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Judicial supervision on the stage of inquest

Abstract: It is considered the issues of carrying out a judicial supervision on the stage of inquest; it is analyzed the provisions of the CPC, given suggestions to change and supplement the criminal-procedural legislation.

It is noted incompliance of the provisions of the CPC in part of judicial supervision to the requirement of the Constitution.

Keywords: inquiry; judicial supervision; initiation of criminal case; subject; Constitution.

An idea of combination of various form of the control (supervision) – prosecutor's, departmental and judicial has a wider recognition in the post-soviet area including Azerbaijan. These forms supplementing and insuring each other have guaranteed not only successful production on a case, but a protection of the rights and freedoms of the citizens, involving in sphere of criminal proceedings.

Judicial control is destined for defence of personal interests (legal interest of the participants of a process in pre-trial stages) from violation from the bodies of investigation and prosecutor's office, to eliminate having in practices of investigation the violations of the law that is corresponded to the public interest. On expression of D.N. Kozak, the expansion of powers of the court are allowed refusing from prosecutor's model and go over to the judicial model of the control for restriction of the freedom and personal integrity of an individual who is persecuted in criminal order (3, p. 14).

The main function of the prosecutor in pre-trial stages of criminal proceeding

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is the function of supervision for legality of the crimes investigation then a judicial control is destined for a defence of the rights and freedoms of the citizens in pre-trial production.

Introduction of a judicial control over the preliminary investigation became a reason of appearance a number of theoretical and practical discussions. A lawmaker dedicated of the judicial control whole Chapter LII of the CPC.

The general provisions on performance of the judicial control are in the article 442 of the CPC: in a frame of its powers the judicial control carries out an appropriate court of the first instance on a place of forced executing of investigative actions, application of a measure of procedural coercion or implementation of the operative-searching action. In order of implementation of the judicial supervision the court examines: petitions and statement on forced performance of the investigative actions, application of the measures of procedural coercion or carrying out of the operative-searching measures in connection with information about restriction of the right of each to freedom, inviolability of the home, personal integrity, personal privacy (including family privacy, secrets of the correspondence, telephone conversations, postal, telegraph and other communications), and also on information having state, professional or commercial secrets; complaints on procedural actions or resolutions of a body carrying out criminal process.

One of the main forms of performance of the judicial control is appeal to a court of the procedural actions or resolutions of a body carrying out criminal process. According to article 449 of the CPC, to a court carrying out the judicial control might be appealed the procedural actions or resolutions of the following persons of a body carrying out criminal process: an inquirer (a person executing his powers); a person carrying out detention or keeping of a detained in custody; a person carrying out the operative-searching activity; an investigator; prosecutor carrying out the procedural leadership by the preliminary investigation. According to this article, an accused (suspected) and his defender; a victim and his legal representative; other persons, the rights and freedoms of which are violated due to acceptance of a resolution or action have the right to appeal to a court the procedural actions or resolutions of a body carrying out criminal process in connection with the following: refusal in acceptance

of an application about crime; detention and keeping under arrest; violation the rights of detained; using of torture or other ill-treatment with a person kept in custody; refusal in initiation of criminal case, suspending of the production on criminal case or stopping of a case of production; forced performance of an investigative action, application of a measure of procedural coercion or implementation of the operative-searching measure without resolution of the court; removal of a defender of accused (suspected) from criminal process.

We believe that in considered article the inaccuracies were made by a lawmaker. First of all, it appears a question, why stipulated in the article persons may appeal in a court only procedural actions or resolutions. A lawmaker did not take into account that the bodies of preliminary investigation enable to violate the rights of the participants of a criminal process due to inactions also. One unable not to consider that in the second part of the article 60 of the Constitution of Azerbaijan Republic is written that everyone may appeal in a court the decisions and actions (inactions) of the state bodies, political parties, professional unions, and other public associations and officials. Therefore, it may be concluded that considered norm of the CPC does not correspond to the main law of the state.

Consequently, we consider it necessary to supplement the article 449.3 of the CPC with provision about "inaction" of the bodies carrying out criminal process.

As it seen, in article 449.1 of the CPC a lawmaker has definitely limited a circle of the persons, resolutions and procedural actions of which might be appealed in a court. We believe that this limitation is wrong. Obviously, that during production on a criminal prosecution is appeared a big number of various procedural relations. So, the article 84.8 of the CPC stipulates that a prosecutor, carrying out a procedural leadership by the preliminary investigation, is obliged to follow of the instructions of a superior prosecutor. In addition, the superior prosecutor has the powers in cases stipulated in article 218 of the CPC to prolong the terms of a preliminary investigation. Accordingly the instructions of a prosecutor might be also appealed by the participants of a criminal process. Considering above said, one may suppose that the participants of a process might be addressed to the court with complaints as on a

resolution of a prosecutor carrying out procedural leadership so and the superior prosecutor.

