional.

Thus, according to Art. 3 of CPC of Georgia witness is an individual that may know data, necessary for establishment of facts of the criminal case. The individual obtaine status, rights and obligations of a witness after warning about criminal liability and taking an oath²⁵. In this case in Georgia, different from CPC of Ukraine as well as from Ukrainian academics' opinions, a moment when witness obtains procedural status is legally enshrined, that, certainly, deserves attention.

In our opinion, it is not right to call an individual who had been called for questioning to the investigator as a witness, but it was established that he/she does not know facts that are important for the criminal proceedings, as witness. Hence, witness is defined as individual who was called in order, prescribed by CPC of Ukraine, who knows circumstances that value for the criminal proceedings and has to inform about known circumstances during questioning. Such understanding allows to solve question on possibility to consider an individual as a witness only from the moment of completion of his/her first questioning as a witness. Meanwhile it is necessary to keep in mind that in some cases individual who had been called for questioning to the investigator does not possess relevant information and investigator becomes known about it only during individual's questioning.

Concerning this issue S. O. Zayika appropriately noted that "procedural status of individual established correctly provides him/her with real possibilities to obtain certain procedural rights and to realize them, as well as to actually understand his/her procedural obligations. However, discrepancy of procedural status of de facto situation of certain participants of criminal procedural activity creates some contradictions in theory of criminal process and law enforcement activity of judicial and lw enforcement bodies. Improvement of procedural status of subjects of

²⁴ Kuchyns'ka O. P. Protseual'nyy status svdkiv: deyaki osoblyvosti za novym KPK // Yurydychnyy chasopys Nats. akad. vnutr. sprav. 2013. № 1. S. 298.

²⁵ Criminal Procedure Code of Georgia (2009, amended 2016) (English version). URL: <http://legislationline.org/documents/section/criminal-codes> (date of request: 02.04.2019).

criminal procedural activity is one of the main directions of academic researches in criminal process sphere currently”²⁶.

In our strong belief, individuals obtain criminal procedural status of witnesses during criminal proceedings according to the decision of authorized procedural bodies. As it is known, criminal procedural (sectoral) status of witnesses as complex of of their procedural rights and obligations in criminal justice is enshtined in Art. 66 in CPC of Ukraine: “Right and obligations of witness”. Legal status of witnesses as individuals that have been already taken under protection, is determined in particular laws of Ukraine and in some departamental legal acts (for example, in Art. 5 of the Law of Ukraine “On ensuring the safety of individuals that take part in criminal justice”, in Art. 19 of the Law of Ukraine “On state protection of court and law enforcement bodies employees” etc.)²⁷.

Thus, summerizing, we can conclude that legal status of witnesses as subjects regardings which safety measures in criminal justice of Ukraine may be ensured, is regulated by different laws of Ukraine and it is different for different categories of subjects of ensuring the safety; different departamental subjects by different means of ensuring safety carry out ensuring the safety of participants of criminal justice, including witnesses. Regarding legal basis of the subject of the research – it is normatively divided between different departments.

13.3. Problems of witness’ legal (procedural) status of obtaining by particular categories of individuals in criminal justice

Problematic issues in this sphere include possibilities of obtaining procedural status of witnesses by witnesses of search, arrest, seizure, a line-up etc. and ensuring their safety in mentioned status during criminal justice, as in para. 7 Art. 223 of CPC of Ukraine is stated that during judicial review witnesses of search, arrest, seizure, a line-up etc. may be questioned as witnesses of certain investigative (inquisitorial) action. Hence the question arises on procedural status of such individuals as witnesses and its special features.

According to the para. 7 of Art. 223 of CPC of Ukraine victim, relatives of suspected, accused and victim, officers of law enforcement

²⁶ Zavika O. S. Naukove zabezpechennya dosudovoho rozsliduvannya: problemy teorii ta praktyky // zb. tez dop. V Vseukr. nauk.-prakt. konf. (Kyiv, 8 lyp. 2016 r.). Kyiv, 2016. S. 80.

