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Ukrainian Law Enforcement Reform Digest

Digest is dedicated to the process of reform of law enforcement authorities in Ukraine, first of all of police, prosecution authorities, State Bureau of Investigation and criminal justice legislation. It is published with the aim to better inform the society, expert community and international institutions on the state of reforming mentioned authorities and spheres of their activity.

I. NATIONAL POLICE

System of law enforcement authorities in Ukraine undergoes a long transformation process from soviet system of internal affairs authorities directed at protection of state security to law enforcement agencies with European standards, which should be oriented on provision of services to population, public dialogue and human rights observance.

However, as of the beginning of 2017, changes occurring in police have a more non-systemic character as a result of the lack of detailed, step-by-step roadmap for conducting a reform elaborated in the form of one comprehensive document, and the very process of reforming is sometimes oriented on the interests of the institution itself rather than on the needs of people.

MolA regulated the use of photo and video imaging devices by the police

On February 8, the Order of the MoIA of Ukraine dated December 18, 2018 №1026 On Approving the Regulations on the Use of Technical Devices and Technical Means with the Functions of Photographic Imaging, Camera and Video Recording, the Means of Photographic Imaging, Camera and Video Recording by the Police Agencies and Branches became effective.

The Regulations define the procedure for using technical devices and means with the functions of automatic photographic imaging, camera and video recording by the police agencies and branches, the access of police officers and other persons to video records, the procedure of storing, giving and accepting technical devices and means, as well as storing, deleting and using the information obtained from these devices.

The period of storing video records is defined as follows:

1. from portable and dashboard cameras, installed in official cars – 30 days;
2. from the vehicle system or the permanently installed system, depending on technical characteristics – at least 30 days;
3. in permanently installed systems, used while selecting applicants for police service – 60 days;
4. while conducting the training sessions and drills for police officers – to be defined by the head of training department.

Therefore, a step has been made towards solving the problem of protecting personal data kept by the police, which is still the focus of the European experts' attention. Until present, there have been no by-laws to regulate the procedure of collecting, processing, storing personal data and giving the third parties access to it.

Order № 1026 of the MoIA on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/ri7apb>

From now on local police will report differently

Serhiy Knyazev, the Chief of the National Police, reported about two sociological surveys – external and internal ones, which were conducted at the end of 2018. About 25 thousand people from all the regions of the

country took part in the external survey about the work of the police. The management of the National Police will take decisions regarding changes in the approaches to police work based on the analysis of the survey results.

In addition, a decision, based on the survey results, has been taken to launch an experiment in the territory of one region. The National Police will also improve their communication with local communities. In particular, it will include a new form of police reporting directly to the citizens.

Among other things, this report will contain the information about the average police response time – within the city and within the district, separately. The police officers will also report about the total number of notifications, as well as notifications, received and processed within a specified period, for instance, within 10 seconds.

In addition, the report will contain the information about rewarding policemen and about bringing them to disciplinary liability. The community will also have the information about the problems with police personnel, its being undermanned, the load per one policeman, etc.

Information about a new form of police reporting: <https://goo.gl/E2EorJ>

II. PROSECUTOR'S OFFICE

Reform of prosecutorial bodies started only after the Revolution of Dignity, although it was one of the commitments to the Council of Europe from the times of accession to this organization and adoption of the Constitution of Ukraine. For a long time, prosecution preserved its centralized and militarized structure with absolute internal subordination of prosecutors to their line managers established back in the Soviet times.

Over the last three years, a new Law on Prosecution was adopted (2014), prosecution lost its general oversight function (2014), the General Inspectorate was created (2015), prosecutorial self-government bodies and the Qualification and Disciplinary Commission began their work (2017), and public prosecution offices were deprived of their powers to carry out pre-trial investigation of crimes (2017). At the same time, several initiatives were not completed, and no evaluation of overall reform efficiency was done.

Constitutional Court of Ukraine closes proceedings on a complaint regarding the unconstitutionality of some provisions of the Law of Ukraine On Prosecution

On February 13, the First Senate of the Constitutional Court of Ukraine adopted a ruling on closing the constitutional proceedings in the case upon a constitutional submission by Ihor Petryk concerning compliance with the Constitution of Ukraine (constitutionality) of provisions of Article 50, Section 10 of Article 78 of the Law of Ukraine On Prosecution.

The holder of the right to a constitutional submission believed that the contested provisions of the mentioned law limited his constitutional right to judicial appeal against the decisions, activity or inactivity of state and local authorities, officials and civil servants, as they deprived him of

“the possibility to exercise his right to protection from violations on the part of public bodies, namely, on the part of the Qualification and Disciplinary Commission of Prosecutors”.

