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ARTICLE 375 OF THE CRIMINAL CODE OF UKRAINE

REALITIES AND PROSPECTS OF APPLICATION

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Nove Pravosuddya Justice Sector Reform Program (New Justice)

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Development Objective 1: More Participatory, Transparent and Accountable Government Processes.

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BACKGROUND INFORMATION

The USAID Nove Pravosuddya Justice Sector Reform Program in Ukraine (hereinafter – the USAID New Justice Program) is designed to support the judiciary, the Government, the Parliament, civil society and Ukrainian people to implement judicial reform taking into account constitutional changes of 2016 and Justice Sector Reform Strategy for 2015-2020.

The USAID New Justice Program builds its operations on the achievements of USAID FAIR Justice Project and will use them to coordinate close cooperation with Ukrainian partners, USAID and USG projects and other projects of international donor organizations in Ukraine.

In achieving this overarching goal, the USAID New Justice Program focuses on the following objectives:

- (1) Judicial Independence and Self-Governance Strengthened.
- (2) Accountability and Transparency of the Judiciary to Citizens and the Rule of Law Increased.
- (3) Administration of Justice Enhanced.
- (4) Quality of Legal Education Strengthened.
- (5) Access to Justice Expanded and Human Rights Protected.

This report was developed based on systemically and comprehensively revised information on the actual state of affairs in applying Article 375 of the Criminal Code of Ukraine, the disposition of which provides for “Rendering of a knowingly illegal sentence, decision, ruling or order by a judge (or judges).” pursuant to the Scope of Work of the USAID New Justice Program in order to find the options of reducing the possibilities of undue influence and pressure on judges and to strengthen judicial independence.

INTRODUCTION

With the adoption of a new version of the Criminal Code in 2001, it has been repeatedly reported that commencement of criminal proceedings under this Article was aimed at exerting pressure on a judge on the part of prosecution bodies and law enforcement agencies. The Council of Judges of Ukraine has repeatedly received applications from judges who reported the facts of such pressure by means of commencing criminal proceedings or threats of such commencement.

On June 2, 2016, Article 126 of the Constitution of Ukraine was amended as follows: “A judge shall not be held liable for decision rendered by him/her, except for commitment of crime or disciplinary offence.” In view of such amendment, a need for conceptual revision of the content of Article 375 arose in order to bring it into compliance with the Constitution.

In drafting this report, the practice of law enforcement agencies was analyzed starting from November 2013 (when a new Criminal Procedure Code came into

force) with regard to entering the reports of such alleged crimes under Article 375 to the Unified Register of Pretrial Investigations, referring such proceedings to court, closed proceedings and case law on the results of consideration of such cases. Similarly, such analysis was conducted with regard to proceedings and court cases under Article 376 of the Criminal Code of Ukraine “Interference with the operations of judicial bodies”. The aim of such analyses was to develop recommendations on making changes to the legislation of Ukraine in order to strengthen the liability for interference with the operations of judicial bodies and making it impossible to exert undue influence on judges.

In analyzing the issue of clarifying the law-maker’s intentions in using the term “illegal decision” in Article 375 of the current version of the Criminal Code of Ukraine in order to distinguish it from such terms as “illegal” and “unlawful”, the following should be mentioned.

Until September 1, 2001 when a new Criminal Code of Ukraine came into force, for several decades, without any amendments, the Criminal Code of Ukraine of December 28, 1960, had contained Article 176 which also provided for criminal liability of judges for rendering a knowingly illegal decision, however, provided that such decision was adopted out of selfish motives or another personal interest.

The mentioned article of the Criminal Code of Ukraine of December 28, 1960 reads as follows:

Article 176. Rendering a knowingly illegal sentence, decision, ruling or order by judges

Rendering a knowingly illegal sentence, decision, ruling or order by judges out of personal motives or another personal interest is punished by up to five years of prison.

The same action, if it has resulted in grave consequences, is punished by up to eight years of prison.

Thus, provisions of Article 375 of current Criminal Code of Ukraine which since 2001 has provided for liability for rendering a knowingly illegal sentence, decision, ruling or order by a judge (or judges) can be hardly called a novelty in terms of applying the notion of an “illegal decision”.