²⁷ Pro derzhavnyy zakhyst pratsivnykiv sudu i pravookhoronnykh orhaniv: zakon vid 23.12.1993 № 3781-XII // Vidom. Verkhovnoyi Rady Ukrayiny. 1994. № 11. St. 50.

bodies as well as individuals interested in results of criminal proceedings can not be witnesses.

Nevertheless, O.P. Ostriychuk considers that “para. 7 of Art. 223 of CPC of Ukraine allows questioning of witnesses of search, arrest, seizure, a line-up etc. as witnesses of certain investigative (inquisitorial) action. At the same time in law there is no statement about questioning in this status during pre-trial investigation. In CPC of Ukraine there is no legislative reclamation of questioning order of witnesses of search, arrest, seizure, a line-up etc. as witnesses of certain investigative (inquisitorial) action. In O. P. Ostriychuk’s opinion “witness in criminal proceedings and witnesses of certain investigative (inquisitorial) action differ from each other according to their legal status of individual. Definition of term “witness” is given in Art. 66 of CPC of Ukraine. Even shallow analysis of mentioned rule of procedural law we see that witnesses of search, arrest, seizure, a line-up etc. as witnesses of certain investigative (inquisitorial) action does not fall under normative definition of witness. Witnesses of search, arrest, seizure, a line-up etc. do not know circumstances that are not subjects of proof in criminal proceedings. Except that empowering of witnesses of search, arrest, seizure, a line-up etc. with legitimacy of witnesses would be wrong. Witness gives testimony on circumstances that are known to him/her and are subject of proof, while witness of search, arrest, seizure, a line-up etc. testifies correctness of investigative action’s conduct and its results’ fixing. Thus, witnesses of search, arrest, seizure, a line-up etc. and witness are two different procedural figures by their purpose”²⁸. O. L. Buleyko stands on the same position and states that “wide practice of questioning of witnesses of search, arrest, seizure, a line-up etc. as witnesses is anything other but creation of “artificial witnesses”. Such individuals can not inform any new facts, but only confirm those that have been already set out in the protocol of investigative action that had been conducted with their participation”²⁹.

It is worth to mention that there is no institute of witnesses of search, arrest, seizure, a line-up etc. in legislation of United States of America as well as in many other countries³⁰. Also this institute was not almost kept in Commonwealth of Independent States and exists in limited form in small

²⁸ Ostriychuk O. P. Pokazannya yak protsesual'ne dzherelo dokaziv u kryminal'nomu provadzhenni: dys. ... kand. vuryd. nauk. Kyiv, 2016. S. 119.

²⁹ Buleyko O. L. Uchast' ponyatykh u kryminal'nomu protsesi: monohrafiya. Kyiv.: KNT, 2010. S. 140.

³⁰ Makhov V. N., Pyeshkov M. A. Uholovnyy protsess SSHA (dosudebnye stadyy). M., 1998. S. 155.

number of investigative actions only in Georgia, Latvia, Lithuania and Estonia.

After CPC of Ukraine entered into force questions of individuals' procedural status as witnesses that know or may know circumstances that are subjects of proof during criminal proceedings from hearsay (Art. 97 CPC of Ukraine) also became a problem.

This question is urgent also from the point of view of ensuring the safety measures to such individuals because providing them with procedural status of witness is not undeniable and unconditional. It is worth to mention that Art. 97 of CPC of Ukraine was criticized on pages of legal periodicals as such that contradicts rules of Constitution of Ukraine and international legal acts in the sphere of human rights protection. Thus, V. T. Nor noted on this issue that "if witness can not inform about the source from which he/she obtained information on circumstances covered by subject of proof in criminal case ("heard somewhere", "somebody told", "everybody knows that" etc.), such data can not be evidence"³¹.