In particular, the Grand Chamber of the Supreme Court expressed the following opinion in the final ruling regarding this case, “As for the right to appeal the resolutions on refusing to start disciplinary proceedings against a public prosecutor, the absence of regulatory activity in the national legislation regarding this provision is a reasonable restriction in the procedure of disciplinary liability of a public prosecutor, aimed at avoiding excessive burden on the judicial system on condition that the current legislation envisages specific procedures of protecting the rights and interests of the interested party.”

The Constitutional Court of Ukraine noted that the systemic analysis of the contested provisions of the Law of Ukraine On Prosecution gave grounds to assertions that the latter “regulate legal relations in terms of the public prosecutor and the person, who submitted a disciplinary complaint against the prosecutor’s disciplinary offense, submitting a complaint against the decision of the Qualification and Disciplinary Commission of Prosecutors, taken based on the results of the disciplinary proceedings, instead of the decision of the mentioned commission on refusing to start disciplinary proceedings”.

However, the Constitutional Court of Ukraine noted that in his constitutional submission Ihor Petryk had not presented sound arguments about the unconstitutionality of the contested legal provisions, and ruled on closing the constitutional proceedings due to inappropriateness of the submission.

Ruling of the Constitutional Court of Ukraine № 1-up(I)/2019 dated February 13, 2019: <https://goo.gl/YB12jE>

III. STATE BUREAU OF INVESTIGATION (SBI)

An important reform in law enforcement must be the creation of the State Bureau of Investigation – the main controller of all law enforcement officers, high-level officials and judges.

The State Bureau of Investigations is a pre-trial investigation body authorized to investigate crimes committed by politicians, members of Parliament, civil servants, judges, prosecutors, police officers and other staff members of law enforcement agencies.

Outcomes of the first months of the SBI work

The SBI investigators carry out 3,417 criminal proceedings. These proceedings have been registered or submitted according to the jurisdiction within the first two months of work of the State Bureau of Investigations.

“As of today, the SBI carries out pre-trial investigations in 3,417 proceedings. The investigators of Poltava and Kyiv local departments of the SBI carry out the most investigations: 703 and 624, respectively. There are 170 open proceedings in the central secretariat. 2,674 proceedings came from other authorities, 743 proceedings were launched by the SBI investigators”, Roman Truba, the SBI Director, said.

He also noted that 150 indictments have already been submitted to the court, 142 of them pertaining to military crimes, and the rest – to obtaining unlawful benefit, abuse of power, etc.

1,636 law enforcement representatives, 1,391 military servicemen, 66 judges, 3 members of the Parliament, and 25 category “A” officials are among the persons, against whom criminal proceedings have been initiated.

At the same time, Roman Truba highlighted that the highest number of criminal proceedings had been initiated against law enforcement

representatives – 503 proceedings pertain to exceeding the powers or authorities by an employee of a law enforcement body.

At the same time, the SBI Director noted that the SBI started investigating the crimes, which had practically never been investigated in Ukraine, namely,

- abuse of office, accompanied with violence or threat of violence, use of weapons or special devices, or painful actions, and actions humiliating personal dignity of the victim, with no signs of torture – 245 proceedings;
- torture – 14 proceedings.

More information – on the web site of the SBI:
<https://goo.gl/HDXmKa>

Beating of activists outside Podil district police station in Kyiv: a strong challenge for the SBI

The investigators of the SBI central office initiated the investigation on alleged abuse of power by the employees of the National Police. On February 9, 2019 during a clash outside the Podil district police station in Kyiv, the policemen caused bodily harm to the activists of the “Who Ordered the Murder of Katya Handzyuk” initiative.

The data about the fact of a criminal offense, committed by the policemen under section 2 of Article 365 of the Criminal Code of Ukraine (abuse of power or authorities by an employee of a law enforcement agency, which was aggravated with violence), were introduced into the Unified register of pre-trial investigations.

Since this is one of the first high-profile cases of policemen exceeding their authorities, the SBI has attracted attention of the society and there are high expectations for the investigation of this crime.

IV. CRIMINAL JUSTICE

There is still a problem with harmonization and approximation of criminal and criminal procedural legislation with the European standards. Since adoption of the CPC in 2012, this law has been going through chaotic and unsystematic changes (such as Lozovyi's amendment), which necessitates systematization of changes. Both amendments to the CPC of Ukraine and the CC of Ukraine have a strong impact on fighting corruption that today is one of the largest challenges faced by Law Enforcement agencies. More specifically, introducing misdemeanors influences efficiency of activities of the criminal justice bodies in general, more specifically – workload of investigative and operative units, efficiency of the criminal law, and adherence to the principle of inevitability of punishment. It should be mentioned that draft of law №7279-d on criminal misdemeanors has gone through first reading in Verkhovna Rada. Also there has been currently working group established under the Committee for the Legislative Support of the Law Enforcement of the Verkhovna Rada conducting comprehensive review of the CPC and developing systematic amendments of the Code.

