Artículo de investigación

Theoretical and Enforcement Issues of Criminal Proceeding in the Format of Private Prosecution

Теоретичні та правозастосовні проблеми здійснення кримінального провадження у формі приватного обвинувачення

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Abstract

In the article, *the relevance of the topic under the study* is related to significant changes of the concepts previously known to the theory of the criminal procedure in the Criminal Procedure Code of 2012. No exception is private prosecution, the modernization of which has caused a number of problems in its uniform law application. This is due to a certain innovation in the legal regulation of the legal provisions on criminal proceedings in the format of private prosecution. Obviously, this has adversely affected the law applicable activities of law enforcement and judicial authorities in Ukraine. According to the results of the study, certain conclusions and recommendations are made in regard to possible addressing the problematic aspects that arise nowadays during the pre-trial investigation in the format of private prosecution. *The aim of the article* is to carry out a systematic analysis of legislative provisions regarding criminal proceedings in the format of private prosecution, to identify on this basis the gaps and contradictions in the CPC of Ukraine, and to formulate certain ways of their elimination. *Methods of the study* are determined by the aim stated. For this purpose, methods of scientific knowledge, such as comparative legal, statistical ones and generalization, are used to the achieve

Анотація

Актуальність досліджуваної в статті проблематики пов'язана з тим, що у Кримінальному процесуальному кодексі України 2012 року значна частина відомих раніше теорії кримінального процесу інститутів піддалася суттєвим змінам. Не виключенням із цього став і інститут приватного обвинувачення, модернізація якого викликала низку проблем в його одноманітному правозастосуванні. Зазначене зумовлено певною новелізацією у правовому регулюванні законодавчих положень з питань здійснення кримінального провадження у формі приватного обвинувачення. Це звісно негативно вплинуло на правозастосовну діяльність правоохоронних і судових органів України. За результатами дослідження зроблені певні висновки і рекомендації щодо можливого врегулювання проблемних аспектів, які на сьогодні виникають під час досудового розслідування у кримінальних провадженнях у формі приватного обвинувачення. *Метою статті* стало проведення системного аналізу законодавчих положень в частині здійснення кримінального провадження у формі приватного обвинувачення, виявлення на цій основі прогалин і суперечностей, що

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comprehensiveness and objectivity of scientific research, validity and consistency of the conclusions formulated.

Keywords: Concept of private prosecution, victim, criminal proceeding in the format of private prosecution.

містяться в КПК України, та формування певних шляхів їх усунення.*Методи дослідження* обрані з урахуванням поставленої мети. Задля цього використані такі методи наукового пізнання, як порівняльно-правовий, статистичний та узагальнення, що сприяло досягненню повноти і об'єктивності наукового пошуку, обґрунтованості та узгодженості сформульованих висновків.

Ключові слова: інститут приватного обвинувачення, потерпілий, кримінальне провадження у формі приватного обвинувачення.

Introduction

In historical retrospect, at each stage of its development, the criminal procedure legislation of Ukraine is characterized by specific features inherent in a particular type of state formation. Having declared independence, Ukraine started building a democratic, law-based State, where human rights, freedoms and guarantees thereof determine the essence and course of the activities of the state, that was directly and explicitly declared in the 1996 Constitution of Ukraine (CU). Significant influence in this area had the signing on 9 November 1995 of a fundamental and generally recognized international instrument, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (CPHRFF). Therefore, the adoption of the Basic Law and ratification of the Convention by the Verkhovna Rada of Ukraine became a significant event not only for the further improvement of national legislation, but also for its bringing to European legal standards of criminal justice. Obviously, this could not but affect the process of improving the domestic criminal procedure legislation, the logical result of which was the adoption of a new Criminal Procedure Code (hereinafter - the CPC of Ukraine) on April 13, 2012 (CPC). In addition, the legislator has also changed the approach to criminal proceedings in the format of private prosecution, although this concept, as compared to other specific criminal proceedings (such as criminal proceedings based on an agreement), is not a novelty, as it has long been known in the criminal procedure. However, the practice of applying the provisions of the CPC of Ukraine on criminal proceeding in the format of private prosecution indicates that there are problematic legal issues that need to be resolved.