Problem of definition of legal (procedural) status of individuals that had been infiltrated by operational units of Ukraine and investigators undercover in criminal environment with usage of confidential cooperation according to current legislation and ensuring their safety during criminal justice is a substantial problem in legislation of Ukraine. It deals with cases, foreseen in Art. 256, 272 and 275 of CPC of Ukraine. In this aspect urgent issue is a question of admissibility and legitimacy of the information, gathered by them, its proofness in criminal justice and, in whole, whether these individuals were authorized to conduct investigative actions and on what legal basis such authority is exercised and whether mentioned individuals may have witness status with a right to ensuring personal safeness. In the case on constitutional request of State Security Service of Ukraine on official interpretation of para. 3 of Art. 62 of Constitution of Ukraine (Case No. 1-31/2011 of 20, October 2011 No. 12-пп/2011) Constitutional Court decided that "accusation in crime commitment can not be based on factual data received as a result of investigation activity of authorized person without adherence to constitutional provisions or with violation of order, prescribed by law as well as received by means of commitment of concerted actions regarding

³¹ Nor V. T. Svidok u kryminal'nomu protsesi Ukrayiny: kolo osib, predmet pokazan' ta svidots'kyy imunitet. Vybrani pratsi/ uporyad.: V. V. Lutsyk, A. A. Pavlyshyn. Kharkiv: Pravo, 2015. S. 665.

their gathering and fixation with taking actions, foreseen in the Law of Ukraine “On investigative activity” by an individual that was not authorized to maintain such activity”³².

From position of mentioned Decision of Constitutional Court of Ukraine on official interpretation of para. 3 of Art. 62 of Constitution of Ukraine (Case No. 1-31/2011 of 20, October 2011 No. 12-пп/2011) and Art. 95 of CPC of Ukraine question of legal status of individuals that had been infiltrated by authorized bodies in criminal environment as well as admissibility, appropriateness and credibility of their testimony in criminal proceedings is still questionable and problematic.

Except that current CPC of Ukraine does not foresee effective mechanism of ensuring personal safety of individuals that conducted secret investigative actions (hereinafter – SIA) or were involved to their conduction in case of necessity of their questioning as witnesses during criminal justice and does not disclose their legal status.

M. V. Lotots'kyi noted on this subject that “the list of individuals that may be involved to conduction of secret investigative action is not foreseen in legislation, but, on our point of view, they include individuals that are not officers of operational units. As a rule they are previously convicted persons that had been exempted from criminal liability, to whom risks administrative or criminal punishment, persons under administrative supervision. Often “seller/buyer” of narcotic drugs are individuals that are suspected in criminal proceedings. Giving “voluntary” consent in SIA participation is accompanied by physical and moral pressure. In our opinion engagement of such persons in SIA participation is not only illegal, but also immoral³³”.

D. B. Serhyeyeva correctly noted on this issue that “results of analysis of provisions of Chapter 21 of CPC of Ukraine give grounds to make a conclusion that, nevertheless, CPC of Ukraine foresees possibility for the investigator to use information, received as a consequence of confidential cooperation with other individuals or to involve these individuals to secret investigative actions conduction “in cases, foreseen by the Code” (para. 1 of Art. 275 of CPC of Ukraine), but such cases are not mentioned by legislator, and usage of information, received as a consequence of

³² Visn. Konstytutsiynoho Sudu Ukrayiny. 2011. № 6. S. 155–163.

³³ Lotots'kyi M. V. Zakonnist' zaluchennya «inshykh osib» do uchasti u nehlasnykh slidchykh (rozshukovykh) diyakh (kontrol' za vchynenniam zlochynu) // Nauk.-informats. visn. Ivano-Frankiv. un-tu prava imeni Korolya Danyla Halyts'koho: 2016. № 2(14). S. 224. (Seriya Pravo).

confidential cooperation during secret investigative actions conduction as well as involvement of individuals to cooperation during secret investigative actions conduction does not meet essential characteristics of secret investigative actions. Confidential cooperation usage is not secret investigative action, but measure of interim character”³⁴.

This is despite the fact that Ukrainian legislator did not provide criteria of division of SIA and operational-investigative measures in operational-investigative activity (hereinafter – OIA), inexplicably established in legislation realization of OIA measures through CPC of Ukraine what initiated secret pre-trial investigation in Ukraine.

Obviously, individual authorized to execute such task in OIA and his/her legal (procedural) status has to be clearly identified in legislation of Ukraine. Mentioned circumstance significantly complicates ensurament of safety of such individuals as witnesses in criminal justice of Ukraine.

