



THE CENTRE FOR POLITICAL AND LEGAL REFORMS

# **Implementation of the new Criminal Procedure Code of Ukraine in 2013**

## **Monitoring Report**

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The report analyzes the implementation of the new CPC of Ukraine during the first eight months of 2013. The report features the following types of analysis: crime statistics, practical issues of CPC implementation, by-laws and newsletters of the High Specialized Court of Ukraine for Civil and Criminal Cases, draft legislation introduced to the Parliament, and media attitudes to the new Code.

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## I. STATISTICS<sup>1</sup>

The analysis of crime statistics in 2013 compared with the corresponding figures for 2011 and 2012 leads to the following conclusions on the **initial implementation results** of the new Criminal Procedure Code of Ukraine.

There is a general **positive** trend toward humanization of criminal justice, which, in particular, is evidenced by the following facts:

1. *The share of acquittals has increased.* In H1 2012, 199 persons were acquitted in the public prosecution cases, representing 0.25% of the total of 78,500 sentences. In H1 2013, 372 persons were acquitted amounting to 2% among 19,250 sentences passed by the CPC rules of 1960.

However, the level of acquittals under the CPC 2012 has slightly increased amounting to 0.4% (160 people per 42,000 sentences).

2. *The number of persons relieved by the court of any criminal charges increased by almost 20% or 1,350 people (from 6,500 in H1 2012 to 7,850 people in H1 2013).*
3. *The number of registered criminal proceedings increased by 35% or **20,000 proceedings** (approximately 38 000 cases were opened monthly in 2012 and 58,000 proceedings remained in the Register each month in 2013).*

As one can see, the change in early pre-trial investigation methods (automatic opening of proceedings) in the new CPC increased the odds of the victims to have their cases investigated and bring the perpetrators to justice.

However, there was a problem in Q2 with indiscriminate closing of the cases resulting in only 40,000 proceedings remaining in the Registry. This figure is not much different from the number of cases opened under the "old" CPC in previous years. This makes the feasibility of introducing the automatic opening of pre-trial investigation questionable.

4. *The number of apprehensions under criminal proceedings has decreased.* It is now less than **25%** or **700** cases per month (from 2,800 apprehensions (monthly) in 2012 down to 2,100 apprehensions over 8 months in 2013).

However, the report of the Legal Aid Coordination Center (see Section II) shows that the legal requirement for mandatory notification of legal counsels about all apprehensions is not fully implemented. However, the CPC clearly indicates that all evidence obtained in the absence of a counsel shall be inadmissible in court (Part 1 and Clause 3 of Part 2, Article 87).

5. *The number of people in pretrial detention (SIZO) has decreased by **45%** or **13,900 people** (from 32,000 as of December 1, 2012 down to 18 100 persons as of August 15, 2013). Considering the amount of decriminalized economic crimes in 2012, according to the Law of Ukraine "On Amendments to Some Legislative Acts of*

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<sup>1</sup> The information in this Section is based on the data from 2011 to 2012 and 8 months of 2013, obtained through requests for access to information from the Ministry of Interior, the Office of the Prosecutor General, the State Court Administration, the State Penitentiary Service and the Data from the Legal Aid Coordination Center of the Ministry of Justice.

*Ukraine in terms of Humanization of the Responsibility for Economic Violations*" No. 4025-VI issued on November 15, 2011, the reduction amounts to **50%** or **18,900** people.

This substantial reduction of "prison population" is caused by two main reasons:

- The fact that the CPC requires the investigating judge to establish the amount of bail in his ruling to put someone in custody. Therefore, the payment of the bail to the State Treasury shall result in the release of the detained person;
- Decrease in the number of prosecutors' requests for custody at the cost of increased use of alternative remedies.

6. *The number of investigator/prosecutor requests for custody has reduced by 45%* (from 2,500 monthly requests in 2012 down to 1,400 monthly requests during 8 months in 2013). By comparing the situation with 2011, we see a *decrease by 70%* (monthly amount of requests reached 4,350 in 2011).

A possible explanation for this decline is the loss of investigators' ability to independently initiate the request for custody of suspects before the court. Today, only the prosecutors have this authority while the investigators should coordinate the appropriate requests with the prosecutors. Since the latter do not always cooperate, the investigators began to have less contact with the prosecutors in terms of requesting custody.

7. *The number of applied alternative preventive measures remains at a high level.* Personal bail is applied to over 45 people each month, *over 480 people* receive home arrest and *2,250 people* receive individual restrictions (ban on changing the place of residence, make an active job search, etc.).

At the same time, the constant increase in the total number of requests for preventive measures (from 4,000 monthly requests in Q1 to 4,300 requests in Q2 and to 5,000 requests during 7 and 8 months in 2013) becomes alarming. This trend shows that the prosecutors are trying to obtain court injunctions restricting certain rights and freedoms in the maximum number of criminal proceedings.

8. The number of searches has decreased by 25% (from 4,000 monthly searches in 2011 to 3000 in H1 2013). However, an increase in the average monthly rate as compared to H1 was recorded in July and August of 2013. This increase may also take place for the reason that previously the orders were issued for home and property searches of individuals while now they need a court warrant to search homes or other property of both physical and legal persons (e.g. office search).

9. *The number of warrants issued by the court for individual wiretapping reduced by 20%.* The investigative judges monthly issued 1,650 warrants for wiretapping during 2013. In previous years, the figure was 2,000 - 2,100 warrants per month (exact official data is unavailable)<sup>2</sup>.

10. *The number of cases of plea bargain is 8%* of the total number of proceedings submitted to the court (or 1,030 of such cases per month for 8 months in 2013).

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<sup>2</sup> Law Enforcement Officers Receive 25,000 Orders for "Wiretapping" Ukrainians Each Year// <http://www.pravda.com.ua/news/2010/01/21/4648880>

The situation is different in countries that introduced a plea bargain concept ahead of Ukraine (agreement with the prosecutor): most of the proceedings are carried out in a simplified manner (based on plea bargain agreements) and few of them are complete. The above statistics indicate that the number of simplified proceedings in Ukraine is at an acceptable level and this innovation has not transformed our system into a "conveyor belt for generating sentences."

11. *The number of the settlement agreements is 8% of the total proceedings sent to the court (or 1,075 of such agreements per month for 8 months in 2013). This means that the legal possibility of an agreement between the suspect (defendant) and the victim has been positively viewed by a large part of the population and may become an alternative way to solve a criminal law conflict.*

However, one may note the emergence of the following **negative trends**.

1. *The satisfaction rate of the requests from the prosecutors by investigative judges amounted to 85-95% (depending on the type of the proceeding). That is, 9 out of 10 prosecutors' requests to conduct investigative actions, covert actions, issue interim measures under the proceedings or preventive measures are supported by the courts. The same rate was reached in 2011 and in 2012. The judges ignore that the provisions of the CPC have significantly increased the requirements for prosecutor's requests and related decisions of the investigating judges.*
2. *The number of cases where pre-trial investigation authorities get access to property and documents and forfeit them increases permanently. The leaders are the tax police investigators who have access to the above items on average 2.5 times per a criminal proceeding that they perform (8,000 warrants for 20,000 proceedings). This practice is clearly contrary to the plans of the Ministry of Revenues to cut the number of inspections by one quarter, as officially published on the website of the Ministry<sup>3</sup>.*

Other investigating authorities do not lag behind regarding the issue: the SSU investigators receive, on average, one warrant for access in one proceeding that they perform. The investigators of the prosecutors' office receive one warrant for access in 6 proceedings, and the investigations of the interior agencies receive one warrant for access in 9 proceedings.

## II. PRACTICAL APPLICATION OF LAW

Interviews conducted with individual participants in criminal proceedings (lawyers, prosecutors and judges) allow drawing some conclusions about the practical problems in the implementation of the new CPC. Among them:

1. *Establishing barriers for the registration of claims and reports of criminal offences, including:*
  - Failure to provide comfortable environment for the visitors to the district police stations, resulting in queues;
  - Crime reports are recognized as applications and treated as such by the Law "On Citizens' Applications";

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<sup>3</sup> [http://www.kmu.gov.ua/control/uk/publish/article?art\\_id=245972805&cat\\_id=244276429](http://www.kmu.gov.ua/control/uk/publish/article?art_id=245972805&cat_id=244276429) 7

- Crime reports are not registered and no explanation is given to that. The claimants are notified of unavailability of any grounds to initiate proceedings after the expiry of the 10-day period established by the law to appeal against the inaction of the investigator (prosecutor);
- Categorization of the violation is identified at the investigators' discretion, ignoring the content of the information presented in the claims.

This negative trend is also reflected in the analyzed statistics. While in previous years the number of monthly claims and reports of crimes reached 300,000 the average number of applications in 2013 was only 140,000. That is, every other citizen's claim is not accepted in violation of the requirements of Article 214 of the CPC in terms of registering all crime reports.

2. There is one quite frequent occurrence when the *criminal cases closed years ago* by the decision of the investigator, the prosecutor or the court's ruling are registered again in the Unified Register of Pre-trial Investigations. This violates the legal prohibition of double accusation in the same criminal offence (Part 1, Article 19 of the CPC).

In this case, the investigators and the prosecutors are using gaps in the Transitional Provisions of the CPC. Because of this, one may initiate an investigation in the cases that were closed by other investigators, prosecutors or judges, rather than by a court verdict.

3. *Disproportionately frequent use of interim measures in the form of temporary access to property and documents* with the possibility of their seizure (Chapter 15, CPC), which creates a significant restriction of the rights and legitimate interests of businessmen.

For example, here one can mention, without exception, financial instruments or contracts concluded by a company during a year and more. In this case, the documents are removed from a corporation but the likely suspect can only be an individual - the head of the company. The latter will not be officially charged to avoid expiry of the formal period of investigation.

4. *Misuse of the mechanism for seizing property and documents during inspection* (Part 5, Article 237 of the CPC). This article suggests that during the inspection of public areas and spaces one does not require the authorization of the investigating judge to remove the identified documents or property. The investigators use it when inspecting certain documents in the offices of companies.

However, examination of any items or documents in a house or other property (including in the office) and removal of certain items can only take place subject to the ruling of the investigating judge (Part 2 of Article 237).