The aim of the article is to carry out a systematic analysis of legislative provisions regarding the legal regulation of criminal proceedings in the format of private prosecution. This is carried out in order to identify the gaps and contradictions contained in the CPC of Ukraine, as well as to form certain areas of their elimination on this basis.

Methodology of the study

For the purpose of comprehensiveness and objectivity of scientific research, validity and consistency of the conclusions formulated, methods of scientific knowledge are used, such as comparative legal, statistical and generalization. For example, comparative legal method enables to analyse provisions of criminal procedure legislation of Ukraine and to study scientific views on the legal regulation of criminal proceeding in the format of private prosecution. The statistical method and the generalization method enable to analyse law application practices and to identify errors.

Results and discussion

In the Criminal Procedure Code of Ukraine, the procedure for conducting criminal proceedings in the format of private prosecution is provided for in a separate chapter 36. The analysis of the provisions of this chapter enables to state that: first, the legislator has added the number of criminal offenses that can be investigated in the format of private prosecution; second, the pre-trial investigation of the criminal offenses under Art. 477 of the CPC of Ukraine, initiates in a general manner, namely from the moment when the investigator or public prosecutor enters the information concerned in the Integrated Register of Pre-Trial Investigations (Art. 214 of the CPC);

third, the only ground for initiating the type of criminal proceeding under the study is the victim's application. Thus, according to P. Cimbal and I. Dikov, the approach chosen by the legislator enables to identify distinctive features of private prosecution, such as: personal interest of the victim; low public danger of crime; mandatory consideration of the victim's opinion during criminal proceeding (Cimbal, P., Dikov, I., p. 111). Regarding the latter provision, it should be noted that these are cases in which the victim waived the accusation in criminal proceedings in the format of private prosecution, except crime related to domestic violence. In this case, the criminal proceeding shall be closed. At the stage of pre-trial investigation, such a decision is made by the public prosecutor in the form of a decision (paragraph 7 of Part 1, Part 4 of Article 284 CPC), and during trial, the court renders a ruling (Part 7 of Article 284 CPC). According to O. V. Ryashko and M. A. Shabanov, in such criminal proceedings, the will of the victim, his assessment of the act and the person who committed it are signified by criminal law and criminal procedure. It is important whether the accused has reconciled with the victim, whether the victim has forgiven and reconciled with him. That is, in solving the issue of closing proceeding in private prosecution, the victim also plays a role (Ryashko, O., Shabanov, M., p. 324–325).

Therefore, criminal proceedings in the format of private prosecution possesses the following features: 1) it is carried out only in the case of criminal offenses, an exhaustive list of which is defined in Part 1 of Art. 477 CPC of Ukraine; 2) aggravating circumstances are absent; 3) the victim is the only subject of initiating the pre-trial investigation in criminal proceedings in the format of private prosecution; 4) closure of such criminal proceeding may be conditioned by the will of the victim. These signs are interrelated and complementary, so they should definitely be taken into account by the investigator, the prosecutor.

Therefore, it should be appropriate to carry out the study in the light of the above features.

First of all, the specifics of criminal proceedings in the format of private prosecution are determined by the nature of the criminal offense committed, the degree of its gravity, the fact of causing harm to the person and his will both to begin the investigation and to terminate it. Nowadays, in accordance with Art. 477 CPC of Ukraine, proceeding in the format of private prosecution can investigate 43 crimes under the CC of Ukraine. Regarding the extension of the list of certain types of crimes that may undertake pre-trial investigation in criminal proceedings in the format of private prosecution, most scholars are positive about such legislative innovations (Perepelytsia S., p. 176; Koval, P., p. 81; Ianovska, O., p. 246). However, opponents argue that the list of crimes, in relation to which proceedings in the format of private prosecution may be conducted, should not be substantially expanded (Stratonov, V., Litvin, V., p. 71). We argue that the expansion of the list of crimes, regarding which criminal proceedings can be carried out in the format of private prosecution, is conditioned by the development of the principle of adversarial nature of parties, publicity and optionality of criminal proceeding. In addition, the humanization of the criminal legislation of Ukraine influenced this process.