Nevertheless question of individuals’ legal status determination in the system of law enforcement bodies, established in para. 1 of Art. 1 of the Law of Ukraine “On state protection of court and law enforcement bodies employees”, to whom safety measures may be applied in criminal justice, is problematic in Ukraine. It is a question that terms “law enforcement bodies”, “legal status of officer of law enforcement body” etc. are not disclosed in legal field of Ukraine that does not give a possibility to clearly identify circle of subjects of state protection regarding whom safety measures may be applied in criminal justice in whole, in particular on the stage of criminal proceedings.

V.H. Drozd, A. V. Ponomarenko, M.S. Tsutskirydze and others correctly noted on this issue that “there are no clear normative outlined criteria in legislation of Ukraine according to which certain activity or bodies may be classified as law enforcement. Thus, in the Law of Ukraine “On National Security Framework of Ukraine”³⁵ law enforcement bodies are identified as “public authorities that have been assigned to maintain law enforcement functions by Constitution and laws of Ukraine”, and in the Law of Ukraine “On democratic civil control on Military organization

³⁴ Serhyeyeva D. B. Nehlasne spivrobitnytstvo u kryminal’nomu protsesi // Visn. krymin. sudochynstva. 2016. № . S. 50, 52-53.

³⁵ Pro osnovy natsional’noyi bezpeky Ukrayiny: zakon vid 19.06.2003 № 964-IV // Vidom. Verkhovnoyi Rady Ukrayiny. 2003. № 39. St. 351.

and law enforcement bodies of Ukraine”³⁶ as “state bodies that maintain law enforcement or public-security functions according to the legislation”. Nevertheless terms “public-security functions”, “law enforcement activity” and “law enforcement functions” are also not defined legally³⁷.

In connection with that M. V. Koval’ proposes to define legally status of law enforcement officer in separate legal act – Law of Ukraine “On status of law enforcement officer”³⁸. What concerns particular measures of ensuring the safety of witnesses in criminal justice of Ukraine, their enumeration and legal definition are absent in CPC of Ukraine. L. D. Udalova correctly noted on this issue that “absence of the list of safety measures and common rules of their usage in the CPC of Ukraine creates problems that do not allow participants of criminal proceedings to maintain their right on effective ensuring of their safety. Common rules of application of safety measures of criminal proceedings should be included to CPC of Ukraine and have a special place in system of its rules. With this aim we propose to add Chapter 3 of CPC of Ukraine “Court, Parties and Other Participants of Criminal Process” with separate paragraph “Safety of participants of criminal process” that has to define common rules regarding application of safety measures for participants of criminal process, in particular: a list of safety measures that may be used during criminal proceedings; a list of participants of criminal process that have the right on ensuring safety and rights of individuals to whom safety measures are applied; definition of common procedure of application of safety measures, order of making and execution of a decision; common rules of change, cancel or appeal of safety measures application to participants of criminal proceedings”³⁹.

V. H. Drozd, A. V. Ponomarenko, M. S. Tsutskirydze and others consider absence of a single Law of Ukraine on mentioned issue with maximum list of safety measures of participants of criminal justice and

³⁶Pro demokratychnyy tsyvil'nyy kontrol' nad Voyennoyu orhanizatsiyeu ta pravookhoronnymy orhanamy Ukrayiny: zakon vid 19.06.2003 № 975-IV // Vidom. Verkhovnoyi Rady Ukrayiny. 2003. № 46. St. 366.

³⁷Zabezpechennya bezpeky svidkiv yak uchasnykiv kryminal'noho sudochynstva v Ukrayini: problemy ta shlyakhy vdoskonalennya: monohrafiya / V. H. Drozd, A. V. Ponomarenko, M. S. Tsutskirydze ta in.; Derzh. nauk.-dosl. in.-t. Kyiv: Vydavnychyy dim «Hel'vetyka», 2018.S.84.