5. *Conducting individual interrogations under the old rules* in terms of drawing up protocols (police reports), notwithstanding the provisions of the CPC requiring the court to obtain direct testimony from the individuals (Part 1, Article 23). Ongoing practice of such interrogations has the following explanation:

- The Code references witness interrogation protocols (Clause 7, Part 1 of Article 66) contrary to the rules of Part 1, Article 104, where the progress and results of the proceedings shall be recorded in the protocol except as provided hereto. However, Articles 224-227, which identify the process of interrogation, do not provide for drawing up a protocol;

- Lack of sufficient case law under the new CPC, which would have decided the future of the interrogation reports being filed;
- These investigative actions are carried out in order to put pressure on witnesses and suspects.

6. *Pre-trial investigation authorities send information requests to corporations* in the course of some criminal proceedings. Investigators believe that when the request is only about the information in some of these documents rather than property or documents per se, the ruling of the investigating judge for such acts is unnecessary.

But the criminal proceedings are performed in accordance with the CPC provisions and they do not contain any individual obligations for providing any information to the prosecution otherwise than during interrogation or under a court order.

7. *Abuse of power by the tax police investigators, who introduce the information on a criminal offense* into the Unified Register of pre-trial investigations for each case of crediting additional amount of taxes or fees. Such actions are initiated by the investigators regardless of whether the decision on collecting a higher tax has/has not been appealed to the administrative court.

This is inconsistent with the provisions of Clause 1, Article 214 of the CPC requiring the investigators to introduce the information into the Register only after the discovery of the circumstances "that may indicate that criminal offense was committed."

This approach has led the authorities to plan for the preparation of amendments to the legislation. These changes include an explicit prohibition to start criminal proceedings in case of appeal against crediting additional amount of taxes in the administrative or judicial procedure (p. 103 of the National Action Plan 2013 for Implementation of the Program of Economic Reforms 2010-2014 "Prosperous Society, Competitive Economy and Effective Nation", approved by the Presidential Decree No. 128/2013 issued on March 12, 2013).

However, there are other problems that can be divided into two main types:

- 1) *Unlawful restrictions of the defense*, and
- 2) *Difficulties in organizing the activities of criminal justice authorities*.

The prosecution **restricts the rights of the defense** as follows:

1. Violations of the right to defense<sup>4</sup> (Article 20, CPC):
  - Centers of free secondary legal aid are not notified of all cases of detention of persons;
  - The notification deadlines for the legal aid centers in terms of the detention of persons are not followed;
  - The legal counsels are not allowed to visit the detainees;
  - The detainees are forced to refuse the assistance of the counsel;
- The detainees participate in proceedings before the arrival of the counsel;

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<sup>4</sup> For more information see: The Preliminary Report on the Results of the Analysis of the Issues Faced by Defense during Application of the New Criminal Procedure Legislation (Legal Assistance Coordinating Center) // [http://legalaid.gov.ua/images/Actual/Results\\_research.pdf](http://legalaid.gov.ua/images/Actual/Results_research.pdf).



- The suspects are not provided with the opportunity of confidential communication with the counsels;
  - They practice interviewing everyone involved in a particular case (e.g., traffic accident) as witnesses. Later they decide who shall be recognized as a victim and a suspect. This violates the right of persons not to incriminate themselves, their family members and close relatives (Article 63 of the Constitution of Ukraine);
  - Individuals are not charged yet in the presence of sufficient grounds. The investigators initiate proceedings, collect the necessary information and issue charges at the conclusion of the proceedings before sending the case to court. Thus, they limit the right of persons to prepare themselves to face the charge because they have much less time to establish their defense in the case.
2. *Violations of the right to liberty and personal security* (Article 29, Constitution of Ukraine, Article 12, CPC) because of an ambiguous interpretation of the issue of detention during the preparatory proceedings (Part 3, Article 315 of the CPC). Therefore, many judges continue the practice of "automatic" extension of this interim measure despite the clear policy of the European Court of Human Rights in this area and the CPC provisions for limiting freedom just by a judicial decision.
  3. *Violations of the right to non-interference in private life* (Articles 31, 32, Constitution of Ukraine, Article 15 of the CPC). With the purpose of obtaining the information about phone communications of the subscribers (call duration, time, content, phone numbers called, etc.), the prosecution often addresses the investigative judges with a request for access to the documents. Although, they should request this in the manner provided for undercover investigations.

The difference is that any interference with private communication shall be performed under stringent safeguards: only appellate court judges may sanction this in the proceedings concerning grave and especially grave crimes. Thus, the prosecution illegally opts for a less onerous method of getting information.

4. *Violations of the rights for the security of property* (Article 41, Constitution of Ukraine, Article 16 of the CPC). During the search of an individual's house or other property, they practice seizing of more documents or items than indicated in the ruling (sanction) of the investigating judge. Following the logics of Part 7, Article 236 of the Code, these "additionally" seized items become a temporarily seized property and its future must be decided upon by the court the following day. Although, since the search protocol is not available to the persons searched, later they will find it impossible to prove in court that these items were seized. This unlawfully violates the right to own or possess certain property by individuals.
5. *Violations of the principle of trial impartiality* (Article 21, CPC). In order to implement this principle, CPC suggests that the court shall receive only an indictment and a list of materials (Part 4, Article 291). While all the other collected material shall be provided at the beginning of the trial. However, the prosecutors hand all the case information to the judges already at the preparatory meeting, allowing them to develop an accusatory bias. In addition, during the preparatory proceedings they never practice verification of appropriateness and admissibility of evidence collected by the parties.

### **Difficulties in organizing the work of the criminal justice system:**

1. *Shortcomings in the organization of the courts.* Many first instance courts (the situation is especially critical in the courts of appeal) do not practice putting investigating judges on a 24-hour duty. Consequently, they lose possible evidence of the crimes and the potential suspects disappear. There are many cases when the prosecution's request is responded during a few days instead of responding within 24 hours. In such circumstances, the strict requirement of the 6-hour period for review of the request for an undercover investigative action (surveillance, wiretapping, etc.) is not universally followed.
2. *Insufficient number of judges* causes problems with the establishment and regularity of the peer group meetings in courts (Part 9, Article 31 of the CPC). This leads to a violation of the principles of a reasonable trial period (Article 28, CPC).
3. *Excessive pressure on the investigators.* The workload has grown from a few dozen cases per month to hundreds of criminal proceedings. The main reason for this is the changing relationships between the investigators and the operative staff. Previously, the entire range of crime reports was distributed among the investigating personnel and the staff of the operative units of the police. Now, the operative staff has lost their capacity to initiate actions and they work only under the authorization of the investigator.

A transfer of sufficient operative staff to investigator positions could be the way out of this situation.

4. *Lack of initiative among prosecutors.* The investigators continue deciding on the issue of holding or ignoring a particular investigative action or petitioning the court. This should be the main task of the prosecutors as procedural managers of the investigation.

### III. GOVERNMENT LAW-MAKING

The Parliament and other authorities continue to adopt regulations and amend existing legislation to implement the new CPC. However, one can observe outright errors and cases of non-compliance with the law. They are caused, first and foremost, by overlooking the new ideology of the CPC when making those changes.

The analysis has revealed the following shortcomings in these regulations:

1. The Law of Ukraine "*On Amendments to Some Legislative Acts of Ukraine for Harmonizing the Legislation with the Criminal Procedure Code of Ukraine*" No. 245-VII issued on May 16, 2013, has introduced changes to a number of legislative acts, such as:

- The Disciplinary Statute of the Prosecutor's Office of Ukraine, approved by the *Verkhovna Rada* on November 6, 1991 (Part 3, Article 12);
- The Law of Ukraine "On Disciplinary Statute of the Armed Forces of Ukraine" issued on March 24, 1999 (Article 91-1);
- The Law of Ukraine "On Diplomatic Service" issued on September 20, 2001 (Part 4, Article 28);
- The Law of Ukraine "On the National Special Transport Service" issued on February 5, 2004 (Part 15, Article 5);

- The Law of Ukraine "On the State Criminal Enforcement Service of Ukraine" issued on June 23, 2005 (Clause 6, Part 8 of Article 14);
- The Law of Ukraine "On the Disciplinary Statute of the Customs Service of Ukraine" issued on September 6, 2005 (Part 3, Article 33);
- The Law of Ukraine "On the Disciplinary Statute of the Law Enforcement Agencies of Ukraine" issued on February 22, 2006 (Part 5, Article 17);
- The Law of Ukraine "On the Disciplinary Statute of the National Service for Special Communications and Information Protection of Ukraine" issued on September 4, 2008 (Part 4, Article 18);
- The Law of Ukraine "On the Disciplinary Statute of the National Civil Defense Service" issued on March 5, 2009 (Part 2, Article 85-1).

*The problem* is that these provisions allow suspending the suspected officers from office "in the manner prescribed by the law." However, the CPC clearly identifies that the procedure for applying this interim measure for criminal proceedings shall be made solely on the grounds of the ruling by the investigating judge or the court. There may be no other process of suspending from office, and especially without a court order.

The Law of Ukraine "On Pre-trial Detention" issued on June 30, 1993.

The problem is that Article 8 established that the "confidentiality of pre-trial investigation" shall be one of the grounds for detention of an individual in custody. But the new CPC has abandoned the concept of the "confidentiality of investigation".

The Law of Ukraine "On the Legal Organization of the State of Emergency" issued on March 16, 2000.

The Law of Ukraine "On Banks and Banking Activity" issued on December 7, 2000.

*The issue* is that the words "crime" and "acquisitive crime" have been replaced by the phrase "criminal offense" and this was done automatically and unreasonably. Thus, in the first case, the change suggests that announcing a state of emergency can be done in order to not only prevent crime but also criminal offenses. However, there can be no criminal offenses against the national security but the crimes only. In the second case, the Board shall inform the National Bank even on a suspicion of a criminal offense (previously - acquisitive crime). This may be a misdemeanor unrelated to the banking sector (e.g., speeding).

The Civil Code of Ukraine of January 16, 2003 (Part 6, Article 295)

The Law of Ukraine "On the Statutes of the Garrison and Guard Services of the Armed Forces of Ukraine" of March 24, 1999 (Part 1, Article 111, Clause 1, Article 218)

*The issue:* these acts restrict certain rights of the persons "in respect of whom the criminal proceedings are performed." But the CPC does not contain such a wording so it is unclear whose status is in question: the suspect, the victim, or anybody else.

The Law of Ukraine "On the System of Guarantees for Individual Deposits" of February 23, 2012.

*The issue:* the law prohibits a suspected person to act as an authorized agent of the Deposit Guarantee Fund (Clause 2, Part 2 of Article 35). However, any restrictions for the suspects can only be identified in the CPC. Moreover, the presumption of innocence applies at this stage.

