UKERAINIAN PARLIAMENTARY COMMISSIONER FOR HUMAN RIGHTS
SPECIAL REPORT
CONCERNING THE RESULTS OF PILOT MONITORING OF NEW UKRAINIAN CRIMINAL PROCEDURE CODE IMPLEMENTATION BY KYIV COURTS

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GENERAL RECOMMENDATIONS

Introduction

The purpose of trial monitoring in Kyiv was to identify the practical state of play of the implementation of the new Criminal Procedure Code of Ukraine (hereinafter – CPC), and to generate the relevant recommendations that would facilitate enhancement of the criminal justice effectiveness, proper application of the CPC in accordance with the national and European standards; defining the critical areas of the courts' operation in need of improvement through training or other supportive measures; further development of the capacities of the Secretariat of Ukrainian Parliament Commissioner for Human Rights and civil society to monitor the implementation of the CPC in light of the European Convention on Human Rights and the European Court of Human Rights case law.

This monitoring became a pilot project implemented by the Secretariat of Ukrainian Parliament Commissioner for Human Rights in cooperation with Kharkiv city civil society organization, the Institute of Applied Humanitarian Research, and with the support of: Democratization and Human Rights Programme in Ukraine, implemented by the United Nations Development Programme in Ukraine and funded by the Ministry of Foreign Affairs of Denmark, Council of Europe Project "Support to the Criminal Justice Reform in Ukraine", funded by the Government of Denmark, as well as the Criminal Justice Reform and Anti-Corruption Program in Ukraine, the Office of Overseas Prosecutorial Development Assistance and Training (OPDAT) of United States Department of Justice funded by Bureau of International Narcotics and Law Enforcement Affairs, US Department of State.

This trial monitoring involved the use of observation techniques for data generation by professionally trained monitors (observers), whose mission was to document certain facts (acts or failure of participants of judicial process to act, other circumstances of the trial, etc.) based on specifically developed questionnaires containing checklists (questions). Their findings were subjected to statistical consolidation associated with relatively representative aggregate of judicial proceedings rather than individual cases.

International experience proves that monitoring of actual judicial processes is widely regarded as a useful tool to support and control the process of judicial reform.[1] Trial monitoring can provide a realistic picture of current judicial practices, identify 'problem areas' and provide models to solve problems that have been found. The principle of trial publicity allows to regard such observations as a way for observers to document the true status of judicial proceeding, or to reflect the judicial process 'as is', rather than regarding them as 'research scenarios' (like in case of conducting surveys).

The following are principles underlying the monitoring:

- *Non-intervention* – monitors should avoid any interruption of judicial process, interaction with legal actors or any contacts in the courtroom, if possible;
- *Respect of the court* – monitors must observe the rules of conduct in courtrooms as well as generally recognized ethical standards of legal profession;
- *Confidentiality* – observers use observation and other information that they become aware of during a trial, and provide assessments and conclusions only to fill in questionnaires; observers are forbidden to disseminate subject information or to use it in any other ways;
- *Professionalism* – observers should have basic theoretical knowledge of specific legislation, and in the course of monitoring they should be guided by instructions and directions that have been provided by experts at appropriate preparatory training sessions;

[1] Trial monitoring. Handbook for practitioners./ ODIHR/OSCE. – Warsaw, 2013.

- *Objectivity* – observers should keep notes of their observations and impressions exclusively following the indicators contained in questionnaires, and in other cases they should be guided by instructions that they have been given concerning how additional information needs to be reflected;
- *Officiality* – observers inform of their status and objectives, if the court staff ask them about the purpose of their presence at the judicial process, request to present an ID, if necessary, and they will follow the established requirements concerning access to court premises;
- *Procedural focus* – observers pay attention to violations of procedural law, without evaluating the court's assessment of evidence or other similar questions.

This monitoring was conducted as **"general monitoring"** (versus thematic or ad hoc trial monitoring), i.e., it covered those stages of criminal proceedings that are included in the new CPC and related to judicial processes at trial and appellate courts. However, the monitoring did not cover such trials that were conducted in closed manner according to court decision.

The following **types of proceedings** were subject to monitoring in courts in Kyiv**:**

- Hearing before investigating judge;
- hearing of appeals against rulings of investigating judges;
- preparatory proceedings;
- judicial consideration based on plea agreements;
- trials on the merits;
- hearing of appeals against the verdicts and judgments of trial courts.

A group of 28 observers was selected to conduct observations. The observer selection criteria were as follows: legal education, appropriate work experience, motivation to engage in the public monitoring, no conflict of interest in the course of observation and the availability for systemic engagement in the study for extended periods of time.

Observations were conducted at 10 district courts in Kyiv and at Kyiv Court of Appeals between 5 July 2014 and 15 February 2015. In total 1,628 observations (court visits) were conducted. However, materials of only 1, 288 observations were used for analysis due to a number of adjourned cases or situations where observers could get no access to courtrooms for some reasons or where court sessions failed to begin. In such cases (340 in total) observers documented only such facts and circumstances that were accessible for them (access to court premises, in what setting the visitors were waiting for their trial to begin, the quality of services and communication between court employees and visitors, how complete and effective was information concerning the place and time of court sessions, etc.).

The following is how observations (filled up questionnaires) break down into:

- Hearings before investigating judge - 138;
- Hearing of appeals against rulings of investigating judges - 123;
- Preparatory proceedings -195;
- judicial consideration based on plea agreements - 78;
- Trial on the merits - 544;
- Hearing of appeals against the verdicts and judgments of trial courts - 210.

The specific of pilot observation technique was that instead the overall proceeding, it was just one hearing within the whole judicial proceeding that became the subject of observation, and it was attended by observers randomly. Such approach, if significant numbers of proceedings were visited, guaranteed potentially objective information concerning the trials in certain

proceedings on the whole. Moreover, the observers were not allowed to inform the judges or other participants of the proceedings on their visits' schedule.

There is a limited possibility to assess the statistical **representativeness** of the data that has been obtained, considering that the general totality (number of proceedings of certain types) is rather heterogeneous. The reliability of statistical indicators in this case is ensured by random sampling of court sessions (with the exception of non-typical and smaller scale subject-wise subtypes of proceedings), even distribution of observers in courts and systematic visits to courts for a long period of time.

The information obtained in the course of observations has its specifics that should be taken into account in its interpretation. It provides a vision of **judicial proceedings from the standpoint of *"a general practitioner that makes no judgment, but only documents the presence or absence of certain legally significant circumstances or facts".*** The summary and conclusions based on such information have limited nature in terms of individual proceedings. However, if they occur in large scales and become repetitive and typical, they may indicate existence of **certain qualitative profiles of judicial practice** that cannot be identified based on traditional analysis (individual trials or individual court decisions, information from participants, personal observations, etc.). Such data is particularly important to determine how the actual judicial process goes on, whether the procedural requirements or procedural rights of participants in criminal proceedings are exercised to the full extent, or whether the proceedings is affected by non-legal (non-procedural) factors that are not reflected in the course of documenting the trials, but are essential for administering justice (e.g., *«disregard by the court»* of bruises on the suspect's body) etc.

This monitoring was conducted as **pilot** monitoring, considering that based on its results the current observation methodology will be improved, and this toolkit will be promoted as basic and standardized tools, if decision is taken to continue monitoring observations in other regions across the country.

Monitoring results

Section 1.

General issues of court work organization

The key principle of organization and operation of judiciary are established by the Constitution of Ukraine.

Thus, according to Article 129, Constitution of Ukraine, the key principles of judiciary are the following: 1) lawfulness; 2) equality of all participants of court procedures before law and courts; 3) ensuring that guilt is proved; 4) competitiveness of parties and their freedom to provide court with their evidence and prove that the evidence is convincing; 5) support of state accusation in court by procurator; 6) ensuring the accused the right to defense; 7) publicity of court proceedings and its complete recording by technical means; 8) ensuring appeals against court decisions, except cases established by law; 9) court decisions are obligatory.

Article 130, Constitution of Ukraine, reads that the state shall ensure financing and proper conditions for operation of courts and activity of judges. Self-government of judges shall be implemented to solve issues of internal activity of judges.

The legal framework for the organization of judiciary and administration of justice in Ukraine, judicial self-government and other issues related to the judiciary and status of judges are established in the Law of Ukraine on the judiciary and the status of judges.

*1.3. **Access to court premises***

According to Article 3.3 of Law of Ukraine on the judiciary and the status of judges (here and hereinafter version of the Law No. 2453-VI of 07.07.2010, that was current at the time of monitoring applies), the judicial system shall ensure access to justice for every person according to the procedure established by the Constitution and laws of Ukraine, including in particular, unimpeded access to court premises.

According to Article 115 of this Law the issues of internal operation of courts are to be decided at meetings of judges of relevant courts, and presidents of appropriate courts will ensure the implementation of decisions rendered by meetings of judges that are mandatory for the judges.

According to Article 10, Law of Ukraine on police of 20.12.1990 and Article 154 of Law of Ukraine on the judiciary and the status of judges, security and public order in courts and in particular security of court premises and participants in legal proceedings shall be provided by special Griffon units of specialized troops under the MoI, Ukraine.

Each court has rules for allowing access to court premises developed in accordance with above standards and according to which entry points to court premises are equipped with appropriate access control and communications equipment. A commanding officer of court police units shall be responsible for controlling access to court premises. In addition, those rules shall be posted in court premises to ensure that they can be seen and accessed effectively by visitors. However, it should be noted that visitor access control rules are displayed inside this court premise making it impossible for the general public to familiarize with them prior to entering a court premise.

According to subject rules access to court premises is granted, in particular, to the persons participating in adjudication of criminal, civil and administrative cases based on the list issued by the Registry or when presenting judicial summons, court ruling and ID documents; persons attending public court sessions presenting their ID documents. The persons are granted access to court premises or to the court venue on work days or according to the work schedule established at the court..

Access to the court premise became one of the issues subject to monitoring. Furthermore, the 'unimpeded access' indicator, in addition to actual circumstances under which observers obtained access to the court premises, also reflects subjective perception of accessibility of court premises for the general public. This indicator often reflects how correctly the court police staff performed their monitoring findings, observers could get access to court premise without any hindrances:

- in 48.9 % visits to district courts in Kyiv;
- in 19.4 % visits to the Court of Appeals in Kyiv.

In those cases where observers failed to get immediate access to court premises, they faced the following hindrances (see Tables 1-1 and 1-2).

Table1-1. Impeded access to district court premises in Kyiv (%)

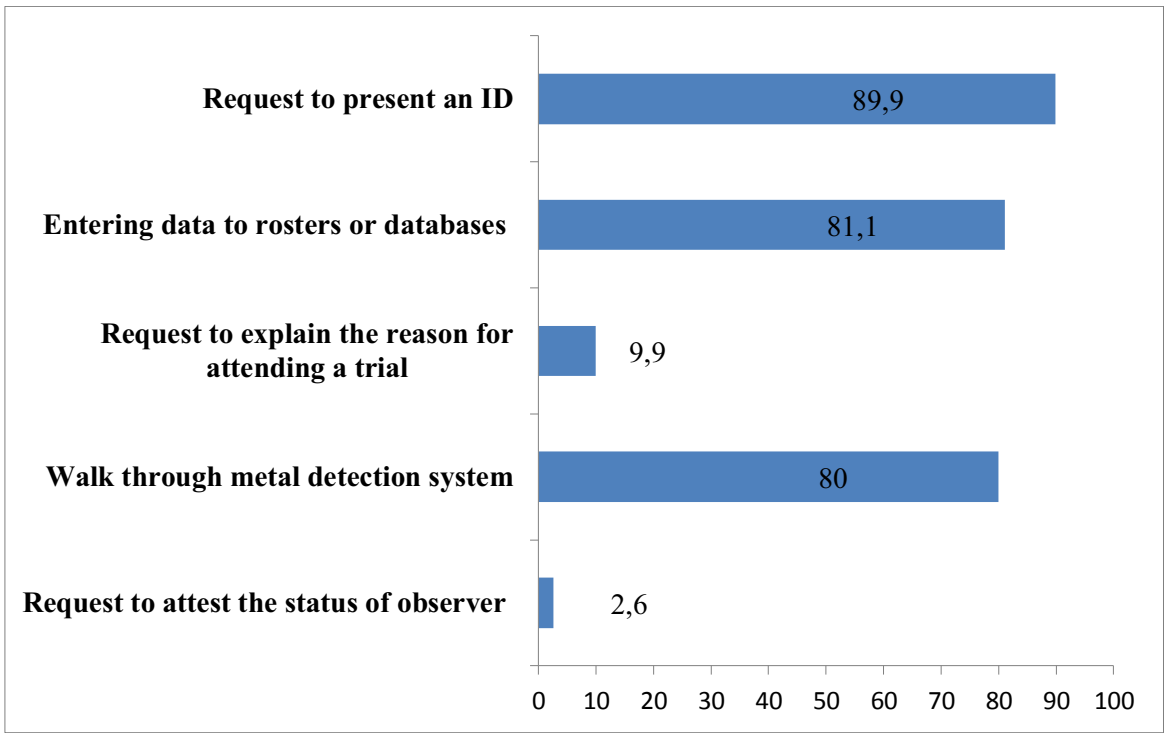
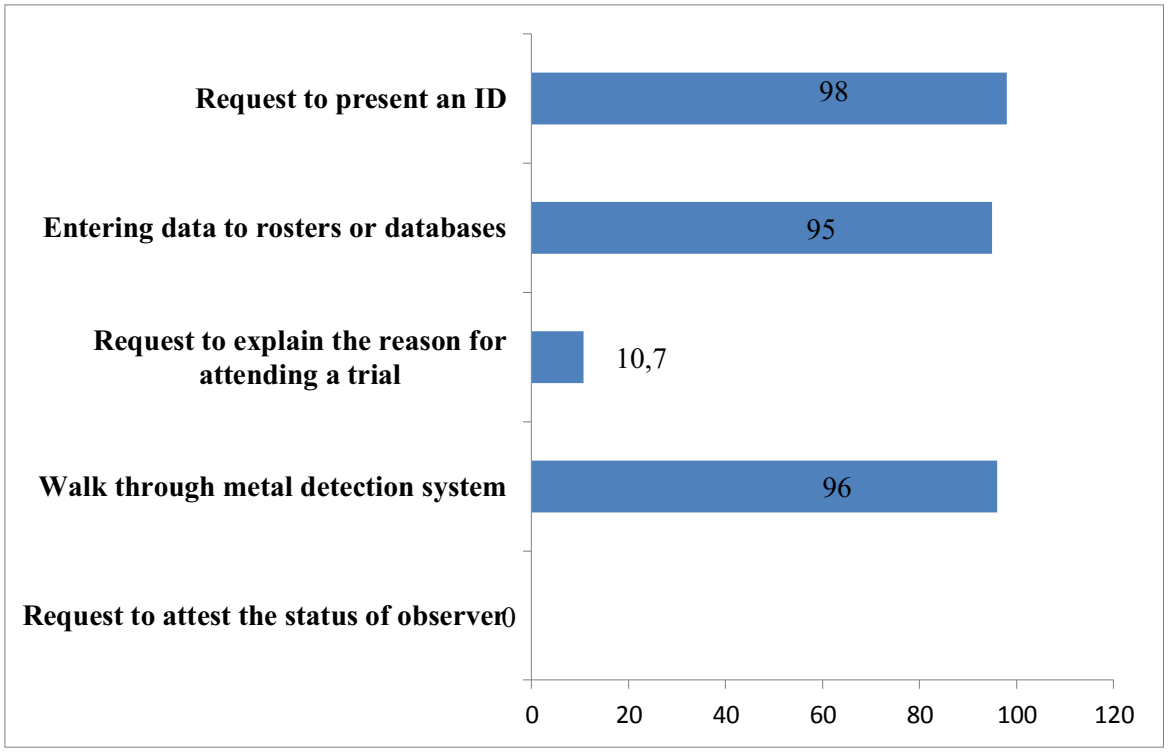


Table1-2. Impeded access to the premise of Court of Appeals in Kyiv (%)



The above information indicates that observers (monitors) gained absolutely unimpeded access to local court premises in almost 50% visits to local courts and almost 20% visits to the Court of Appeals in Kyiv.

In the remaining cases the monitors presented their ID documents, as requested by judicial police officers to have their information entered into special visitor logs. In 10 % of visits monitors were requested to explain why they needed to attend a trial. In addition to the above, in 2.6% visits to local courts the monitors were also requested to attest their status of observers.

Only after following the above judicial police officer requests and walking though metal detection systems the monitors gained access to court premises.

Therefore, the monitoring proves that access to court premises is not sufficiently free for the general public to gain access to any trial they would be interested in. In such circumstances accessibility of justice for each person, including in particular unimpeded access to court premises remains rather declarative.

Recommendations

The Council of judges of Ukraine, State Judicial Administration of Ukraine, Kyiv Court of Appeals and district courts in Kyiv should address the issue concerning the organization of access of average citizens to court premises in such manner that would not have an impact on the principle of trial publicity and openness.

1.4. Information concerning the time and place of court sessions

According to Laws of Ukraine on access to public information, on the judiciary and the status of judges, on information and the procedural law, in order to ensure trial publicity and openness each court issues the Regulation concerning access to public information that is approved by the order of the President of each relevant court.

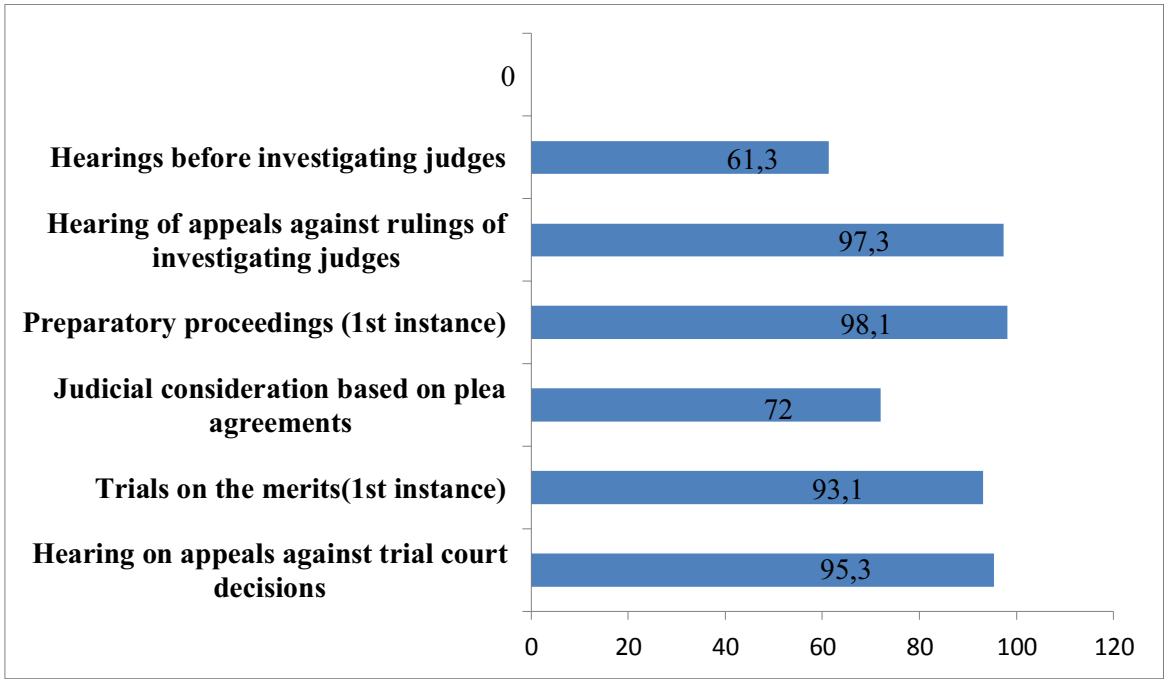
According to this Regulation the up-to-date information, in particular concerning the case movement in courts, the date, time and place of trials within relevant judicial procedures,

should be posted on court web-pages. In addition, information concerning the date, time and place of the court sessions in the cases that are assigned to be tried, should be posted on information boards inside the court premises.

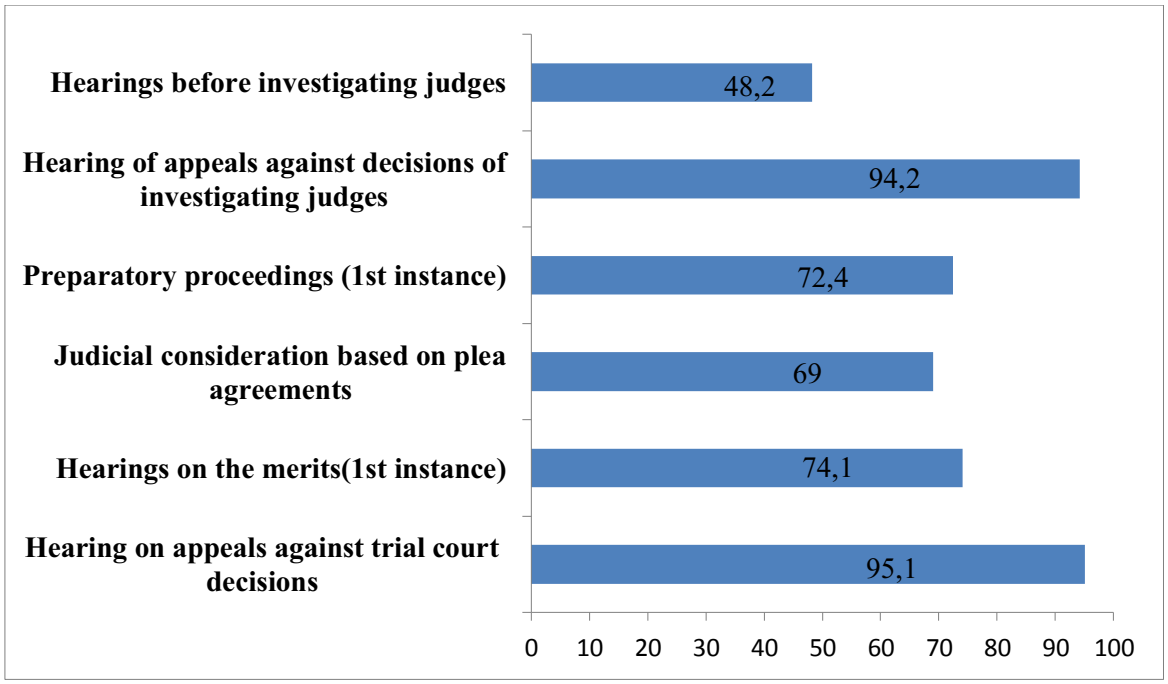
Observers could obtain such information on court web-sites or on information boards located directly inside the court premises. The results of observations are provided in the following tables *(based on the type of proceedings, the number of monitors that managed to obtain such information, %)*.

Table 1.- 3. Availability of information concerning the time and place of court sittings

Information inside the court premises (%)



Information on court web-sites (%)

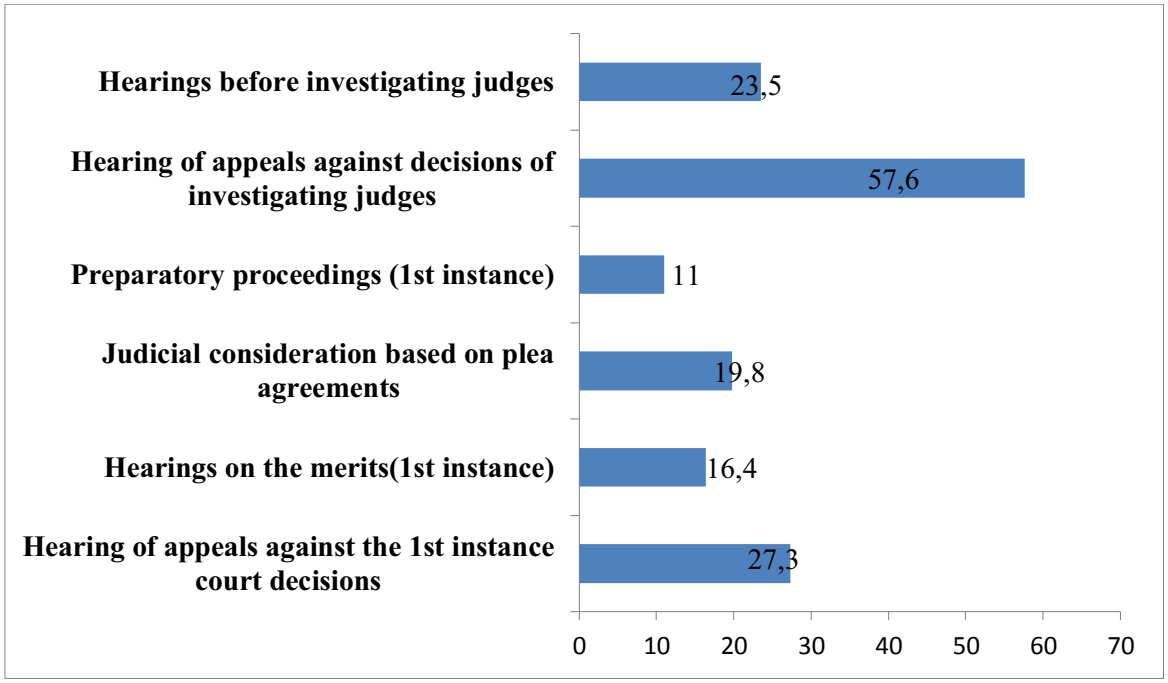


In addition to the availability of the above information, the observers also had an opportunity to assess its *accuracy and reliability*.