³⁸Koval' M. Shchodo pytannya pro zakonodavche vyznachennya statusu pratsivnyka pravookhoronnoho orhanu v Ukrayini // Aktual'ni problemy upravlinnya ta sluzhbovo-operatyvnoyi diyal'nosti orhaniv vnutrishnikh sprav u suchasnyy period rozvytku derzhavnosti Ukrayiny: materialy Vseukr. nauk.-prakt. konf. (Kyiv, 26 zhovt. 2007 r.). Kyiv: Lesya, 2008. S. 220–223.

³⁹Udalova L. Current issues of ensuring security of the criminal proceeding participants. ISSN 2410-3594 // Scientific Journal of the National Academy of Internal Affairs. 2017. № 1(102). P. 16.

organizational order of their application; absence in CPC of Ukraine separate chapter where criminal procedural aspect of their application would be regulated; absence in Ukraine of the Witness Protection Program unlike many European countries etc. refers to legal misjudgments and gaps in these problematic questions in Ukraine. At the same time, we agree with opinion of mentioned authors that in Ukraine there is no statistical record of safety measures that were applied in the State in whole, there is no body that would coordinate work of units of mentioned bodies on witnesses' protection. Supreme Court of Ukraine consolidated case-law on abovementioned question in the past century (almost 20 years ago) in connection with what modern analysis of practice and experience of applied measures of ensuring the safety of witnesses as participants of criminal justice, especially on such financially expensive types as: medical change of appearance; change of documents; resettlement in other place of living etc. is absent. Many safety measures foreseen by basic laws do not apply on practice because of different reasons including absence of appropriate regulation of order and circumstances of their application, order of financing etc.

CONCLUSION

Legal status of witnesses as subjects concerning which safety measures may be applied in criminal justice of Ukraine regulates by different laws of Ukraine and it is different for different categories of subjects of ensuring the safety, ensuring the safety of participants of criminal justice, including witnesses, different authorized subjects maintain different means of ensuring safety. Legal basis on the question of the study is normatively divided between different departments.

Problematic issues of this sphere also include possibilities to obtain procedural status of witnesses by witnesses of search, arrest, seizure, a line-up etc. and ensuring their safety in mentioned status in the process of criminal justice, as in para. 7 of Art. 223 of CPC of Ukraine is noted that witnesses of search, arrest, seizure, a line-up etc. may be questioned as witnesses of certain investigative (inquisitorial) action. Hence the question arises on procedural status of such individuals as witnesses and its special features.

Except that current CPC of Ukraine does not foresee effective mechanism of ensuring personal safety of individuals that conducted secret

investigative actions (hereinafter – SIA) or were involved to their conduction in case of necessity of their questioning as witnesses during criminal justice and does not disclose their legal status.

Ukrainian legislator did not provide criteria of division of SIA and operational-investigative measures in operational-investigative activity (hereinafter – OIA), inexplicably established in legislation realization of OIA measures through CPC of Ukraine what initiated secret pre-trial investigation in Ukraine.

In Ukraine problematic question includes possibilities of application safety measures to individuals that can not be questioned as witnesses with obtaining corresponding procedural status in process of criminal justice, list of which is established in para. 2 of Art. 65, point 3 para. 1 of Art 66 of CPC and individuals, outlined in Art. 63 of Constitution of Ukraine that have witness immunity. As it is known, in mentioned cases legislation of Ukraine either, in fact, prohibits questioning of such individuals as witnesses in criminal proceedings with providing them with relevant legal (procedural) status, or significantly limits possibilities of their questioning in this status. A substantial problem in current legislation of Ukraine that needs legal solution is a problem of definition of legal (procedural) status of individuals that had been infiltrated by operational units of Ukraine and investigators undecover in criminal environment with usage of confidential cooperation according to current legislation and ensuring their safety during criminal justice. It deals with cases, foreseen in Art. 256, 272 and 275 of CPC of Ukraine. In this aspect urgent issue is a question of admissibility and legitimacy of the information, gathered by them, its proofness in criminal justice and, in whole, whether these individuals were authorized to conduct investigative actions and on what legal basis such authority is exercised and whether mentioned individuals may have witness status with a right to ensuring personal safeness.