2. The Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on Implementation of the Action Plan for Liberalization of the EU Visa Regime for Ukraine in terms of the Liability of Legal Persons" issued on May 23, 2013.

*The issue:* the representatives of legal persons (corporations) now face a new responsibility forbidding them to obstruct the process of "establishment of circumstances of the criminal offence" (Clause 2, Part 7, Article 64-1 of CPC). It reflects the logic of the old CPC and unduly limits the corporation's defense opportunities. Any active investigation by the counsel can be regarded as obstructing the establishment of such circumstances.

3. *"The Procedure for calculating the amount of the actual costs of a health care establishment for inpatient treatment of the victim of the offense and crediting of the penalties paid by the perpetrators to the appropriate budget and their use", approved by the Cabinet Resolution No.545 on July 16, 1993.*

*"The service performance TORs for junior and senior personnel of the National Service for Special Communications and Information Protection", approved by the Cabinet Resolution No. 1828 on December 27, 2006.*

*"The Procedure of investigation and registration of accidents, cases of occupational disease and accidents at work", approved by the Cabinet Resolution No. 1232 on November 30, 2011.*

*The issue:* categorization of the grounds for terminating criminal proceedings as rehabilitating and non-rehabilitating (paragraph 3, Clause 3 of the Procedure, paragraph 2, Clause 60 of the TORs, sub-clause 5, Clause 16 the Procedure) is contrary to Article 284 of the CPC.

The theory of non-rehabilitating grounds existed since before the Bolshevik coup and suggested that the proceedings shall be closed due to "the impossibility of proving guilt" and the person "remains a suspect" for the authorities. However, this does not correspond to the new CPC. In addition to formal inconsistencies, such regulation restricts human rights as it illegally allows certain persons to receive reimbursement for treatment or service tenure while depriving others of such opportunities.

4. *"The TORs on sale, purchase, registration, accounting and application of special means of self-defense featuring tear and irritant substances", approved by the Cabinet Resolution No. 706 on September 7, 1993.*

*The issue:* a notification of a suspicion in any criminal offense automatically becomes the grounds for refusal to issue (void) the permits for buying, storing (carrying) of gas pistols (revolvers).

According to the CPC, no such restrictions of human rights can be inferred from the fact that a person has been notified of any suspicion. Restrictions may only be imposed by court.

5. *"The Procedure of certifying wills and the powers of attorney which is equated to notarizing", approved by the Cabinet Resolution No. 419 on June 15, 1994.*

*The issue:* the duty of the officers to provide information on notarized wills and the powers of attorney at the request of the court, prosecutor, investigator, or the operative unit (paragraph 5, Clause 3) violates the confidentiality of notarized acts (Clause 3, Article 162 of the CPC).

6. *"The Rules of the registration and issuance of a citizen's passport for traveling abroad and children's travel documents, their temporary suspension and removal", approved by the Cabinet Resolution No. 231 on March 31, 1995.*

*The issue:* the application of the interim measure prohibiting travel abroad (sub-clause 3, Clause 22) may be the grounds for denial to issue a passport.

But the CPC does not provide for such an interim measure. It only provides a possibility of applying personal liability in the form of depositing the passport for travel abroad (Clause 8, Part 5, Article 194 of the CPC).

7. *"The Procedure of keeping personal files of public servants in the executive branch", approved by the Cabinet Resolution No. 731 on May 25 1998.*

*The issue:* the personal file of an employee features not only the information about his criminal record but also about the criminal proceedings against him (paragraph 7, Section 3). But the CPC does not provide for any restrictions for the persons ever subjected to an investigation.

8. *"The TORs on the procedure of service by the junior and senior staff of civil defense authorities" approved by the Cabinet Resolution No. 629 on July 21, 2005.*

*The issue:* civil defense officials are subject to removal from office when notified of a suspicion (paragraph 1, Clause 47). However, under Chapter 14 of the CPC, the decision on removal from office shall only be made by the court.

9. *"The Procedure for obtaining a court order to carry out measures temporarily restricting human rights and the use of obtained information", approved by the Cabinet Resolution No. 1169 on September 26, 2007.*

*The issues:*

- The purpose of this procedure is questionable in view of the new CPC;
- Requirements to the requests (Clause 4) differ from the corresponding provisions of Article 248 of the CPC. The list is much shorter;
- A requirement "to establish the truth" in the case (Clause 14), although the new Code deliberately abandoned this objective of the criminal process.

10. *"The Procedure of issuance, extension and revocation of work permits for foreigners and stateless persons", approved by the Cabinet Resolution No. 322 on April 8, 2009.*

*The issue:* a foreigner loses the right to receive a work permit in the case when he is notified of a suspicion or a charge (paragraph 12, Clause 5, paragraph 9, Clause 14). This is a violation of human rights because a suspicion about a person cannot be a ground for restricting his labor rights.

11. *The Cabinet Resolution No. 1104, "On the Implementation of some provisions of the Criminal Procedure Code" issued on November 19, 2012 along with the Cabinet Resolution*

*No. 710, "On Approval of the Guidelines on the procedure and compensation (recovery) of costs and remuneration for persons summoned to the pre-trial investigation authorities, prosecutors' offices, courts or the authorities in charge of the administrative case proceedings and compensation to the specialized government forensics institutions for involvement of their experts and specialists" issued on July 1, 1996.*

*The issues:*

- No ceiling has been introduced for compensating the travel costs to the location of pretrial or court proceedings, for the members of the defense, the representatives (other than legal) of the victims (provided for in Clause 5, Article 121 of the CPC);

- No compensation for "lost earnings" has been envisaged for the victims, witnesses and civil plaintiffs involved while the employers are obliged to pay the average salary to these individuals during the entire period of their leave (Clause 1 of the Guidelines).

12. *"The Procedure for storing, selling, re-cycling and destruction of material evidence by the prosecution and costs associated with storage, shipping and security of the temporarily seized property during criminal proceedings", approved by the Cabinet Resolution No. 1104 on November 19, 2012.*

*The issue:* the procedural costs of storing and shipping material evidence (Article 123 of the CPC) are reimbursed only to the prosecutor's office, thus failing to comply with the provisions of the CPC. Besides, no ceiling has been established for the reimbursement of these costs to the defense.

13. *"The Guidance on conducting undercover investigation (detective) activities and use of results hereto in criminal proceedings", approved by the Office of the Prosecutor General, MoI, SSU, Border Guards Service, the Ministry of Finance and the Ministry of Justice on November 16, 2012 (No. 114/1042/516/1199 / 936/1687/5/)*

*The issues:*

- Seizure of correspondence can be also performed for the documents found in financial institutions (Clause 1.11.3). However, the CPC provisions establish restrictions in terms of correspondence only for the communication facilities. Besides, the term "financial institution" has not been explained which may lead to abuse;

- The Undercover Investigative Action Report shall be delivered to the prosecutor within 24 hours after it is *generated* (Clause 4.3). However, in accordance with Clause 3, Article 252 of the CPC, the Report shall be generated within 24 hours after appropriate action has been completed and immediately passed on to the prosecutor. It could also be a reason for possible abuse.

14. *"The TORs on the Procedure for keeping the Unified Register of Pre-trial Investigations", approved by the Order No. 69 of the Prosecutor General of Ukraine on August 17, 2012, amended on November 14, 2012, January 25, 2013 and April 25, 2013.*

*The issues:*

- Unclear status of the information contained in the Register. Is this open, confidential information or a state secret? If its status is unclear, even in the CPC, then it shall be deemed open. It follows from Articles 8, 19, 22 and 34 of the Constitution of Ukraine.

If this information is not classified then it is unclear why the measures are taken to protect it (Clause 1, Section IV) and why the Register cannot be used, for example, by the judges or attorneys who could just have an access code, as is the case in many other countries. Is it really against the presumption of innocence and Article 222 of the CPC? (In this regard, see the Register Access Rights TORs - Clause 1, Section III);

- Clause 2.2 is contrary to Article 214 of the CPC in the following aspects:

a) The CPC effectively prohibits the investigators and prosecutors to send "inquiries" to the institutions, enterprises and organizations requesting "documents or relevant data, etc.";

b) Certain data can only be disqualified during the preliminary investigation rather than "inspections";

- Clause 1.3 involves warning the individuals who submit an application or report a criminal offense of their criminal liability. But the CPC does not allow for this procedure. Moreover, it is not always possible to have them "sign on it";

- Paragraph 2, Clause 2.2 of Section II provides for the need to introduce additional notes into the Register making a "distinction between obvious homicides, the cases of natural death, suicide and missing people." This requirement is meaningless and artificially forces the investigators or the prosecutors to knowingly submit false information, since one could not be sure of the true causes of death at the indicated time. One can only assert the presence or absence of external signs of a violent death. On the other hand, these changes are a dangerous violation of Article 214 of the CPC in terms of immediate entry of information into the Register. The investigator/prosecutor will not officially record the information before confirming natural death or a homicide;

- Clause 5.2 of Section II violates the presumption of innocence concept. It has established that the suspect or the accused person when deceased is registered as "a person who has committed a criminal offense" (rather than a person who was charged or suspected in having committed it);

- Clause 7.1 of Section II recognizes a criminal case closed when a prosecutor sends the case to the court. Clause 7.3 uses term "criminal case closed (with suspicion)" when someone is merely notified of the suspicion. These provisions reflect the explicitly accusatory bias of the criminal justice system and may stand in the way of court acquittals because the judges have to oppose the system in their decision-making. The system that registers respective acts and persons involved as closed cases;

- Clause 7.2 of Section II recognizes criminal cases unsolved if over two months have passed since their registration while the information on any notification of a suspicion has not been entered in the Register. This is contrary to the requirements of Article 214 of the CPC. Apparently, the investigators are reluctant to enter the information into the Register on non-obvious criminal offenses that might "damage" the statistics. One consequence of these changes was a reduction in the number of registered criminal proceedings.