Therefore, it would be reasonable that a lawmaker does not determine of an exhaustive circle of the persons carrying out a criminal process whose decisions and instructions would be appealed in a court.

This restriction should not be touched the persons who have the right to institute a procedure of a court inspection (art. 449.2 of the CPC) and the list of procedural acts, actions or inactions (art. 449.3 of the CPC).

An absence in article 449.2 of the CPC in the list of the persons having the right to appeal actions of the bodies of preliminary investigation and prosecutor an individual committed a deed gives the ground to assert that in this form of preliminary investigation an appeal to a court and performance of a judicial control is not foreseen by a lawmaker.

Such restrictions are related by a lawmaker to a circle of procedural actions and decisions, which might be appealed in a court. In this case a position of the lawmaker is not clear due to an exclusion of the article 449.3.8 of the CPC, in which stipulated other cases allowing to the participants of a preliminary investigation to appeal to a court. For example, why one cannot be appealed such procedural decisions as decision on initiation of a criminal case or appointment of an expert examination etc. Necessity introduction of the norm on appeal of a decision about refusal in initiation of a criminal case will be considered below.

Thus, the legal orders, formulated in the norms of article 449 of the CPC, are not spread all over the issues linked with the complaints on actions of the inquirers, investigators and prosecutors. They do not allow to the interested citizens full and efficiently realizing their interests with public procedural bodies

Resuming above said, we think more right to supplement article 449 of the CPC so that in it the first, on demand on the interested persons any procedural act of the pre-trial stage would be subjected to a judicial supervision; the second, the right to appeal should be possessed each citizen whose constitutional right is violated by the criminal-procedural actions or decisions, but not only the participants of criminal proceedings.

Principally new is looked a position of a lawmaker as to possible judicial protection those public interests, which cannot be transformed into criminal-procedural relations due to counteraction from side of law enforcement bodies. The lawmaker has foreseen in article 449.3.1 of the CPC a possibility of the judicial appeal of a decision on refusal to accept a statement about crime, putting under the judicial control those public relations, which had regulated earlier with the departmental acts or had been a subject of a prosecutor's control.

According to N.N. Kovtun, a complainant is enough to prove to a court the fact addressing to a proper law enforcement bodies with application on a crime in order the court to make a decision on its consideration by the appropriate bodies; registration in compliance with established procedural order (4, p. 197). But, considering modern realities, it is difficult to the citizens to prove a fact of refusal to accept an application on a crime since the employees of law enforcement bodies can be brought to disciplinary responsibility in case of proven their guilt.

More wide spread form of the judicial control over the bodies of preliminary investigations is the checking by the court of the reasonableness of acceptance by the inquirers the decisions on refusal in initiation of a criminal case or stopping of it. Both of the decisions are the juridical facts, which create obstacles of a resumption of this production in further without repeal of the above named procedural decisions, which are fixed in the articles 39.1.6 and 39.1.7 of the CPC. Accordingly, in dependence on rehabilitating or non- rehabilitating grounds the stopping of a case or refusal in it initiation, a court is obliged to check as the formal observance of the norms, so and evidence of the system of conditions doing such decision substantiated. Wherein, it does not call the doubts the an object and bounds of control of the court will be different for each of the grounds, stipulated in the articles 39 and 40 of the CPC as it is objectively differ the system of conditions, which determine the legality and substantiate of decision making.

It was said an opinion in juridical science that since in considered situation the criminal-procedural relations are exhausted them; a checking of substantiation should be carried out in a frame of civil proceedings (2, p. 20). We are not agreed with this opinion as an object of such complaint is a procedural decision based on criminal-

procedural relations, and consequently, procedure of criminal-procedural control is the most optimal for execution of the goals of this checking.

Let's try to consider in details the procedural form of the judicial checking of the legality and groundless of the decision of the bodies of inquest and investigation about refusal in initiation of a criminal case or its stopping. In compliance with a checking, a court makes a decision on acknowledgement of the decision as legal or illegal (art. 451.1 of the CPC).