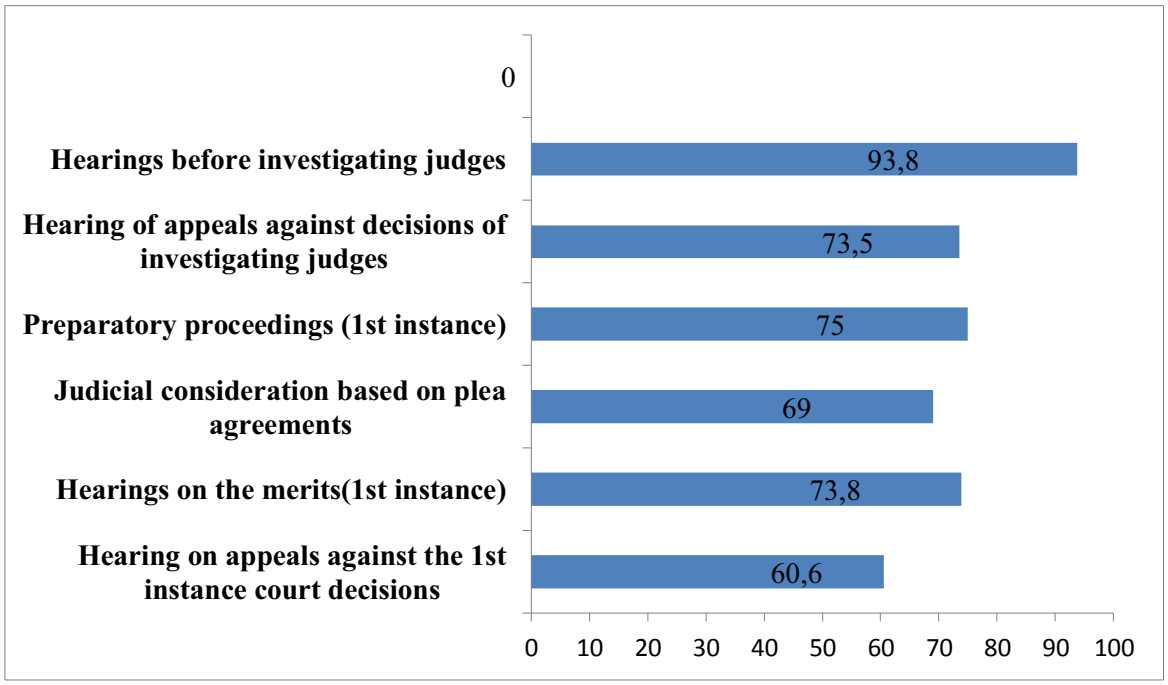
The following Table reflects the specific gravity of such situations, when information was inconsistent (lack or significantly inaccurate date, time or place of court sitting).

Table 1.- 4. Availability of information concerning the time and place of court sitting that was inconsistent

Information inside the court premises (% reports on inaccuracies or errors)



Information on court web-sites (%)



According to observer reports, in many instances the degree of inconsistency of information concerning the time and place of court sitting was absolute, and in some cases it was presented in confusing and deceiving manner.

Information provided in the tables above proves that formally courts ensure compliance with current legislation in terms of informing the public concerning the date, time and place of court sittings in the cases assigned for hearing. However, information provided inside the courts premises was more comprehensive than information on their web-sites. For example, if inside local courts information concerning hearing before an investigation judge was available in 61.3 % cases, preparatory proceeding in 98.1 % cases and hearing on the merits in 93.1 % cases, while on the website this was the case only in 48.2 %, 72.4 % and 74.1 % cases accordingly.

As for information at Kyiv Court of Appeals, the monitors attested that situation here is somewhat better. Thus, information concerning hearing of appeals against decisions of investigating judges was provided inside the Kyiv Court of Appeals premises in 97.3 % cases and hearing of appeals against decisions of trial courts in 95.3 % cases, while information on the website was available in 94.2 % and 95.1 % cases accordingly.

However, according to monitors, it should be particularly emphasized that although the local courts provided subject information both inside court premises and on their websites, this information in most instances was inconsistent. For example, although information concerning hearing of the case before investigating judges was provided inside the court in 61.3 % cases, in 23.5 % cases it was inconsistent, and where this same information was posted on websites in 48.2 % cases, in 93.8 % cases it was inconsistent.

If information concerning preparatory proceedings was available inside trial court premises in 98.1 % cases, in 11 % cases it was inconsistent, and where this information was posted on websites in 72.4 % cases, in 75 % cases it was inconsistent either.

Kyiv Court of Appeals is no exception either. In particular, if inside the Kyiv Court of Appeals information concerning hearing of appeals against decisions of investigating judges was available in 97.3 % cases, in 57.6 % cases this subject information was inconsistent; if information concerning the hearing of appeals against decisions of trial courts was available in 95.3 % cases, and in 27.3 % cases it was inconsistent either.

The above observations indicate that apparently the subject situation is caused by inappropriate organization of court staffs work and of chiefs of staff who are responsible for posting information on court web-sites.

Recommendations

The Council of judges of Ukraine, State Judicial Administration of Ukraine, President of the Kyiv Court of Appeals and presidents of Kyiv district courts should enhance control and take steps to post current information concerning the case progress in courts, the date, time and place of hearings within an appropriate judicial procedure on information boards inside the court premises and on court websites in effective and timely manner.

Section 2.

General issues of organization of court hearings

This section presents the monitoring findings concerning the cross-cutting problems that occurred in all types of proceedings.

2.1. Access to court sessions

One of key principles of justice, according to Article 129, Constitution of Ukraine, is publicity of trial and taking records thereof.

In addition, International Covenant on Civil and Political Rights (Article 14) and Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6.1) that make a part of national legislation declare that in the determination of any criminal charge against him, or of his rights and duties in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In terms of alignment with this standard of the Constitution of Ukraine and international agreements, Ukrainian law on the judiciary and the status of judges (Article 11) provides for open trials, except as provided for in procedural law. Closed hearings may be allowed by justified court decisions in the cases provided for by procedural law.

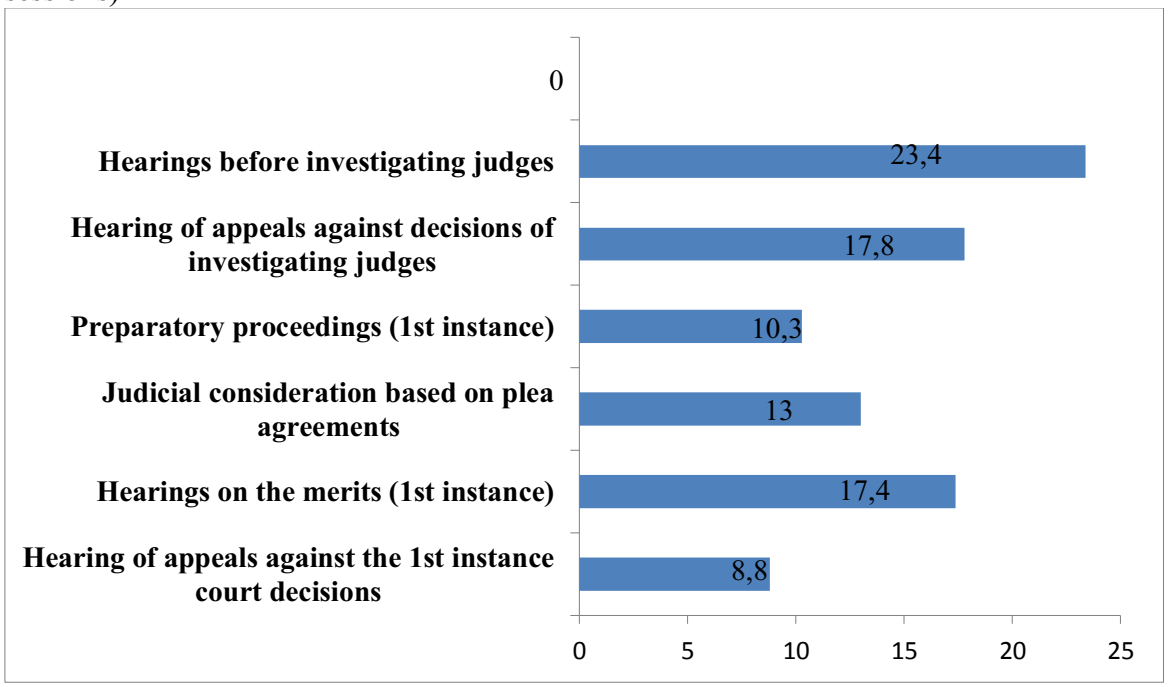
Article 27, CPC, contains a similar standard stating that criminal proceedings are conducted openly in courts of all instances. Investigating judge or court may decide to conduct closed criminal proceedings in the cases that are specified in this article.

Article 328, CPC, states that The number of those present in the courtroom may be restricted by the presiding judge only in case of the lack of seats in the courtroom.

In addition, according to Article 27, CPC, each individual present at court session may keep verbatim records, make written notes and use portable audio recording device.

In the course of monitoring observers monitored the publicity and openness of trials in criminal proceedings. Table 2. – 1. presents the percentage of those who failed to have unimpeded access to court sessions. In such cases observers took notes of how those judges or staff employees acted against the principle of unimpeded access to open court sessions.

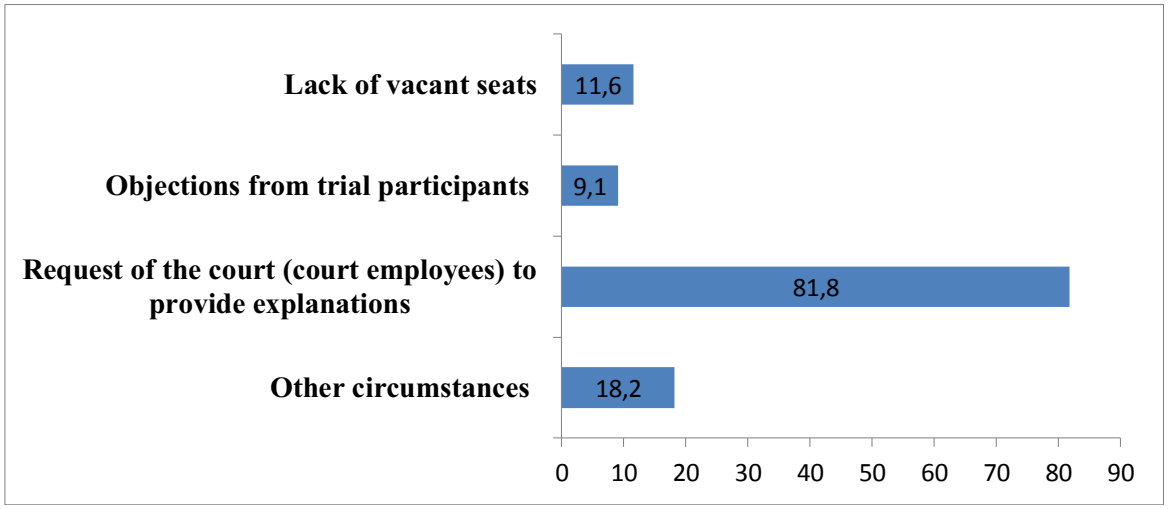
Table 2.- 1. Access to court sessions (% of those who failed to have unimpeded access to court sessions)



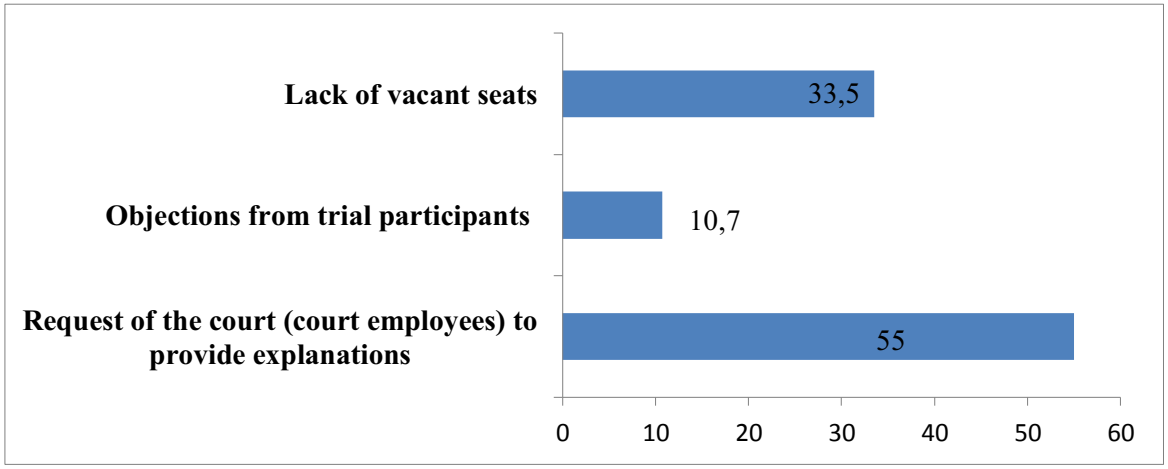
The most frequent hindrances faced by observers are presented in the following table.

Table 2.- 2. Access to court sessions (% of those who failed to have unimpeded access to court sessions)

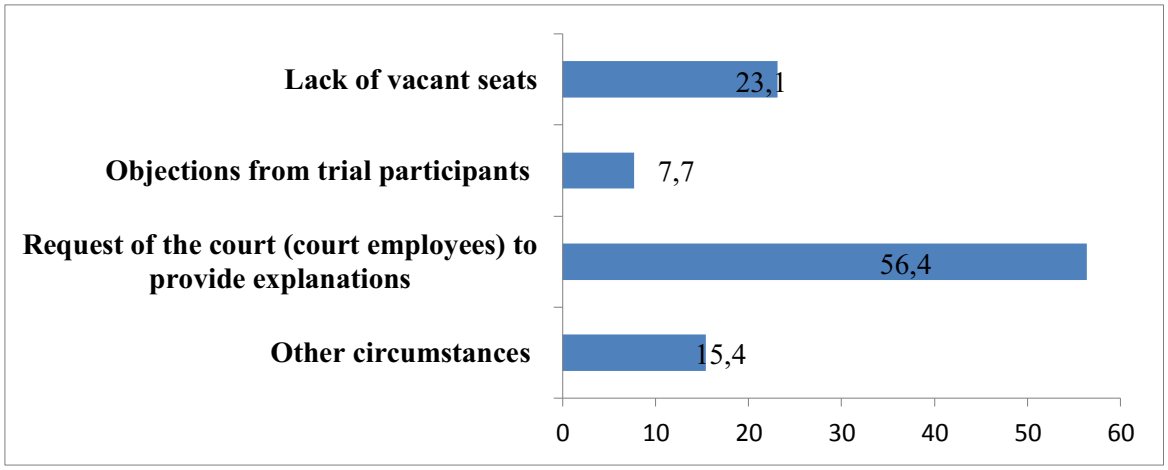
Hearing before investigating judges



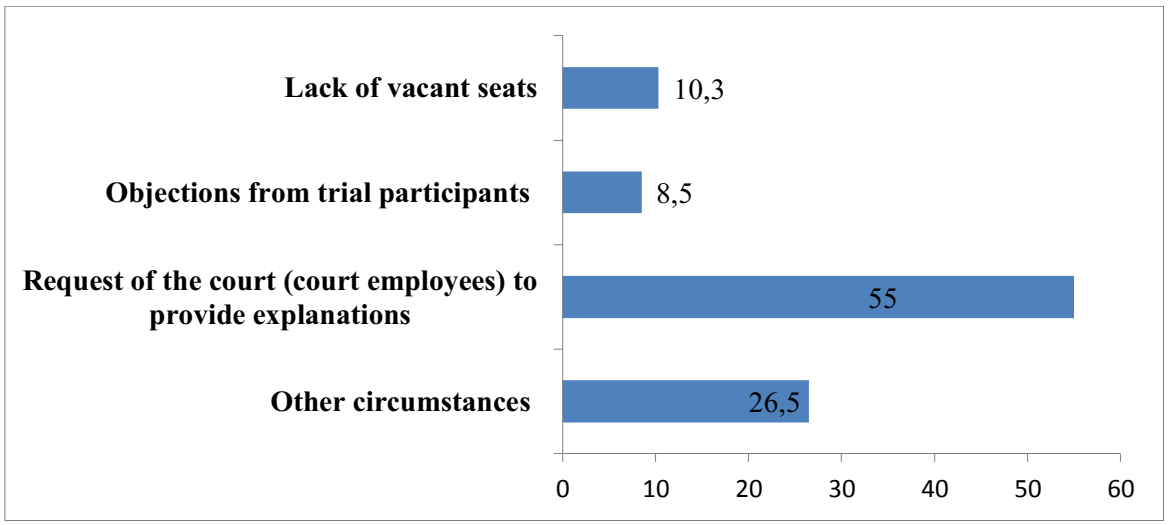
Preparatory proceeding (1st instance)



Hearing on the merits (1st instance)



Hearing of appeals against the 1st instance court decisions



In addition to above situations with impeded access to court sessions, observers quite often and actually in all courts faced the situation where *"the judge's office was locked from the inside. However, they could hear that a court session was going on; furthermore, no information concerning a closed court session was available either on the office door or elsewhere».*

In many cases, particularly during Phase One of the monitoring, observers might stay in the courtroom only after they were granted a ***"direct permission of the judge".***

In addition, judges commonly allowed no audio recording of court sessions to be made by observers on their cellular telephones; gave direction to Griffon officers to additionally check the documents of observers leaving the court premises; allowed no presence at hearings concerning extension of custody were handled where observers had no authorization from prosecutors, or had not submitted an application to Court Registry requesting attendance of that subject court session; denied access to court session noting that '***there's nothing interesting happening there***' or provided no reasoning whatsoever.

The above observations indicate that if a monitor managed to enter court premises upon appropriate checks, this did not mean that he or she could get access to any court sessions as a lay visitor. Observers noted that they could get no access to hearing before investigating judges

in 23.4 % cases, preparatory hearings in 10.3 % cases, hearings on the merits in 17.4 % cases, plea bargain hearing in 13 % cases, court sessions at Kyiv Court of Appeals concerning hearings against decisions of investigating judges in 17.8 % cases and hearing of appeals against decisions of courts of 1st instance in 8.8 % cases.

The monitors noted the following reasons of their failure to get access to court sessions: lack of vacant seats, objections raised by trial participants, request of the court (court employees) to provide explanations and other circumstances.

Thus, monitors failed to get access to court sessions due to lack of vacant seats: hearings before investigating judge in 11.6 % cases, preparatory court sessions in 33.5 % cases, hearings on the merits in 23.1 % cases, court sessions at Kyiv Court of Appeals in 10.3 % cases.

Trial participants raised objections against presence of lay visitors at investigating judge hearings in 9.1 % cases, preparatory court sessions in 10.7 % cases, hearings on the merits in 7.7 % cases and at appellate hearings in 8.5 % cases.

However, requests to explain the purpose of attending a court session made by judges and particularly their secretaries or assistants and their further denial of access for observers deserve particular attention. Thus, judges and court employees denied access for monitors to hearings before investigating judges in 81.8 % cases, preparatory court session in 55 % cases, hearings on the merits in 56.4 % cases, appellate hearings in 55 % cases.

In addition, attention should be paid to such cases where judges allowed no trial recordings (including on their cellular telephones) to be made by lay visitors, which is apparently against Article 27, CPC Ukraine.

It should be noted that importance of the principle of publicity of judicial proceedings is based on the fact that publicity and openness (particularly of criminal proceedings in court of all instances) is an important condition for impartial, comprehensive and thorough examination of circumstances around a criminal offense and rendering a lawful, substantiated and fair decision. Access of trial participants and any other public to court sessions enhances confidence in the effectiveness of legal proceedings and fair and lawful justice, and therefore, it will foster public trust in the judiciary. Such principle encourages judges and other trial participants to exercise their rights and perform their professional duties in good faith, to follow strictly the rules of legal proceedings, ethical relationships between trial participants, as well as has an educational impact on all those present in the courtroom.

However, the above findings of monitors prove that judges intentionally create artificial impedances for public trials, and this, in turn, leads to justified concerns of the public regarding their objectivity and impartiality and is a significant breach of one of fundamental principles of criminal proceeding established by Article 7, CPC Ukraine, which is publicity and openness of judicial proceedings.

Recommendations

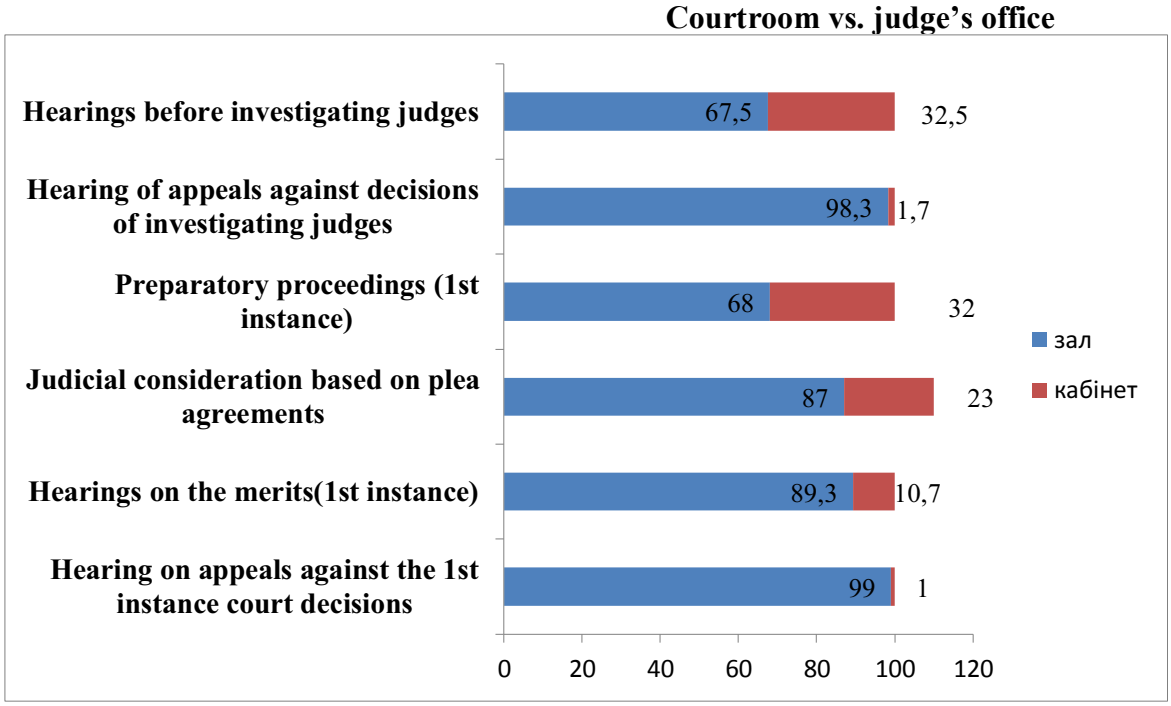
The Council of judges of Ukraine, High Council of Justice, High Qualification Commission of Judges of Ukraine, Supreme Court of Ukraine, High Specialized Court of Ukraine for civil and criminal cases, Kyiv Court of Appeals and Kyiv district courts should address the facts associated with violation of general principles of criminal proceedings and take steps to ensure public and open judicial proceedings as provided for by procedural legislation.

2.2. Place of sessions

According to Article 318, CPC, court sessions should take place in specifically equipped premises: courtrooms. If necessary, individual procedural steps can be conducted outside the courtrooms.

The following information presents the findings regarding the place of court sessions.

Table 2.- 3. Place of court session (%)

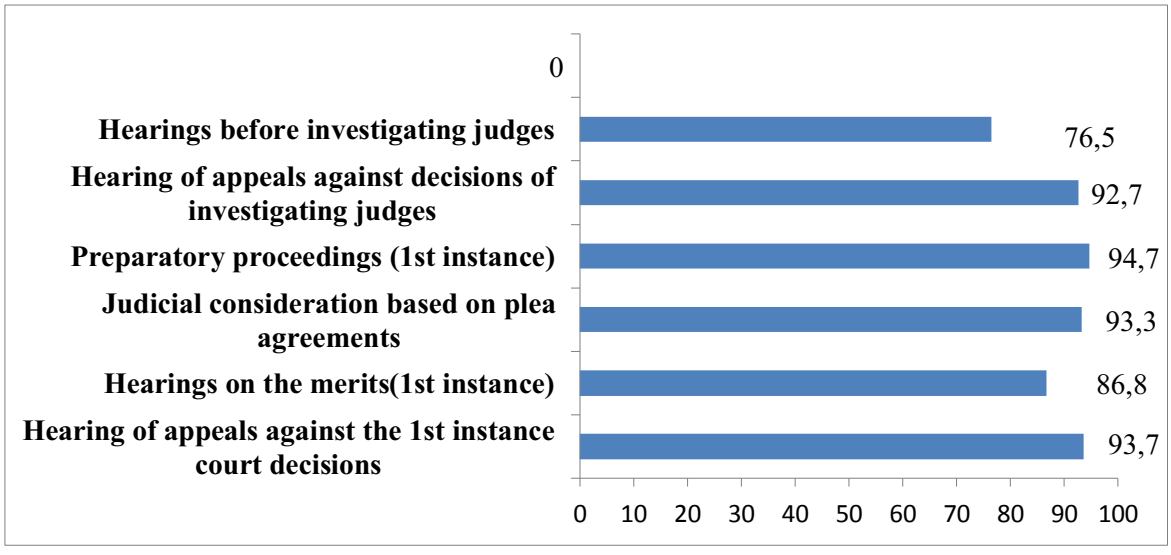


This information indicates that quite frequently court sessions take place in judges' offices. Most frequently they are hearing before investigating judges in 32.5 % cases, preparatory court sessions in 32 % cases, and judicial consideration based on plea agreements in 23 % cases.

It should be specifically noted that in some instances hearings moved to judges' offices, when an individual (monitor) wishing to attend a court sessions showed up.

Observers also watched whether public could attend court sessions in terms of availability of vacant seats.

Table 2.- 4. Availability of vacant seats for the public (% monitors who noted that there were sufficient vacant seats for all)



The above information indicates that the most challenging is availability of vacant seats for those who intended to attend court hearings before investigating judges. This problem is apparently linked to the issue of high incidence of conducting hearings before investigating judges in the judges' offices versus courtrooms. Where hearings take place in courtrooms, participants in criminal proceedings and other individuals willing to attend the session can get access to observe judicial processes. However, where hearings took place in judges' offices, such offices were not sufficient in their size for all participants in trial proceedings to fit in physically, and therefore, they had no appropriate setting to present their position, which in turn could have an impact on how effectively their interests were protected, which is also one of general principles of criminal proceedings.

Recommendations

The Council of judges of Ukraine and State Judicial Administration of Ukraine should take steps to ensure that court have such premises that would meet the requirements for having court sessions conducted in appropriately equipped courtrooms.

The President of Kyiv Court of Appeals and presidents of Kyiv district courts should take steps towards more effective use of court premises to create appropriate environment for judges to administer justice in the manner required by current Ukrainian legislation and to ensure that participants in criminal proceedings exercise their procedural rights and responsibilities.

2.3. Timely beginning of trials

According to Article 318, CPC, trial shall be held and completed within a reasonable period of time. Trial is held in court session with mandatory participation of parties to criminal proceedings, except in cases provided for in the present Code.

According to Article 322 CPC, trial shall continue without breaks, except for time to rest. Trial shall not be deemed discontinued, if court sessions are adjourned for the reasons listed in this Article.