Nevertheless, the question of individuals' legal status determination in the system of law enforcement bodies, established in para. 1 of Art. 1 of the Law of Ukraine “On state protection of court and law enforcement bodies employees”, to whom safety measures may be applied in criminal justice, is problematic in Ukraine. It is a question that terms “law enforcement bodies”, “legal status of officer of law enforcement body” etc. are not disclosed in legal field of Ukraine that does not give a possibility to clearly identify circle of subjects of state protection regarding whom safety measures may be applied in criminal justice in whole, in particular on the stage of criminal proceedings.

After CPC of Ukraine entered into force in 2012 questions of individuals' procedural status as witnesses that know or may know circumstances that are subjects of proof during criminal proceedings from hearsay (Art. 97 CPC of Ukraine) also became a problem. This question is urgent also from the point of view of ensuring the safety measures to such individuals because providing them with procedural status of witness is not undeniable and unconditional as well as other problematic questions that were considered by us and need legal regulation.

Summing up we can make a conclusion that in current circumstances of reforming of legal system of Ukraine and renovation of domestic criminal procedural legislation existing academic theoretical groundworks in this area does not exhaust and does not solve mentioned complicated scientific-practice problems of witnesses' protection, but rather create fundamental base for its further conceptual redefining and further academic researches and projections, and current procedural legislation of Ukraine in this sphere needs renovation and improvement.

SUMMARY

Problems of safety of participants of criminal justice in Ukraine from real danger and threats from criminals' side, especially witnesses, are analyzed. These problems are urgent in modern circumstances and their solution depends on effectiveness of justice in whole. Solution of mentioned problems gives opportunity to prosecute individuals who had committed severe and especially severe crimes in organized groups and criminal organizations. Legislation of Ukraine, in particular criminal procedural, has to be oriented on that.

Except that law enforcement bodies has to make everything so that every human would be confident in its safety as well as in that threats on his/her address from the criminals' side will be only threats and guilty will be prosecuted.

While considering this problematic positions of domestic academics on definition of term "ensuring the safety of witnesses" in criminal justice, legal (procedural) status of witnesses as guarantees of ensuring of their safety in criminal process, problems of obtaining of legal (procedural) status of witnesses by certain categories of individuals in the process of criminal proceedings etc. are covered and analyzed, and ways of their solution are outlined. In particular, it is proposed to define terminological filling of mentioned problem. Clear understanding and clear interpretation of content of such terms as "safety measures", "ensuring", "justice",

“safety” etc. depend on solution of problems of ensuring the safety of witnesses as participants of criminal proceedings in Ukraine. Special features and feasibility of obtaining of legal status of witnesses by particular categories of individuals were considered and legal gaps and misjudgments of Ukrainian legislation in these issues were emphasized.

Conclusions that were made may be useful for practicing officers of law enforcement bodies and may serve as a basis for further academic researches and projections in this sphere.

REFERENCES

1. Kryminal'nyy protsesual'nyy kodeks Ukrayiny: zakon vid 13.04.2012. № 4651-VI. Vidom. Verkhovnoyi Rady Ukrayiny. 2013. № 9–10, № 11–12, № 13. St. 88.
2. Konstytutsiya Ukrayiny: zakon vid 28.06.1996 № 254k/96-VR. Vidom. Verkhovnoyi Rady Ukrayiny. 1996. № 30. St. 141.
3. Kyrychenko O. Katehorial'no-ponyatiynyy aparat u sferi operatyvno-rozshukovoyi protydyi zlochynam proty hromads'koyi bezpeky: EUROPEAN POLITICAL AND LAW DISCOURSE, 2015. Volume 2 Issue. S. 315-320.
4. Zelenetsky V. S. Obshchaya teoriya bor'by s prestupnost'yu. Kontseptual'nye osnovy. Khar'kov: Osnova, 1994. 321 s.
5. Tlumachnyy slovnyk ukrayins'koyi movy. Uklad. Koval'ova T. V., Kovryha L. P. Kharkiv, 2005. 672 s.
6. Russko-ukraynsky slovar' termynov po teoryi hosudarstva y prava. Pod obshch. red. N. Y. Panova. Khar'kov, 1993. 164 s.
7. Tlumachnyy slovnyk ukrayins'koyi movy. 672 s.
8. Yunusov A. A. Oberezhnyye uchastnykov uholovnoho protsessa y ykh blyzhnykh: dys. ... kandydata yuryd. nauk. N. Novhorod, 1998. 168 s.
9. Zelenets'ky V., Kurkin M. Osnovni polozhennya vchennya pro zabezpechennya bezpeky sub'yektiv kryminal'noho protsesu, shcho vedut' borot'bu z orhanizovanoyu zlochynnisty // Prokuratura. Lyudyna. Derzhava. 2004. № 4 (34). S. 38-42.
10. Hryn'kiv O. O. Ponyattya zabezpechennya bezpeky osib, yaki berut' uchast' u kryminal'nomu sudochynstvi. Formuvannya pravovoyi derzhavy v Ukrayini. Problemy i perspektyvy: materialy KH Vseukr. nauk.-prakt. konf. (kvit. 2008 r.). Ternopil', 2008. S. 519-523.
11. Praktyka zastosuvannya zakonodavstva, shcho peredbachaye derzhavnyy zakhyst suddiv, pratsivnykiv sudu i pravookhoronnykh orhaniv