Either due to the fact that the norm on criminal liability of a judge for rendering a knowingly illegal decision has moved to the current Criminal Code of Ukraine from the Soviet-time Criminal Code, or due to other reasons, but results of revision of transcripts of plenary meetings of the Verkhovna Rada of Ukraine, including of September 10, 1998, September 14, 2000 and April 5, 2005 when a relevant draft law was voted on in the first, second and third readings, show that unlike many other articles, the provisions of a future Article 375 of the CC of Ukraine was not discussed separately at all. The content of amendments to the draft law and work on them also do not indicate that in adopting the Criminal Code of Ukraine in 2001 the legislator made any effort to add a new special content to the notion of “illegal decision” that would differ from the one that had existed before.

When the Verkhovna Rada of Ukraine adopted the draft law in the second reading, amendment of Member of Parliament Medvedchuk V.V. was taken into account which consisted in deleting from part one of Article 346 (at that time in the draft law), which provided for a liability for rendering a knowingly illegal sentence, decision, ruling or order by a judge (or judges) out of personal motives or other personal

interests, the words “out of personal motives or other personal interests”. In the result of this very amendment, today, the current Criminal Code of Ukraine in part one of Article 375 provides for liability for rendering a knowingly illegal sentence, decision, ruling or order by a judge (or judges).

One can try and find out how the adoption of this decision by Members of Parliament depended on their understanding of the notion of “illegal decision, or analyze various theoretical approaches of such legal scholars as Andrushko P.P., Vynogradova L.Ye., Ovcharenko O.M., Navrotskyi V.O., Didyk S.Ye. and others to defining the notion of illegal and its correlation with the notions of illegal and unjustified, yet it is obvious that current legislation today provides for criminal liability for rendering a knowingly illegal decision by a judge (or judges) while there is no legal definition of the notion of “illegal decision”.

Under such circumstances, a constitutional application of the Supreme Court of Ukraine to the Constitutional Court of Ukraine regarding official interpretation of the word combination “as illegal” used in part 4 of Article 62 of the Constitution of Ukraine in terms of correlation of notions “unjust”, “illegal” and “unjustified” is a right step the apparent necessity of which has existed for a long time. The Venice Commission at its 110th Plenary Session in March 2017 mentioned the necessity of solving such issues by the Constitutional Court of a relevant country.

PRACTICE OF APPLYING ARTICLE 375 OF THE CRIMINAL CODE OF UKRAINE AGAINST JUDGES

One of manifestations of the status of Ukrainian society today is the lack of common understanding and perception by citizens of the constitutional principle of judicial independence and prohibition of any influence on them. Almost every day new examples of such “communication” between representatives of society and judges appear where the declarative nature of some constitutional provisions is becoming more and more obvious.

During last years, pretrial investigations in criminal proceedings under Article 375 of the CC of Ukraine due to the adoption of court decisions in some cases have turned into one of the most efficient, safe for their initiator, simple to implement and, therefore, widespread ways of exerting influence on judges by stakeholders. After a number of reports of such facts, a lively discussion of the specifics of applying Article 375 of the CC of Ukraine and reasonability of this Article in the Criminal Code of Ukraine has started and is still ongoing among representatives of legal community, experts have been trying to develop recommendations for judges in case of interference with their activity, and judicial self-government bodies have made statements related to instances of pressure on judges. Relevant issues have repeatedly become a subject of debates at the High Specialized Court of Ukraine and Supreme Court of Ukraine where the need to remove Article 375 from the Criminal Code of Ukraine or to clarify its provisions was discussed, which would have put to an end existing abuses with regard to judges, but such discussions have resulted

only in the constitutional application of the Supreme Court of Ukraine to the Constitutional Court of Ukraine regarding official interpretation of the notion of illegal court decision.

The understanding of the need to change current (in the first place – criminal procedure) legislation to prevent the situation where each case of disagreement with adopted court decision will be considered as grounds for criminal liability, i.e. situation which will contradict not only the basic principles of justice, but also common sense, has come only recently.