15. *"The TORs on the criminal investigation authorities of the MoI of Ukraine" approved by the MoI Order No. 686 on August 9, 2012.*

*The issues:*

- Clause 5.4 mistakenly (contrary to the CPC) establishes that:

a) The heads of the pre-trial investigation are entitled to interfere in any way with the judicial process of the investigator, in particular to establish the category of a criminal offense;

b) "The staff of the organization and methodology units" and "criminologists and the investigators" have certain rights in the criminal proceedings, including the right of access to the materials of criminal proceedings, request them from the investigator to check the status of the investigation, review them and provide guidance, etc.;

- Clause 5.7 - in fact, only *written* requirements of the investigator to the operative units are binding rather than any requirements;

- Chapters VI and VII do not include the provisions of Article 3 of the CPC meaning that the investigator may only be the person authorized to conduct pre-trial investigation of criminal offenses. Therefore, if the investigator is a "methodology expert" or a "criminologist" not authorized or actually not conducting pre-trial investigation he cannot be called "investigator";

- The same applies to Chapter IX about the "assistant investigator." In fact, police officers (Clause 9.2) are not obliged to offer him "full assistance" and he has no rights or obligations to execute orders of the chief of the criminal investigation authority, his deputy or the investigators "in the manner prescribed by the law", because according to the CPC ( Article 3 and other) such a position does not exist. In addition, court subpoenas are served by the secretary of the hearing (Article 73 of the CPC), the eye-witnesses are summoned by the investigator or the prosecutor (Article 223). Only the individuals mentioned in the CPC are eligible to participate in the investigation and review the materials of pre-trial investigation while the investigator has no right to make "inquires".

16. *"The Guidance on participation of the staff of the MoI Expert Service in criminal proceedings as subject matter experts" approved by the MoI Order No. 962 on October 26, 2012.*

*The issue:* together with Part 2, Article 97 of the CPC they raise doubts regarding the impartiality of the person who initially was involved as an expert (for instance, before the examination) and later as an expert in criminal proceedings. This cannot be the grounds for recusal in accordance with the CPC.

17. *"The Guidance on the procedure of keeping unified registration of reports and statements of committed criminal offenses and other events in the MoI agencies and departments" approved by the MoI Order No. 1050 on November 19, 2012.*

*The issue:* Clauses 3.5-3.7 and 3.9.3 disagree with the CPC in the following aspects:

a) No approval by the chief/acting chief of the enforcement agency is envisaged by the CPC and is contrary to its provisions hereto about the investigator's independence;

b) In accordance with Articles 60 and 214, the notification slip shall be issued to the claimant by the investigator only.



18. *"The Guidance on the procedure of receiving, registration and review of statements and reports of criminal offenses by the Security Service of Ukraine, approved by the Order No. 515 of the SSU Central Office on November 16, 2012.*

*The issues:*

- Clause 2.6 refers to the obligation which is not the claimant's responsibility according to the CPC. Such as, personally come to the SSU to submit a written statement (the requirement to come is disguised as a "proposal");

- Clause 3.1 – the CPC sets a different procedure: the proceedings should be closed and the claimant notified if no circumstances indicating a criminal offense are established (rather than sending the claim to the regime and clearance unit).

19. *"The Guidance on the procedure of keeping unified registration of reports and statements of committed criminal offenses and other events and commission TORs in the MoI agencies and departments", approved by approved by the MoI Order No. 1050 on November 19, 2012, amended on April 1, 2013.*

*The issue:* it has been provided for an electronic processing of all the statements and reports of criminal offenses committed since July 1, 2013 to July 1, 2014. The need for keeping such electronic records is determined by the need to improve the registration system and the objectivity of statistical reporting. However, the different registration systems (electronic and paper-based) will be working in parallel for another year.

20. *"The Guidance on the procedure of processing the reports and information received by the SSU hotlines", approved by the Order No. 99 of the Security Service of Ukraine on March 18, 2013*

*The issue:* there has been provided the possibility of anonymous reporting of criminal offenses via a hotline without further identification of the caller. This violates the requirements of Article 214 of the CPC which requires establishing the full name of the claimant before submitting information to the Register.

21. *"The TORs on the legal compliance measures during detention of individuals suspected of committing a crime without the order of the investigating judge or the court and during deciding on a preventive measure of detention during criminal proceedings" approved by the Orders No. 289/540/5 of the Ministry of Interior and the Ministry of Justice on March 26, 2013.*

*The issue:* Clause 1.6 suggests that there should be an internal investigation in each case of acquittal or a decision to close criminal proceedings where the person was kept in detention against the police officers who detained the suspect. This provision reflects the accusatory nature of the criminal justice system. Thus, they establish a system where the acquittal for the defendant becomes a tragedy for the members of the prosecution. After all, it may result in their dismissal or other disciplinary actions. In such circumstances, acquittals will never become commonplace.

22. *"The Guidance on the performance of departments (groups, sectors, senior inspectors) overseeing enforcement of judgments in penal institutions and pre-trial detention faculties" approved by the Order No. 847/5 of the Ministry of Justice on June 8, 2012, amended on May 14, 2013.*

*The issue:* the application of Clause 10.3 of the Guidance could result in a violation of the constitutional rights to liberty and security of persons (Article 29 of the Constitution of Ukraine, Article 12 CPC). The governor of the pre-trial detention establishment is required to verify the availability of any "other judgment" in each case of a court decision to release the person from custody which still involves keeping the person in custody. Although Part 3, Article 206 of the CPC provides that the existence of any "other judgment" shall be verified only in the court (rather than in the other government agency) during release of person unlawfully deprived of liberty.

#### IV. Opinion of the High Court<sup>5</sup>

The unlawful practices of sending out information letters to the lower courts have been entrenched in the Ukrainian judicial system. They continue even after adoption of the new Law "On Judicial System and Status of Judges" which has no provisions concerning such powers for the courts of cassation. But the judges pay considerable attention to interpretation of the law as presented in the guidelines authored by their colleagues from the higher courts. Such situation is not normal for a democracy with the rule of law.<sup>6</sup>

After adoption of the new CPC, the High Specialized Court for Civil and Criminal Cases has issued a dozen of such letters. And these letters, too, had some evident discrepancies.

1. *HSCU Information Letter "On Procedures to Conduct the Preparatory Proceedings according to the Criminal Procedure Code of Ukraine" as of 3 October 2012 No. 223-1430/0/4-12*

##### *Problems:*

- Paragraph 2 Item 1 of the Letter suggests that the ruling to set the preparatory judicial hearing should be delivered not later than five days from the day when a specific judge has initiated proceedings in an indictment or in any other documents identified in the legislation. But this recommendation contravenes Art. 314 of CPC according to which the count of the 5 day's term has to start from the day when such documents have been received *by the* court and not by a specific judge for further proceedings. Art. 314 does not provide for any obligation to deliver a ruling setting the preparatory judicial examination;

- According to paragraph 4 Item 1, judicial proceedings cannot start earlier than five days after the defendant has received a copy of the indictment. But it never refers to any provision of CPC which would be the reason for HSCU to make this conclusion;

- Paragraph 4 Item 1 which establishes that the defendant held in custody needs to be the initiator of his/her participation in the preparatory judicial examination contravenes Part 2 Art. 314 of the CPC whereby the defendant shall be a compulsory participant of this examination. Besides, the fact that the defendant has requested his/her participation in this examination by correspondence does not mean an automatic satisfaction of such request without checking whether the request has been voluntary and has had sufficient grounds (Part 1 Art. 336 CPC);

- The defendant's consent for consideration of the indictment through simplified proceedings may be depicted in the prosecutor's/investigator's motion (in the indictment) (Item 1). But this is in contradiction to Part 3 Art. 302 of the CPC which provides that in such case the suspect's *written* consent prepared in the presence of his/her counsel is required;

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<sup>5</sup> This Section uses materials presented by Vitaliy Kasko for Council of Europe Project "Support to Reform of Criminal Justice in Ukraine".

<sup>6</sup> See for more details: Хавронюк М. Хто в нас «понтіфіки»? // Закон і бізнес. – 18.05—24.05.2013 <http://www.pravo.org.ua/2010-03-07-18-06-07/lawreforms/1358-khto-v-nas-pontyfiky.html>

- In its Letter, paragraph 14 Item 2, dealing with the grounds for closing proceedings by the court, the Court missed the ground contemplated by Item 8 Part 1 Art. 284 CPC (failure to obtain a consent of the extraditing State in the course of international cooperation in criminal proceedings);

- The Letter suggests that one of the grounds to return the indictment to the prosecutor shall be the fact that it contains contradictory provisions (paragraph 15 Item 2). But the CPC never mentions such grounds;

- Paragraph 17 Item 2 implies that the investigator or prosecutor, when the court returns the indictment to them in view of its incompliance with the CPC requirements, has the powers to implement certain investigative and procedural actions out of the number of those indicated in the court's ruling. But the CPC never provides for any investigative actions at this stage while the suggested approach seems to be a hidden attempt to bring back in part the institution of the additional investigation which has been rejected by the new CPC;

- In the wording of paragraph 3 Item 3 of the letter, the case law of ECtHR concerning Item 1 Art. 6 of ECHR should have been taken into account with respect to the grounds and procedures to restrict the right to public trial where the emphasis is made on the need to ensure adversarial proceedings and balancing of the competing interests (principle of proportionality), etc. when considering such matters;

- Paragraph 17 Item 3 does not provide for a final solution of the issue of extension of the defendant's detention as a measure of restraint at the stage of pre-trial judicial examination. Taking into account the ECtHR judgment in "Kharchenko v. Ukraine" of 10 February 2011 (where systemic shortcomings related to Art. 5 of ECHR in Ukraine have been found), it should be stressed that: 1) in the ruling on setting the case for consideration, the court needs to substantiate the grounds for extending the term of the defendant's detention, provided that the court has delivered such ruling; and 2) the specific term of effect of the ruling concerning this part needs to be indicated (taking into account Part 3 Art. 331 of CPC). This item should have been taken into account in paragraphs 4 and 5 of Item 4 of the Letter dealing with reasoning and findings of the respective ruling. This also applies to other interim measures which would take place during the judicial consideration;

- The Letter mistakenly provides the possibility for the parties to produce, during the preparatory judicial examination, any documents (as sources of evidence) including reports on investigative actions and other materials (Item 5). This is in direct contradiction to Part 4 Art. 291 of CPC which prohibits submittal of any other documents (except for the indictment and annexes thereto) before the start of the trial. In practice, the result is that prior to the trial the court receives materials of the criminal case in the Soviet format of criminal case files developed by the prosecutor; in other words, it results in rejection of the principle of adversarial proceedings and of CPC provisions on examination of the evidence by the court as it is produced by the parties to the proceedings during the trial.