It should be noted that before December 6, 2017, Article 477 of the CPC of Ukraine had contained paragraphs 2 and 3, which were excluded under the Law of Ukraine «On Amendments to the Criminal and Criminal Procedure Codes of Ukraine in order to implement the provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence». For example, paragraph 2 of Article 477 of the CPC of Ukraine provided for the elements of crimes, in relation to which criminal proceedings in the format of private prosecution were carried out if it was committed by the spouse of the victim. And item 3 of Art. 477 of the CPC of Ukraine provided condition that the crime was committed by the spouse of the victim, his other close relative of family member, or committed by a person who was employed by the victim and caused damage to the property of the victim exclusively.

The systematic analysis of the CPC of Ukraine enables to highlight another additional ground for criminal proceedings in the format of private prosecution. Namely, the provisions of Art. 340 CPC of Ukraine state that if the public prosecutor refuses to prosecute on behalf of the State in court, the victim has the right to press charges in court, while enjoying all the rights of the prosecution party. Thus, the legislator provides for a differentiated procedure for acquiring criminal proceeding status of private, both at pre-trial proceedings and directly during court proceedings. Obviously, this demonstrates the importance of the principle of adversarial nature of parties, equality before law and court, access to justice, and the need for the proper implementation and achievement of criminal proceeding missions such as the protection of the

person, as well as rights, freedoms and legitimate interests of the victim on the one hand, and on the other, prosecution of anyone who has committed a criminal offense to the extent of their guilt.

As already noted, the commencement of a pre-trial investigation in criminal proceedings in the format of private prosecution is instituted upon the victim's request exclusively, as emphasized in Articles 25, 478 of the CPC of Ukraine. However, it should be considered that: first, the provision of Part 4 of Art. 26 of the CPC of Ukraine is imperative, since it explicitly provides for the closure of criminal proceedings on the ground of a victim's request; second, a report on a criminal offense can only be filed within the limitation period of bringing a person to criminal responsibility for committing a certain type of criminal offense. Moreover, the legal requirement to file an application by the victim exclusively causes some debate among scholars. For example, I. A. Titko argues that it is expedient, in exceptional cases, to grant the prosecutor the right to initiate criminal proceedings in the format of private prosecution without receiving an application from the injured person, given the helplessness of the latter (Titko, I., p. 264). In addition, S. Perepelytsia and V. Kolodchyn propose to extend such conditions by adding to them the advanced age, disability, poor health and being underage (Perepelytsia S., Kolodchyn V., p. 45–46). In our opinion, giving a prosecutor such a right goes beyond his functional area. In addition, the Recommendation of the Committee of Ministers of the Council of Europe Rec (2000) 19 «The role of the Prosecutor's Office in the criminal justice system» emphasized that the prosecutor is required to perform only supervisory functions (CMCE).