ta osib, yaki berut' uchast' u sudochynstvi. Visn. Verkhovnoho Sudu Ukrayiny. 1999. № 6(16).

12. Pro zabezpechennya bezpeky osib, yaki berut' uchast' u kryminal'nomu sudochynstvi: zakon vid 23.12.1993 № 3782-XII. Vidom. Verkhovnoyi Rady Ukrayiny. 1994. № 11. St. 51.

13. Zaytsev O. O. Teoretycheskye y pravovye osnovy hosudarstvennoy zashchyty uchastnykov uholovnoho sudoproyzvodstva v Rossyyskoy Federatsyy: dys. ... d-ra yuryd. nauk. M., 1999. 512 s.

14. Universal Declaration of Human Rights, adopted by Resolution 217 A (III) of General Assembly of UNO of 10.12.1948. URL: <https://www.un.org/en/universal-declaration-human-rights/> (date of request: 02.04.2019).

15. International Covenant on Civil and Political Rights, adopted by Resolution 2200 A (XXI) of General Assembly of 16.12.1966. URL: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (date of request: 02.04.2019).

16. Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher. E/CN.4/2005/102/Add.1 URL: https://digitallibrary.un.org/record/541829/files/E_CN.4_2005_102_Add.1-EN.pdf?version=1 (date of request: 02.04.2019).

17. Pro zatverdzhennya Stratehii rozvytku orhaniv systemy MVS na period do 2020 roku: rozporyadzhennya Kabinetu Ministriv Ukrayiny vid 15.11.2017 № 1023-r. URL: http://mvs.gov.ua/ua/pages/strategiya_2020.htm (data zvernennya: 02.04.2019).

18. Kalachova O. M. Vyznachennya slidchym protsesual'noho statusu osib, shcho berut' uchast' u dosudovomu provadzhenni: dys. ... kand. yuryd. nauk. Luhans'k, 2008. 177 s.

19. Recommendations of Council of Europe No. R (97) 13 concerning intimidation of witnesses and the rights of the defence, adopted by the Committee of Ministers of 10.09.1997. URL: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c4a0f> (date of request: 02.04.2019).

20. Lushpiyenko V. M. Pravovyy status svidka u kryminal'nomu protsesi Ukrayiny ta inozemnykh derzhav. Derzhava ta rehiony. 2017. № 1 (55). S. 120-124. (Seriya: Pravo).

21. Slovnyk ukrayins'koyi movy. Akademichnyy tлумachnyy slovnyk URL: <http://sum.in.ua/s/neghlasnyj> (data zvernennya: 02.04.2019).