**2. HSCU Information Letter "On Some Issues of Trial Procedure in Judicial Proceedings at First Instance according to the Criminal Procedure Code of Ukraine" as of 5 October 2012 No. 223-1446/04-12**

*Problems:*

- The explanation provided in paragraph 15 Item 1 with respect to the procedures of the court's actions if the victim has failed to appear does not correspond in full to Art. 325 CPC which makes this matter dependant, first of all, on whether it is possible to clarify all circumstances during the trial in absence of the victim;

- The recommendation to the courts (Item 7) to ask the defendants about various last names, names and patronymics which they have had *to evade their detection as perpetrators in a crime* should be removed in view of its inquisitorial nature;

- The sequence of examination of the evidence is defined (Item 9), although according to Art. 349 CPC, the sequence of examination of the evidence shall be defined by the court of first instance during the trial;

- It is stated that the expert may add information to his/her opinion in the court during the trial (Paragraphs 2, 3 Item 9). This contravenes directly Art. 356 of CPC stating only that the expert may *explain* his/her opinion;

- Paragraph 9 Item 9 reads that during the trial the exhibits subject to examination are those which have been inspected during the investigation as well as produced in the court. This explanation needs to be specified because the general rule is that the pieces of evidence have to be obtained during the investigation and disclosed to the defense before the trial;

- The recommendation (Item 10) to take into account the defendant's conduct during the judicial proceedings for purposes of examination of any aggravating or mitigating circumstances is not based on any CPC provisions.

**3. HSCU Information Letter "On Certain Issues of the Procedure to Challenge Decisions, Actions or Omissions of Pre-Trial Investigation Authorities" as of 9 November 2012 No. 1640**

*Problems:*

- Application or notification of a crime is deemed to have been submitted from the moment when the individual has been warned of criminal liability (Item 2 of the Letter). This is in direct contradiction to Part 1 Art. 214 of CPC which never makes the submittal of such application or notifications dependant on any warnings about criminal liability.

The HSCU's opinion that the regulatory term to enter information to the Register has to be counted from the moment of receipt of the application by the investigator/prosecutor does not comply with Part 1 Art. 214 of CPC either, because this provision includes the term of 24 hours after *submittal* of the application (to the respective entity) and not after its receipt by a specific official;

- The opportunity to challenge omissions of the investigator or prosecutor consisting in failure to return the seized property is interpreted too narrowly (Sub-Item 3 Item 2). Thus, the courts are explained that according to Art. 169 of CPC, the temporarily seized property has to be returned to the individual from whom such property has been seized *on the basis of the prosecutor's order*, and hence, the omission may consist in failure to issue such order when there are no grounds to seize the property. This interpretation of the CPC Art. 169 does not correspond to its substance; in particular, to provisions of Part 5 Art.171 and Part 6 Art. 173 referred to directly in Art. 169. In practice, this may lead, inter alia, to limitation of the grounds to challenge the actions of an investigator;

- The individual whose complaint has been dismissed because of missing the deadline for complaints shall be deprived of the right to bring the second action before the investigating judge (Item 6). This is not the case according to the Part 7 Art. 304, and therefore such interpretation restricts the individual's right to bring action before a court;

- The investigating judges are required to initiate proceedings and to rule on setting the application for consideration (Item 7). This requirement is not based on the law;

- The exhaustive list of decisions by the investigating judge (paragraph 1 Item 12) ignores Item 4 Part 2 Art. 307 of CPC (dismissal of the application) while the reference to this list in paragraph 2 Item 12 of the information letter does not solve the problem on the merits. The last sentence of paragraph 2 Item 12 of the Letter fails to consider the substance of Part 3 Art. 395 of CPC which contains two more important options to count the term for appeals against the investigating judge's rulings on dismissal of the initiation of proceedings or on return of the application (for a person held in custody, without summoning the person or in absence of the person). This may deprive individuals of the right to appeal such rulings;

- The list of the investigating judge's rulings which can be challenged in the course of appeal proceedings (Item 14) seems to be exhaustive. But it fails to consider, for instance, provisions of Art.5 of ECHR and Parts 11 and 12 of Art. 584 of CPC (the matter concerns appeal against the decision on presence or absence of the grounds to continue holding an individual in custody pending extradition).

**4. HSCU Information Letter "On Some Issues of Implementation of Criminal Proceedings on the Basis of Agreements" as of 15 November 2012 No. 223-1679/0/4-12**

*Problems:*

- Item 1 suggests construing Part 4 Art. 469 of CPC in such a manner that “proceedings where the victim participates” and where the plea agreement is not allowed are proceedings concerning crimes and criminal offenses which entail harm to the rights and interests of individual persons and/or interests of legal entities. But such interpretation fails to take into account the absolutely new approach of the CPC to participation of the victim in criminal proceedings (Parts 1, 2 and especially Part 7 of Art. 55 CPC), where the investigating authority or court cannot “designate” an individual as the victim and such individual’s participation in this status in any criminal proceedings depends exclusively on his/her will. For the same reasons, the attempt to equalize “social interests” in Part 4 Art. 469 CPC to the term “public interests” in the Special Part of CC of Ukraine looks artificial and unjustified;

- The parties to a reconciliation agreement are supposed to take into account the offender’s personality and any circumstances aggravating or mitigating the liability (Item 3). But according to Item 3 Part 1 art.65 of Criminal Code (CC) of Ukraine, this is an obligation of the court. Besides, it is difficult to imagine how the parties would do that;

- The courts are recommended to dismiss the agreements if the parties have agreed on a sanction which, by its form and/or amount, does not correspond to the nature and gravity of the committed act and to the personality of the offender and does not take into account any circumstances aggravating or mitigating the liability, therefore the recommendation is to replace the sanction with a more severe one (Item 3). But CPC does not provide at all for submittal of such information to the court for purposes of approval of the agreement;

- The parties to the agreement may agree on a sanction which is less severe than the one provided by the law in the course of the procedure of Art. 69 of CC (Item 3). But according to CC, application of Art. 69 is the right of the court only and cannot be delegated to the parties to the agreement or to anybody else;

- The letter states that the judge has to deliver a decision (ruling) to appoint the preparatory judicial examination not later than five days after the respective materials have been transferred (received) for this judge’s proceedings (paragraph 3 Item 4). But Art. 314 CPC does not provide for the need to deliver such ruling while the count of 5 day-term to consider this issue starts on the day when the case file materials have been received by the court and not on the day when they have been received by a specific judge (Part 1 Art. 314 CPC);

- According to the letter, the court is under the obligation to demand and obtain the documents submitted by the parties during the pre-trial investigation (paragraph 3 Item 4). In fact, Part 6 Art. 474 of CPC deals with the court’s *right* to demand and obtain, *when appropriate*, the documents, in particular, the defendant’s complaints submitted by him/her during the criminal proceedings and any decisions resulting from consideration thereof, as well as to summon persons to the court hearing and to question them;

- According to the letter, the court is under the obligation to ask the defendant who is a party to a reconciliation agreement whether he/she pleads guilty (paragraph 10 Item 4). But if we compare provisions of Item 3 Part 4 and Item 3 Part 5 of Art. 474 of CPC we will see that a reconciliation agreement can also be approved when the defendant pleads not guilty. Similar problem exists in paragraph 11 Item 4 stating that the defendant, as a party to a conciliation agreement, may plead guilty in part. If HSCU’s opinion is that the reconciliation agreement cannot be concluded with a defendant who pleads not guilty in part, then such opinion needs a detailed substantiation with references to specific legal provisions;

- Paragraph 11 Item 4 should have taken into consideration legal provisions concerning *evident impossibility* for the defendant to comply with the undertaken obligations (Item 5 Part 7 Art.474 of CPC) and recommended to the courts to use this provision in a flexible manner in view of additional guarantees to ensure compliance with the agreement as presented in Art. 476 of CPC;

- Paragraph 12 Item 4 of the letter deals with the court’s obligation to make sure that the agreement is voluntary. But the ways to implement this obligation need to be selected by the court

rather than to be implemented only “by means of examination of *requested and obtained documents*, questioning of the parties and other persons” as the letter requires because such requirement is in contradiction with the substance of Part 6 Art. 474 of CPC;

- Paragraph 13 Item 4 and paragraph 2 Item 5 contain the requirement for the court to retire to the conference room after it has checked compliance of the agreement with the effective legislation and made sure that no grounds established by CPC to reject the agreement are in place; this requirement seems to be inconsistent because the court during its deliberations in the conference room may decide to reject the agreement (Part 7 Art. 474, Part 1 Art. 475 of CPC);

- If paragraph 13 Item 4 refers to the parties to the agreement (and not to criminal proceedings) one should recommend hearing also the opinion of the legal counsel and victim’s representative (not the prosecutor’s opinion only) with respect to the respective issue;

- The defendant is called “the sentenced person” before the sentence has entered into force (Item 8). This is not in correspondence with the CPC;

- Paragraph 19 Item 8 has broadened unreasonably the scope of prosecutor’s intervention in the course of procedure of challenging the plea agreements and, contrary to the law (Part 4 Art. 469 CPC), such scope includes situations when damages have been theoretically caused/could have been caused to a natural person (who does not declare himself/herself a victim) or when damages have been caused to *any* legal entity. But Part 4 Art. 469 of CPC states that the plea agreement may be concluded in the proceedings where damages have been caused to public or social interests. Hence, according to HSCU’s opinion as expressed in the letter, if a legal entity does not declare itself a victim or if it is, for example, state owned, then the plea agreement is impossible. It distorts the substance of Part 4 Art. 469 of CPC;

- The letter alleges that the prosecutor can challenge, in the course of cassation procedure, judgments of the lower courts concerning reconciliation agreements (Item 9). But Items 2, 3 Part 3 Art. 424 of CPC imply that this right belongs only to the victim, victim’s representative and legal representative.

**5. HSCU Information Letter “On some Aspects of the Procedure to Conduct Judicial Proceedings to Review Judgments at Court of Appeal according to the Criminal Procedure Code of Ukraine” as of 21 November 2012 No. 10-1717/0/4-12**

*Problems:*

- Paragraph 4 Item 17 contains a list of circumstances demonstrating lack of completeness of the judicial consideration (failure to conduct necessary investigative actions, find reasons for discrepancies in the evidence, etc.); such list is not provided for by CPC and hence cannot be taken into account by the courts;

- Annex 1 to the letter vests the prosecutor with powers to challenge, in the course of appeal proceedings, any rulings delivered during the judicial proceedings by the court of first instance before the judgment is passed while other authorities from the list are not vested with such powers. Besides, such prosecutor’s powers are not limited with any specific cases. The reference to Art. 292 CPC in the list as the reason for making such conclusion does not solve the problem. Also, it should be noted that the list of officials presented in Annex 1 to the letter is not exhaustive. In particular, it does not include the person who is to be extradited pending respective decision and who acts as appellant in this case;

- Annex 3 does not provide for the opportunity to appeal the ruling of the investigative judge concerning absence or presence of the grounds to continue holding a person in custody pending extradition (periodic judicial control) while such opportunity arises from provisions of Parts 11 and 12 of Art. 584 of CPC and with consideration of Parts 6 and 7 of Arts. 199 and 584 of CPC.