In the context of the discussion, V. D. Simonovych raises another issue, that is, whether close relatives or family members of the victim, if the latter is disable because of the age or illness, are entitled of applying in his interest, if the investigation of the crime is to be conducted in the format of private prosecution? According to the scientist, Part 6 of Art. 55 of the CPC of Ukraine does not eliminate the debate, providing for that «if a criminal offence caused death of a person, or if this person's condition prevents the person from filing an appropriate application, provisions of the CPC of Ukraine regarding recognition of a person as a victim shall apply to close relatives or family members of such person». The author argues that a key aspect of the content of this provision is the fact that the death or certain condition of a person, which prevents the person from filing an appropriate application, is caused by a criminal offense. Therefore, according to the scientist, there is no clear answer to the question of how to act if the helpless condition of a person is not related to the consequences of a criminal offense (Simonovych, D.). In this study, this perspective is not supported, because according to the content of Part 6 of Art. 55 the CPC of Ukraine, the phrase "if a criminal offence caused" refers solely to the situation when the victim's death has occurred. Evidence of this is the use of the conjunction "or" by the legislator. Therefore, the provisions of Part 6 of Art. 55 of the CPC of Ukraine are also applicable to criminal proceedings in the format of private prosecution. From I. A. Titko's extraordinary perspective, a possible solution to the above problem is to take into account the moment of occurrence of a legal fact, that is, the death of the victim. In view of this, he classifies the legal consequences of criminal proceedings, depending on four cases: 1) the victim has died before filing an application on a criminal offense against him and submitting information to the Single register of pre-trial investigations (in this case, criminal prosecution may be initiated by the public prosecutor without the victim's application); 2) the death of the victim has occurred after the submission of the information to the Single register of pre-trial investigations, but before the court rendered a final judgement (in this case, the death of the victim does not eliminate the prosecution party, so criminal proceeding should occur in normal manner); 3) the victim died during the pre-trial investigation or trial, after that the prosecutor refused to support the State prosecution (in this case, the consequence of the legal fact is that the prosecutor, as the only «performer» of the charge in a certain proceeding, refuses to continue the prosecution of the person that is the reason for closing the criminal proceeding); 4) the death of the victim in the proceeding of private prosecution of a subsidiary form came after the prosecutor had refused to support the State prosecution and acceptance of the burden of proof on the victim (this case requires implementing the concept of procedural succession, providing in the law that procedural rights are transferred to one or more (subject to their consent) close relatives of the deceased) (Titko, I., p. 285–294).

It should be emphasized that despite the fact that in criminal proceedings in the format of private prosecution it is the victim who presses the charge, this in no way relieves the investigator and public prosecutor from the obligation within their competence to take all measures provided

by law to establish the occurrence of crime and perpetrator thereof. That is, the procedure for collecting and verifying evidence already obtained during a pre-trial investigation is carried out not by the victim as the subject of the charge, but by the investigator and public prosecutor.

In view of the beginning of pre-trial investigation in criminal proceedings in the format of private prosecution, a warning, provided for in Art. 477 CPC of Ukraine, that certain criminal offenses should be committed without aggravating circumstances is important. With respect to this issue, it should be noted that legal perspective of the High Specialized Court of Ukraine on civil and criminal cases based on the fact that, for example, a criminal offense without any aggravating circumstances in the context of part 1 of Art. 122 of the Criminal Code of Ukraine is an offense that does not contain these elements, since in this case it is part 2 of Art. 122 of the Criminal Code of Ukraine that provides for aggravating circumstances. If the public prosecutor asserts the presence of an aggravating circumstance, a recurrence of crime, and thereof the criminal proceeding could not be closed in the presence of the victim's refusal to prosecute, this assertion is groundless and contradicts to the general principles of sentencing and characterization of the crime. That is, the prosecutor's identification of the circumstances aggravating the punishment (Article 67 of the Criminal Code) with the circumstances affecting the characterization of the crime, the characteristic (aggravating) circumstances, provided for in the disposition of the second part of the article of the alleged crime, is incorrect. Therefore, the presence or absence of the circumstances aggravating punishment in the actions of a person, provided for in Art. 67 of the Criminal Code of Ukraine, the list of which is exhaustive, which are not features of a specific crime and do not affect its characterisation, but indicate an increased degree of public danger of the act and (or) of the perpetrator, do not prevent the application of Art. 477 CPC of Ukraine (HSCU). This position of the court is also provided in other judgments, which state that the public prosecutor is required to differentiate between the notion of «circumstance aggravating punishment» and «aggravating circumstance». The panel of judges argues that in this case not the provisions of Art. 67 of the Criminal Code of Ukraine should be considered, but circumstances, specified in the disposition of the article, that is, characteristic features of crime, because if the criminal proceeding is closed, punishment is not imposed (HSCU).