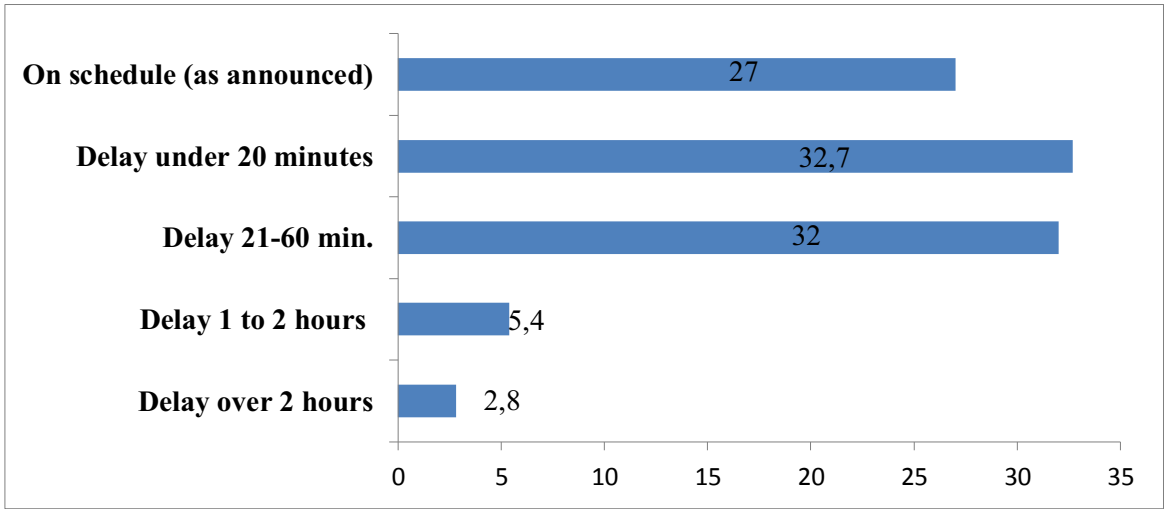
Articles 342, 343 CPC establish that the Presiding judge ***opens a court session*** *at a time fixed for court trial and announces the trial in the criminal proceedings concerned. Secretary of the court session reports to the court concerning the appearance of participants, verifies the powers of defense counsel and representatives, reports the reasons for failing to appear of those that had been summoned to appear, if those reasons are known. In addition, secretary of the court session announces that the entire trial is recorded and on conditions for recording court session.*

The monitoring findings indicate that court sessions rarely begin in timely manner. Moreover, there are systemic observations of over one hour delayed court trials.

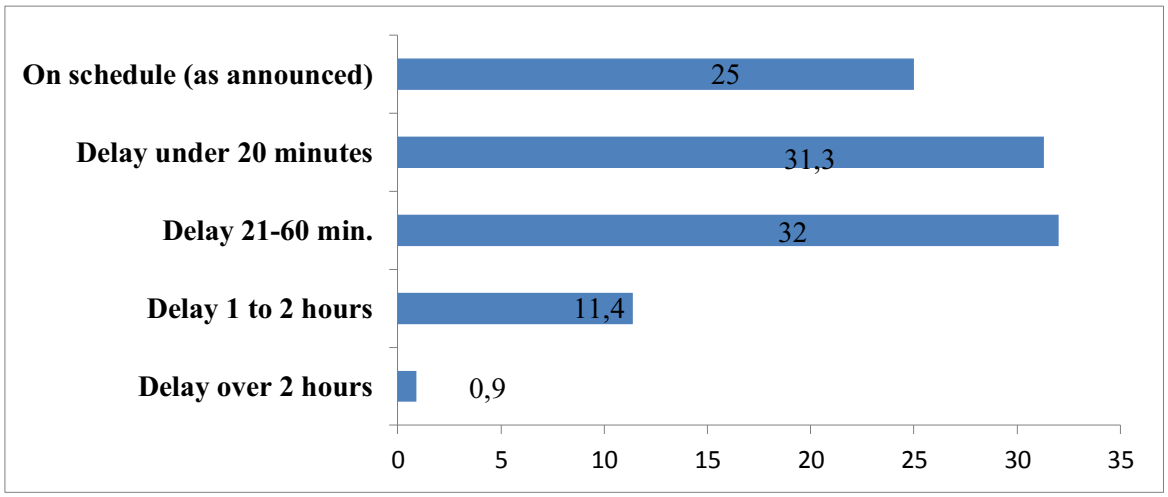
The findings in such observations are presented in the following Table.

Table 2.- 5. Delayed court sessions

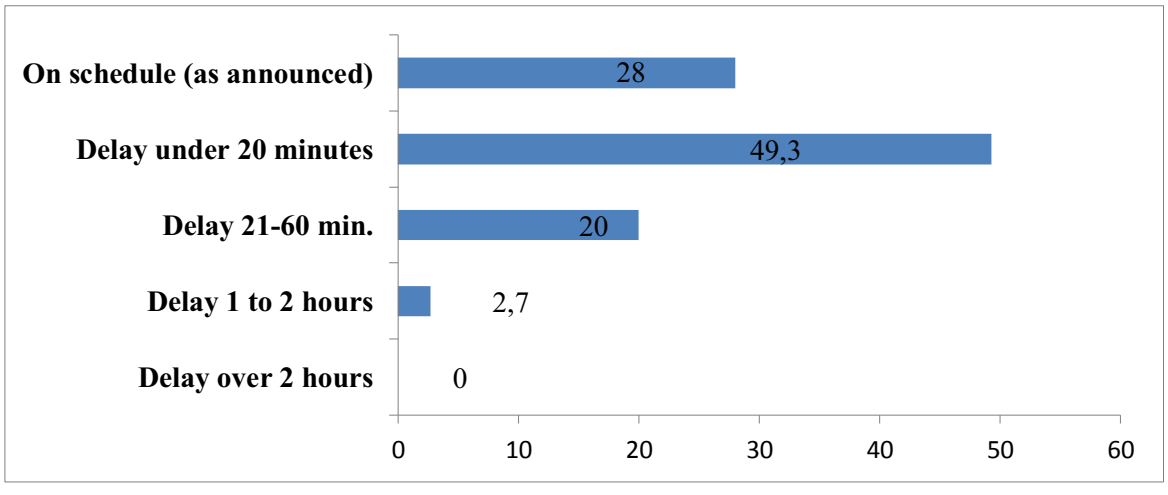
Hearing before investigating judges (%)



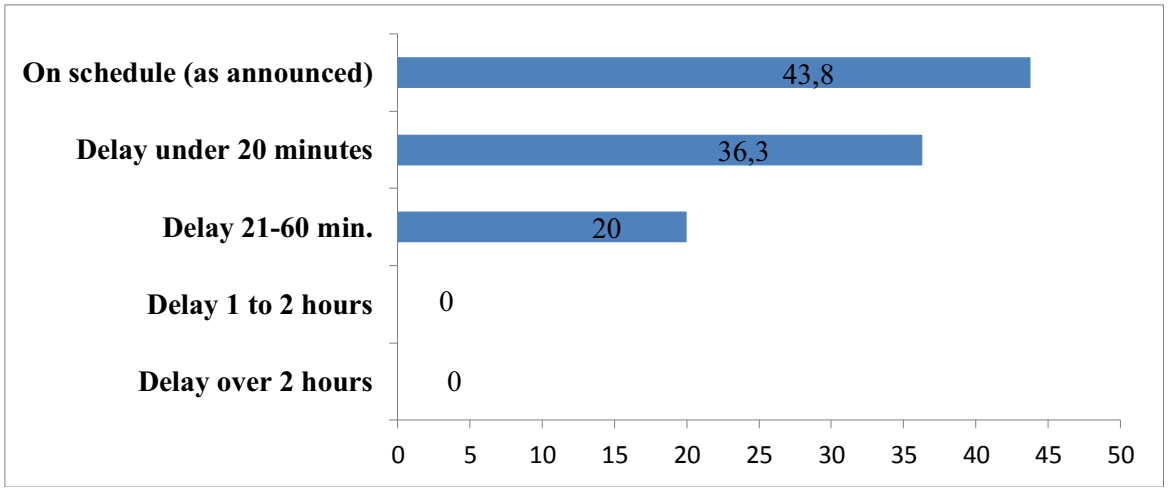
Appeals against investigating judges' decisions (%)



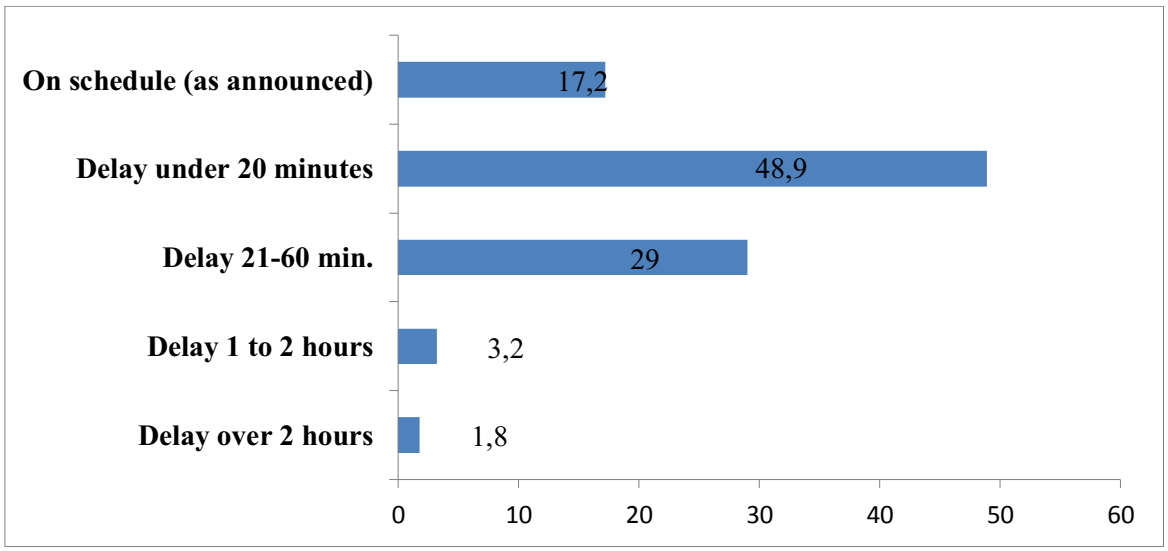
Preparatory proceeding (1st instance) (%)



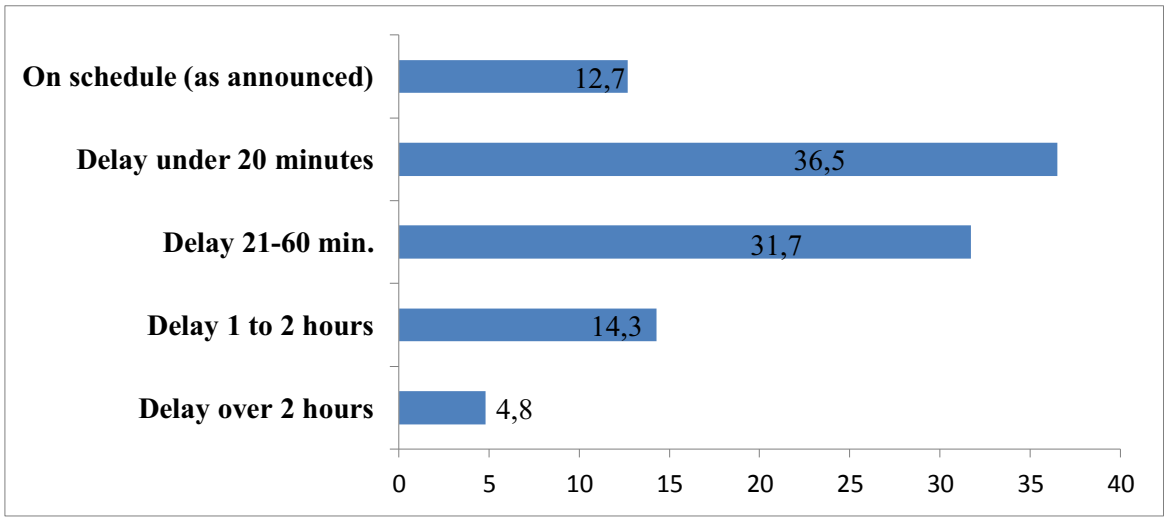
Plea bargain trial (%)



Hearing on the merits (1st instance) (%)



Hearing of appeals against 1st instance court decisions (%)



The above information indicates that court sessions started in timely manner, i.e., according to the schedule as follows: with investigating judges in 27 % cases, preparatory court sessions in 28 % cases, judicial consideration based on plea agreements in 43.8 % cases, hearings on the merits in 17.2 % cases, appeals against decisions of investigating judges in 25 % cases, hearing of appeals in 12.7 % cases. In each category of trials on average 30 % cases were delayed for less than 20 minutes and approximately 30% trials were delayed for 20 minutes to one hour.

However, in numerous cases trials were delayed for over one hour. For example, hearings before investigating judges were delayed for one to two hours in 5.4 % cases, and 2.8 % sessions were delayed for over two hours; 2.7% preparatory court sessions were delayed for one to two hours; 3.2% hearings on the merits were delayed for one to two hours, and 1.8% hearings on the merits were delayed for over two hours; 11.4% hearing of appeals against decisions of investigating judges were delayed for one to two hours, and 0.9% were delayed for one to two hours; 14.3% sessions on appeals were delayed for one to two hours, and 4.8 % sessions were delayed for over two hours.

Monitors indicated that this failure to begin sessions in timely manner was caused by inappropriate planning and organization by judges of their work, failure of participants in criminal proceedings to appear in court in timely manner, delayed delivery of suspects (accused) that are kept in custody in Kyiv pretrial detention facility.

This situation has an apparent impact on how participants in criminal proceedings can exercise their procedural rights and responsibilities and on trial duration, resulting also in additional unplanned procedural costs.

Recommendations

The president and judges of Kyiv Court of Appeals, as well as presidents and judges of Kyiv district courts should address the inappropriate organization and planning of criminal trials.

The Ministry of Interior of Ukraine and the State Penitentiary Service of Ukraine should take steps to ensure timely delivery by convoy units of detained persons and persons in custody to courts for their participation in court sessions.

The National School of judges of Ukraine should cover planning and estimation of trial duration, etc. in its training programs for judges.

The High Qualification Commission of judges of Ukraine should include such indicator as '*adherence of judges to reasonable trial duration requirements*' in judge performance evaluation procedures.

2.4. Postponement of hearings

As was mentioned above, Article 322 CPC provides that trial shall continue without breaks, except for time to rest. Shall not be considered to be breach of the continuity of trial ***the instances of adjourning the court session*** *in consequence of: 1) non-appearance of a party or other participants in criminal proceedings; 2) preparation and approval by the public prosecutor of procedural documents pertaining to dropping of public prosecution, changing of charges, or bringing of an additional charge; 3) preparation by the accused of his defense against a changed or new charge; 4) preparation of the victim for prosecution in court if public prosecutor refused to back the public prosecution; 5) examination of objects in the place of their location, field inspection 6) evaluation to take place in the cases and pursuant to the procedure as set forth in Article 332 of this Code; 7) giving access to items or documents or commission to carry out investigative (detective) actions.*

However, court sessions can also be adjourned at the request of any participant in criminal proceeding with the purpose of exercising appropriate procedural rights.

As for the timeframe of pretrial investigation and trial, according to Article 28 CPC investigating judges shall ensure that the issues assigned to their competence shall be examined within the timeframe established by this Code, and the courts will ensure that cases are tried within reasonable timelines.

Since investigating judges (during pretrial investigation) and courts (during trials) are authorized to deal with quite diverse issues, the current CPS establishes various and sometimes rather expedited periods of time for their examination: immediately upon the receipt or initiation of relevant motions to courts; no later than 2 (3) days upon delivery of appropriate motions to courts; immediately, but no later than 72 hours upon actual detention of suspects, accused, or upon delivery of appropriate claims; no later than 5 days upon delivery of appropriate claims, etc.

Furthermore, according to CPC some issues should be addressed exclusively at court sessions including mandatory attendance of summoned stakeholders, whose failure to appear sometimes hinders hearing of those issues, while in other cases causes no impedances. Some issues are not examined at court sessions, and no such persons are summoned.

As for hearing of appeals against decisions of investigating judges or trial courts, it should be noted that here milestones for appeals and some specifics also exist. Thus, Articles 309, 392 CPC specify the very rulings of investigating judges and trial courts may be appealed against.

According to Article 395 CPC, rulings of investigating judges may be appealed against within 5 days after they have been announced, and trial court rulings may be appealed against within 7 days after they have been announced.

Furthermore, if Article 422 CPC established that an appellate complaint against a investigating judge's ruling shall be considered not later than within three days after its receipt by the court of appellate instance, no timeline for the consideration of appeals against trial court rulings are specified in this Code.

Therefore, the subject provisions of CPC should be taken into account in assessment of the following data.

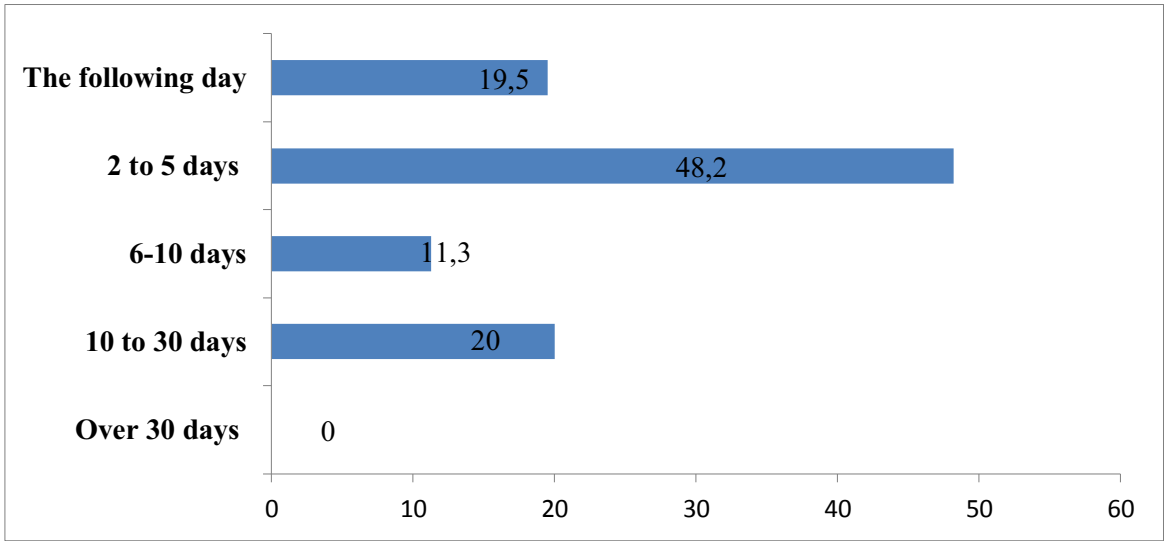
The observers found that in some situations hearings were adjourned. In general, the incidence rates of these situations were as follows:

- hearing by investigating judges – 10.7 %;
- appeals against rulings of investigating judges – 55.6 %;
- preparatory proceedings (1st instance) – 13.9 %;
- hearings on the merits (1st instance) – 42.1 %;
- hearing of appeals against trial court decisions - 22.4%.

The duration of intervals between court sessions is presented in the following Table.

Table 2.- 6. Trial adjournments (% structure of cases that were adjourned)

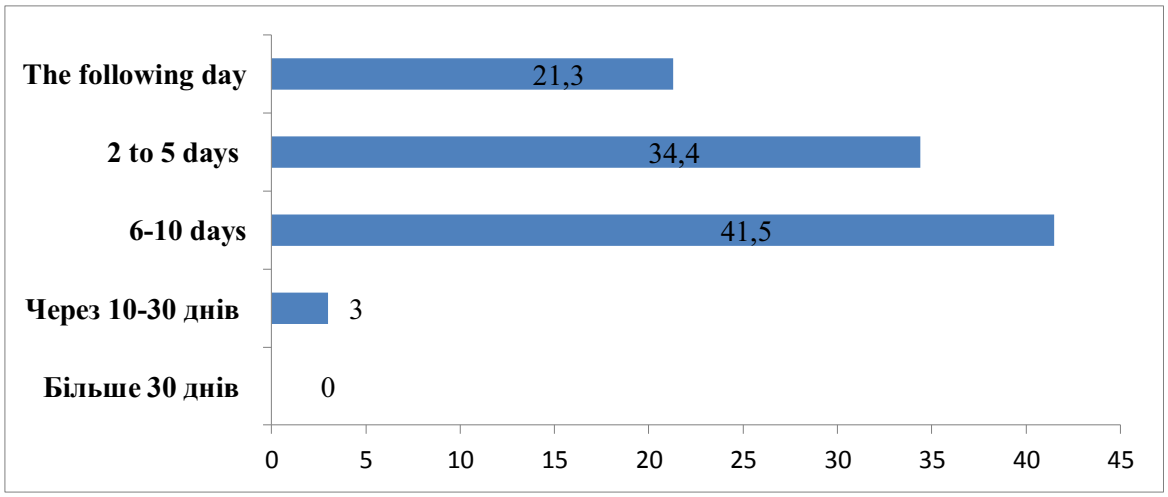
Hearing by investigating judges (%)



The above Table indicates that almost 50% hearings before investigating judges were adjourned for 2 to 5 days, 11.3 % were adjourned for 6 to 10 days, and 20 % were adjourned for 10 to 30 days .

However, most of these cannot be expressly believed to indicate the violation of timelines established in the CPC considering that the duration of intervals between court sessions may be justified in each specific case: for example, based on the motions from participants of legal proceedings that might have been submitted for the purpose of objective and comprehensive finding of circumstances in the case. Only one of above indicators, such as 'adjournment of court session for the period of 10 to 30 days', may indicate potential violation of established timeframe requirements by investigating judges.

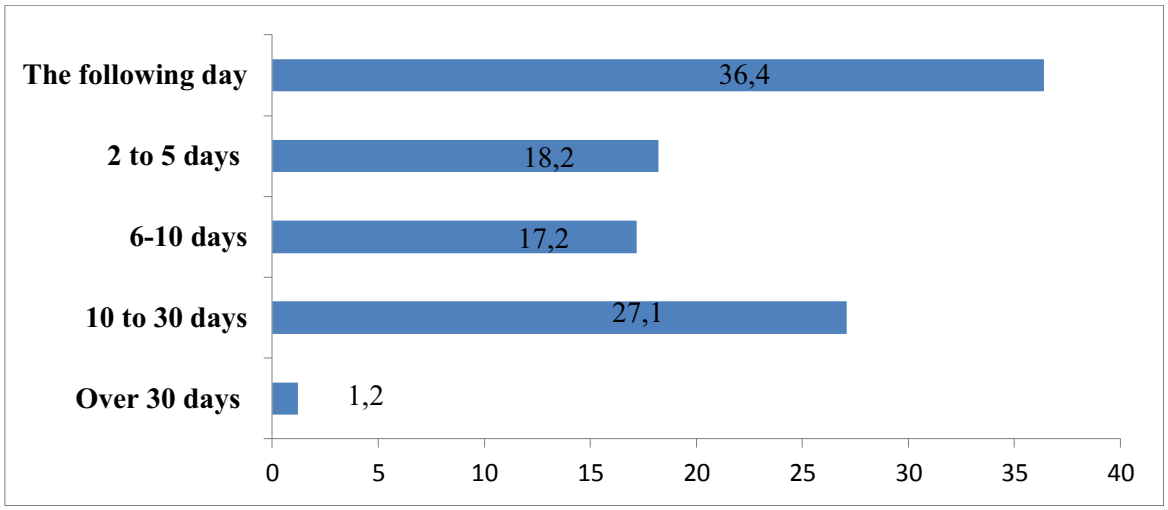
Appeals against rulings of investigating judges (%)



This Table shows that in most cases courts of appeals try to deal with appellate complaints in timely manner. However, in more than one case court sessions were adjourned in breach of above timelines. Furthermore, the reasons for adjournment should obviously be taken into account considering that such adjournment may have been justified by the obligation of the

court to grant relevant participants in criminal proceedings an opportunity to exercise their right for defense.

Preparatory proceedings (1st instance) (%)

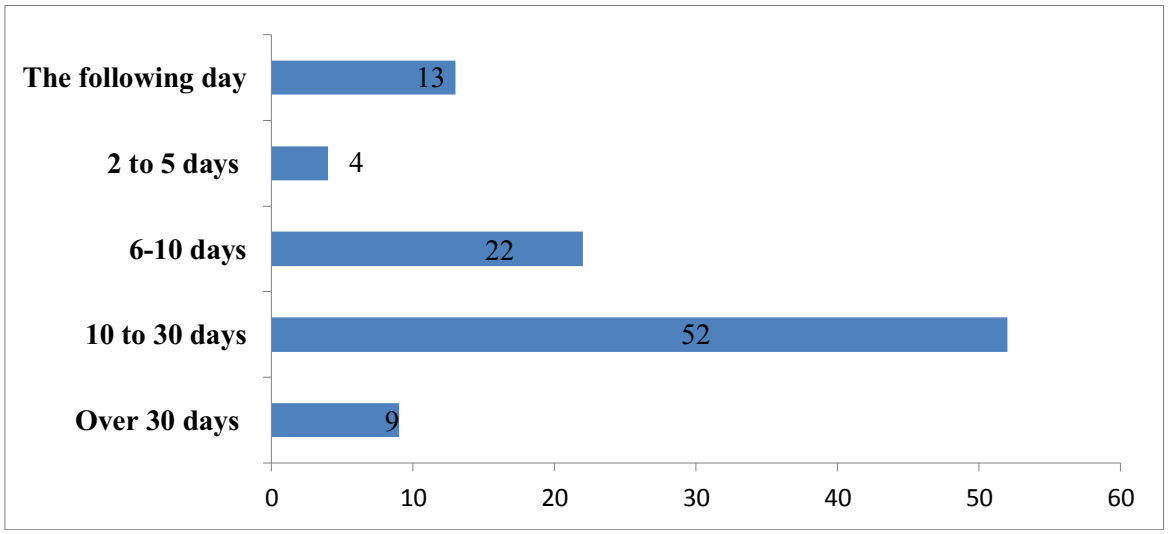


It should be noted that CPC establishes no timeframes for preparatory proceedings to be completed. According to the practice, this may involve several court sessions that may take few months in terms of time.

He above findings indicate that in most cases preparatory court sessions were adjourned or intervals were announced until the following day in 36 % cases, up to 5 days in 18 % cases, up to 10 days in 17 % cases, up to 30 days in 27 % cases. In some instances the intervals between court sessions lasted for over 30 days.