**6. HSCU Letter “On Certain Issues of Implementation of Judicial Control of Compliance with Rights, Freedoms and Interests of Persons by Investigative Judge of Appeal in Criminal Proceedings” as of 29 January 2013 No.223158/0/4**

*Problems:*

- The recommendation concerning possibility to grant permission for covert investigative (search) actions with respect to “any other person” (not only the suspect) with reference to Part 1 Art. 253 of CPC and only to the need to obtain evidence in criminal proceedings (Item 4 of the Letter) fails to take into full account Items 4, 5, 7 of Part 2 Art. 248 of CPC which require that the request for such permission include information on the persons with respect to whom the action needs to be conducted, circumstances allowing for suspecting such persons of the crime and demonstration of the fact that the information cannot be obtained in any other manner. In view of these CPC provisions and requirements of Art. 8 of ECHR, it should be stressed here that such requests must include any exceptional or extraordinary grounds for that and demonstration of the link between such persons and/or the suspect, which would outweigh the right of such persons to privacy;

- The recommendation stating that the investigator’s/prosecutor’s request for permission to conduct covert investigative (search) actions should not include obligatorily all of the data listed in Part 2, Art. 248 of CPC (Item 5 of the letter) contravenes Part 2 Art. 248 of CPC. The wording is imperative;

-The recommendation to consider requests for implementation of various covert investigative (search) actions within the same proceedings (Item 6) is not based on CPC provisions either; in some cases it may negatively impact the effect of such actions;

- Paragraph 2 Item 6 recommends to the investigative judges that in parallel with granting permission for surveillance of a specific person they can decide to grant permission for surveillance of other individuals (not identified yet) with whom such person enters in contact during the surveillance. Such interpretation of this provision does not arise from its substance; it is extremely broad and may lead to abuses. Surveillance of such persons may be conducted without permission of the investigating judge during a limited period of time and only in exceptional urgent cases as provided by Part 1 art. 250 of CPC;

- The letter provides for too broad interpretation of the grounds and scope of granting permission for temporary access to the documents which are in possession of communication operators and providers, in particular, it has the recommendation to grant temporary access to all information with respect to all users who have been on the scene of crime at the respective time (paragraph 3 item 6) within the same single judicial decision. Such approach contravenes to the principle of legal certainty as a component of the rule of law which is immanent to ECHR;

- The recommendations (paragraph 5 item 7, items 11, 12, 13 of the letter) constitute an attempt to delimit the scope of the CPC (in particular, of Chapter 21) and of the Law of Ukraine “On Detective and Search Operations”; however, the simultaneous application of the CPC and of this Law creates legal uncertainty, which in practice may lead to abuses in this area of legal regulation so important for individuals’ rights and to violation of Art. 8 of ECHR (the requirement of interference with the private life in accordance with the law will not be met due to improper quality of the law).

## V. Parliamentary Legislation

Since the CPC came into effect, 22 bills have already been submitted to the Parliament with suggestions to change certain provisions of the Code; 19 of them were submitted by representatives of the opposition factions.

Significant number of the bills contains positive innovations. But many of these bills are aimed at complete revocation of the new Code or at cancellation of certain innovations (prosecutorial guidance of the investigation, implementation of covert actions by the investigator, automatic start of the investigations, video-conferences, etc.) instead of containing any constructive ideas. The full list of the bills includes:

**1. Draft Law on Amending Certain Legislative Acts of Ukraine (with respect to humanization of criminal legislation and organizational-legal prerequisites for introduction of probation service) No. 1198 as of 04.01.2013 p. Initiator: People's Deputy V. Shvets.**

This bill suggests introducing special reports on personal conditions of the suspect prepared by the probation service which is proposed to be established. This would facilitate the prosecutor's and court's choice of measures of restraint for such persons and of sanction for the convicts.

**2. Draft Law on Declaring the Criminal Procedure Code Invalid No. 1212 as of 08.01.2013. Initiator: People's Deputy S. Vlasenko.**

This bill was withdrawn on 19 March 2013.

**3. Draft Law on Amending Certain Legislative Acts of Ukraine with respect to introduction of criminal-legal measures to be applied to legal persons No. 2032 as of 17.01.2013 p. Initiator: Cabinet of Ministers of Ukraine**

Following example of many European countries, the government suggested applying criminal sanctions to the legal persons (fines, prohibition to engage in certain activities and to participate in tenders) for commission of unlawful acts by their representatives: managers, employees, etc.

These provisions were introduced to the new CPC by another Law of Ukraine "On Amending Certain Legislative Acts of Ukraine with respect to Execution of Action Plan for Liberalization of Visas by European Union for Ukraine concerning Liability of Legal Persons" as of 23 May 2013.

**4. Draft Law on Amending Certain Legislative Acts of Ukraine (with respect to ensuring real openness of justice) No. 2078 as of 23.01.2013 p. Initiator: People's Deputy A. Hrytsenko.**

The bill author suggested allowing to any person to record the course of judicial hearings with special technical means (photo, video, TV and radio broadcast) without obtaining permission of the court or of other participants to the proceedings.

In our view, to implement the principle of transparency and openness of the proceedings, the available opportunities for those present to make trial transcripts, to take notes and to use portable audio recording devices are sufficient (Part 6 Art. 27 of CPC).

**5. Draft Law on Amending Criminal Procedure Code of Ukraine (with respect to inadmissibility of personal judgments and hearsay as evidence) No. 2112 as of 28.01.2013 Initiator: People's Deputy H. Moskal.**

Hearsay is a new type of evidence for our system. This evidence is immanent to the adversarial criminal proceedings of the case law system where any statements have to be obtained by the court directly (instead of reading minutes of interrogations).

Implementation of the principle of adversarial proceedings and direct examination of evidence by the court in the new CPC implies borrowing this type of evidence for our law. Otherwise we would face situations when the court would ignore statements of an eye witness (for instance, of a doctor who was next to the victim before his/her death and has learnt about the circumstances of the crime directly from such victim).



**6. Draft Law on Amending certain Legislative Acts concerning Renewal of Functions of Supreme Court of Ukraine No. 2203 as of 06.02.2013 p. Initiator: – People’s Deputy Yu. Odarchenko.**

The bill suggests returning to the Supreme Court its powers for cassation review of criminal cases, which have been taken away from it since 2010. Also, the bill contains provisions on elimination of the procedure when the cassation courts assess admissibility of the applications for the Supreme Court.

On the other hand, if such powers are returned to the SCU there will be continuous problems with double cassation review of judgments.

**7. Draft Law on Amending Certain Legislative Acts of Ukraine (concerning Bringing the Criminal Procedure Code of Ukraine and other Legislative Acts of Ukraine in Compliance with European Standards of Criminal Justice) No. 2270 as of 11.02.2013 p. Initiators: People’s Deputies A. Yatsenyuk, P. Petrenko.**

**8. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning Guarantees of Constitutional Rights of Participants to Criminal Proceedings) No. 2399a as of 21.06.2013 p. Initiators: People’s Deputies A. Yatsenyuk, P. Petrenko.**

Harmonization of the CPC with European standards suggested by the bills is quite far away from the goal. For instance, rejection of automatic start of pre-trial investigation, prosecutorial procedural guidance of the investigation and recognition of the investigator as an independent procedural actor do not meet legal requirements of most European states.

A positive novelty of these bills is the suggestion to implement the classic jury trial where the panel of the people’s representatives decides on their own whether the defendant is (not) guilty while the professional judge’s function is limited to sentencing (if the individual has been found guilty).

**9. Draft Law on Amending Criminal Procedure Code of Ukraine concerning Cancellation of Video Conferences No. 2305 as of 15.02.2013 p. Initiator: People’s Deputy H. Moskal.**

The reason for this bill to be proposed was the use of video-communications in one of the trials against Yuriy Lutsenko.

In the meantime, Part 2 Art. 232 of CPC provides that any remote proceedings by means of video-conferences may be conducted only if the suspect has no objections against it. Moreover, the intensive use of video-conferences will promote significant savings of the public funds and reduced terms of proceedings. In addition, this initiative looks like an attempt to slow down the technological progress.

**10. Draft Law on Amending Certain Legislative Acts of Ukraine with regard to Establishment of the Fact of Death of a Person No. 2361 as of 21.02.2013 p. Initiators: People’s Deputies I. Spirina, M. Herasymchuk**

The amendments to CPC suggested by the drafters deal with the matters which are not subject to regulation by this Code (establishment of the fact of the death of a person). This bill appears to be a reaction to the problems of having access to corpses during the first weeks after the Code became effective. But this issue has already been regulated by the Procedure of Interaction between the Units of Internal Affairs, Institutions of Health Care and Prosecutor’s Offices of Ukraine for purposes of establishment of the fact of death of a person; the Procedure was approved jointly by the Ministry of Health, Office of Prosecutor General of Ukraine and Ministry of Internal Affairs on 28 November 2012.

**11. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning Integration of Cases into Single Proceedings) No. 2393 as of 26.02.2013 p. Initiator: – People’s Deputy T. Sliuz.**

This bill is inconsistent with the Code’s Transitional Provisions according to which the procedure of case consideration depends on when it was received by the Court: those received before 20 November 2012 shall be heard according to CPC as of 1960 and those received after 20 November 2012 shall be heard according to the new CPC.

**12. Draft Law on Amending the Criminal Procedure Code of Ukraine (with respect to Improvement of Implementation of Investigative (Search) Activities No. 2475 as of 06.03.2013 p. Initiator: People's Deputy H. Moskal.**

The bill provides for taking away from the investigators the powers to conduct covert investigative actions (wiretapping, surveillance, etc.) and granting such competences exclusively to the detective units.