On our opinion, an absence the powers to a court to institute a criminal case make narrow the powers of the judicial bodies. This is a duty of a prosecutor. By other words, a court being found a violation of the law on refusal to institute a criminal case or stop a criminal prosecution makes a proper decision about repeal of this decision. At the same time, a court has no the powers to institute a criminal case or give such instructions to the bodies of preliminary investigation. We think that an absence of these powers are limited the activity of the courts and its control functions, deprived an independence of it, make it unable in full scale to fulfill the tasks of the control over a preliminary investigation.

It should note that opponents of providing a court with the right to institute a criminal case think that cancelling a decision on refusal to initiate a criminal case, and instituting a criminal case on a complaint of an applicant, a court takes the tasks, which are belong to accusation party and thereby the court replaces it activity (6, p. 112). In counterbalance of this, our opinion is that it cannot consider an initiation of a criminal case as the act of accusatory purposefulness as this is a decision of a competent body to begin an activity in connection with information on presence of the crime signs. We should not forget that initiation of a criminal case is an independence primary stage of a criminal process.

Defending our position, we would like to note and the practical significance of granting a court with the right to institute a criminal case. Prosecutors of the Districts levels periodically check the materials of the inquest, on which made decisions about rejection to initiate a criminal case. Often it happen events when the decisions checked but not rejected by the prosecutor's office, are reversed by the courts. Considering that if a court regards it necessary to reverse a decision of an inquirer

about rejection to institute a criminal case, it even under the presence of sufficient grounds cannot initiate the criminal case. This is in turn is made the prosecutor's supervision higher than judicial one; that it seems wrong to us. The same opinion are kept the practitioners, more than 60% of which during interviewing were for granting of the courts with powers to institute a criminal case. It is necessary to supplement the article 451 and to grant a court with powers to initiate a criminal case.

In frame of our study we consider it necessary to touch in details the form of pre-trial control, implementing in connection with the relations appeared at the stage of initiation of a criminal case. Accordingly, it is necessary to examine as much as possible a judicial appeal and judicial control of the decision of the bodies of preliminary investigation about institution of a criminal case. We have noted above that a lawmaker did not include on non-understandable reasons an appeal of the decision about initiation of a criminal case in the subject of the judicial control.

We think that in case of initiation of a criminal case in respect of a specific person are touched the constitutional rights and freedoms of an individual. We are also agreed with opinion of the authors, who believe that just this act stand a man in position of a suspected, testifies about beginning his criminal prosecution, gives to the bodies of criminal proceedings an opportunity to apply in respect of an suspected and other persons the wide spectrum of the measures of procedural coercion (5, p. 165). In our view, an initiation of a criminal case legalizes all further procedural activity, is a procedural-legal ground of investigation, which allows making all further procedural actions and to apply procedural measures including ones of a forced nature. In compliance with the norms of criminal-procedural legislation, a decision about initiation of a criminal case is a initial ground for all further procedural decisions and investigative actions. Initiation of a criminal case touches the fundamental rights of a man and citizen, puts in doubt his reputation, threaten to the further limitation of his rights. In connection with this we may make a conclusion that impossibility to appeal to a court the decision about institution of a criminal case does not correspond to the parts 1 and 2 of the article 60 of the Constitution of Azerbaijan Republic. Our opinion is come to that a sense of a judicial-control procedure is concluded in that to prevent a violation or unfound restriction of the

rights of citizens, recognizing considered act under presence of sufficient grounds illegal in the beginning of criminal proceedings.

From our point of view, a lawmaker may not reject in the right to the participants of criminal proceedings to appeal the decisions of the bodies of preliminary investigation and prosecutor as this can be caused an essential violation their constitutional rights. For the body of inquest and investigative bodies such checking can be a certain barrier from unfound bringing to a criminal responsibility without sufficient grounds. Under strict observance of the norms of the law for an inquirer, investigator or prosecutor will not be complexity to substantiate to a court legality of initiation of a criminal case. We believe that stated position should find reflection in the CPC through doing changes.

In juridical science it were repeated expressed different suggestions as to the subject having the right to consider the complaints of the interested persons on violation their rights and freedoms, and also the petitions of the bodies of preliminary investigation about performance of investigative actions and acceptance of decisions allowing limitation of the constitutional right to freedom and personal integrity. It is supposed this duty to entrust to a court or special judges, or with this purpose to create position of the judicial investigators controlling pre-trial stages.

It seems an interesting the position of I.F. Demidov, who insisted on establishing of "the institute of specialized bodies of judicial power, - investigative judges carrying only the functions of judicial control and free from powers on execution of the justice. An investigated judge may not be included in board of any court, but he has to have his assisting personal" (1, p. 25).