However, in general, having reviewed materials in this field, there is a firm impression that legal community not quite clearly determines the essence of the problem related to the possibility of exerting pressure on judges by conducting pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine, and this explains lack of proposals with really effective ways of its solution. In most cases, problem analysis comes to simple and categorical conclusions, such as "...Article 375 of the CC of Ukraine is used for abuses and exerting pressure on judges – therefore, it must be removed (deemed as unconstitutional)"; "...if the Supreme Court of Ukraine provides clarification of the application of provisions of Article 375 of the CC of Ukraine, employees of law enforcement agencies, having reviewed them, will stop exerting pressure on judges", "...if in each specific instance judges or judicial self-government bodies apply to relevant authorities and the public with clarifications of inadmissibility of exerting pressure on judges and demands to bring guilty persons to liability, relevant abuses will stop" and other.

With all due respect to lawyers, it should be recognized that such approaches within existing legal conscience of citizens and law application activity of law enforcement agencies look superficial, let alone naïve. However, the problem does exist, it concerns essential issues of delivering justice and, thus, requires significant attention and, preferably, comprehensive analysis.

It is proposed to start such analysis from examining official statistical data related to the issue in question, first of all, from the available on the website of the Prosecutor General's Office of Ukraine statistical data on pretrial investigations within criminal proceedings under Articles 375 and 376 of the CC of Ukraine in the period from 2013 to 2016.

The table with relevant data is as follows.

Year	Article of the CC of Ukraine	Criminal offences registered in the reporting period	Criminal offences where notices of suspicion were served on persons	Criminal offences which were brought to trial		Criminal offences proceedings on which were closed		Criminal offences on which decision has not been made as of the end of reporting period
				With indictment	With a motion to discharge from criminal liability	Total	Including under points 1,2,4 and 6 of part 1 of Article 284 of the CPC of Ukraine	
2013	375	52	2	0	2	454	454	51

2013	376	21	0	0	0	42	42	21
2014	375	110	13	1	0	110	110	106
2014	376	44	0	0	0	30	30	44
2015	375	206	22	7	0	182	182	195
2015	376	81	7	4	0	50	50	77
2016	375	174	7	6	0	200	200	168
2016	376	57	3	2	0	43	43	54

Statistical data on the number of persons who were convicted, acquitted, cases with regard to whom were closed can be found on the official web-portal "Judiciary" in section "Judicial Statistics", form 6.

Year	Article of the CC of Ukraine	Persons in total, sentences (rulings) with regard to whom have come into force in the reporting period	Including the number of persons			Number of persons cases with regard to whom were closed			
			convicted	acquitted	cases with regard to whom were closed	Due to the lack of criminal episode and corpus delicti	Based on amnesty act	Due to the change of conditions	Due to other grounds
2012	p. 1 Art.375	5	1	0	4	0	2	1	1
2012	p.2 Art. 375	0	0	0	0	0	0	0	0
2012	p.1 Art. 376	2	2	0	0	0	0	0	0
2012	p.2 Art. 376	0	0	0	0	0	0	0	0
2013	p.1 Art. 375	3	1	0	2	0	1	0	1
2013	p.2 Art. 375	0	0	0	0	0	0	0	0
2013	p.1 Art. 376	0	0	0	0	0	0	0	0
2013	p.2 Art. 376	0	0	0	0	0	0	0	0
2014	p.1 Art. 375	2	1	0	1	0	1	0	0
2014	p.2 Art. 375	1	1	0	0	0	0	0	0
2014	p.1 Art. 376	0	0	0	0	0	0	0	0
2014	p.2 Art. 376	0	0	0	0	0	0	0	0
2015	p.1 Art. 375	3	0	0	3	0	1	0	2
2015	p.2 Art. 375	2	2	0	0	0	0	0	0
2015	p.1 Art. 376	2	1	0	1	0	0	0	1
2015	p.2 Art. 376	0	0	0	0	0	0	0	0
2016	p.1 Art. 375	0	0	0	0	0	0	0	0
2016	p.2 Art. 375	0	0	0	0	0	0	0	0
2016	p.1 Art. 376	0	0	0	0	0	0	0	0
2016	p.2 Art. 376	0	0	0	0	0	0	0	0

The given official statistical data should be critically evaluated, to some extent, taking into account that:

- some indicators available on the website of the the Prosecutor General's Office of Ukraine in section "On registered criminal offences and results of their pretrial investigation" do not correspond to analogous data from section "On the operations of pretrial investigation bodies";
- maintaining judicial statistics does not involve forming separate statistical data on criminal proceedings under Articles 375 and 376 of the CC of Ukraine brought to trial and backlog of relevant criminal proceedings in courts as of the end of reporting periods. In this regard, it is impossible to check the accuracy of the data of prosecutor's office regarding the number of criminal proceedings brought to trial and determine actual dynamics of consideration of relevant cases by courts;
- statistical information on the number of persons convicted under relevant articles of the Criminal Code of Ukraine, acquitted or proceedings with regard to whom were closed does not conform with data from the Unified State Register of Court Decisions which evidence slightly different indicators, namely:

Year	Article of the CC of Ukraine	Persons in total, sentences (rulings) with regard to whom have come into force in the reporting period	Including the number of persons			Number of persons cases with regard to whom were closed			
			convicted	acquitted	cases with regard to whom were closed	Due to the lack of criminal episode and corpus delicti	Based on amnesty act	Due to the change of conditions	Due to the end of period of limitations
2012	p. 1 Art.375	3	0	0	3	0	2	0	1
2012	p.2 Art. 375	0	0	0	0	0	0	0	0
2012	p.1 Art. 376	1	1	0	0	0	0	0	0
2012	p.2 Art. 376	0	0	0	0	0	0	0	0
2013	p.1 Art. 375	3	0	0	3	0	1	0	2
2013	p.2 Art. 375	1	1	0	0	0	0	0	0
2013	p.1 Art. 376	0	0	0	0	0	0	0	0
2013	p.2 Art. 376	0	0	0	0	0	0	0	0
2014	p.1 Art. 375	0	0	0	0	0	0	0	0
2014	p.2 Art. 375	0	0	0	0	0	0	0	0
2014	p.1 Art. 376	0	0	0	0	0	0	0	0
2014	p.2 Art. 376	0	0	0	0	0	0	0	0
2015	p.1 Art. 375	3	1	0	2	0	0	0	2
2015	p.2 Art. 375	3	3	0	0	0	0	0	0
2015	p.1 Art. 376	1	1	0	0	0	0	0	0
2015	p.2 Art. 376	0	0	0	0	0	0	0	0
2016	p.1 Art. 375	0	0	0	0	0	0	0	0
2016	p.2 Art. 375	0	0	0	0	0	0	0	0

2016	p.1 Art. 376	0	0	0	0	0	0	0	0
2016	p.2 Art. 376	0	0	0	0	0	0	0	0

However, regardless of possible errors, in general, the given statistical data evidence the following:

1. Since 2013 there has been an increase by several times in the number of registered criminal offences provided for by Article 375 of the CC of Ukraine, namely, as compared with 52 criminal offences in 2013:
in 2014 – 110 (+112%),
in 2015 – 206 (+296%),
in 2016 – 174 (+234%).

At the same time, the number of registered criminal offences provided for by Article 376 of the CC of Ukraine is, as compared with 21 criminal offences in 2013, as follows:

- in 2014 – 44 (+109%),
- in 2015 – 81 (+285%),
- in 2016 – 57 (+171%).

2. As compared with the number of registered within a relevant period criminal offences provided for by Article 375 of the CC of Ukraine, the percentage of criminal offences where a notice of suspicion was served on persons is as follows:

- in 2013 – 3.8% or 2 criminal offences where a notice of suspicion was served on persons as compared with 52 registered criminal offences;
- in 2014 – 11.8% or 13 criminal offences as compared with 110;
- in 2015 – 10.6% or 22 criminal offences as compared with 206;
- in 2016 – 4% or 7 criminal offences as compared with 174.

Analogous indicators regarding criminal offences provided for by Article 376 of the CC of Ukraine are as follows:

- in 2013 – 0% and 0 criminal offences where a notice of suspicion was served on persons as compared with 21 registered criminal offences;
- in 2014 – 0% and 0 criminal offences as compared with 44;
- in 2015 – 8.6% or 7 criminal offences as compared with 81;
- in 2016 – 5.2% or 3 criminal offences as compared with 57.