Adjournment or announcement of intervals in preparatory proceedings was due to the need to address the issues related to the preparation of criminal proceeding to trial. The duration of intervals depends on the content of motions from the participants in criminal proceedings and the issues that need to be addressed by the court at this stage.

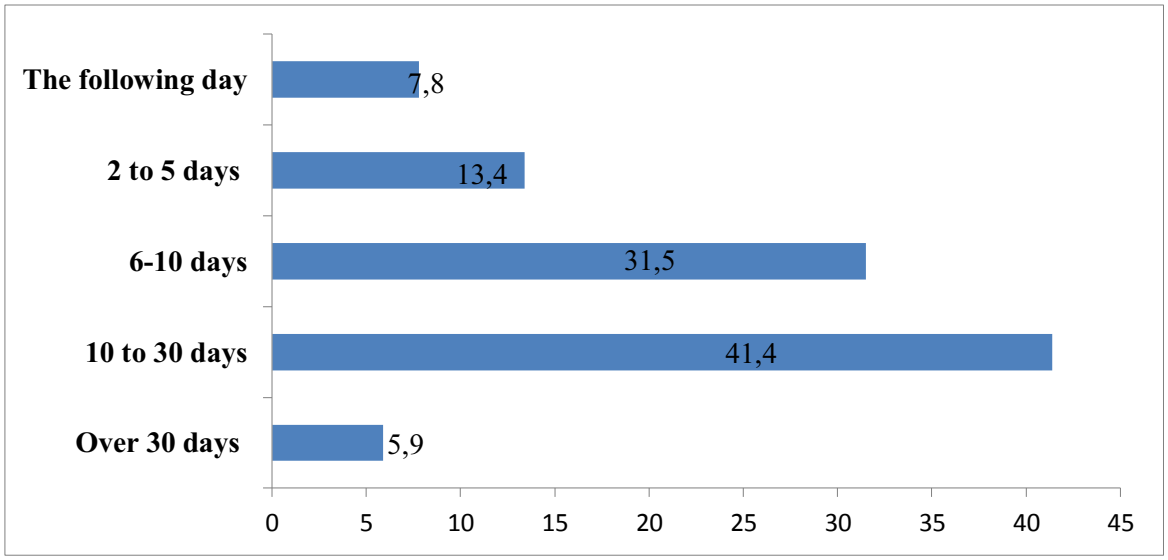
Hearings on the merits (1st instance) (%)



The above observations indicate that in 50 % cases court sessions took place every month, in 20 % cases every 10 days, in 13 % cases court sessions were adjourned until the following day, and in 9 % cases they were adjourned for over 30 days.

In this regard it should be noted that CPC establishes no timeframe for criminal trials in trial courts, considering that in each specific case such duration will depend on how complex criminal proceedings are, on the number of accused and victims, appearance of participants in criminal proceedings in court sessions, the number of motions that are filed to court by various participants in criminal proceedings, duration of forensic examinations, the number of witnesses that the court needs to examine at court sessions, etc.

Hearing of appeals against decisions of trial courts (%)



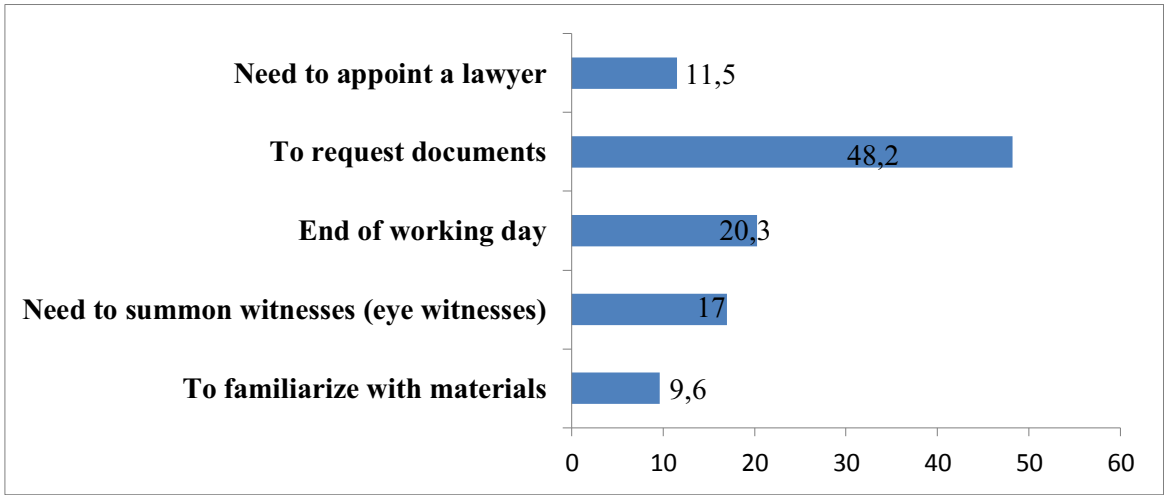
As mentioned above, CPC establishes no timeframe for appellate courts to review criminal proceedings. At this stage trials follow general rules observing the procedural rights of all participants in criminal processes. Therefore, trials are adjourned and intervals between court sessions of courts of appeals are announced on same grounds as in trial courts

In the course of monitoring it was rather difficult to consolidate and classify in certain manner the reasons concerning adjournments of court sessions, since proceedings of each type have their specifics in terms of legal actors, their goals, and grounds for adjournment, etc. Therefore, in the course of observations the reasons for adjournment were recorded in the wording that was used by the court or legal actors.

The findings of observations in terms of reasons for adjournments or intervals are presented in the following Table.

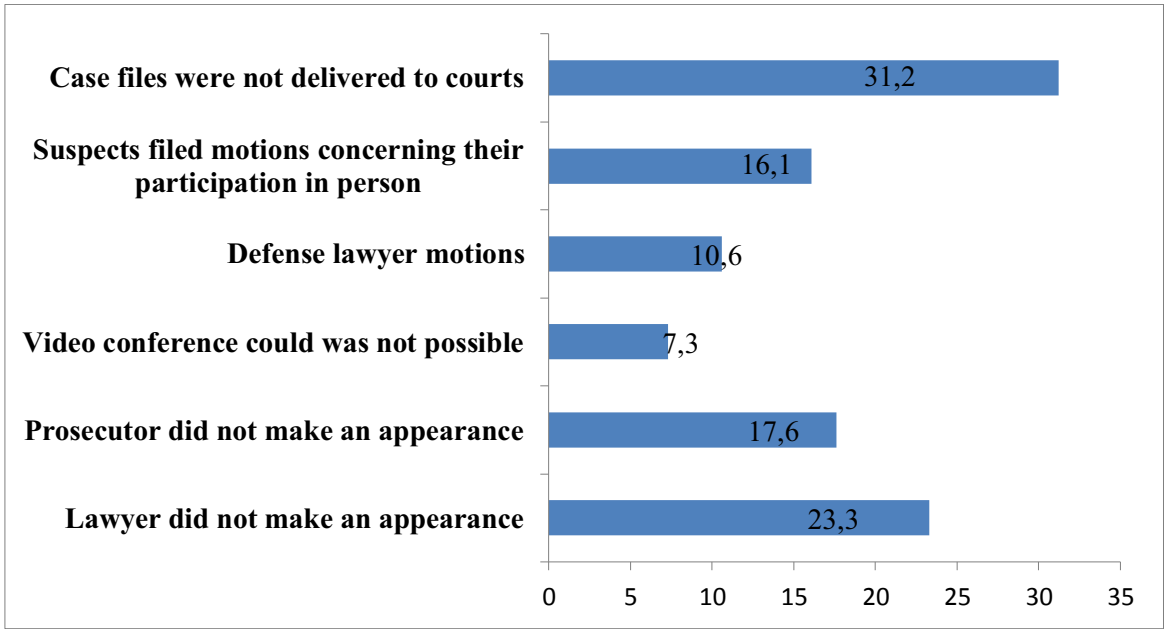
Table 2.- 7. Reasons for trial adjournments ("according to observers")

Hearing by investigating judges (%)



In the course of monitoring observers indicated that most frequently court sessions of investigating judges were adjourned based on motions of participants in criminal proceedings to request documents, as was the case in 48.2 % cases, summon witnesses in 17 % cases, appoint a lawyer for the suspect (accused) in 11.5 % cases, to familiarize with proceeding related files in 9.6 % cases and since the working day was over in 20.3 % cases. The above information indicates that the materials submitted for consideration of investigating judges are poorly prepared, i.e., lack of evidential basis that needs to be examined by investigating judges when considering the motions from participants in criminal proceedings.

Appeals against rulings of investigating judges (%)

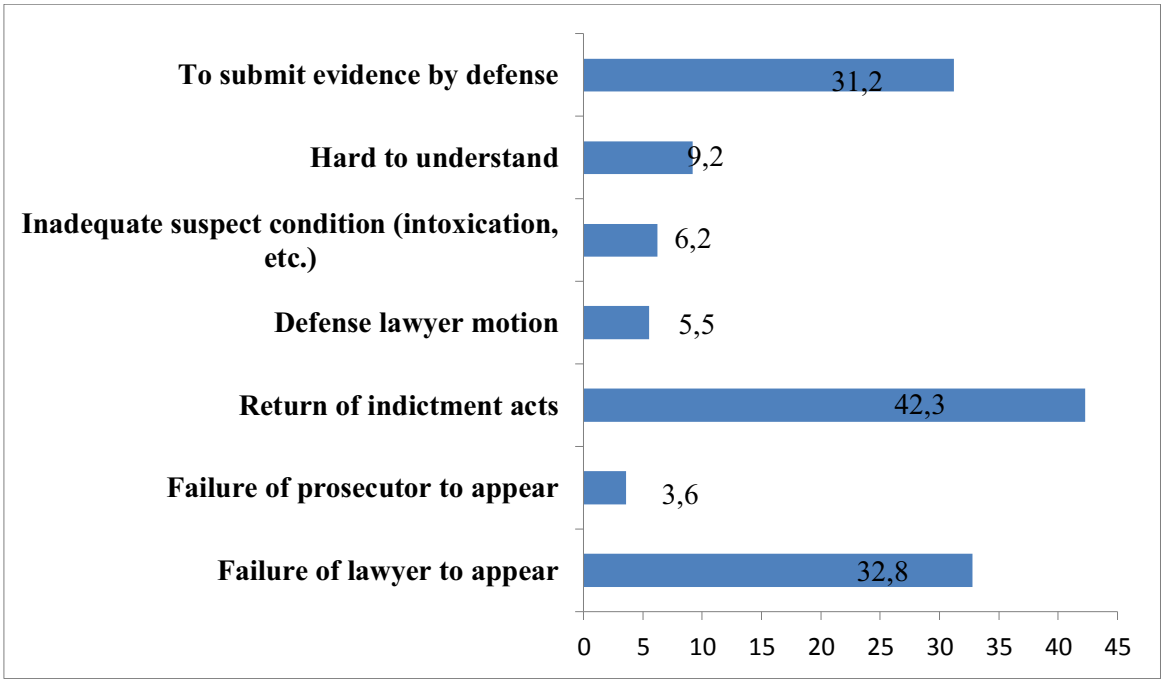


Indicators in this Table show that appellate court sessions during consideration of appeals against rulings of investigating judges were adjourned for the reasons of failure to receive case files from trial courts in 31.2 % cases, failure of lawyers to appear in 23.3 % cases and failure of prosecutor to appear in 17.6 % cases. Such cases could only happen due to inappropriate

organization of work processes at Kyiv district courts and mala fide performance of both prosecutor office employees and defense lawyers.

Furthermore, particular attention should be paid to such reason as no possibility to conduct court sessions in videoconferencing mode in 7.3 % cases. These observations indicate inappropriate organization of work processes at Kyiv Court of appeals and at Kyiv pretrial detention facility with regard to supporting the sessions in the subject manner.

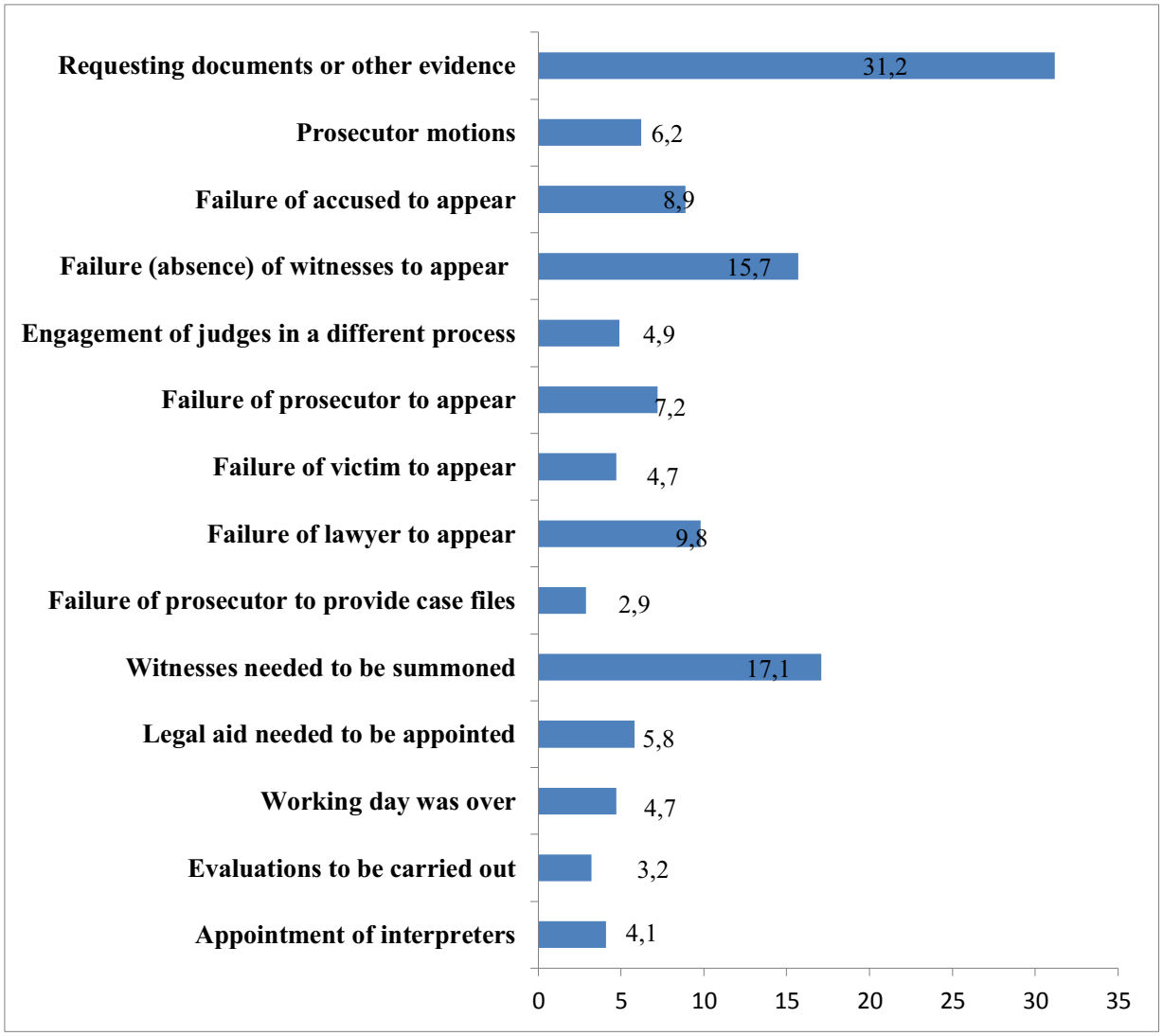
Preparatory proceedings (1st instance) (%)



As can be seen in this Table, preparatory court session was adjourned at the motion of defense lawyer in 5.5 % cases, at the motion of defense party to submit evidence in 31.2 % cases, due to failure of prosecutor to appear in 3.6 % cases and due to failure of lawyer to appear in 32.8 % cases. The latter indicator proves inappropriate performance by lawyers of their professional duties.

As for return of indictment acts to prosecutors, these observations are looked into in section 3.3.

Hearing on the merits (1st instance) (%)

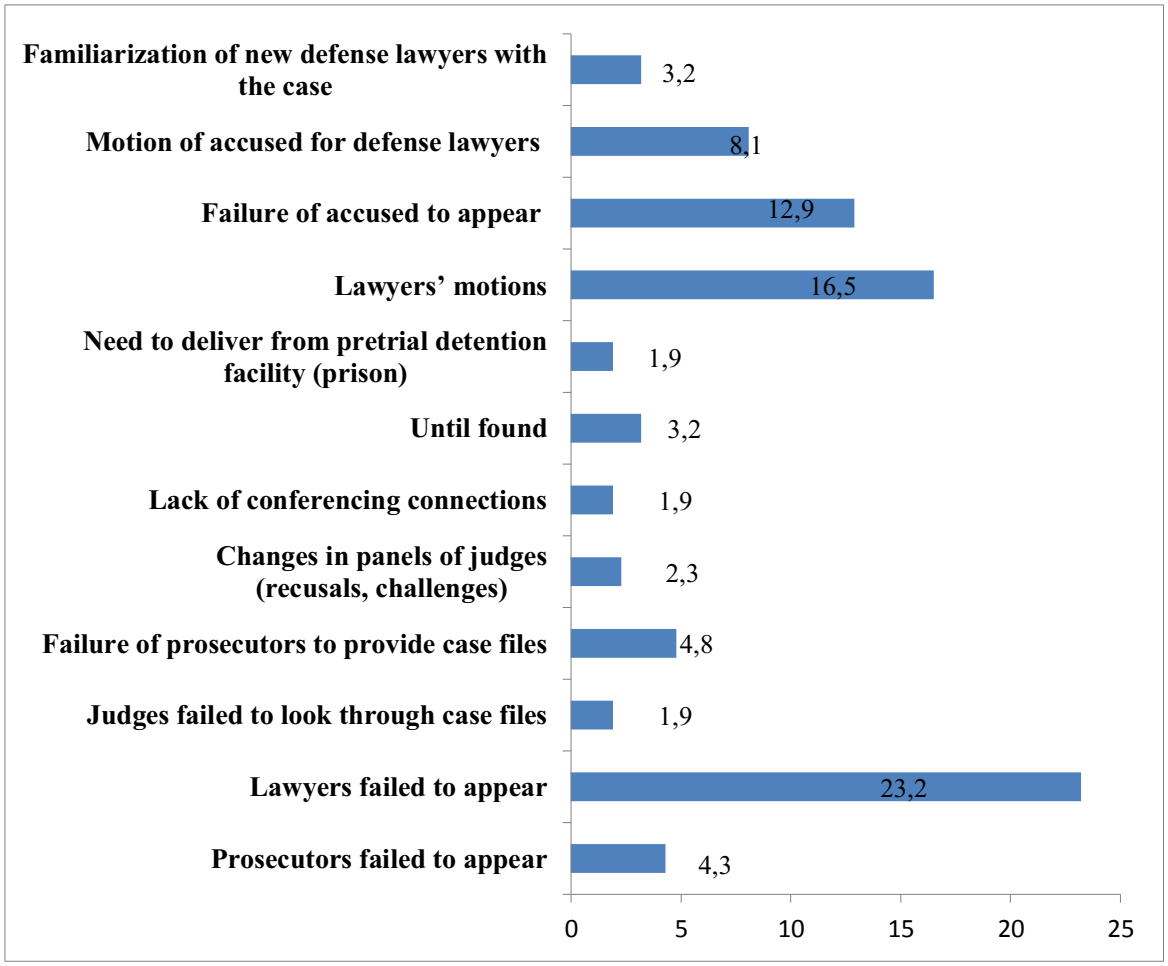


Indicators in this Table show that in most cases court sessions were adjourned on the grounds provided for in CPC Ukraine, such as failure of legal actors, whose attendance in court is mandatory, to appear, participants in the process needed to file motions requesting documents or other documents, witnesses had to be summoned, legal aid or interpreters had to be appointed or evaluations needed to be carried out.

However, again inappropriate performance by prosecutors of their procedural duties can be observed: court sessions were adjourned in 7.2 % cases due to their failure to appear, and in 2.9 % cases they failed to provide the required materials, and also, failure of lawyers to appear caused adjournment in 9.8 % cases.

In addition, as indicated in the above Table, monitors noted the instances of inappropriate organization of work processes by judges considering that in 4.9 % cases court sessions were adjourned due to their engagement in other judicial processes.

Hearing of appeals against rulings of trial court judges (%)



The above observations of monitors indicate that Kyiv Court of appeals adjourned most court on the grounds specified in the CPC Ukraine, particularly due to failure of legal actors to appear, motions filed by participants in legal processes or due to the changes in panels of judges.

However, even at this stage inappropriate performance by prosecutors of their procedural duties is observed, considering that court sessions were adjourned due to their failure to appear in 4.3 % cases, and in 4.8 % cases they failed to provide the required materials.

In addition monitors witnessed the lack of readiness of defense parties to trials in appellate instances, considering that 23.2 % court sessions were adjourned due to their failure to appear, and in 16.5 % cases the adjournment was caused by their motions.

Furthermore, there were instances where the accused were not delivered to participate in court sessions, which happened in 1.9 % cases, lack of videoconferencing connections in 1.9 % cases, and the judges were not ready to trials in 1.9 % cases. This means that in 5.7 % cases court sessions did not take place due to organizational reasons.

Considering the listed reasons for criminal trial adjournments, it may be stated that in 50 % cases such adjournments were caused by mala fide attitude of legal actors to their procedural duties and rights, and this, in turn, affected the duration of appellate processes.

As for videoconferencing at court sessions, it should be reminded that according to Article 11, Law of Ukraine on judiciary and the status of judges, and Article 336 CPC the obligation to ensure videoconferencing at court sessions is vested in courts.

Recommendations

President and judges of Kyiv Court of appeals, presidents and judges of Kyiv district courts should pay attention and take steps to appropriately organize and plan criminal trials.

Ukrainian Prosecutor General Office of Ukraine should take steps to ensure appropriate support by prosecutors of state prosecution in courts, and particularly to prevent adjournments of court sessions due to failure of prosecutors to appear at court sessions and inappropriate preparation of materials that are forwarded to courts.

The National Bar Association of Ukraine, High Qualification and Disciplinary commission of the Bar and Free Legal Aid Coordination Center should take into account and take steps to ensure appropriate performance by lawyers of their professional duties, particularly in terms of ensuring participation in court sessions.

The State Judicial Administration of Ukraine, State Penitentiary Service of Ukraine, President of Court of Appeals and presidents of district courts in Kyiv should take steps to ensure appropriate organization of procedural videoconferencing processes.

The Ministry of Interior of Ukraine and the State Penitentiary Service of Ukraine should take steps to ensure appropriate performance of the components engaged in the delivery of detained persons and persons in custody to courts to participate in court sessions.

2.5. Trial recording with technical means

As mentioned above, according to Article 129 of Ukrainian Constitution, one of key principles of justice is trial publicity and its recording using technical means.

The Law of Ukraine on judiciary and the status of judges (Article 11) establishes that trials shall be recorded using technical means following the procedure specified in the procedural law.

According to Article 7 CPC complete recording of trials using technical means is one of general principles of criminal proceedings, and according to Article 412 CPC Ukraine, the breach of this principle is a significant violation of the requirements of procedural law and constitutes a separate ground for appellate courts to reverse the rulings of trial courts.

Article 27 CPC establishes that trials shall be fully recorded using sound recording technical means. Only the technical recording made by the court following the procedure established by this Code shall be deemed an official trial recording.

During the trial opening, according to Article 343 CPC, the secretary of court session informs that the trial shall be fully recorded, and also notifies on what conditions it will be recorded.

It should be noted that such important principle of justice as trial recording using technical means is a significant condition for impartial trials, ethical relationships between legal actors and prevention of abuse by trial participants of their procedural rights.

In the course of monitoring observers took notes of two parameters: a) announcement of trial recording using technical means; b) motions for trial recording using technical means. The following Tables describe the findings of such observations.

Table 2.- 8. Announcement made by the court concerning trial recording (%)

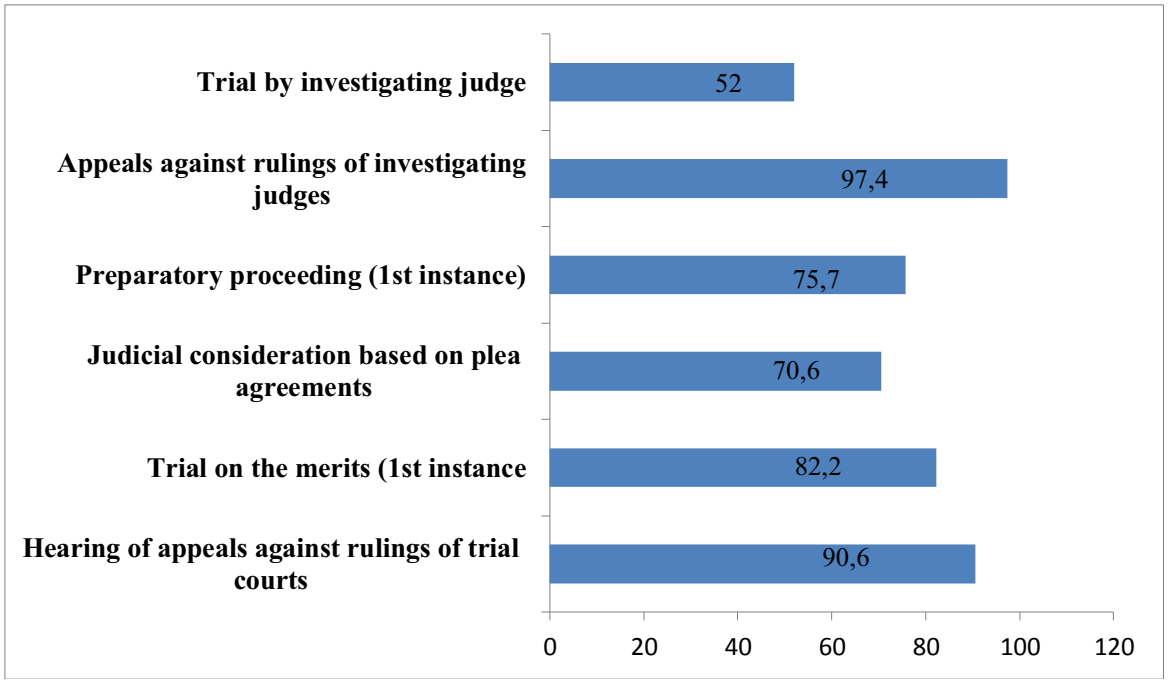
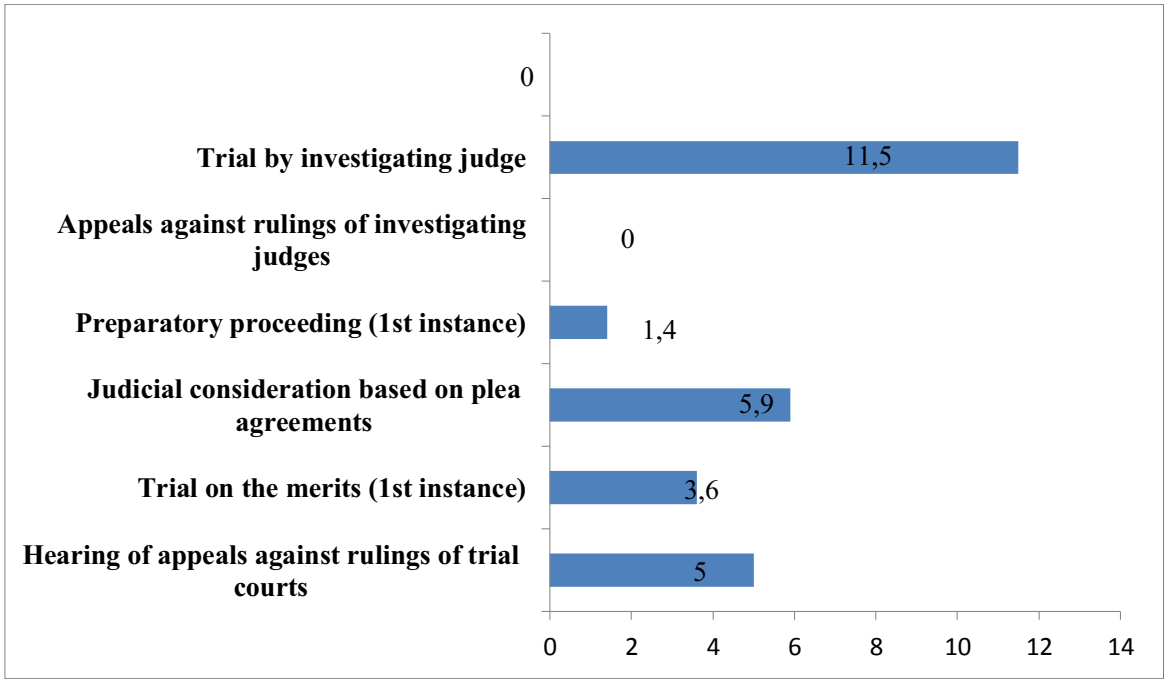


Table 2.-9. Motions for trial recording using technical means (%)



The above observations make it possible to determine to what extent the requirements of procedural law to record trials using technical means were met.