However, such investigator's competences are characteristic of the European criminal proceedings models. Moreover, seven out of nine investigative actions of the kind require court permission, which has not been the case before as this kind of activities was closed for both the public and full-fledged judicial control.

**13. Draft Law on Termination of Certain Provisions of Criminal Procedure Code of Ukraine which regulate use of electronic monitoring devices No. 2482 as of 07.03.2013 p. Initiator: People's Deputy H. Moskal.**

The reason to draft this bill was the lack of sufficient funds to purchase the electronic monitoring devices to be used to monitor compliance with conditions of home arrest. However, the Order of Ministry of Internal Affairs of Ukraine provides that when such devices are unavailable the monitoring of compliance with the conditions of home arrest shall be implemented by the Militia officers guarding the residence of the respective arrested person. That is why there is no need to formally terminate the use of any available electronic devices. In addition, the bill fails to answer the main question: what to do with the effective court orders to use these devices?

**14. Draft Law on Complementing Criminal Procedure Code of Ukraine with Provisions concerning Use of Polygraph (Lie Detector) No. 2521 as of 12.03.2013 Initiator: People's Deputy H. Moskal.**

The bill suggests establishing whether an individual's statements are truthful by means of a lie detector. However, the implementation of this idea will lead to use of such detectors in every case; the individual's refusal to take part in this procedure will be recorded in the report (and, probably, the court will be notified of such refusal during the hearing) and the obtained data will be used and assessed in the court in a manner which is difficult to understand.

**15. Draft Law on amending Criminal Procedure Code of Ukraine (with Respect to Investigative Jurisdiction of Criminal Proceedings on Countering Legalization of Criminal Proceeds) No. 2253a as of 06.06.2013 p. Initiator: People's Deputy I. Stupak**

The suggestion is to increase the scope of the jurisdiction so that the Security Service of Ukraine can investigate the money laundering cases (Art. 209 of CCU). But this proposal fails to meet the requirements of Council of Europe, the Parliamentary Assembly of which urges the Member States to deprive the special services of the powers to conduct criminal investigations.

**16. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning Serving of a Copy of Search Report) No. 2504a as of 04.07.2013 p. Initiator: People's Deputy T. Sliuz.**

The adoption of the proposed bill will allow for reducing abuses by the investigators during searches and for protecting the rights of the individuals who are owners of the searched premises. Nowadays there have been more and more cases when, during a search, the investigators seize without any written record more items (things, money, etc.) than the investigating judge's ruling permits. As the result, the searched persons are left without any evidence of such abuse.

**17. Draft Law on Amending Art. 242 of Criminal Procedure Code of Ukraine (concerning Characterization of Individual Psychological Features of a Suspect or Defendant in Criminal Proceedings on Grave or Especially Grave Violent Crimes) No. 2615a as of 18.07.2013 Initiator: People's Deputy O. Fischiuk.**

The bill provides for compulsory forensic examination in all cases on grave and especially grave crimes. In addition to the fact that this would lead to excessive increase of the budget expenditures and delays in investigations the suggested forensic examination will have no effects for

sentencing purposes. This is because the mental condition of the suspect is conducted in every case when there are doubts concerning his/her sanity.

**18. Draft Law on Amending Criminal Procedure Code of Ukraine concerning Improvement of Proceedings Based on Newly Uncovered Circumstances No. 2914 as of 23.04.2013 p. Initiators: V. Karpuntsov, S. Romaniuk, O. Makhitskiy**

The bill suggests specifying the wording of the newly uncovered circumstances and extending the deadline for submittal of the respective application to 6 months. However, the suggestion to deem the adoption of the new law of procedure (of any amendments thereto) a reason for review of judgments fails to meet the principles of the new law of procedure.

**19. Draft Law on Amending Criminal Procedure Code of Ukraine and Law of Ukraine “On Judicial System and Status of Judges” with regard to the Jury Trial No. 2982 as of 14.05.2013 Initiator: People’s Deputy H. Moskal.**

The drafter suggests implementing the full-fledged jury trial in the criminal cases. However, the quantity of cases subject to consideration by a jury creates well-grounded doubts as to whether it would be possible to implement such system in a moment. Thus, cases on grave crimes will be considered by 12 jurors while those on especially grave crimes, by 24 jurors. Besides, we object to the idea to form juries with the courts of appeal. This will violate the principles of division of the judicial system into instances.

**20. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning the Course of Interrogation) No. 3037 as of 29.07.2013 Initiator: – People’s Deputy T. Sliuz.**

The bill provides for conducting interrogations with compulsory recording (audio or video). Now this matter is within discretionary powers of the investigator. Still, other participants to the proceedings have the right to request recording of any investigative action (not only the interrogation) and this request must be satisfied (Part 1 Art. 107 of CPC).

**21. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning Confirmation of Legal Counsel’s Powers) No. 3131 as of 28.08.2013 Initiators: People’s Deputies V. Holovko, A. Avakov.**

The bill initiators suggest submitting either the order or the contract with the suspect to confirm the legal counsel’s powers. Now the compulsory requirement is to submit both the order and the contract.

**22. Draft Law on Amending Criminal Procedure Code of Ukraine (concerning Improvement of certain Provisions) No. 3168 as of 03.09.2013 Initiators: People’s Deputies V. Holovko, A Avakov.**

The bill suggests to grant more procedural rights to the victim, change the procedure of returning the indictment to the prosecutor and the procedure of preparatory proceedings.

At the same time, the proposed novelties deprive the suspects of an opportunity to achieve a change of the measure of restraint (for instance, detention) if the case is returned to the prosecutors to correct any errors. Besides, according to the bill, during the preparatory proceedings the measures of restraint will be decided in the judge’s office and not in the court hearing.

## **VI. Opinion of the Media**

The media space analysis shows that the prevailing nature of the reports and comments concerning the new CPC is negative, although journalists have tried to maintain the balance and to present differing opinions when developing their reports and broadcasts.

The situation becomes even more complicated due to the fact that most of the messages concerning CPC are formulated by the Government, which a) does it with certain lack of professionalism; b) is not too popular with the majority of the public. In the meantime, the opposition

representatives criticize the new CPC even without any attempts to analyze it, using instead the attitude “*whatever this criminal government has done is bad*”. Besides, traditionally it is done without taking into account positive outcomes of two expert assessments conducted by the Council of Europe in 2007 and 2011.

This politicized discourse ignores the fact that the draft CPC was offered for public discussion yet by the Government headed by Yulia Tymoshenko in October of 2009. The new Government just finalized the process of preparation and adoption of the new Code.

Such polarity of opinions leads to the situation when various myths concerning the Code are disseminated in the information space. Let’s take a look at them in more detailed way.

**Myth Number One. “You will not get the corpse without a certificate from the Prosecutor’s Office”<sup>7</sup>.**

The claim is that this procedure used to be based on the provisions of Part 4 Art. 238 of CPC which provide that the prosecutor’s permission to release to corpse can be granted only after the forensic examination and establishment of the cause of the death. In reality the aforementioned Article concerns the investigative action called “examination of a corpse” whilst any investigative action including such examination is not possible without entering information to the Register of Pre-Trial Investigations. This means that unless a relative’s or another witness’ application on finding the corpse having signs of violent death has been submitted such corpse is subject to the examination according to the procedure which is different from the one mentioned in CPC.

**Myth Number Two. “Anonymous applications about commission of a crime are admissible”<sup>8</sup>.**

In reality the new CPC excludes any anonymous applications about the facts of crimes. This is because Item 2 Part 5 Art. 214 reads explicitly that the data to be entered in the Single State Register of Pre-Trial Investigations shall include “last name, first name and patronymic (name) of the victim or applicant”. If the investigator or prosecutor does not have this information, criminal proceedings and any investigative actions cannot start.

**Myth Number Three. “Everybody is supposed to always have his/her passport or any other ID on him/her”<sup>9</sup>.**

The Code does not provide for such obligation. On the contrary, the detective units are subject to significant restrictions with respect to their powers to apprehend individuals. From now on, the time of the apprehension is deemed to be the time when such apprehension has physically taken place and not the time when respective report has been issued (art. 209 of CPC).

The apprehended person is supposed to be notified and explained concerning all his/her rights according to Part 8 Art. 209 and to be given an opportunity to immediately inform his/her relatives on the fact of his/her apprehension. In addition, the term of detention without a court decision has been reduced: now the term to notify the individual on suspicions is 24 hours instead of the 72, which was the case before. If the individual has not been served the official notice of suspicion within 24 hours from the moment of such individual’s actual apprehension such person shall be immediately released.

In case when the notice of suspicion has been served on time but has not been delivered to the court within 60 hours from the moment of the actual apprehension the individual shall be released, too. Otherwise a respective request needs to be submitted to the investigating judge.

**Myth Number Four. “Search can be conducted without a court’s permission”<sup>10</sup>.**

In reality, CPC provisions require that any search should be conducted on the basis of a ruling of an investigating judge (Part 2 Art. 234).

<sup>7</sup> <http://tyzhden.ua/News/65198>

<sup>8</sup> <http://www.unn.com.ua/uk/news/1032224-noviy-kpk-peredbachae-rozglyad-anonimnih-zayav---gpu>

<sup>9</sup> <http://zik.ua/ua/news/2012/11/19/379557>

<sup>10</sup> <http://www.kommersant.ua/doc/2088935>

The only exceptions are the cases contemplated separately by the Constitution of Ukraine (Part 3 Art. 30) with respect to entry into dwelling in connection with saving people or property and also with direct pursuit of suspects (Part 3 Art. 233 of the Code). This exception is justified and acceptable for all legal systems. When the suspect is bursting into a dwelling or any other premises while being pursued the detectives should not suspend their operation to run to the court for obtaining permission. They should finish the operation by entering into the dwelling. But the permission for such entry still needs to be obtained post-factum. The court's refusal to grant such permission will mean that all obtained evidence is not admissible.

**Myth Number Five. "Special services will have more opportunities to control private life"<sup>11</sup>.**

De-facto, in comparison with the respective European experience, the Code has nothing extraordinary. On the contrary, 7 out of 9 measures require a court's permission, which was not the case before, because such activities were closed for both the public and the full-fledged judicial control.

Now, the following measures are subject to control by the investigating judge: audio and video surveillance of an individual; sequestration, examination and seizure of correspondence; wiretapping of information and electronic information systems; inspections of premises not accessible to the public and of dwelling; location of the place of a radio-electronic device; surveillance of a location, item or person; audio or video monitoring of a location. The court's permission is not required only for control of commission of a crime and special missions aimed at detection of criminal activities.