3. As compared with the number of criminal offences provided for by Article 375 of the CC of Ukraine where a notice of suspicion was served on persons, the percentage of criminal offences brought to trial is as follows:
in 2013 – 100% or 2 criminal offences brought to trial as compared with 2 criminal offences where a notice of suspicion was served on persons. At the same time, this is 3.8% of the total number of registered in 2013 criminal offences.
in 2014 – 7.7% or 1 criminal offence as compared with 13 criminal offences where a notice of suspicion was served on persons. At the same time, this is 0.9% of the total number of registered in 2014 criminal offences.
in 2015 – 31.8% or 7 criminal offences as compared with 22 criminal offences where a notice of suspicion was served on persons. At the same time, this is 3.4% of the total number of registered in 2015 criminal offences.
in 2016 p. – 85.7% or 6 criminal offences as compared with 7 criminal offences where a notice of suspicion was served on persons. At the same time, this is 3.4% of the total number of registered in 2016 criminal offences.

Analogous indicators regarding criminal offences provided for by Article 376 of the CC of Ukraine are as follows:

in 2013 – 0% and 0 criminal offences brought to trial as compared with 0 criminal offences where a notice of suspicion was served on persons, and 21 criminal offences registered in 2013.

in 2014 – 0% and 0 criminal offences brought to trial as compared with 0 criminal offences where a notice of suspicion was served on persons, and 44 criminal offences registered in 2014.

in 2015 – 57% or 4 criminal offences brought to trial as compared with 7 criminal offences where a notice of suspicion was served on persons. At the same time, this is 4.9% of the total number of registered in 2015 criminal offences.

in 2016 – 66% or 2 criminal offences brought to trial as compared with 3 criminal offences where a notice of suspicion was served on persons. At the same time, this is 3.5% of the total number of registered in 2016 criminal offences.

4. As compared with the number of registered within a relevant period criminal offences provided for by Article 375 of the CC of Ukraine, the percentage of criminal proceedings where decision has not been adopted as of the end of reporting period is as follows:

in 2013 – 98% or 51 criminal offences on which decision has not been adopted as of the end of reporting period as compared with 52 criminal offences registered in a relevant period;

in 2014 – 96% or 106 criminal offences as compared with 110;

in 2015 – 94,6% or 195 criminal offences as compared with 206;

in 2016 – 96,5% or 168 criminal offences as compared with 174.

Analogous indicators regarding criminal offences provided for by Article 376 of the CC of Ukraine are as follows:

in 2013 – 100% or 21 criminal offences on which decision has not been adopted as of the end of reporting period as compared with criminal offences registered in a relevant period;

in 2014 – 100% or 44 criminal offences as compared with 44;

in 2015 – 95% or 77 criminal offences as compared with 81;

in 2016 – 94.7% or 54 criminal offences as compared with 57.

5. Ratio of the number of persons convicted under Article 375 of the CC of Ukraine or with regard to whom criminal proceedings were closed on non-rehabilitating grounds to the number of persons on criminal offences provided for by Article 375 of the CC of Ukraine registered in a relevant period.

Year	Article of the CC of Ukraine	Number of persons on criminal offences registered in a relevant period	Total, persons with regard to whom sentences (rulings) came into force (% of the number of persons on registered criminal offences)
2012	Art.375	N/A	5
2012	Art.376	N/A	2
2013	Art.375	52	3 (5,7%)
2013	Art.376	21	0 (0%)
2014	Art.375	110	3 (2,7%)
2014	Art.376	44	0 (0%)
2015	Art.375	206	5 (2,4%)
2015	Art.376	81	2 (2,4%)

2016	Art.375	174	0 (0%)
2016	Art.376	57	0 (0%)

The given statistical data evidence the following:

1. After 2012, the number of criminal proceedings initiated under Article 375 of the CC of Ukraine has increased in several times although the number of persons convicted under Article 375 of the CC of Ukraine or with regard to whom criminal proceedings were closed on non-rehabilitation grounds has even reduced and amounts to a scanty percentage of the number of persons on criminal offences recorded in a relevant period.
2. The number of criminal proceedings under Article 376 of the CC of Ukraine is several times less than the number of criminal proceedings under Article 375 of the CC of Ukraine, and the efficiency of this norm is characterized by the fact that for the period from 2013 to 2016 one person had been convicted under Article 376 of the CC of Ukraine and with regard to another person criminal proceedings had been closed on non-rehabilitation grounds.
3. Small percentage of criminal offences provided for by Article 375 of the CC of Ukraine where a notice of suspicion was served on persons as well as extremely high (up to 96%) percentage of criminal offences where no decision has been adopted as of the end of reporting period evidence that after the commencement of pretrial investigation within criminal proceedings under Article 375 of the CC of Ukraine a decision to close criminal proceedings is not adopted for a long time, and a notice of suspicion is not served on a person either. According to current legislation, this means that the term of pretrial investigation does not start, a judge does not have rights of a suspect and cannot defend his/her legal position, and prosecutor and pretrial investigation body get a possibility to carry out investigative actions and take actions to ensure criminal proceedings for an unlimited term under relevant criminal proceedings.
4. The fact that even out of those few criminal offences provided for by Article 375 of the CC of Ukraine where a notice of suspicion had been served on persons for the period from 2013 to 2016, only 36% on average were brought to trial, at the same time, on over 96% of criminal offences of registered as of the end of reporting period no decisions have been adopted. This means that representatives of law enforcement agencies well realize the lack of a so called "trial prospect" of relevant criminal proceedings, but for some reasons discussed below, they don't adopt rulings to close criminal proceedings.

CONCLUSIONS

Analysis of facts established based on statistical data allows making a range of conclusions.

- The number of pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine has increased by several times after 2012 when Ukraine adopted a new Criminal Procedure Code which established a so called "autodynamic" procedure of the commencement of pretrial investigation.
- Provisions of current CPC of Ukraine allow representatives of law enforcement agencies to initiate the commencement of pretrial investigation

due to the adoption of a specific decision by a judge either themselves, or use for this applications of other persons, after which they have a possibility, for a long time, under relevant criminal proceedings, at any time to initiate and carry out certain investigative actions (such as searches of court premises, long and repeated interrogations of a judge and all persons related to him/her which will involve efforts to obtain testimony regarding events that are not related to the facts of criminal proceeding), carry out actions to ensure criminal proceedings (most often – temporary access to things and documents with seizure of the latter), and if they want – actually block the work of a judge and the whole court for some time. The latter is possible not only by carrying out investigative actions and taking actions to ensure criminal proceedings, but also by including to relevant groups of prosecutors and investigation groups as many officials as possible to artificially create the provided for in point 4 of part 1 of Article 75 of the CPC of Ukraine grounds for judicial recusal from considering cases to which such prosecutors or investigative prosecutors are directly related.

- Just “autodynamic” procedure of commencement of pretrial investigation is not a self-dependent or major reason for abuses in conducting pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine. Nothing prevents law enforcement agencies, upon obviously unjustified applications on the commitment of criminal offence, from closing criminal proceedings due to the lack of criminal episode or corpus delicti in the shortest time possible. However, similarly, if they want to exercise undue influence on a judge, they will actively carry out the abovementioned actions for a long time upon the absurd application or report and without serving on a judge a notice of suspicion which will objectively prevent a judge and other persons to perform their official duties and will put them under tension. Based on the given statistical data, law enforcement agencies have chosen the latter option, they deliberately use the provided by current CPC of Ukraine possibility to exert pressure on judges disguised as carrying out pretrial investigations in relevant criminal proceedings. This is the essence of the widely discussed issue with Article 375 of the CC of Ukraine.
- In fact, today the situation is that any judge, including a judge of a court to be created (e.g., anti-corruption, where the number of judges will be limited), within a short time, can be put in position when due to decisions adopted by him/her dozens of pretrial investigations will start and be actively carried out, grounds for recusal of such judge from specific criminal proceedings will be artificially created. As a result, judges will not be able to perform their official duties appropriately and court operations can be blocked.
- Filing of an application or report of the commitment of criminal offences provided for by Article 375 of the CC of Ukraine by any litigant or any other person cannot be considered as a separate form of undue influence on judges, since, anyway, such influence can be realized only through relevant activity of prosecutor and pretrial investigation body. Thus, there are no grounds to limit the group of persons who have a right to file relevant applications and reports, the same concerns representatives of law enforcement agencies who, if such limitation is set, can easily evade it and motivate other persons to file necessary applications. At the same time, the situation when on the initiative of unsatisfied party pretrial investigation of the facts of adopting any court decision must be commenced within 24 hours is also absurd and requires additional regulation.