Thus, in most instances judges informed participants in criminal proceedings concerning technical recording of trials. This requirement is best met in Kyiv Court of appeals, although there were instances of non-compliance with Articles 7, 27 CPC concerning the announcement of such recordings.

However, Kyiv local courts made no such announcement in average 25 % cases. Furthermore, it should be noted that according to CPC investigating judges during trial only

consider complaints against decisions, acts or failure to act of investigator or prosecutor in the course of pretrial investigation, i.e., it is the only category of issues that belong to the competence of investigating judges and their consideration at court sessions should be recorded. Other issues to be handled by investigating judges may be considered outside court sessions, and without summoning the relevant participants in criminal proceedings.

One should pay attention to the fact that although the court announces that hearing before investigating judge will be recorded only in 52 % cases, only in 11.5 % cases legal actors filed motions for one or another trial recording. Also, legal actors did not always filed motions for recording in other types of judicial proceedings where courts failed to announce technical recording. Such situation indicates low activity of parties in terms of ensuring trial recording and inappropriate performance by judges of their procedural duties.

Upon review of above indicators, conclusion may be made that the requirement of Ukrainian Constitution and the CPC in terms of trial recording using technical means is not met to the full extent. The reasons for violation of procedural law in this case may include: 1) inappropriate performance by court secretaries of their duty to announce the recording using technical means of court sessions before they begin, 2) lack of recording equipment in courts, 3) court sessions take place in the rooms (judges' offices, as mentioned above) that are not equipped to ensure full recording of judicial processes.

Recommendations

The State Judicial Administration of Ukraine should ensure that courts have appropriate equipment to implement procedural clauses concerning the trial recording.

The President and judges of Kyiv Court of appeals, presidents and judges of Kyiv district courts should take steps to ensure that criminal trials are conducted according to the procedure and in such manner as required by the CPC, particularly in terms of trial recording.

2.6. Advising trial participants on their rights and duties

According to Article 345 CPC, at the beginning of trial the ***bailiff hands over*** *to participants who take part in trial the instruction on their rights and duties prescribed in the present Code After the accused and other persons who participate in the trial, review the instruction, the* ***presiding judge*** *finds out whether they understand their rights and duties, and if necessary, provides* ***explanations****.*

According to Articles 347, 348 CPC the trial begins with the public prosecutor reading an operative part of indictment , and thereupon ***the court explains*** *to the accused the essence of charges and* ***ask*** *whether the accused understands it, pleas guilty and whether he or she wishes to give testimony.*

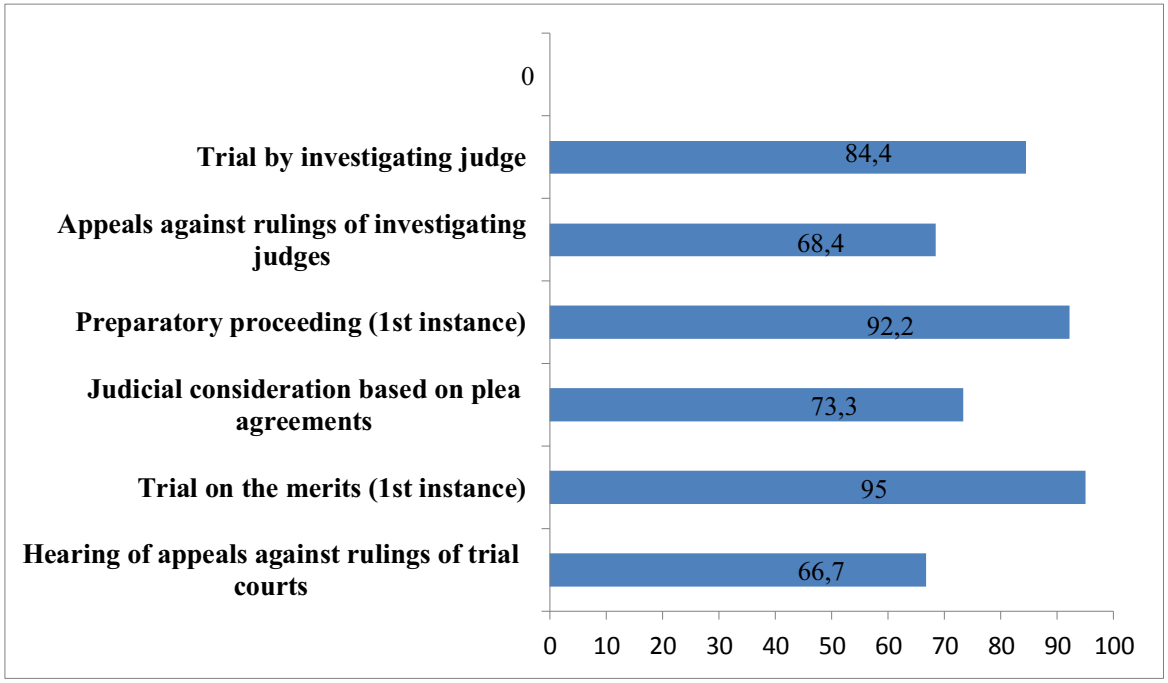
Taking into account the specifics provided for in Chapter 26 CPC, the investigating judge considers complaints against decisions, actions or failure to act of investigator or prosecutor during pretrial investigation following the same procedures.

During monitoring how these CPC standards were followed was assessed: a) concerning all participants in legal process; b) concerning suspects (accused).

The following Table includes the summary of assessment of how trial participants were advised on their rights (% of situations where the courts took an appropriate step).

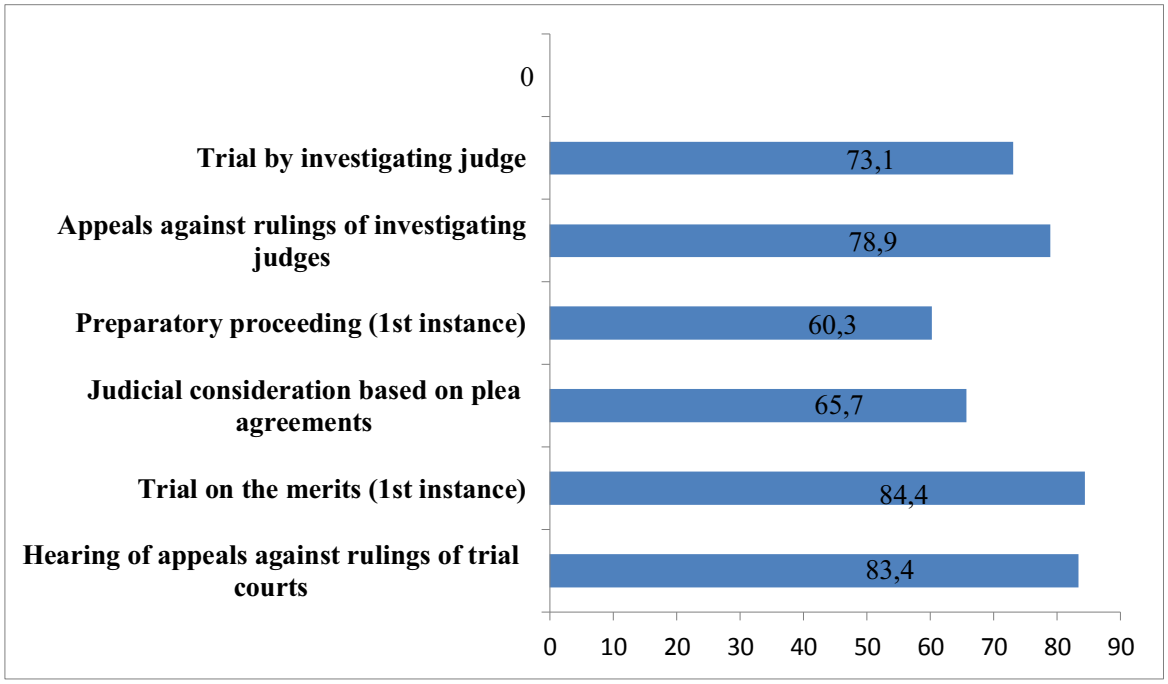
Table 2.-10. Court actions concerning advising to trial participants on their rights and duties (%)

Court provided an instruction concerning the rights and duties (% of all observations)



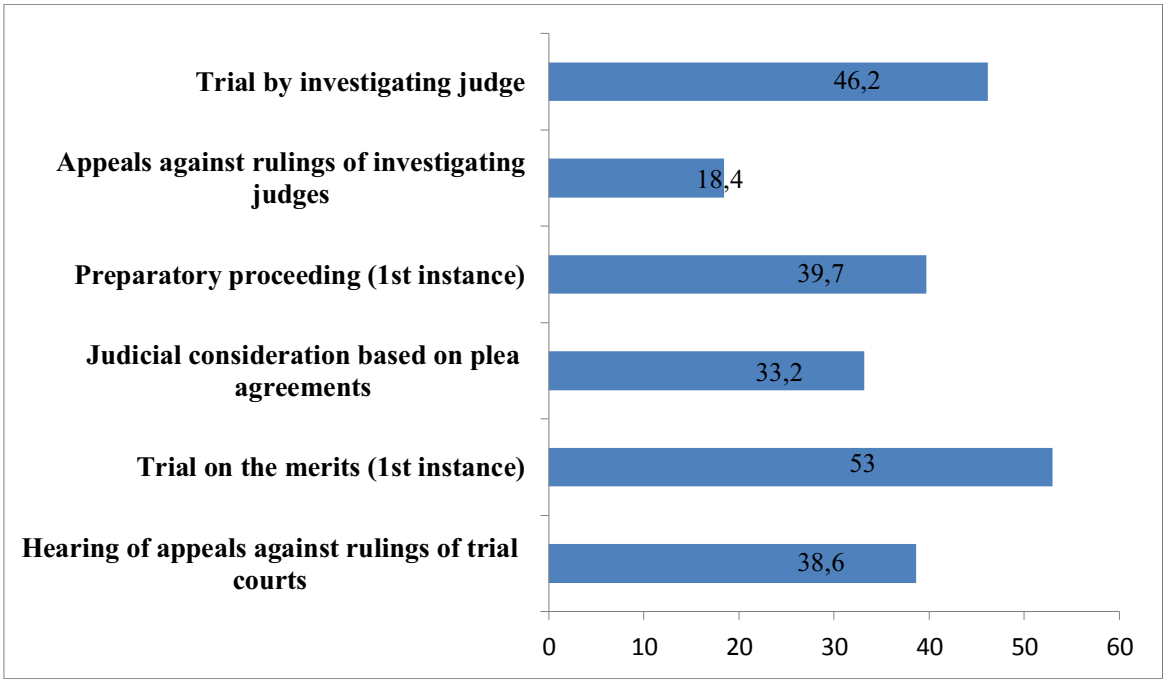
The above data indicate that bailiffs of local courts, but mostly of Kyiv Court of Appeals, do not effectively perform their duty in terms of delivery to participants of instructions concerning their procedural rights and duties, which in turn affect further exercise by participants in criminal proceedings of their right to defense.

Courts asked whether participants understand their rights and duties (%of all observations)



The indicators in this Table show that in more than one instance judges never asked trial participants whether they understood their procedural rights and duties. In this regard the data regarding local courts are more concerning, since in 60.3 % cases observation of preparatory proceedings and in 65.7 % cases observation of judicial consideration based on plea agreements identified that judges disregarded whether or not trial participants understood their procedural rights and duties.

The court asked whether participants needed explanation of their rights and duties (% of all observations)

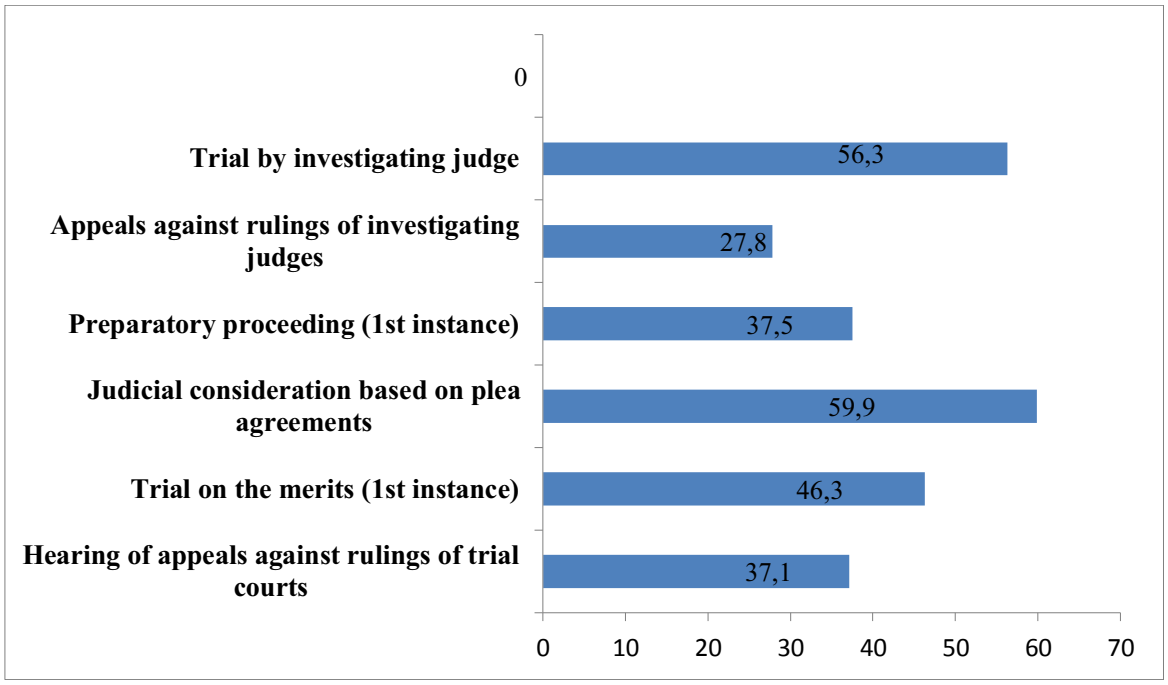


The above data indicate that in most cases judges only read through the instruction concerning the procedural rights and duties, and in many instances they never ask whether trial participants need their explanation.

The following Table describes the results of assessment of the circumstances where the suspects (accused) were advised on their rights (% of situations where courts took certain steps).

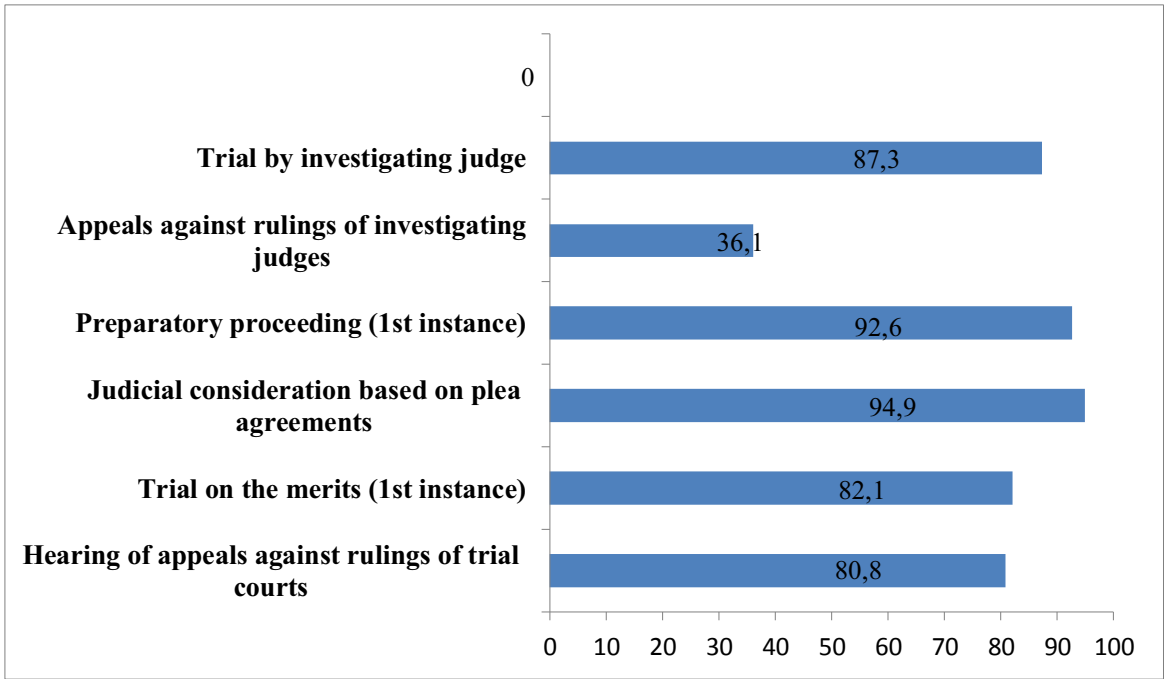
Table 2.-11. Steps taken by the courts to explain the suspects (accused) their rights and duties

Courts explained the suspects (accused) their rights and duties (%)

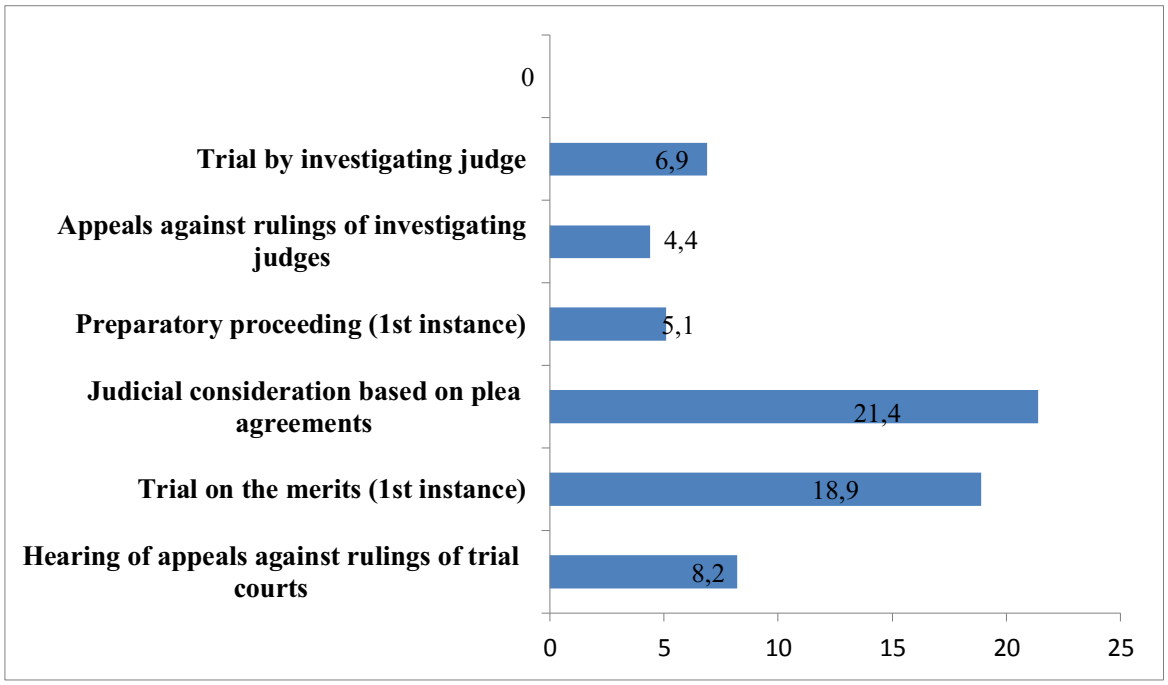


The above Table indicates that unfortunately, judges do not believe it necessary to individually explain to suspects or accused their procedural rights, which may affect the exercise by them of their right to defense.

The suspect (accused) confirmed that he/she understood the rights (% of situations where explanation of the rights was provided)

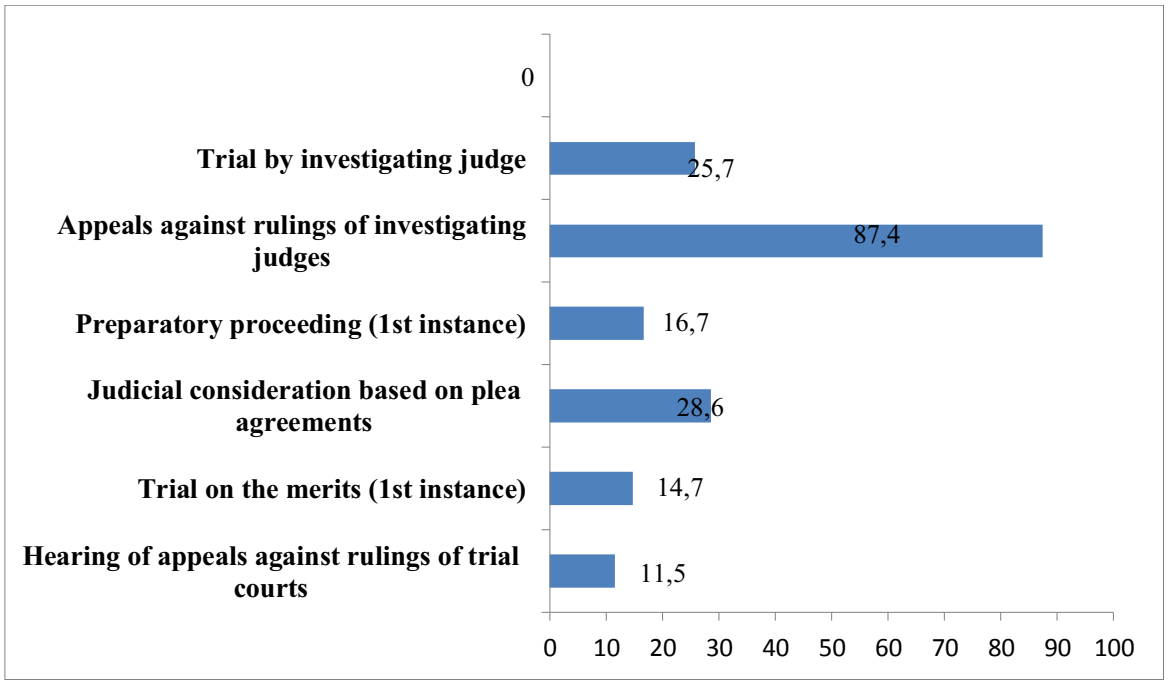


The court explained the right of suspects (accused) to keep silent and to not self-incriminate) (% of all observations)



In this case again the judges are observed to not care about giving the suspects or accused an opportunity to exercise the right to refuse to provide explanation with regard to suspicion and refuse to answer questions.

Court explained to the suspect or accused the essence of suspicion or the content of charges



The above information from monitors indicate that judges in most cases never explained to the suspects and accused the essence of suspicion or charges in breach of procedural law.

Therefore, the monitors attested that the court sessions where bailiff never handed over to trial participants any instructions concerning their procedural rights and duties, the judges never asked them whether they understood their rights and duties or explained such rights, if necessary, or where judges never asked the accused whether they understood the essence of charges were common.

Recommendations

The President and judges of Kyiv Court of appeals, presidents and judges of Kyiv district courts should pay attention to consistently comply the requirements of CPC concerning provision to trial participants of instructions concerning their procedural rights and duties and concerning the need to explain those rights to each trial participant. Particular attention should be paid to the need for judges to ask the suspects and accused whether they understand the essence of suspicion/charges, the right to not self-incriminate and not to answer questions.

The State Judicial Administration of Ukraine: Should provide to courts sufficient amounts of printed materials containing instructions concerning the rights and duties of participants in trial proceedings

2.7. Right to defense

Article 129 of the Constitution of Ukraine states that ensuring the accused's right to defense is of the basic principles of justice.

According to Article 7 of the CPC the right to defense is also one of the general foundations of criminal proceedings.