The legislator strengthens responsibility for domestic violence and sexual crimes

On January 11, the Law of Ukraine № 2227-VIII dated December 6, 2017 *On Amending the Criminal and Criminal Procedure Codes of Ukraine with the Purpose of Implementing the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence as well as Combating Such Manifestations* came in force.

According to the provisions of this Law, criminal responsibility is envisaged for committing the mentioned crimes. For instance, willful systematic physical, psychological or economic

violence against a spouse or a former spouse or another person, with whom the guilty person has (had) marital relations, is subject to arrest for the period of up to six months, or restraint on liberty for up to five years, or imprisonment for up to two years. Such legal consequences arise in case if the offender's actions have led to physical or psychological suffering, health disorder, loss of productivity, neediness or deterioration of life quality of the victim.

As for the fourth form of domestic violence, specified in the Law of Ukraine *On Preventing and Combating Domestic Violence* – sexual violence – it is defined by other articles of the Criminal Code of Ukraine (if applicable). In particular, such actions are qualified by investigators as crimes against sexual freedom and sexual immunity of a person.

At the same time, the General Conditions of the Criminal Code of Ukraine were supplemented with a new section "Restrictive Measures". It contains Article 91-1 "Restrictive measures to be applied to persons who have committed domestic violence".

According to this Article, along with imposing punishment, not related to imprisonment, the court may apply one or several restrictive measures to a person who has committed domestic violence. These are applied in the interests of a person who has suffered from a crime, related to domestic violence.

For instance, an abuser may be prohibited the presence in the place of co-residence with the victim of domestic violence and restricted in the communication with a child if domestic violence has been committed against a child or in his/her presence, etc.

The law envisages criminal liability for non-compliance of the abuser with the restrictive measures. For instance, Article 390-1 of the Criminal Code of Ukraine envisages the liability for non-compliance with restrictive measures, restrictive regulations or non-compliance with

the program for abusers. The sanctions of the Article envisage punishment by arrest for up to six months or restraint on liberty for up to two years.

Harsher punishment is also envisaged for sexual crimes. Article 134 of the Criminal Code of Ukraine (Illegal performance of abortion or sterilization) has been revised. The current article envisages criminal liability for performing abortion by a person without specialized medical education. The punishment for this crime is a fine in the amount of fifty to one hundred basic income amounts of citizens or public works for a term of one hundred to two hundred and forty hours, or correctional labor for a term of up to two years.

In addition, forced abortion without a voluntary consent of the victim is punishable by restraint on liberty for a term of up to five years or imprisonment for a term of up to three years with debarring from holding some offices or involvement in some kinds of activity for a term of up to three years, or without the latter punishment.

At the same time, the Law envisages some amendments to Article 152 (Forceful Rape) of the Criminal Code. In particular, this article envisages criminal liability for sexual assault – without a voluntary consent of the victim. Pursuant to Note to Article 152, the consent is deemed to be mutual, if it results from free act and deed of the person with the consideration of attending circumstances. At the same time, the legislator has envisaged harsher punishment for collective and repeated rape.

The Law № 2227-VIII on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/AwqwnN>

Liability for bullying is established in Ukraine

On January 19, the Law of Ukraine № 2657-VIII dated December 18, 2018 On Amendments to Certain Legislative Acts of Ukraine on Counteracting Bullying (Harassment) came in force.

According to this Law, bullying/harassment is

viewed as actions, which include psychological, physical, economic, and sexual violence, including using electronic communication devices, against a minor or underage person or by such a person in relation to other participants of the educational process, as a result of which mental or physical harm could be or was inflicted to the victim's health.

The Law of Ukraine On Education describes the following typical signs of bullying (harassment): systematic nature (repetition frequency) of the action; presence of parties – abuser (bully), wronged individual (victim of bullying), observers (if available); the abuser's actions or failure to act which result in inflicting mental and/or physical harm, humiliation, fear, anxiety, submitting the victim's interests to those of the abuser and/or social isolation of the victim.

The rights and responsibilities of participants of the educational process have been extended to counteract bullying. For instance, the founding principal of the educational institution should provide psychological and educational services to bullies or persons, who have become witnesses or victims of bullying.

The Law № 2657-VIII on the web site of the Verkhovna Rada of Ukraine: <https://goo.gl/4vvvKQ>

Constitutional Court of Ukraine recognizes illicit enrichment as corpus delicti unconstitutional

On February 26, the Constitutional Court of Ukraine adopted a decision in the case upon a constitutional submission of 59 members of the Parliament of Ukraine concerning compliance with the Constitution of Ukraine (constitutionality) of Article 368-2 of the Criminal Code of Ukraine.