- In the vast majority of pretrial investigations, judges with regard to whom data on rendering a knowingly illegal decision were entered to the Unified Register of Pretrial Investigations, are deprived of a possibility to effectively defend their legal position, since they cannot challenge the commencement of pretrial investigation and, it is likely, that no one was going to serve on them a notice of suspicion of committing a criminal offence provided for by Article 375 of the CC of Ukraine (according to Article 42 of the CPC of Ukraine, since this very moment a person acquires the rights of a suspect).

At the same time, according to part 3 of Article 48 of Ukraine “On the judiciary and status of judges”, a judge is obligated to report interference with his/her judicial activity in terms of rendering justice to judicial self-government bodies and law enforcement agencies. However, according to statistical data, the number of registered criminal offences provided for by Article 376 of the CC of Ukraine is many times less than the number of criminal offences provided for by Article 375 of the CC of Ukraine. This can evidence either that judges do not consider pretrial investigations with regard to rendering of knowingly illegal decisions as interference with their activity, or do not comply with a duty provided for by part 3 of Article 48 of the Law of Ukraine “On the judiciary and status of judges”, or, most likely, applications on interference with judicial activity are not considered by law enforcement agencies as applications on committed criminal offences, and inactivity of investigator or prosecutor with regard to entering data on criminal offence to the Unified Register is not challenged.

Under such circumstances, since a judge has limited possibilities to defend his/her legal position in criminal proceedings under Article 375 of the CC of Ukraine, and Article 376 of the CC of Ukraine provides for liability for any form of interference with judicial activity in order to prevent him/her from performing official duties, it is necessary, in case a judge files a report in line with Article 48 of the Law of Ukraine “On the Judiciary and Status of Judges”, to ensure the entry of data on criminal offence in the Unified Register, commencement of pretrial investigation within criminal proceedings under Article 376 of the CC of Ukraine and acquiring rights of a suspect by a judge in line with part 2 of Article 55 of the CPC of Ukraine. A judge has to obtain a possibility to defend his/her legal position in criminal proceedings under Article 376 of the CC of Ukraine, including in establishing the facts which are significant during pretrial investigation within criminal proceedings under Article 375 of the CC of Ukraine.

- The problem of exerting pressure on judges by carrying out pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine is not the existence of the mentioned article of the Criminal Code of Ukraine, but general disposition of representatives of law enforcement agencies to exert such pressure and that CPC of Ukraine of 2012 provides necessary procedural possibilities. According to statistical data, today pressure is exerted not through convicting judges under Article 375 of the CC of Ukraine, but through the procedure of pretrial investigation, therefore, no any clarifications of the application of Article 375 of the CC of Ukraine, amendments or calls for complying with the law will change the situation significantly. Moreover, even removal of Article 375 from the Criminal Code of Ukraine will not solve the problem of exerting pressure on judges by carrying out pretrial investigations, since to achieve the necessary results, law enforcement agencies, based on reports of their employees or applications of other persons, including separately motivated, will enter in the Unified

Register data on the alleged commitment of crimes against justice or crimes in the field of official activity by judges, and after that they will again have the necessary procedure of pretrial investigation. However, this is another issue which requires a separate analysis.

- The notion of “illegal decision” has been used in the Criminal Procedure Code since 1960 and there are no data that in 2001 when a new Criminal Procedure Code of Ukraine was adopted this notion received any new special content.
- With regard to obviously unclear construction of corpus delicti provided for by Article 375 of the CC of Ukraine and taking into account position of the Venice Commission, more accurate wording of the norm on judicial liability can be achieved by official interpretation by the Constitutional Court of Ukraine of notions mentioned in constitutional application of the Supreme Court of Ukraine. As an option, the definition of a notion of “illegal” can be enshrined in the Criminal Code of Ukraine by making amendments to Article 375 of the mentioned Code.
- As for Article 375 of the CC of Ukraine itself, this article has been a part of the Criminal Code of Ukraine for a long time, however, only for the last 3-4 years, i.e. after changes in criminal procedure legislation, the problem of exerting pressure on judges has been related to it. This proves that it is not Article 375 of the CC of Ukraine that is a source of the mentioned problem. Therefore, taking into account the specifics of adopting some court decisions in Ukraine, it would not be logical to remove it from the Criminal Code of Ukraine to protect judicial independence.