Articles 42, 56, 66 of the CPC provide that suspects, the accused have the right to have a counsel, victims – an authorized representative and witnesses - a lawyer. In this case, the CPC grants both suspects and the accused with the right to have appointed counsel if they have no funds to pay for a lawyer or cannot involve the lawyer on their own due to other objective reasons. According to Article 52 participation of a defense counsel shall be mandatory in criminal proceedings concerning especially grave crimes. In other cases the mandatory participation of a defense counsel is provided in criminal proceedings: 1) regarding persons suspected or accused of a criminal offense who are under the age of 18; 2) regarding persons expecting to undergo compulsory educational measures; 3) regarding persons who, because of mental or physical disability (dumb, deaf, blind, etc.) are not able to fully exercise their rights; 4) regarding persons who do not speak the language of the criminal proceedings; 5) regarding persons expected to undergo compulsory medical measures or persons regarding whom the question of application of such measures is being considered; 6) regarding the rehabilitation of the deceased; 8) regarding persons who are subject to an ongoing special pre-trial investigation or special proceedings; 9) involving a plea agreement concluded between a prosecutor and suspects or the accused.

In addition, Article 206 of the CPC imposes an obligation on an investigating judge to take the necessary measures to ensure that person, who is deprived of liberty, gets a counsel and to adjourn any proceedings, where such person is involved, for the period of time necessary for obtaining a counsel if the person wants to have a counsel or if the investigating judge decides that circumstances established during criminal proceedings call for participation of a counsel.
According to the CPC a counsel has the same procedural rights and obligations as the person he defends. In particular, Article 47 of the CPC identifies duties of a defense counsel, including an obligation to come and participate in the procedural actions involving suspects, the accused. If it is impossible to come at the appointed time, the defense counsel must inform the investigator, the prosecutor, the investigating judge, or the court in advance about such inability and its reasons, and in case the counsel is appointed by a body (institution) authorized by law to provide free legal aid – he should inform this body (institution) as well.

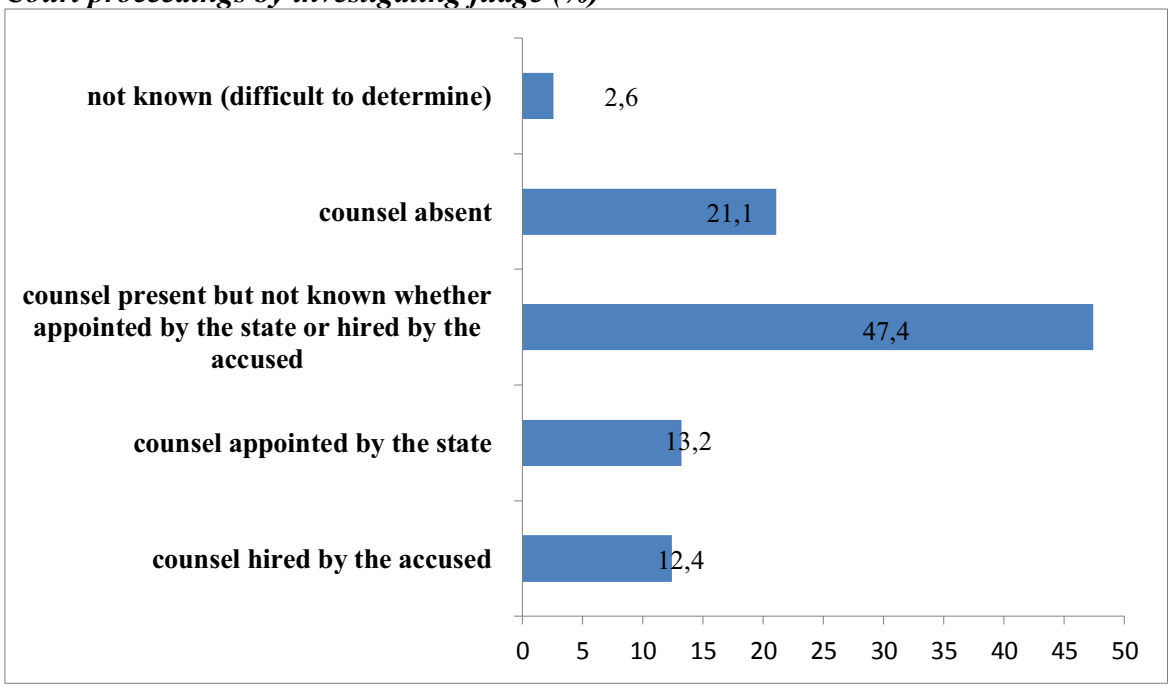
According to the CPC defense counsel's failure to appear both in the trial court and the appellate court is a ground to adjourn the trial.

In view of the exceptional importance of the right to defense in criminal proceedings, the extent of its exercise was examined by several criteria during the monitoring.

First of all, the fact of *counsel's presence* was recorded as well as his status – whether he was brought in on the contract basis or was appointed. The results are shown in the table below.

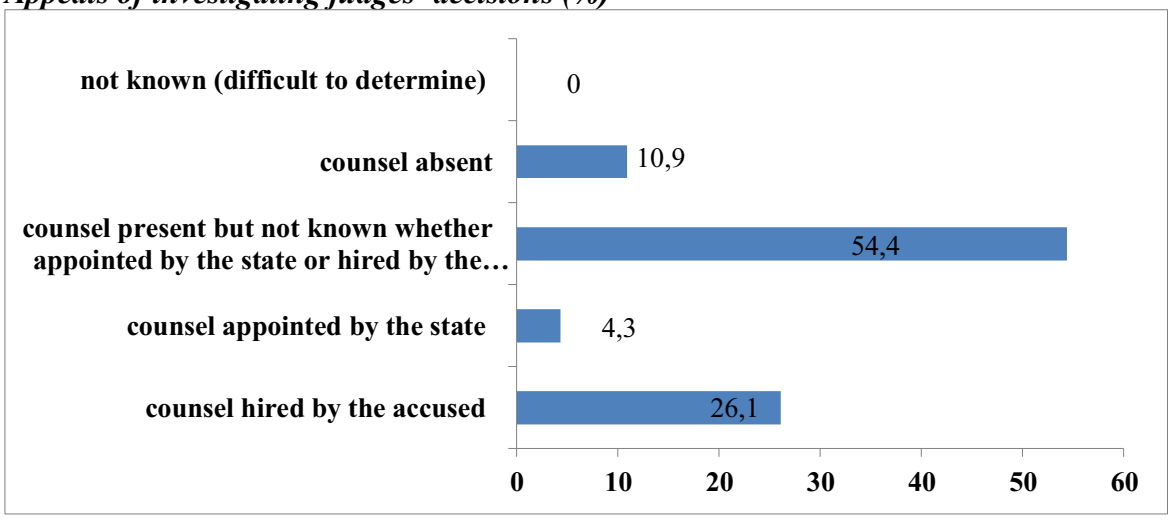
Table 2.-12. Presence of a Counsel

Court proceedings by investigating judge (%)



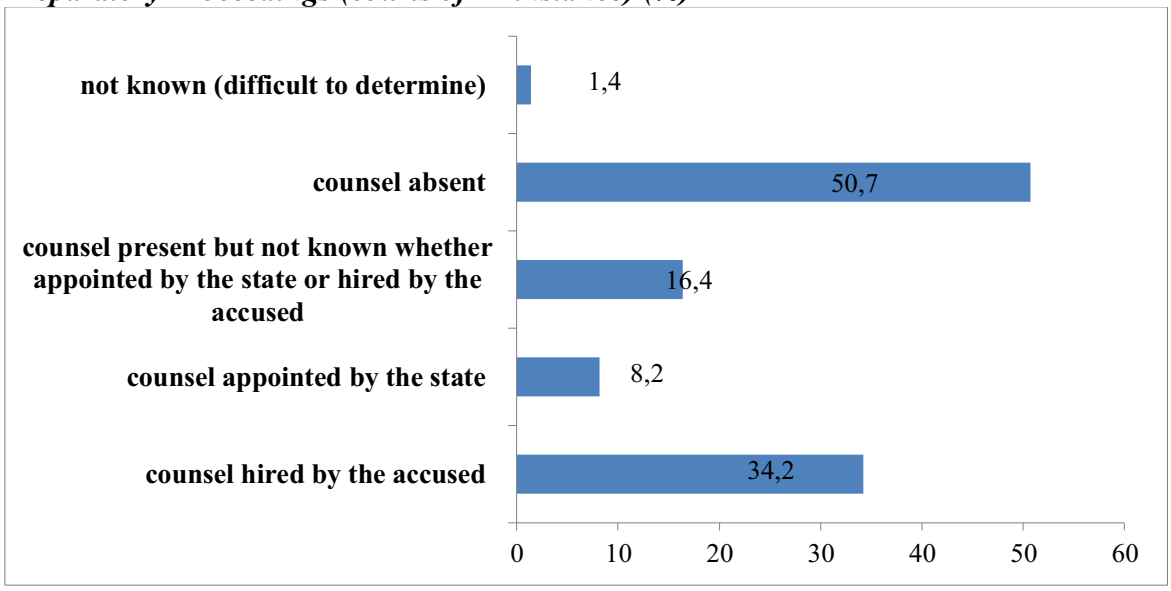
The presented figures show that suspects in most cases (73%) enjoy the right to use the lawyers' services, although there were cases where they had to defend themselves on their own without the involvement of lawyers, and cases where the investigating judge was deciding issues that did not require a lawyer to be involved.

Appeals of investigating judges' decisions (%)



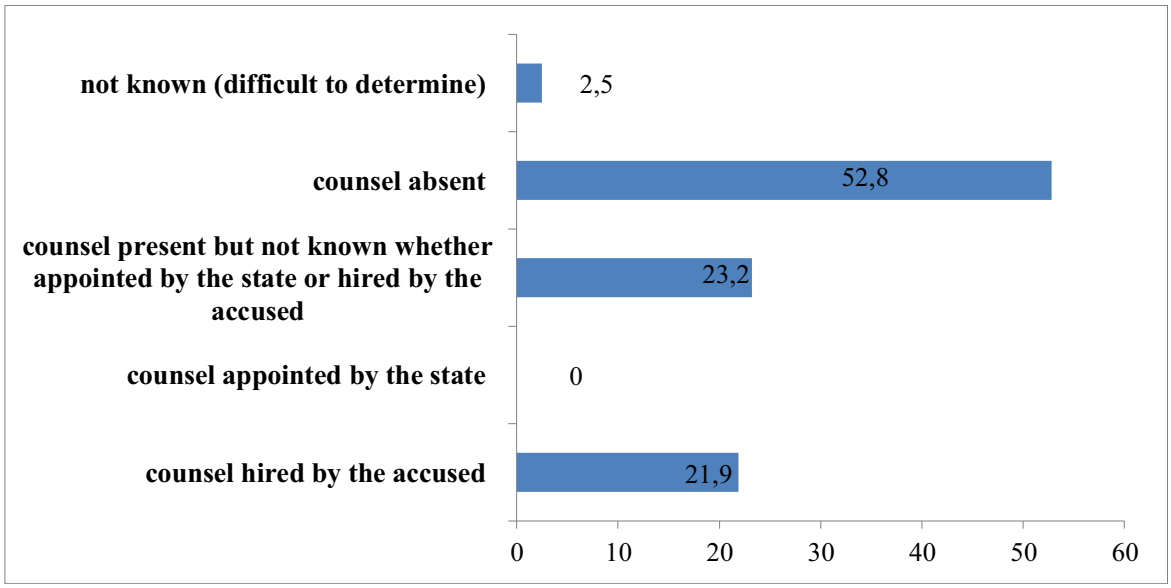
The data from this table show that lawyers continue to defend interests of their clients in courts of appeal. This being the case, the indicator of absence of counsels in 10.9% of cases may point at: non-timely notification of the upcoming court hearing; existence of certain, perhaps valid, excuses; being not prepared for a trial; counsel's non-involvement.

Preparatory Proceedings (courts of 1st instance) (%)



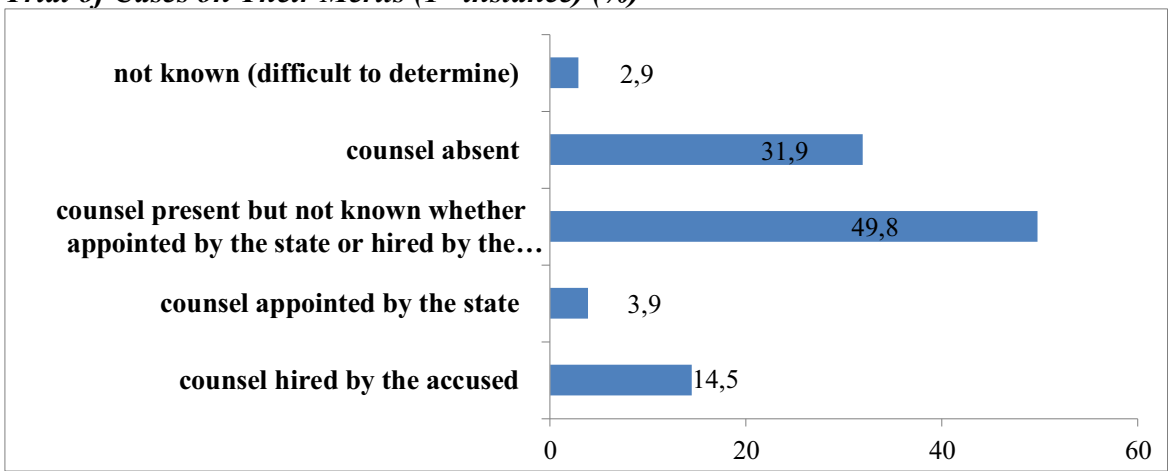
According to the above figures in almost 51% of cases counsels would not appear for preparatory court hearings. Their absence can be explained by non-involvement, by improper notification about upcoming hearings, by existence of certain reasons, that he should have informed the court about in advance, or by unpreparedness for a trial.

Court Proceedings Based on Agreements (%)



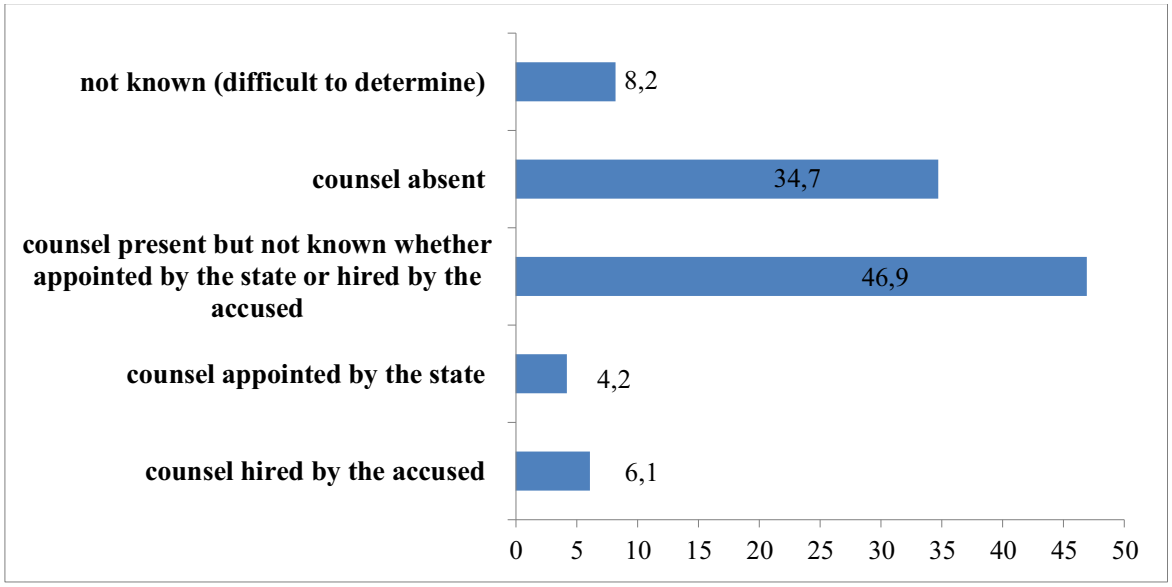
These data indicate that in 45% of the monitored instances the accused used the services of a lawyer in the court proceedings based on agreements, whilst in the remaining 52.8% of cases the counsel either was not involved or could be absent for the same reasons as described above.

Trial of Cases on Their Merits (1st instance) (%)



The presented figures show that lawyers appeared in hearings in trial courts to defend their clients in 68% of instances. However, in 31,9% of cases they were absent for the same reasons as mentioned above.

Consideration of Appeals Against Decisions of 1st Instance Courts (%)



According to the above observations lawyers appeared in court hearings of courts of appeals in 58% of instances. In 34.7% of cases they were absent for the reasons mentioned above.

Absence of Counsel

During the monitoring observers witnessed that in 80% of cases of non-appearance of lawyers in court hearings the court announced that the lawyer was timely and properly notified about the time and venue of the court hearing. At the same time observers reported that lawyers did not always inform the court about the validity of reasons for their non-appearance. For example, there were 27% of such instances during the trial of criminal cases on the merits, and almost 70% - during court proceedings by investigating judge.

When counsels were absent, special attention was paid to whether or not suspects (the accused)

belonged to certain "risk groups". Thus, the most "problematic" group included persons suspected of (accused with) committing especially grave crimes - in 12.5% of instances when a lawyer was absent. Group of minors - 3.8% of cases when lawyers were absent and group of people with mental or physical disabilities - 1.3% of instances with lawyers being absent, were both significantly smaller.

Absence reasons of counsels were recorded by monitors according to "the statement of the court":
• "reasons for absence are unknown" - 62.9%;
• "business trip" - 1.7%;
• "other trial or participation in investigatory actions" - 5.7%;
• "illness" - 11.4%;
• "other reasons" - 20.0%.

In addition to these above reasons for counsels' absence, monitors reported that inability to pay for lawyers' services was of essential significance for some of the accused (according to monitors' observations). At the same time, the accused were skeptical about information provided by courts on possibility to receive legal assistance in centers of free legal aid, either due to their non-awareness or because of doubts they had regarding quality of such services and them actually being free of charge.

Actions of persons without defense counsels (figures from the total number of cases without lawyers being involved):
• suspects in 77.9% of cases in court proceedings by investigating judge and the accused in 86% of instances of the same observations during trials in courts of 1st instance wanted to defend themselves;
• in approximately 10% of cases suspects, the accused asked the court to adjourn the hearings because they wanted to involve defense counsels who participated in the proceedings earlier and the court would grant such requests;
• in 11.2% of cases in court proceedings by investigating judge and in 5.6% of cases at trials on the merits suspects and the accused requested the court to appoint counsels at state expense, and the court granted these requests;

Court actions regarding a person who chooses to defend himself
The court explained to the accused the possible consequences and risks of such decision in the following proceedings:
• *preparatory proceedings - 56.5%;*
• *trials on the merits - 65.4%;*
• *appellate review of decisions of courts of 1st instance - 38.9%.*

However, this explanation did not change the decision of persons in most cases. They held on their decisions to defend themselves in 89.3% of cases (where the court provided relevant explanations); accepted the proposal to appoint a counsel at state expense in 4.2% of cases; asked to adjourn the hearing to invite defense counsel, who had previously taken part in the proceedings - in 3.9% of cases; decided to hire a defense counsel on their own - in 2.6% of instances.

Appointment of a counsel at state expense.
The total number of such situations was negligible. In most cases (87, 8%), which were monitored, courts made rulings that were then sent to centres of free legal aid.
However, monitors have witnessed several instances where a center of free legal aid refused to

respond to the ruling sent by fax, and demanded its delivery by a courier, which in the end led to delay of the trial, and when the lawyer from said center was already in the courtroom.

Person's refusal of the defense counsel *(dissatisfaction with the quality of services)*
Cases when a person would refuse from a defense counsel were not widespread. Only in 1.7% of cases the court granted such applications. However, in other instances of submission of such applications the monitors paid attention to:
• applications' groundlessness since they were justified with lack of results after the lawyer filed motions about, for instance, disqualification of a judge;
• the fact that these applications were used as a way of delaying the trial, for instance to exclude an unwanted witness from the trial who was a foreigner and whose stay in Ukraine was limited.

Recommendations
Ukrainain National Bar Association, the Higher Qualification and Disciplinary Bar Commission of Ukraine shall inform lawyers of their obligation to properly carry out their professional duties including appearing before investigating judge and court to attend the hearing.
Coordination Center for Legal Aid Provision shall pay attention to the need for strict observance of the law on the right to receive free legal aid in criminal proceedings and to the need to improve the organizational support of procedures for appointing and sending lawyers to attend court hearings to provide free legal aid in criminal proceedings.

2.8. Interpretation/translation

According to Article 29 of the CPC investigating judge, court, prosecutor, investigator ensure that participants of criminal proceedings who do not speak or do not speak enough of the state language, enjoy the right to testify, file motions and complaints, present arguments in court in their native or another language they speak, using where necessary interpreter/translator according to the procedure prescribed by this Code.

Articles 42, 56, 66 of the CPC provide that suspects, victims and witnesses are entitled to use their native language, give explanations, testimony in their native or other language they speak, and if necessary, use the services of an interpreter/translator. In these cases suspects, the accused and victims receive assistance of an interpreter/translator at state expense.

In accordance with Article 68 of the CPC parties to criminal proceedings, investigating judge or court invite appropriate interpreter/translator (sign language interpreters) if translation of explanations, testimony or documents is necessary in the course of criminal proceedings.

A total of 3.9% of proceedings where suspect, the accused had difficulty understanding the Ukrainian language, was reported. In such cases, courts acted in the following way:
• ruled on involving interpreters/translators and adjourned the hearing - 23.2%;
• continued hearings in Ukrainian - 10.3%;
• continued hearings in the language that suspect, the accused could understand - 57.8%.

Monitors illustrated situations where the accused did not speak Ukrainian with the following typical examples:
• applications on not understanding the language of the proceedings were used as a way to delay the trial or as an opportunity to refute some evidence by referring to lack of understanding of questions by clients;
• often the accused spoke the Russian language, so in such cases, the judge would continue with proceedings in the Ukrainian language, whilst counsels used both Russian and Ukrainian; in

cases where the accused has difficulty understanding the Ukrainian language, the judge repeated questions in Russian.

Thus, there were no violations of the procedural law on provision of interpreters/translators to suspects and the accused during the monitoring. On the contrary, monitors have witnessed how the defense abused its right to have an interpreter/translator with the purpose to delay the trial or justify certain actions or testimony of the accused, which were committed or provided by him earlier in time.

Recommendations

Ukrainain National Bar Association, the Higher Qualification and Disciplinary Bar Commission of Ukraine, **Coordination Center for Legal Aid Provision** shall inform the lawyers on inadmissibility to abuse their procedural rights.

2.9. Videoconference

Article 11 of the Law of Ukraine "On Judicial System and Status of Judges" states that participants to a trial, upon court's decision, are provided with an opportunity to participate in the court hearing through a videoconference following the procedure prescribed by procedural law. The court that has received a court decision to hold a videoconference bears the duty to have videoconference.

The CPC foresees the possibility to carry out certain procedural actions through videoconference at the stage of pre-trial investigation and during trial.

The procedure and instances for carrying out judicial proceedings through videoconference are determined in Article 336 of the CPC.

Distance court proceedings according to the rules of this Article may be held in courts of first instance, courts of appeal, courts of cassation, the Supreme Court of Ukraine during court proceedings on any matters that are within the competence of the courts.

Frequency of use of videoconference varies depending on different kinds of proceedings:

- court proceedings by investigating judge - 8.3%;
- appeals against decisions of investigating judges - 24.7%;
- preparatory proceedings (1 instance) - 1.3%;
- trial on the merits (1 instance) - 3.9%;
- appeals against judgments of 1st instance courts - 4.4%.

During videoconferences monitors noted technical and organizational problems both in courts and in the predetention center of Kyiv.

The above observations show that hearings are often held through videoconferences. However, as noted above, instances were frequent when the hearings were postponed because of technical problems or other organizational issues, which, in turn indicates the presence of flaws in the organization of this work both in courts and in the predetention center of Kyiv.

Recommendations

The State Judicial Administration of Ukraine, the State Penitentiary Service of Ukraine, the head of the Court of Appeal of Kyiv and heads of Kyiv district courts shall take measures for proper organization of proceedings through videoconference**.**

2.10. Application of the Convention for the Protection of Human Rights and Fundamental Freedoms and practices of the European Court of Human Rights

Article 8 of the CPC states that criminal proceedings are carried out in compliance with the principle of the rule of law, according to which individual, his rights and freedoms are recognized as the highest values that determine the content and direction of the state activities, and with consideration of practices of the European Court of Human Rights.

According to Article 9 of the CPC in the course of criminal proceedings investigating judge, prosecutor, chief of pretrial investigation agency, investigator, other officials of state authorities are obliged to strictly adhere to the Constitution of Ukraine, this Code, international treaties ratified by the Verkhovna Rada of Ukraine, and requirements of other legislation. If provisions of the CPC are contrary to international treaty ratified by the Verkhovna Rada of Ukraine, the provisions of the relevant international treaty of Ukraine prevail.

Monitoring has shown that frequency of references to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention) varies for different kinds of proceedings:

- trials by investigating judge - 8.3%;
- appeals against decisions of investigating judges - 11.1%;
- preparatory proceedings (1 instance) - 1.3%;
- trials on the merits (1 instance) - 3.1%;
- appeals against judgments of 1st instance courts - 3.4%.

The *form* of references to the Convention (% of instances where parties referred to the Convention or to practice of ECHR) was as follows:

- general (mentioning the Convention or its separate articles) - 28.6%;
- general reference to practices of the European Court of Human Rights but without reference to specific cases - 57.1%;
- reference only to the name of the case without mentioning its content (legal reasoning of the ECHR) - 14.1%;
- a detailed reference (name and essence of the legal reasoning of the ECHR) - 7.0%.

Participants to the judicial proceedings had different levels of activity when referring to the Convention. Defense made references more often, although the prosecution was also quite active, and the difference is less than one fourth of instances. Only in a few cases, courts referred to the Convention upon their own initiative.

These observations by monitors show that to date participants to criminal proceedings are not familiar enough either with the provisions of European Convention for Protection of Human Rights and practice of the European Court of Human Rights or with duty of courts, investigating judges, prosecutors and investigators to strictly abide by the requirements of international treaties ratified by the Verkhovna Rada of Ukraine and to apply practice of the European Court of Human Rights in criminal proceedings. In this regard, it is very common for judges, lawyers, and prosecutors to make references to the European Convention and practices of the European Court of Human Rights only by mentioning specific articles or court judgments without an explicit reference to the legal reasoning of the ECHR on certain aspects of application and interpretation of the Convention.

Recommendations

The Council of Judges of Ukraine, the National School of Judges of Ukraine, the Prosecutor General's Office of Ukraine, National Academy of Prosecutors of Ukraine, Ukrainain National Bar Association, Coordination Center for Legal Aid Provision should continue improving their knowledge of international treaties ratified by the Verkhovna Rada of Ukraine, and of practices of the European Court of Human Rights.