Instead, the Supreme Specialized Court of Ukraine for civil and criminal cases in its Ruling of December 14, 2016 noted that since the crime under Part 1 of Art. 122 of the Criminal Code of Ukraine, which was committed under aggravating circumstances, namely in the state of alcohol intoxication, there was no reason to close criminal proceeding in connection with the refusal of the victims of their applications. Such a diametrically opposed position was the ground for the Criminal Trial Chamber of the Supreme Court of Ukraine in its decision of May 18, 2017 in Case No. 5-79ks(15)17) to annul the aforementioned Ruling of the SSCU. The reason for this was the lack of conformity of the legal positions of the cassation court regarding the application of the provision of Article 477 of the CPC, which is the ground for the revocation of the ruling and referral of the case to the court of cassation. The Supreme Court of Ukraine emphasized that the content of the SSCU's position on the correct application of the provision of Art. 477 CPC, is that for the recognition of the criminal proceeding as carried out in the format of private prosecution, the warning in Art. 477 of the CPC concerning aggravating circumstances relates to characteristic features of a specific offense, provided for in the disposition of the article of the Special Part of the Criminal Code and does not extend to the circumstances aggravating punishment, provided for in Part 1 of Art. 67 of the Criminal Code (SCU).

The analysis of the materials of criminal proceedings reveals that in practice many cases require in the course of the procedural actions to change the characterisation of the act of the suspect for the criminal offense, defined in Art. 477 CPC of Ukraine. In this case, we agree with the position of those judges who believe that, in the course of a pre-trial investigation in the form of a public prosecution, grounds for issuance of a suspicion report or to change a previously reported suspicion with the recharacterization of the suspect's action into crime, which entails criminal proceedings according to Article 477 of the CPC, can be initiated by the investigator, public prosecutor on the only ground of the victim's application, but the prosecutor or investigator, upon the approval of the public prosecutor, shall be required to ask the victim's opinion on this matter and has the right to draw up a corresponding notification of suspicion or a new notification of changed suspicion only upon the victim's written application that a criminal offence of private prosecution has been committed against him with entering the information concerned in the

Integrated Register of Pre-Trial Investigations. If the victim refuses to file a written application, the prosecutor shall be required to close the criminal proceeding according to paragraph 7 of Part 1 of Art. 284 CPC of Ukraine. Otherwise, all the procedural actions taken during the pre-trial investigation should be considered as being in contravention of the procedure set forth in criminal procedure law, and the collected evidence should be considered admissible.

When there is a need of recharacterization of a criminal offense of a private nature into a public one, the investigator, public prosecutor may do so without the victim's prior consent and notify an individual of a suspicion without the victim's consent.

In criminal proceedings in the format of private prosecution, a conciliation agreement may be concluded between the victim and the suspect or accused (para. 1, Part 1, Art. 468 of the CPC of Ukraine). The generalisation of judicial practice of criminal proceedings on the basis of agreements revealed that, when considering criminal proceedings in the format of private prosecution, judges mostly rendered decisions to close proceedings because of reconciliation of the accused with the victims, which is undoubtedly accurate and positive. However, cases of concluding agreements can be revealed in such category of proceedings. For example, a judgement of the Desnianskyi district court of Kyiv approved a reconciliation agreement between the accused K.Ye. (whose actions could be assessed by the pre-trial investigation body according to Part 1 of Article 185 of the CC) and the victim, who, according to the court record and the technical means of fixation, is the mother of the accused, forgave K.Ye. and had no claims against him, however, there was no information in the text of the concluded agreement and in the indictment on the existence of family relations between the parties (Case No. 754/13029/13-k). It should be noted that in the procedural arrangements, concluding a reconciliation agreement in proceedings of public and private prosecution has no significant differences.

Conclusions

Therefore, criminal proceedings in the format of private prosecution is a differentiation of the procedural form. The specificities of implementing this type of criminal proceedings are defined in the relevant articles of Chapter 36 of the CPC of Ukraine. In the course of this proceeding, the investigator, public prosecutor, judge are required to pay special attention to the protection of the rights, freedoms and legitimate interests of the victim, and especially those who cannot independently exercise their legal rights, take other actions of pressing the charge due to being underage, incompetence or limited legal capacity, physical disabilities and other circumstances. In addition, the investigator, public prosecutor and court should be convinced of the prosecution voluntarily supported, that is, to establish that the victim's refusal to prosecute the perpetrator is not a consequence of the use of violence, coercion, threats in order to make an appropriate decision.

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