At the same time, there is an obvious urgent need for other changes to current legislation aimed at:

- removing objectively existing interest of specific prosecutors and investigators in carrying out pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine and using them to exert pressure on judges;
- using the procedure of pretrial investigation within criminal proceedings under Article 375 of the CC of Ukraine to combat abuses in pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine;
- determining the procedure of entering in the Unified Register of Pretrial Investigations data on criminal offences provided for by Article 375 of the CC of Ukraine which would comply with general rules of Article 214 of the CPC of Ukraine and at the same time prevent both obvious attempts to use the institute of criminal proceedings instead of the procedure of challenging court decisions within the procedure established by law, and instances of downright pressure on a judge and retaliation for adopted decision.

RECOMMENDATIONS

Taking into account the abovementioned, the following is proposed:

- Article 218 of the CPC of Ukraine. Venue of pretrial investigation.

to add a provision

“Pretrial investigation regarding criminal offences provided for by Articles 375 and 376 of the CC of Ukraine cannot be carried out by investigator whose decisions, actions or inactivity can be challenged in court (investigative judge of court) where a judge who adopted a relevant decision or a judge who reported interference with his/her activity works. In such a case investigative jurisdiction is determined by a chairperson of prosecutor’s office, including prosecutor’s office of the highest level, whose decisions, actions or inactivity cannot be challenge in the mentioned court (investigative judge of court).”

- Article 37 of the CPC of Ukraine. Appointment and replacement of prosecutor.

to add a provision

“Procedural supervision of pretrial investigation regarding criminal offences provided for by Articles 375 and 376 of the CC of Ukraine cannot be carried out by prosecutor whose decisions, actions or inactivity can be challenged in court (investigative judge of court) where a judge who adopted a relevant decision or a judge who reported interference with his/her activity works. Prosecutor who will exercise the powers of prosecutor in relevant criminal proceedings is determined by a chairperson of prosecutor’s office whose decisions, actions or inactivity cannot be challenge in the mentioned court (investigative judge of court).”

Article 214. Commencement of pretrial investigation.

to add a provision

“Report of a judge to a law enforcement agency within the procedure stipulated by part 3 of Article 48 of the Law of Ukraine “On the judiciary and status of judges” about interference with his/her activity is a report about committed criminal offence provided for by Article 376 of the CC of Ukraine.”

“Data on the commitment of a criminal offence provided for by Article 375 of the CC of Ukraine by a judge can be entered immediately after the end of consideration of a relevant disciplinary complaint by a body which carries out disciplinary proceedings against judges regardless of results of such consideration.”

“When entering in the Unified Register of Pretrial Investigations data on the commitment of criminal offence provided for by Article 375 of the CC of Ukraine by a judge, data on decisions of the body which carries out disciplinary proceedings against judges regarding a relevant disciplinary complaint must be entered in the Register.”

In case of making the mentioned changes to current legislation it can be foreseen that most of potential applicants will not even file a disciplinary complaint regarding the commitment of criminal offences provided for by Article 375 of the CC of Ukraine by judges to the High Council of Justice, since they perfectly realize that their complaints are unjustified; another part of applicants will understand that their demands are unjustified after the body which carries out disciplinary proceedings against judges in accordance with law rejects their complaint. On the initiative of the

rest of persons pretrial investigations within criminal proceedings under Article 375 of the CC of Ukraine will commence, however, both pretrial investigation and its procedural supervision will be carried out by persons who will not have interest in decisions of specific judge on other cases. Together with an application on the commitment of criminal offence investigator and prosecutor will also get a decision of a body which carries out disciplinary proceedings against judges and a judge, having reported the interference with his/her activity, will be able to actively defend his/her legal position as a victim in criminal proceedings under Article 376 of the CC of Ukraine. Under the mentioned circumstances it can be argued that numerous attempts of undue influence on judges through criminal proceedings under Article 375 of the CC of Ukraine existing today will stop.

At the same time, Article 375 of the CC of Ukraine should not be removed and requirements of Article 61 of the Constitution of Ukraine will not be violated.