2.11. Implementing principle of adversarial proceedings

According to Article 22 of the CPC criminal proceedings are carried out following the adversarial principle, that implies prosecution and defense supporting their legal positions, rights, freedoms and legal interests on their own by means provided by this Code. The court creates the necessary conditions for parties to exercise their procedural rights and to fulfill procedural obligations.

Monitors got the overall impression of relative equality of parties when it came to motions' filing (by parties) and granting (by courts), expressing their opinions, having opportunities to question the opposite party, adding written evidence to case files etc.

It should be mentioned though that there were cases where monitors witnessed prejudicial attitude of courts to resolving issues raised by the prosecution. For example, before court hearings, and often during trials, investigators/prosecutors gave to secretaries or judges' assistants in the presence of the defense digital carriers ("memory sticks") containing, quite possibly, texts of draft motions or court decisions, which created the impression that those motions had already been resolved in advance.

In addition, all monitors noticed a significant passivity of parties to criminal proceedings, and in particular of defenders - to a greater extent. In some cases the court had to remind the parties of their obligation to prove their position and refute the position of the opposite party.

Recommendations

The Prosecutor General's Office of Ukraine, Ukrainain National Bar Association, the Higher Qualification and Disciplinary Bar Commission of Ukraine, the Coordination Center for Legal Aid Provision should take measures to ensure lawyers properly use their procedural rights and perform their professional duties designed to protect rights, freedoms and interests of suspects and the accused.

2.12. Courts' response to violations of human rights

Article 206 of the CPC establishes general duties of a judge regarding protection of human rights. In particular, this Article states that any investigating judge of a court within the territorial jurisdiction of which a person is kept in custody is entitled to issue a decision obliging any public authority or officer to ensure protection of rights of this person.

Also, if in any court hearing a person says that he suffered from violence during arrest or detention in authorized state agency, or public institution, an investigating judge is obliged to place on record this statement or take a written statement from the person and to: 1) ensure immediate forensic medical examination of the person; 2) instruct the relevant pretrial investigation agency to study the facts from the statement of the person; 3) take necessary measures to ensure safety of the person according to the law.

In this case, the investigating judge is obliged to act in the above manner also in cases where a person does not make statements before the court about suffering from violence but where the person's appearance, condition or other circumstances known to the investigating judge give rise to reasonable suspicions of violation of the law during arrest or detention in an authorized state agency or a public institution.

Observers noted signs of abusive treatment only in 1.2% of cases, although the information for exact evaluation was limited. Most situations of abusive treatment became known because the accused mentioned about them.

However, there were cases where such signs were visible. For example, often during the court hearings that were held through videoconference, one could see that a person who was being held in pre-trial detention center had bruises on his hands and face.

These observations confirm the known fact that judges rarely use Article 206 of the CPC in their practice and do not fully perform the general duties of judges on human rights protection. Judges remain indifferent even in cases where the appearance of suspects or detained persons points to being subjected to violence during arrest or detention on the premises of the relevant state agency or public institution.

It should be noted that the issue of abusive treatment of detained persons was addressed by the Ombudsman in the Annual Report of the Ombudsman for 2013.

However, as seen from the monitors' observations the situation in this regard has not changed.

Recommendations

The High Council of Justice of Ukraine, the High Qualification Commission of Judges of Ukraine, Head and judges of the Court of Appeal of Kyiv, head and judges of the district courts of Kyiv should pay attention to the need of strict fulfilment of general duties of judges specified in Article 206 of the CPC and aimed at protecting human rights.

2.13. Conditions for suspects, the accused during trials

Article 318 of the CPC determines that trials take place in a specially equipped room - the courtroom.

According to the European Court of Human Rights holding defendants in metal cages in courtrooms is inhuman and degrading treatment, and, therefore, is a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Since to date the vast majority of Ukrainian courts at all levels are equipped with metal cages, the European Court of Human Rights continues to take decisions against Ukraine in connection with breach of Article 3 of the Convention.

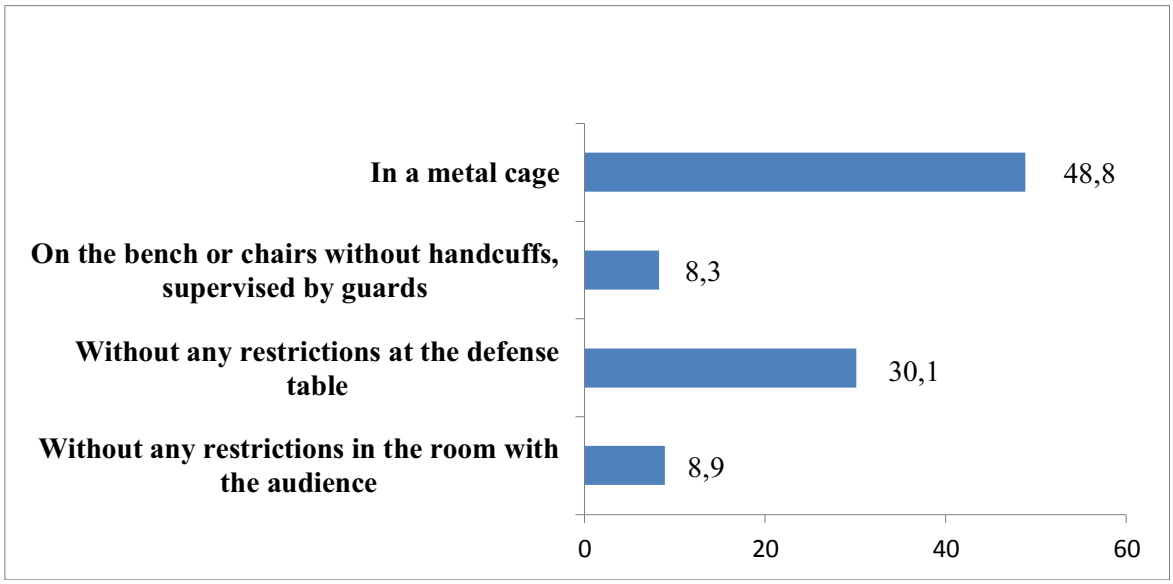
According to clause 21 of the Transitional Provisions of the CPC the Cabinet of Ministers of Ukraine within one month from the date of publication of this Code had to submit to the Verkhovna Rada of Ukraine proposals on bringing the legislation in line with this Code, including proposals to provide financing options for replacing metal barriers that separate the accused from the court and present citizens in the courts of general jurisdiction with the barriers made out of glass or organic glass.

However, due to lack of funding the mentioned clause remains not implemented.

During the monitoring observers had, among other things, to document the conditions for suspects, the accused during the trial.

The following data on the conditions for suspects during court proceedings by investigating judges.

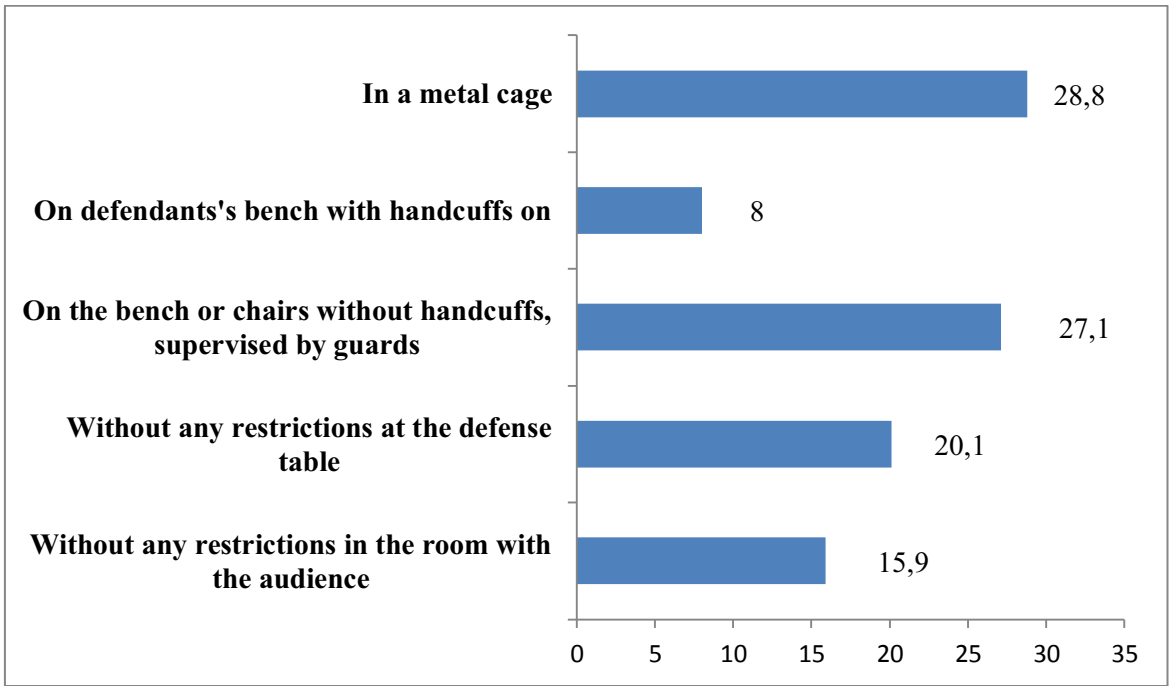
Table 2.-13. Conditions for the accused during trials (not counting videoconferences) (%)



The above observations by monitors confirm that the situation in courts regarding the defendants being kept in metal cages has not changed at all. Therefore, one can predict that the European Court of Human Rights during a long time will be making findings that Ukraine violates Article 3 of the Convention .

The below information describes the conditions for suspects during appellate review of decisions of investigating judges.

Table 2.-14. Conditions for suspects in rooms where hearings are held (not counting videoconferences) (%)

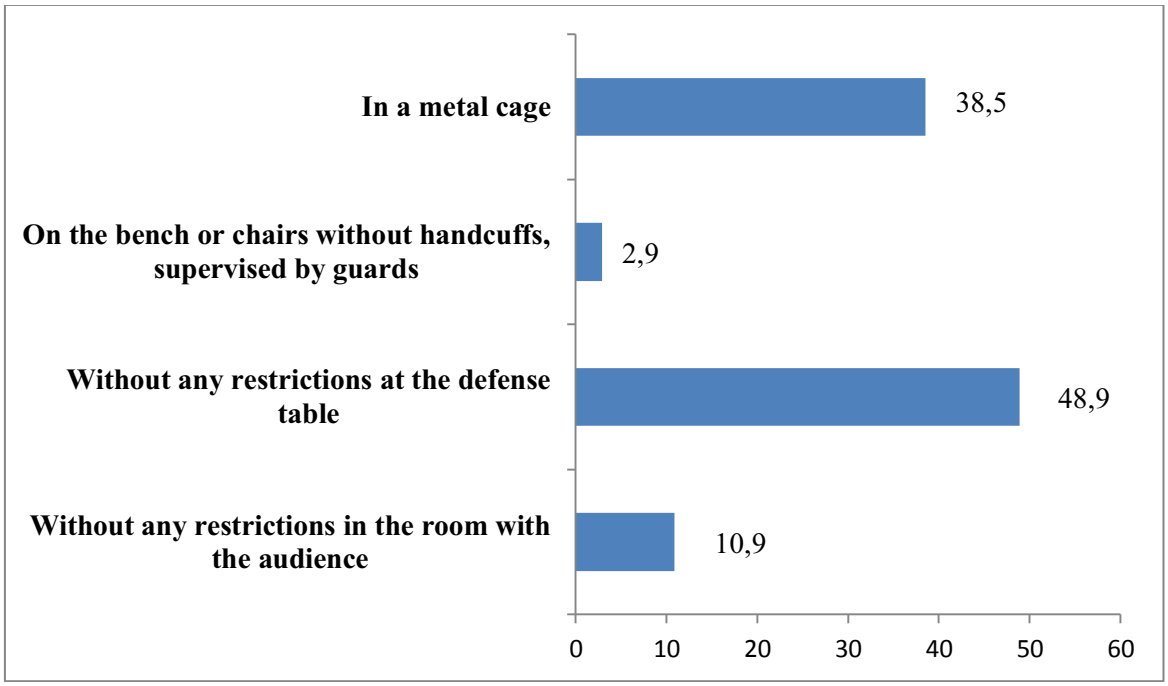


It should be noted that courtrooms of the Court of Appeal of Kyiv, as well as of any other trial or court of appeal of another oblast are mainly equipped with metal cages meant for separating the defendants from the court and other participants to the trial. In this connection monitors witnessed suspects being held in those cages during hearings in 28.8% of cases.

Although it should also be noted that in 63% of cases suspects were present in courtrooms virtually without any restrictions.

The following table shows conditions for the accused in the court of 1st instance during the trial of criminal proceedings on the merits.

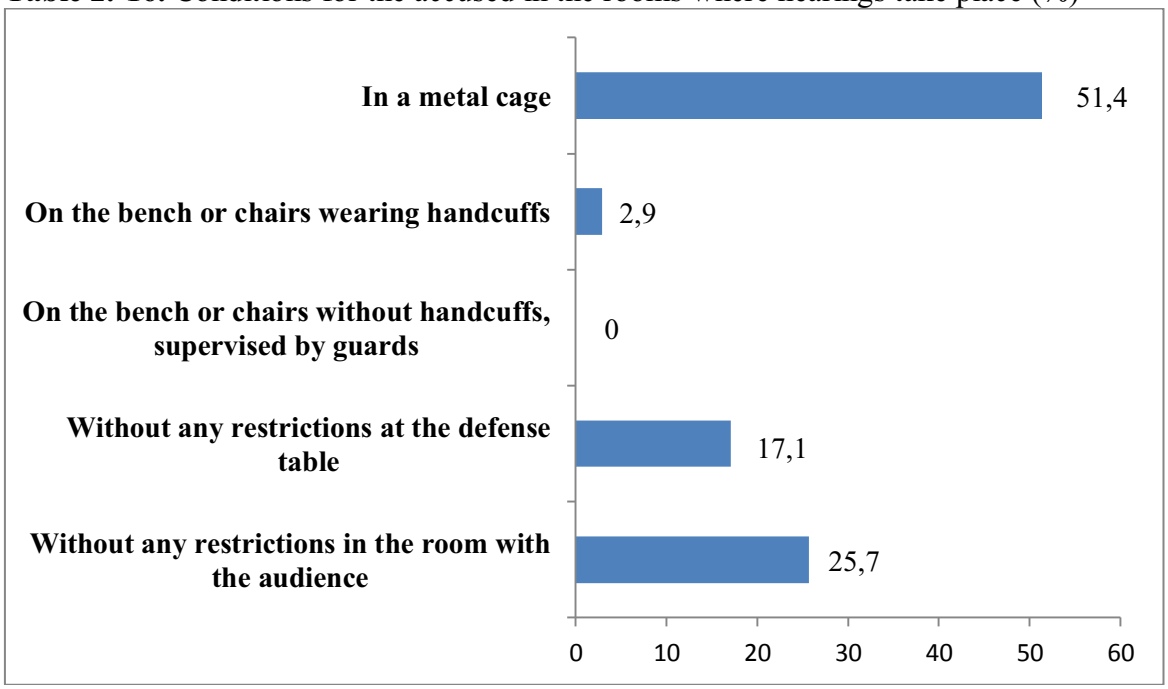
Table 2.-15. Conditions for the accused in the rooms where hearings take place (%)



Regarding the indicators of this table, they do not differ significantly from those of the previous tables. Thus, during trials of criminal cases on the merits in the trial courts the defendants were held in metal cages in 38.5% of observed instances and without any restrictions in the courtroom - in 82.7% of cases.

The following information concernts conditions for defendants during the appellate review of sentences and decisions of trial courts regarding these defendants.

Table 2.-16. Conditions for the accused in the rooms where hearings take place (%)



Observations show that in 51.4% of cases during the appellate review of criminal proceedings the accused were held in metal cages, in other cases - in courtrooms without restrictions.

Recommendations

The Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, State Judicial Administration of Ukraine, State Penitentiary Service of Ukraine should take measures to bring the legislation on the conditions for suspects and the accused during trials in line with the CPC of Ukraine, including securing of financing options for replacing metal barriers that separate defendants from the court and present citizens with the glass or organic glass barriers in the courts general jurisdiction.

2.14. Evidence of judges' non-compliance with the professional standards of conduct

The question of professional standards of judicial conduct has been discussed both by the international community and the Ukrainian society. Opinon No 3 (2002) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on principles and rules governing professional conduct of judges, in particular, questions of ethics, incompatible behavior and impartiality, is one of the results of the mentioned discussions.

In Ukraine, these discussions led to addition of a separate norm to the Law of Ukraine "On the Judicial System and Status of Judges" - namely, Article 56 "Judicial Ethics", according to which questions of judges' ethics are determined by the Code of Judicial Ethics, which is approved by the Congress of Judges of Ukraine.

The Code of Judicial Ethics was approved by the XI Congress of Judges of Ukraine on February 22, 2013. In particular, section 2 of the Code sets the rules of judicial conduct while administering justice, which are as follows:

- the judge should perform his professional duties independently, regardless of any external influences, incentives, threats, interference or public criticism;

- the judge must diligently and impartially perform the duties assigned to him; he should do so with tact, politeness, patience and respect towards the parties to the court proceedings and other persons;

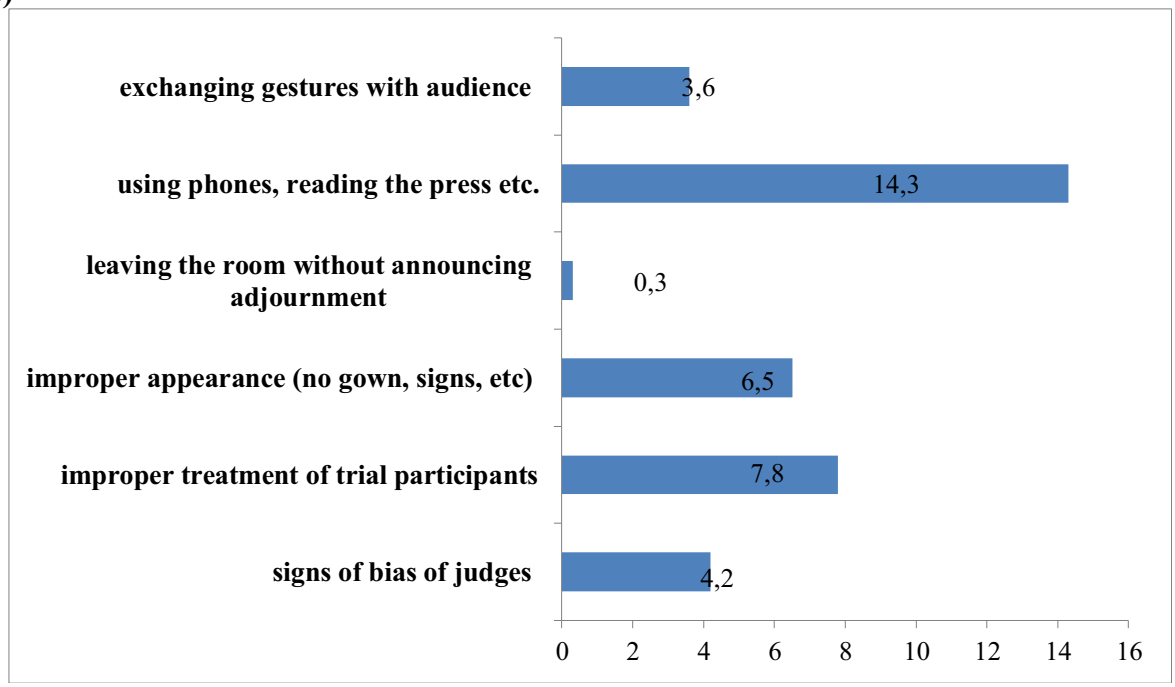
- the judge should perform the duties of a judge fairly and impartially and should refrain from any conduct, actions or statements that can lead to doubts about the equality of professional judges in administering justice;

- the judge should avoid non-procedural relationship with one of the trial participants or his representative in the case in the absence of other trial participants;

- impartial administration of justice is the primary duty of a judge.

Monitors determined the degree of judges' compliance with appropriate standards of professional conduct by documenting separate actions that are inconsistent with the stated requirements. The results are shown in the following table (% of situations where violations were observed).

Table 2.-17. Signs of judges' non-compliance with the professional standards of conduct (%)



As seen from the above information, monitors witnessed inappropriate behavior of judges in 36.7% of cases, which consisted of exchanging gestures with the audience, leaving the premises without announcing adjournment, improper appearance (no gowns or breastplates), improper treatment of trial participants, signs of bias of judges. However, cases when judges use phone and read the press in the courtroom (14.3%) attract the most attention.

The above observations reaffirm that negative attitute to courts exists in Ukrainian society for a reason and the judicial branch is fairly and objectively subjected to harsh criticism from the population that sometimes even transforms into aggressive attacks.

However, despite the said public reaction, judges do not consider it necessary to change their attitude to average citizens and to change their behavior, which continues to discredit the judiciary and gives reasonable grounds not to trust justice administered in Ukraine and is the reason for existing contempt of court.

Recommendations

The Council of Judges of Ukraine, the High Council of Justice of Ukraine, the High Qualification Commission of Judges of Ukraine, head and judges of the Court of Appeal of Kyiv, heads and judges of the district courts of Kyiv should take note of and increase control over compliance of judges with the rules of their conduct during administration of justice established by the Code of Judicial Ethics as of 22.02. 2013.

2.15. Typical or substantial violations

In general, monitors were able to document the violations that were typical (and often repeated) and situations where apparent or alleged violations of procedural law took place that were not foreseen in questionnaires.

Violations that can be called typical were recorded in 8.9% of proceedings that were administered by investigating judges, and in 3.4% of cases of other proceedings.

Examples of such situations (according to observers):

• preventing persons who are not parties to the trial from watching the trial;

• investigating judges taking decisions without going out to the deliberation room and without announcing introductory and resolution parts of the decision upon consideration of the complaint in accordance with Article 303 of the CPC;
• investigating judge conducting court hearings, regardless of the physical condition of the detained person who needed urgent medical care;
• systematic delay of trial because of proseuctor's failure to appear and absence of response to this on the part of the court;
• discussing with procesutor in judges' office the content of judgment prior to trial.

In addition, observers witnessed other situations that were not foreseen in questionnaires:
• the announced composition of the bench did not correspond to the actual bench;
• no response to the request of the accused about his need of medical treatment;
• trial was moved to the office of judge after appearance of a person wanting to attend the hearing.

Recommendations

The Council of Judges of Ukraine, the High Council of Justice of Ukraine, the Higher Qualification Commission of Judges of Ukraine, head and judges of the Court of Appeal of Kyiv, heads and judges of district courts of Kyiv - should pay attention to violations of the general principles of criminal proceedings, including publicity and openness of the proceedings, equality before the law and the court, legitimacy, right to defense, adversariality; should take measures to ensure that criminal proceedings are tried according to the procdeure and manner prescribed by the CPC, with protection of the rights and freedoms declared by the Constitution and international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine.

Section 3.

Particular types of proceedings

Subsection 3.1.
The trial held by the investigating judge

Under Article 3 of the CPC the investigating judge is a judge of the trial court, whose powers include the implementation, in the manner prescribed by this Code, of the judicial control over the observance of rights, freedoms and interests of individuals in the criminal proceedings.

The CPC defines a list of issues within the exclusive competence of the investigating judge.

Thus, during the pre-trial investigation, in accordance with Article 132 of the CPC, the decision on the application of measures ensuring the criminal proceedings is made by the investigating judge.

The CPC also defines a set of investigating (search) actions that can be undertaken only on the basis of decisions of the investigating judge at the request of the investigator, prosecutor or other participants of the criminal proceedings.

Article 206 of the CPC, referred to above, sets out the general obligations of the judge on the protection of human rights, according to which each investigating judge of the court within the territorial jurisdiction of which there is a person in custody is entitled to issue a ruling obligating any public authority or officer to ensure the observance of the rights of such person.

In addition, Article 303 of the CPC defines a list of decisions, actions, inaction of the investigator, prosecutor, which can be appealed against only to the investigating judge.

Moreover, according to the CPC, not all decisions of the investigating judge can be appealed against.

During the monitoring there were 138 observations of proceedings of the investigating judges. According to the monitors, the trials held by the investigating judges were the *"most closed proceedings"*, which could be accessed *"predominantly by chance"* or by *"overcoming stiff opposition from judges and their assistants"*. *According to the above data, 23.4% of monitors could not access the trials held by investigating judges.*

The trials held by the investigating judges had the following structure according to their subjects (trials that were the object of observation):

1) election, continuation, change or cancellation of a preventive measure – 37.2 %;
2) complaint under Article 206 of the CPC – 3.5 %;
3) temporary arrest in accordance with Article 583 of the CPC – 1.2 %;
4) extradition arrest in accordance with Article 584 of the CPC – 4.7 %;
5) complaint under Article 303 of the CPC – 27.9 %;
6) imposition of monetary penalties – 1.2 %;
7) temporary access to belongings and documents – 2.6 %;
8) arrest of property – 9.0 %;
9) other – 12.7 %.

It should be noted that it was quite difficult to ensure the representativeness of the sample of conducted observations. The reason for that was mainly the "closed nature" of activity of the investigating judges and the too high level of its subject differentiation.