In this decision, the Court recognized Article 368-2 of the Criminal Code of Ukraine as non-compliant with the Constitution of Ukraine (as unconstitutional).

The Constitutional Court also highlighted in this ruling that corruption counteraction should be carried out using solely legal measures in compliance with constitutional principles and

provisions of the legislation, adopted according to the Constitution of Ukraine.

The Constitutional Court believes that compliance with the requirement of transparency and unambiguousness of the norms, which envisage criminal liability, is especially relevant due to the specifics of the criminal legislation and consequences for holding criminally liable, since the latter is related to possible considerable restraints on human rights and freedoms. For instance, Article 368-2 of the Code envisages, among other things, the application of such type of punishment as restraint on freedom for a certain period of time. In addition, such preventive measures as, for instance, house arrest and detention, which are related to restraint on freedom, may be applied to persons, suspected or accused of committing a crime, envisaged by the mentioned article of the Code.

The ruling of the Court runs as follows, “The Constitutional Court of Ukraine has come to the conclusion that Article 368-2 of the Code does not meet the requirements to precision, accuracy and univocity, and thus is contradictory to legal certainty as a constituent of the principle of rule of law, set in Article 8 of the Constitution of Ukraine.”

The Constitutional Court of Ukraine specified in this ruling that Article 368-2 of the Code is not in agreement with the constitutional principle of the assumption of innocence (sections one, two and three of Article 62 of the Constitution of Ukraine) and with the constitutional regulation of inadmissibility of holding a person liable for the refusal to testify or provide explanations against oneself, one’s family members or close relatives (the right of a person not to testify or provide explanations against oneself, one’s family members or close relatives) (section one of Article 63 of the Constitution of Ukraine).

In return, the leading non-governmental organizations highlighted the absence of any legal reasons to consider the article on illicit enrichment to be unconstitutional and to infringe the assumption of innocence.

They believe the statement that the article on a crime of illicit enrichment makes a person prove his/her innocence to be inconsistent with

the reality. The burden of proving the crime of illicit enrichment lies on the prosecution. For instance, to qualify an offense pursuant to Article 368-2 of the Criminal Code of Ukraine, the prosecution must prove the presence of all the elements of the corresponding corpus delicti. Moreover, all the doubts regarding the provability of the person’s guilt by the prosecution must be interpreted in favor of the mentioned person.

At the same time, even if the provisions of Article 368-2 of the Criminal Code of Ukraine restricted the action of the principle of assumption of innocence, it should not have impeded criminalization of illicit enrichment and holding the persons, who have enriched in an illicit manner, criminally liable.

The practice of the European Court of Human Rights (the ruling in the *Salabiaku vs France* case) proves that if relevant public interests are at stake, and the person’s right to protection is ensured, criminal law allows reasonable and proportional assumption regarding some facts or rights.

They remind that revision of Article 368-2 of the Criminal Code on the liability for illicit enrichment is in compliance with the UN Convention against corruption which was ratified by Ukraine in 2006.

Decision of the Constitutional Court of Ukraine № 1-r/2019 dated February 26, 2019: <https://goo.gl/Tm7UhX>

Separate opinion of Judge V.P. Kolisnyk (Judge-Rapporteur in the case): <https://goo.gl/3mZtqu>

Dissenting opinion of Judge S.P. Holovaty:yi: <https://goo.gl/TpfxnK>

Separate opinion of Judge O.O. Pervomaiskiy: <https://goo.gl/SjXEaQ>

Separate opinion of Judge V.V. Lemak: <https://goo.gl/3MqZh2>

Separate opinion of Judge V.V. Gorodovenko: <https://goo.gl/hnvKNX>

Separate opinion of Judge S.V. Shevchuk: <https://goo.gl/KkCuVv>

Separate opinion of Judge I.D. Slidenko: <https://goo.gl/sNmwyE>

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Association of Ukrainian human rights monitors on Law Enforcement (Association UMDPL) – non-governmental human rights organization implementing systemic all-Ukrainian monitoring of human rights and fundamental freedoms on law enforcement agencies activity.

Activities (programms):

- Expertise and Analytics programm;
- Development of civic control;
- Education;
- Penitentiary programm.

More about organization and results of work – www.umdpl.info/police-experts

Centre of Policy and Legal Reform (CPLR) – is a Ukrainian think-tank that promotes reform in the law and politics of Ukraine. The organization has its general goals the strengthening of democracy, the rule of law and good governance in our country. The Centre was established in 1996.

CPLR works through research, policy advising, monitoring of public decision making and via civic education. The work of CPLR is focused on the following policy areas: constitutionalism, public administration, judiciary, and criminal justice. The issues of human rights, combating corruption and gradual adaption of the Ukrainian legal system to the standards of the European Union are cross-cutting themes throughout all policy areas.

More about organization and results of work – <http://pravo.org.ua/en>

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