22. Bazhanov M. Y. Svydetely, ykh prava y obyazannosty po sovet'skomu uholovno-protseessual'nomu zakonodatel'stvu. M.: Hosiuryzdat, 1955. 36 s.
23. Kuchyn's'ka O. P. Protseessual'nyy status svidkiv: deyaki osoblyvosti za novym KPK. Yurydychnyy chasopys Nats. akad. vnutr. sprav. 2013. № 1. S. 295-300.
24. Criminal Procedure Code of Georgia (2009, amended 2016) (English version). URL: <http://legislationline.org/documents/section/criminal-codes> (data zvernennya: 02.04.2019).
25. Zayika O. S. Naukove zabezpechennya dosudovoho rozsliduvannya: problemy teorii ta praktyky. Zb. tez dop. V Vseukr. nauk.-prakt. konf. (Kyiv, 8 lyp. 2016 r.). Kyiv, 2016. 314 s.
26. Pro derzhavnyy zakhyst pratsivnykiv sudu i pravookhoronnykh orhaniv: zakon vid 23.12.1993 № 3781-XII. Vidom. Verkhovnoyi Rady Ukrayiny. 1994. № 11. St. 50.
27. Ostriychuk O. P. Pokazannya yak protseessual'ne dzherelo dokaziv u kryminal'nomu provadzhenni: dys. ... kand. yuryd. nauk. Kyiv, 2016. 243 s.
28. Buleyko O. L. Uchast' ponyatykh u kryminal'nomu protsesi: monohrafiya. Kyiv.: KNT, 2010. 168 s.
29. Makhov V. N., Pyeshkov M. A. Uholovnyy protsess SSHA (dosudebnye stady). M., 1998. 208 s.
30. Nor V. T. Svidok u kryminal'nomu protsesi Ukrayiny: kolo osib, predmet pokazan' ta svidots'kyi imunitet. Vybrani pratsi/ uporyad.: V. V. Lutsyk, A. A. Pavlyshyn. Kharkiv: Pravo, 2015. S. 662-668.
31. Visn. Konstytutsiynoho Sudu Ukrayiny. 2011. № 6. S. 155-163.
32. Lotots'kyi M. V. Zakonnist' zaluchennya «inshykh osib» do uchasti u nehlasnykh slidchykh (rozshukovykh) diyakh (kontrol' za vchynenniam zlochynu). Nauk.-informats. visn. Ivano-Frankiv. un-tu prava imeni Korolya Danyla Halyts'koho: 2016. № 2(14). S. 224-229. (Seriya Pravo).
33. Serhyeyeva D. B. Nehlasne spivrobotnytstvo u kryminal'nomu protsesi. Visn. krymin. sudochnystva. 2016. № 4. S. 47-54.
34. Pro osnovy natsional'noyi bezpeky Ukrayiny: zakon vid 19.06.2003 № 964-IV. Vidom. Verkhovnoyi Rady Ukrayiny. 2003. № 39. St. 351.
35. Pro demokratychnyy tsyvil'nyy kontrol' nad Voyennoyu orhanizatsiyeyu ta pravookhoronnyy orhanamy Ukrayiny: zakon vid

19.06.2003 № 975-IV. Vidom. Verkhovnoyi Rady Ukrainy. 2003. № 46. St. 366.

36. Zabezpechennya bezpeky svidkiv yak uchasnykiv kryminal'noho sudochynstva v Ukraini: problemy ta shlyakhy vdoskonalennya: monohrafiya / V. H. Drozd, A. V. Ponomarenko, M. S. Tsutskirydze ta in.; Derzh. nauk.-dosl. in.-t. Kyiv: Vydavnychyy dim «Hel'vetyka», 2018. 362 s.

37. Koval' M. Shchodo pytannya pro zakonodavche vyznachennya statusu pratsivnyka pravookhoronnoho orhanu v Ukraini. Aktual'ni problemy upravlinnya ta sluzhbovo-operatyvnoyi diyal'nosti orhaniv vnutrishnikh sprav u suchasnyy period rozvytku derzhavnosti Ukrainy: materialy Vseukr. nauk.-prakt. konf. (Kyiv, 26 zhovt. 2007 r.). Kyiv: Lesya, 2008. S. 220–223.

38. *Udalova L.* Current issues of ensuring security of the criminal proceeding participants. ISSN 2410-3594 // Scientific Journal of the National Academy of Internal Affairs. 2017. № 1(102). P. 16.

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