According to A. Smirnov, in all stages of preliminary investigation an investigative judge should have the right on own initiative to fulfill control powers, but wherein a criminal case should not be taken back from production of the bodies of preliminary investigation, and participation of the judge has episodic nature. The purpose of judicial investigative actions is in fixation of judicial evidence and checking of action legality of other participants of a process. Adversary nature is a distinguishing sign of judicial investigative actions (6, p. 20).

We are categorically opposite granting the courts with functions of preliminary investigation and believe inadmissible introduction of a staff of judicial investigators. In our view it cannot join in one body the functions of preliminary investigation and judicial examination of the criminal cases and the materials of simplified pre-trial production as it can lead to a loss of unbiased of a court during examination of a criminal case or the materials of simplified pre-trial production connected with decisions of its colleague - a judicial investigator.

Perspective of introduction into the judicial system of the Republic a judicial body carrying out exclusively the judicial control over the bodies of preliminary investigation we see the following way. In the judicial bodies of the first instance should be established and will enable to do the specialized entities - the boards, an activity of which will be limited exclusively to the judicial control over the bodies of preliminary investigation. The main direction of this activity will be an order of fulfillment of the judicial supervision; the object of which is determined by the article 442.1 of the CPC. Supposed by us model of the courts' organization with purpose implementation of the judicial control can be become more efficiency in the system of organization of the court activity and provided mutual control of the judges over procedural activity of each other.

One of the essential lacks of performance the judicial control over the bodies of preliminary investigation is the period examination of a complaint on procedural action or decision of a body carrying out a criminal process. According to article 450.1 of the CPC, the complaint on procedural action or decision of a body carrying out a criminal process is examined in the closed court session by the judge in person during 10 days from a date receiving. If the period of an investigation on a criminal case takes months then maximal period of inquest takes 20 days. In simplified pre-trial production this period is up to 10 days. A simple arithmetical calculation shows that complainant addressed with complaint on action of an inquirer or prosecutor cannot rely on timely protection of their rights and interests on a reason of short time.

It seems that stated period does not respond if the requirements of rapidness of the courts' reacting on offences of the inquest bodies. Established with article 450.1 of the CPC the 10 days' period can be caused a loss of the sense of the judicial control

over the bodies of preliminary investigation since an interval of time is not enough for elimination by the courts of violation of the law in the stage of preliminary investigation. This might be related to the complaints of citizens in respect of rejection to accept by the competent bodies a statement on a crime. Non-timely examination with the courts of the complaints of this category can be led to a loss of the proofs, release from criminal responsibility of a person committed crime. We suppose that three days would be quite enough to the judicial bodies for examination of an issue about legality and groundless of the decisions violating the constitutional rights and freedoms of the citizens whose interests is touched during the pre-trial production. Above stated says in favour of reduction the time of complaint examination.

Introduction of the judicial control over the bodies of preliminary investigation is considerable achievement of the judicial reform carrying out in the Republic but the norms of the acting Criminal-procedural Code are needed in additional development.

With purpose of improvement of the judicial control over the bodies of preliminary investigation we offer to make in the CPC the following changes and supplements:

1. To supplement article 449.1 of the CPC with the following paragraph. To a court carrying out the judicial supervision might be appealed the procedural actions or decisions of the following persons of a body fulfilled a criminal process: *article 449.1.5* - a prosecutor carrying out a procedural leadership of the preliminary investigation, and also *a superior prosecutor.*

2. Article 449.2 of the CPC is to read in the following edition: Procedural actions (inactions) or decisions of a body carrying out a criminal process might be appealed by *the participants of criminal proceedings, and also by other persons whose interests are touched produced investigative actions or accepted procedural decisions.*

3. To make the supplements in article 449.3 of the CPC the following content: The persons stipulated in article 449.2 of the present Code have the right to appeal to a court the procedural actions (inactions) or decisions of a body carrying out a

criminal process in connection with the following: ... *article 449.3.8 - other decisions and actions (inactions), which can be caused a loss to the constitutional rights and freedoms of the participants of a criminal proceedings.*

4. To reduce the period of examination of a complaint and to replace the words 10 (ten) days into the words *3 (three) days* in article 450.1 of the CPC.

5. To supplement the article in the following edition: According to the results of a checking of legality of the procedural actions or decisions of a body carrying out a criminal process a judge makes one of the following decisions of the article 451.1.2 of the CPC: ... on acknowledgement as illegal of appealed action (inaction) or decision and repeal of such decision, *and under presence of sufficiency reasons and grounds stipulated by the articles 207-209 of the CPC institutes a criminal case.*

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