Besides, the aforementioned covert actions are acceptable only for proceedings concerning grave or especially grave crimes and not for any criminal proceedings.

**Myth Number Six. "Legal counsels have no rights in criminal proceedings"<sup>12</sup>.**

The Code of 1960 had a separate article 48 which contained a list of legal counsel's rights. The new CPC, instead of establishing a separate list of legal counsel's rights, derives them from the rights of a suspect or defendant (Part 4 Art. 46). This novelty is implied by the fact that the suspect may choose to defend himself/herself without legal aid making use of eighteen procedural rights guaranteed by Part 3 Art. 42 or to invite a legal counsel for such purpose. In the latter case the legal counsel will implement the rights granted to the suspect.

Moreover, the defense has obtained extremely broad opportunities in the new criminal proceedings. It has no right to implement only those actions which are objectively immanent to the prosecution: to detain persons, to request for measures of restraint, to conduct covert investigative actions, etc.

Besides, the lack of a specific list of legal counsel's powers in CPC is implied by the need to unify the proceedings. The civil, commercial and administrative justice systems (Arts. 44 of Code of Civil Procedure, 26 of Code of Commercial Procedure and 59 of Code of Administrative Justice) have similar provisions stating that the representatives implement the powers owned by the persons whom they represent. And this has never become a reason for legal counsel's to claim that they do not have rights in the respective proceedings.

In addition, the defense has been granted the following new opportunities in the criminal proceedings:

- To request for subpoena of a person for purposes of his/her examination (Chapter 11);
- To request before a judge access to items and documents in possession of other persons (Chapter 15);
- To request before a judge examination of the witness who has become a victim during the pre-trial investigation (Art. 225). This right of the defense is, at the same time, the response to unfair comment that the witnesses cannot be examined by the defense;

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<sup>11</sup> <http://www.kommersant.ua/doc/2088935>

<sup>12</sup> <http://tyzhden.ua/Politics/47159>

- To invite, at its own initiative, experts or to request before the investigating judge forensic examination (Arts. 243, 244).

The availability of the aforementioned measures to the defense have nothing to do with the opinion of the investigator or prosecutor because the respective motions of the defense are filed with the court and are supposed to be examined by it.

**Myth Number Seven. “Parallel effectiveness of the two Codes of 1960 and of 2012 is a sign of legal illiteracy of the drafters”<sup>13</sup>.**

The situation when both Codes of Procedure remain valid in parallel is quite unique for the independent Ukraine. But this situation is due to the drastic nature of the proposed changes, especially as far as the rules of evidence are concerned.

The examples are the provisions on the need to make statements only to the court, on compulsory participation of the legal counsel in implementation of the investigative actions, etc. If we imagine that starting from 20 November the CPC of 1960 has become ineffective, then it would not be possible to deliver a sentence in any of the cases. Hence, the public interests which are extremely important for the criminal proceedings would not have been protected in such case.

**Myth Number Eight. “Elimination of the institution of initiation of criminal case is a step backwards”<sup>14</sup>.**

The history shows that the formal action marking the beginning of an investigation appeared in the USSR in the thirties and remains in place in SIC countries only. However, such institution did not prevent repression against millions of our compatriots during Stalin’s times. On the contrary, the developed democracies (Western Europe) have never had such institution while the young democracies (Eastern Europe) have rejected it during the last decades.

In addition, the new CPC includes the mechanism ensuring that any restrictions of human rights (whether individual or proprietary) can take place on the basis of a court’s permission only. Before, the investigator used to issue a formal order to initiate a criminal case in his/her office thus obtaining a formal *carte blanche* to restrict most of the individuals’ rights for long periods of time.

**Myth Number Nine. “According to the new CPC, any items and documents seized during an unlawful search cannot be returned”<sup>15</sup>.**

This opinion is based on the wrong assumption that the new CPC does not provide for the respective procedure nor does it contemplate liability of the officers.

In reality, Part 7 Art. 236 of the Code establishes that any items seized during the search, if the seizure thereof has not been previously permitted by a court, are deemed temporarily seized property (the legal status of such property is defined by Chapter 16). The prosecution is under the obligation to immediately request sequestration of such property before a court or to return it. If the prosecution fails to comply with this requirement such omission should be appealed on the basis of Item 1 Part 1 Art. 303.

As far as the liability is concerned, it is not and cannot be regulated by CPC. The liability of officers if contemplated by the Criminal Code of Ukraine, Code of Ukraine on Administrative Offenses and by the laws determining grounds for disciplinary liability, etc.

**Myth Number Ten. “The prosecution will engage its “pocket” legal counsels to conduct certain investigative measures”<sup>16</sup>.**

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<sup>13</sup> <http://www.unian.ua/news/537033-ekspert-te-scho-u-krajini-diyut-dva-kpk-tse-pravove-neviglastvo.html>

<sup>14</sup> [http://gazeta.ua/articles/politics/\\_deyaki-normi-novogo-kpk-porushuyut-prava-lyudini-bilshe-nizh-pri-srsr-advokat/446407](http://gazeta.ua/articles/politics/_deyaki-normi-novogo-kpk-porushuyut-prava-lyudini-bilshe-nizh-pri-srsr-advokat/446407)

<sup>15</sup> <http://www.pravda.com.ua/articles/2013/01/22/6981952/>

<sup>16</sup> <http://www.pravda.com.ua/articles/2013/01/22/6981952/>

This opinion is based on the wrong assumption that CPC does not establish any time to notify in advance on implementation of an investigative action.

In reality, the analyzed Art. 53 “Involvement of Legal Counsel to Implement Specific Procedural Action” does not have such provisions.

However, Chapters 8 and 11 provide that any summons and notices are expected to take place, as a rule, not later than three days for the scheduled day. And only if the duly notified legal counsel has failed to appear for implementation of the procedural action, the prosecution or court are supposed to invite another legal counsel through the new system of free legal aid which has become operational from 1 January of the current year. It is expected to reduce significantly any opportunities for the prosecution to manipulate with choice of the legal counsels or to limit their role to the one of “extras”. This is because the specific legal counsel is selected by the coordinator at the center for legal aid and not by the investigator or prosecutor. The list of legal counsels has been prepared through the competitive selection process without participation of representatives of prosecutor’s office or investigation officers.

**Myth Number Eleven.** *“The right of the prosecution to bring additional charges during the trial is discrimination of the defense and return of the cancelled institution of additional investigation”<sup>17</sup>.*

An important safeguard against abuses of this mechanism by the prosecution is the provision of Part 1 Art. 339 requiring “tight linkage” between new charges and initial charges.

On the other hand, the defense is given additional time to prepare its stand with respect to any new charges.

**Myth Number Twelve.** *“The witnesses will be examined in the court during the pre-trial investigation by prosecution only”<sup>18</sup>.*

Art. 225 of the new CPC contains the institution of “depositing evidence by the court” which is new for Ukraine. According to this system, if there is a risk of disappearance of certain piece of evidence, it would be “deposited” with the court for its further use during the main trial. For instance, if there is a risk of death of a witness or victim such individuals will be examined right away with participation of a judge.

Both parties (prosecution and defense) have powers to request examination of a witness. And if the respective person survives till the main trial the court is under the obligation to obtain such person’s statements, this time with participation of the suspect, instead of just reproducing the record of the preliminary examination. This requirement is based on Part 1 Art. 23 of the Code.

Even if the aforementioned examined person does not survive till such moment, even in such case the defense will have a better position than it is now. This is because the new CPC requires that the recording of the examination conducted in compliance with the respective procedures be played instead of reading the examination report prepared in the investigator’s office under the circumstances unknown to anybody else.

**Myth Number Thirteen.** *“Hearsay is a new problem for criminal proceedings”<sup>19</sup>.*

This type of evidence has been in existence for a long time in the English-American legal system. The need to introduce it in Ukraine is implied by the introduction of the new rules of evidence in form of statements by individuals.

To prevent abuses of these rules, the Code provides for clear restrictions for this type of statements: they have to be defined by both parties to the proceedings (Part 4 Art. 97); they cannot be the only evidence (Part 6 Art. 97).

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<sup>17</sup> <http://www.pravda.com.ua/articles/2013/01/22/6981952/>

<sup>18</sup> <http://www.pravda.com.ua/articles/2013/01/22/6981952/>

<sup>19</sup> <http://gazeta.ua/articles/politics/ deyaki-normi-novogo-kpk-porushuyut-prava-lyudini-bilshe-nizh-pri-srsr-advokat/446407>

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More myths arise around the new CPC and the reasons for them are either an intentional desire to discredit the Code or insufficient competence of the experts who make such comments.

However, the real discussion should bring up other issues of the criminal justice reform. These are the need to take political pressure off the police, prosecutor's offices and the judiciary, to implement the classic jury trial, to cancel separate legislative regulation of detective and search activities, etc.



## VII. Conclusions

The analysis of implementation of the new CPC of Ukraine during the first eight months of the year 2013 leads to the following **conclusions**.

**1.** There is a firm trend toward humanization of the criminal justice.

This trend is manifested through increased share of acquittals, number of the persons released from liability, of home arrests and other alternative measures of restraint, and of concluded reconciliation agreements.

Besides, the number of persons held in remand, the number of detentions, searches, wiretappings and other covert methods that interfere with privacy is decreasing.

**2.** At the same time, the prosecution is still trying to impose unlawful restrictions on the rights of the defense. As a consequence, there is a threat to the person's right to defense, freedom and personal immunity, non-interference with one's privacy and inviolability of one's property.

**3.** The prosecutor's proper performance is hampered by the absence of the necessary changes in the structure of pre-trial investigation authorities and prosecutor's offices, which results in overwhelming workload for the investigators and in the lack of proper initiatives coming from the prosecutors as procedural managers of investigations.

**4.** A large number of explicit contradictions with the CPC requirements has been identified in 38 legislative acts adopted and amended after approval of the new CPC.

Similar problems have been identified in the six Information Letters of the High Specialized Court of Ukraine for Civil and Criminal Cases. These Information Letters are not legitimate due to their legal nature.

The aforementioned discrepancies lead to violations of human rights.

**5.** A number of draft laws registered at the Verkhovna Rada of Ukraine suggest to remove (cancel) many positive novelties of the CPC.

**6.** The media has mostly negative reports about the new CPC rather than giving advice to the public on how one can fully use all the opportunities granted by the Code to protect one's rights and interests.