Monitors indicated a high probability of violation of the principle of publicity of the trial by the investigating judges, observed in all Kyiv city courts, where the relevant observations were made as follows:

- *"in the cases of holding the trials after 18-00 the outside monitors almost could not access such trials";*
- *"if the request was considered without one of the parties, the degree of compliance of the judge with the formal requirements of the trial significantly reduced, the trial was held by the "abridged procedure";*
- *"the style of judges in such proceedings differed significantly from the trial on the merits – not all the rules were followed and the transparency was very conditional".*

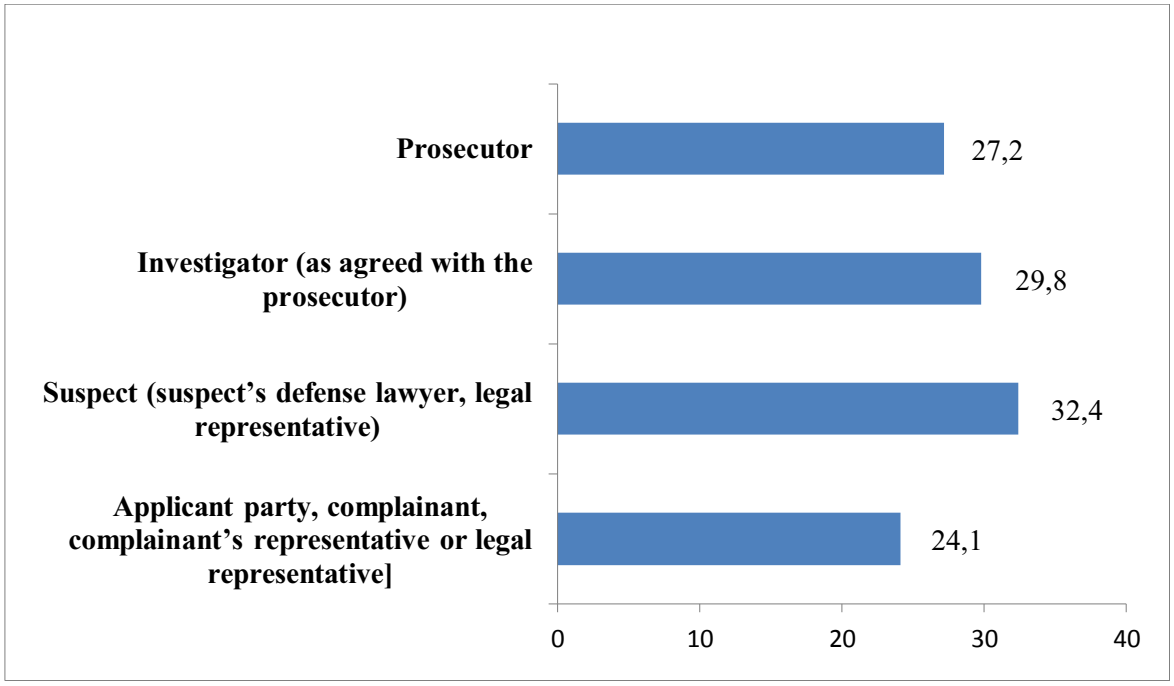
In order to **assess the actual received sample of observations** it may be indicative to compare it with statistics on specific areas of activity of investigating judges of Kyiv city courts over the same period of 2013, which is comparable in terms of duration with the monitoring period. According to the released data, in general, during the indicated period the 25.8 thousand rulings were adopted on measures to ensure the proceedings. The following rulings prevailed: temporary access to belongings and documents - 19.2 thousand, arrest of property - 0.7 thousand, detention – 1.69 thousand. However, there were only 4 rulings on the temporary restriction in the exercise of a special right; 10 rulings on the imposition of monetary penalties, 82 rulings on the removal from office. [2]

With this in mind, it is hard to expect that the conducted observations provided representative data on individual *("non-mass and available")* subjects of proceedings.

During the monitoring the monitors faced significant difficulties in determining the timeliness of the trial by the investigating judges of requests or claims: in 67.2% of situations it was impossible to determine the period within which it occurred; almost a third of trials (23.2%) were held within 2 days, other - in excess of this period.

3.1.1. Participants of the trial held by the investigating judge

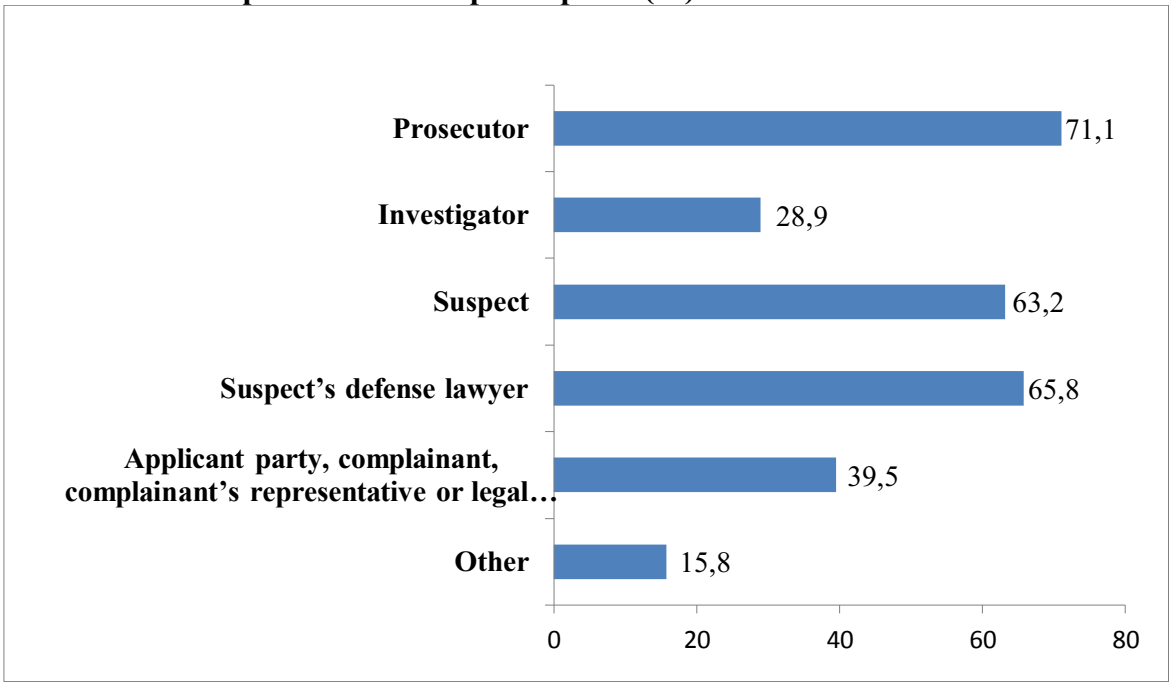
Table 3.1.-1. The initiator of the request or claim (%)



[2]The generalization of the practice of resolution by the investigative judges of issues related to the measures of ensuring the criminal proceedings /http://kia.court.gov.ua/sud2690/uzah/16/

The figures indicate that the participants of the criminal proceedings actively exercise their right to appeal to the investigating judge with relevant requests or complaints in cases established by the procedural law.

Table 3.1.-2. The presence of trial participants (%)



As seen from the above data, in most cases the trials were held by the investigating judges in the presence of persons which initiated the proceedings on a certain issue.

At the same time, during the monitoring period, the monitors recorded the actions of investigating judges in case of no-show of participants, which were summoned.

In most cases, the investigating judges postponed the trials to other dates, although in 48.7% of cases the trials were held in the absence of the defense; in 34.2% - in the absence of the prosecution. The suspect's absence was explained by the court by the availability of the suspect's written request to hold the trial without his participation - 38.6%; the impossibility of bringing to the pre-trial detention center - 44.2%; other circumstances - 21.1%. In other cases the relevant information was not provided.

As noted above, in 8.3% of cases the trials were held by investigating judges as videoconferences.

However, analyzing the given observations, it is necessary to consider that according to the procedural law, some requests of participants of the criminal proceedings may be considered by the investigating judges without the summons of other participants of the criminal proceedings, some requests may be considered upon the summons of the stakeholders, but their no-show shall not constitute an obstacle to the consideration of the relevant matter. The review by the investigating judges of appeals against the decisions, actions or inaction of the investigator, prosecutor in accordance with Article 303 of the CPC can be conducted in the absence of the investigator or prosecutor.

3.1.2. Detention

The Article 29 of the Constitution of Ukraine states that no one shall be arrested or held in custody except under a substantiated court decision and on the grounds and in accordance with the procedure established by law. In the event of an urgent necessity to prevent or stop a crime, bodies authorized by law may hold a person in custody as a temporary preventive measure, the reasonable grounds for which shall be verified by court within 72 hours.

It should be noted that the arrest of a person under Articles 131, 176 of the CPC is one of the types of measures to ensure the criminal proceedings and constitutes a temporary preventive measure applied on the grounds and in the manner prescribed by this Code.

Under Article 207 of the CPC no one shall be arrested without the ruling of the investigating judge, the court, except as provided in this Code. However, this Article sets out that a person may be arrested without the ruling of the investigating judge, the court in the course of an attempt to commit a criminal offense and immediately after the commission of a criminal offense or during the continuous pursuit of such person after the commission of a crime.

Under Article 211 of the CPC the period of arrest of a person without the ruling of the investigating judge, the court cannot exceed 72 hours as of the time of arrest. The person arrested without the ruling of the investigating judge, the court should not later than in 60 hours as of the time of arrest be released or brought to court for a consideration of a request for the relevant preventive measure.

Also, according to Articles 188-191 of the CPC, the suspect, the accused may be arrested on the ground of the ruling of the investigating judge, the court on the permission to arrest with a view to participate in the court session on a consideration of the request of investigator, prosecutor with regard to the application of a preventive measure in the form of detention.

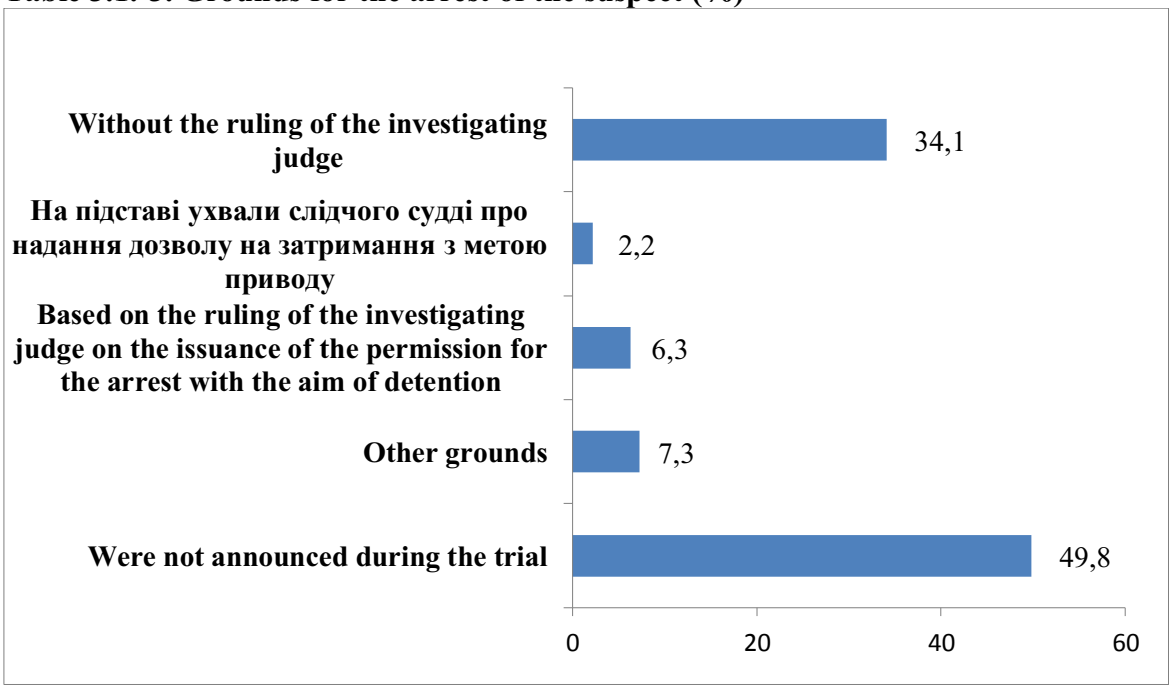
It should be noted that in practice in most cases the arrest is followed by the detention.

Under Article 176 of the CPC, the arrest is one of the preventive measures that can be applied by an investigating judge, the court at the request of the investigator, prosecutor. The Article 183 of this Code sets out that the detention is an exceptional preventive measure that applies only if the prosecutor can prove that none of the milder preventive measures cannot prevent the risks set out in Article 177 of the CPC.

In addition, Chapter 44 of the CPC provides for the procedure of application of the temporary and extradition arrest of the person that committed a criminal offense outside Ukraine.

Below are the data on the grounds of the arrest of the suspect, which became known to the monitors during the trials held by the investigating judges with regard to the arrest or detention.

Table 3.1.-3. Grounds for the arrest of the suspect (%)



According to the monitors:

- in 27.3% of cases of arrests without the ruling of the investigating judge the issue related to the period of bringing to court as of the time of actual arrest by the judge was not studied (or it was impossible to determine in the circumstances in which the trial was held); in other cases the arrested persons were brought in time: in up to 60 hours - in 54.5% of cases; in excess of this period - in 18.2% of cases;
- in 75% of cases of arrest on the grounds of the ruling of the investigating judge the period of detention of the arrested person by the court was not determined or announced; in other cases - the person was brought to trial in up to 36 hours;
- if the arrest took place in connection with the search by a foreign state - the actual time of arrest was not determined (although this information cannot be considered representative because of a small number of relevant situations);
- the investigating judges in 7.7% of cases asked the arrested about the time of their actual arrest; the other 92.3% of cases - this question was not raised or it was difficult to determine during the court session;
- only in certain situations the parties announced a significant delay in the bringing of the suspects to the places of pre-trial investigation; the court considered these comments, but did not find any violations;
- in 58.3% of cases the investigating judges reviewed the requests on the application of preventive measures to the arrested within the 72 hours as of the time of arrest; in other cases (41.7%) the monitors were not able to determine it based on the content of the trial.

These observations indicate that quite often there were cases of arrests without the ruling of the investigating judge (34.1% of observations). It is also necessary to highlight a fairly high percentage (7.3%) of cases of arrests on the grounds other than those envisaged by the CPC (under the ruling of the investigating judge with the aim of detention or without the ruling of the investigating judge in the manner prescribed by Article 207, 208 of the CPC). In addition, the arrested can be brought to court for the investigating judge to make a decision on the detention in violation of the terms established by the procedural law. However, the same as in previous observations, the investigating judges seem to fail to perform their general responsibilities on the protection of human rights and freedoms, including during the arrest.

It should be noted that over three years the Ombudsman in each Annual Report highlights the issue related to the respect for the rights and freedoms of persons during the arrest, especially in cases where the arrest is carried out under Article 208 of the CPC without the permission of the investigating judge. Due to significant violations of human rights and freedoms as well as the provisions of the CPC during the arrest under Article 208 of the CPC the Ombudsman has annually repeatedly appealed to the competent authorities to address the grounds and conditions under which the law is violated. However, unfortunately, the prosecution authorities, law enforcement bodies and other pre-trial investigation authorities continue to demonstrate a clear disregard for the requirements of both the Ombudsman and the current legislation of Ukraine.

Recommendations

The **High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the Chairman and judges of the Kyiv City Court of Appeal**, **the chairmen and judges of the Kyiv city district courts** should inform the judges about the need to strictly fulfill their general obligations established by Article 206 of the CPC aimed at protection of the human rights, namely in terms of clarification of the time of actual arrest, the grounds of arrest and the violations of the terms of bringing the arrested persons to court.

The **Prosecutor General's Office of Ukraine**, **the Ministry of Internal Affairs of Ukraine**, **other bodies of pre-trial investigation** should take steps to ensure strict compliance with the Constitution of Ukraine, the CPC, the provisions of the European Convention on Human Rights, the practice of the European Court of Human Rights regarding the respect for

human rights and freedoms during the arrest without the ruling of the investigating judge, and on the basis of a relevant court decision.

3.1.3. The application of preventive measures

As noted above, Article 176 of the CPC sets out a list of preventive measures. The decision on the application of preventive measures is made by the investigating judge, the court at the request of the investigator, prosecutor.

However, the investigating judge, the court shall reject the application of the preventive measures if the investigator, the prosecutor cannot prove that the circumstances established during the consideration of the request on the application of preventive measures are sufficient to justify that none of the milder preventive measures provided for in this Article cannot prevent the risk or risks established during the consideration. The mildest preventive measure is a personal obligation, and the most severe – the detention.

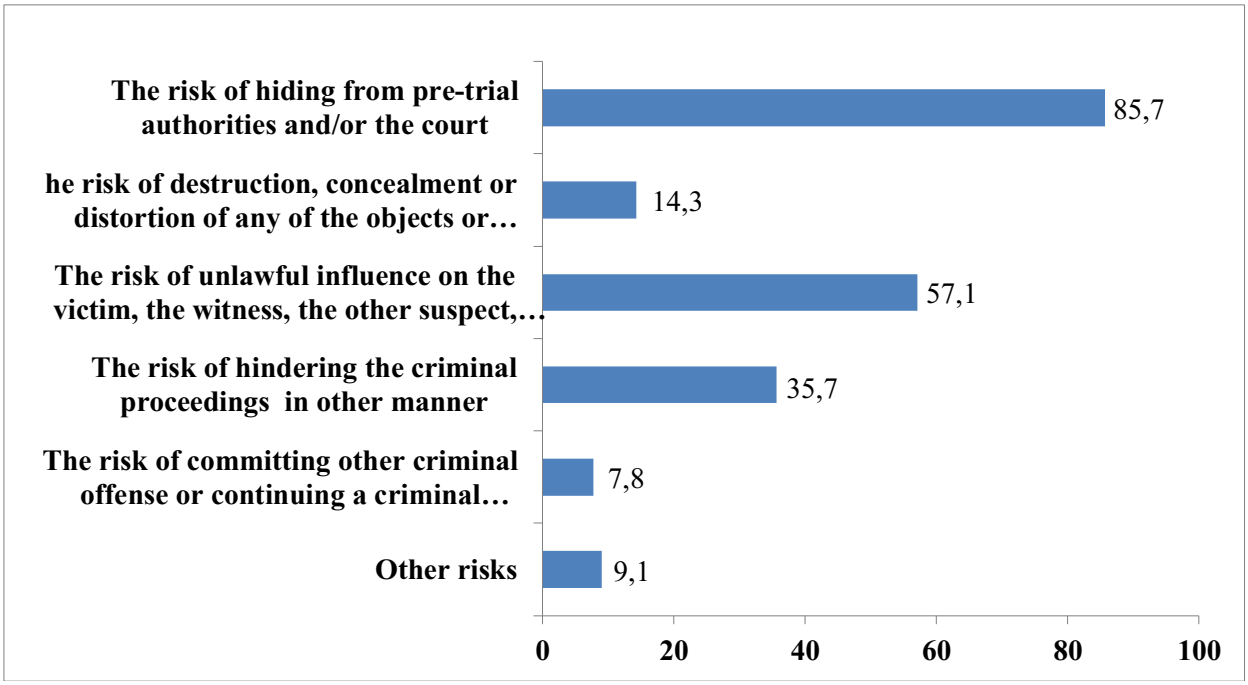
Under Article 177 of the CPC, the grounds for application of the preventive measure is the existence of a reasonable suspicion that a person has committed a criminal offense, and the presence of risks that give sufficient reasons for the investigating judge, the court to believe that the suspect, the accused, the convicted can act as follows: 1) hide from pre-trial authorities and/or the court; 2) destroy, conceal or distort any of the objects or documents that are essential to establish the circumstances of the criminal offense; 3) unlawfully influence the victim, the witness, the other suspect, the accused, experts, specialists in the same criminal proceedings; 4) otherwise hinder the criminal proceedings; 5) commit other criminal offense or continue a criminal offense, in which the person is suspected, accused.

Article 183 of the Code sets out that the detention is an exceptional preventive measure that applies only if the prosecutor can prove that none of the milder preventive measures can prevent the risks envisaged by Article 177 of the Code.

During the monitoring the monitors noted that the prosecutor, referring to the investigating judge with a request for arrest, detention or extension of the detention, in order to justify such a request used the references to: a) the content, classification and severity of suspicion (found in 52% of prosecutors' requests); b) the specific facts and evidence justifying the suspicion and the presence of risks (found in 48% of prosecutors' requests).

The Table below presents the prosecutor's assessment of risks that would be considered by the investigating judge upon the selection of a preventive measure.

Table 3.1.-4. Prosecutor's assessment of risks to be considered (%)



The monitors' observations showed that the prosecutors most often justified their requests for detention or extension of detention by the risk of suspect's absconding from pre-trial authorities or the court (85.7% of cases), the risk of unlawful influence on the victims, witnesses, other suspects, experts (57.1% of cases), the risk of hindering the criminal proceedings otherwise (35.7% of cases), the risk of destruction or concealment of evidence of own guilt (14.3% of cases) and other risks (9.1% of cases).

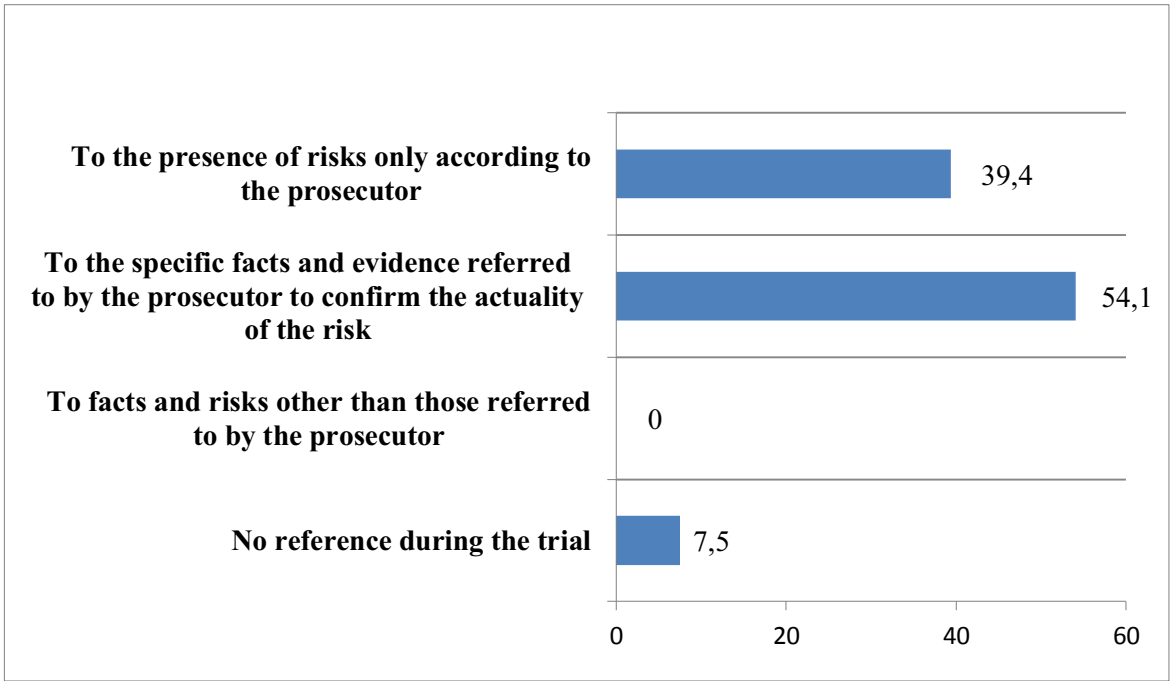
The "other risks" referred to by the prosecutor include as follows:

- *" criminal record";*
- *"previous cases of violation of house arrest";*
- *"no place of permanent residence and lawful sources of income";*
- *"attempts to continue the criminal activity";*
- *"change of names";*
- *"possibility to forge the documents";*
- *"numerous attempts to escape";*
- *"recurrent inclusion into the wanted list".*

The justification by the prosecutor of the risks in the majority of observations was carried out with the reference to the risk and the severity of suspicion (in 58.7% of cases), more rarely - with the provision of specific facts and reference to the evidence confirming the actuality of the risk (in 41.3% of cases).

The Table below presents the position of the court in cases where the decision was adopted in favor of the prosecution on the basis of the existence of risks.

Table 3.1.-5. References of the court to justify the position on assessment of risks (%)

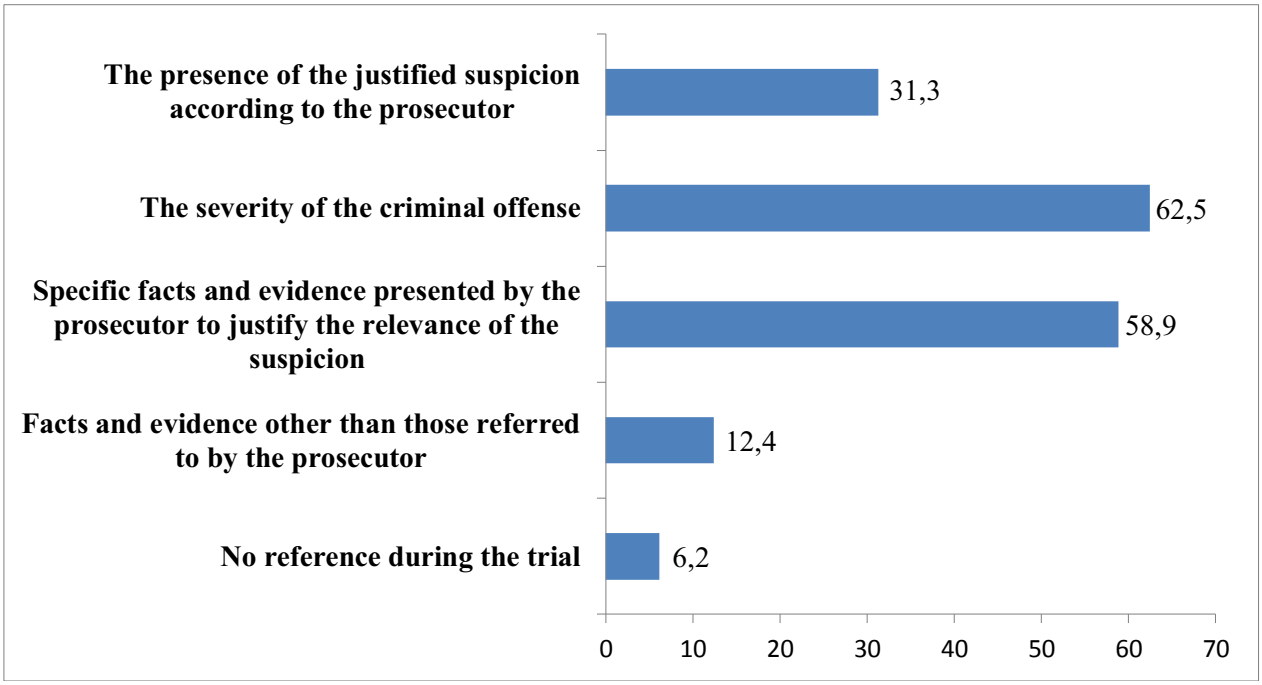


The monitors' observations indicate that the courts in their rulings in 54.1% of cases took into account the specific facts and evidence that were presented by the investigator, prosecutor to prove the actuality of risks, in 39.4% of cases - the presence of risks according to the investigator, prosecutor.

Thus, summarizing the above data, it can be concluded that investigators, prosecutors only in 50% of cases justified their requests referring to the existence of risks, which indicates their improper compliance with the procedural law with regard to the procedure for the application of such preventive measure as detention.

The justification by the courts of the ruling on satisfaction of the prosecutors' requests is presented in the Table below.

Table 3.1.-6. References of the court to justify the satisfaction of the prosecutors' requests (%)



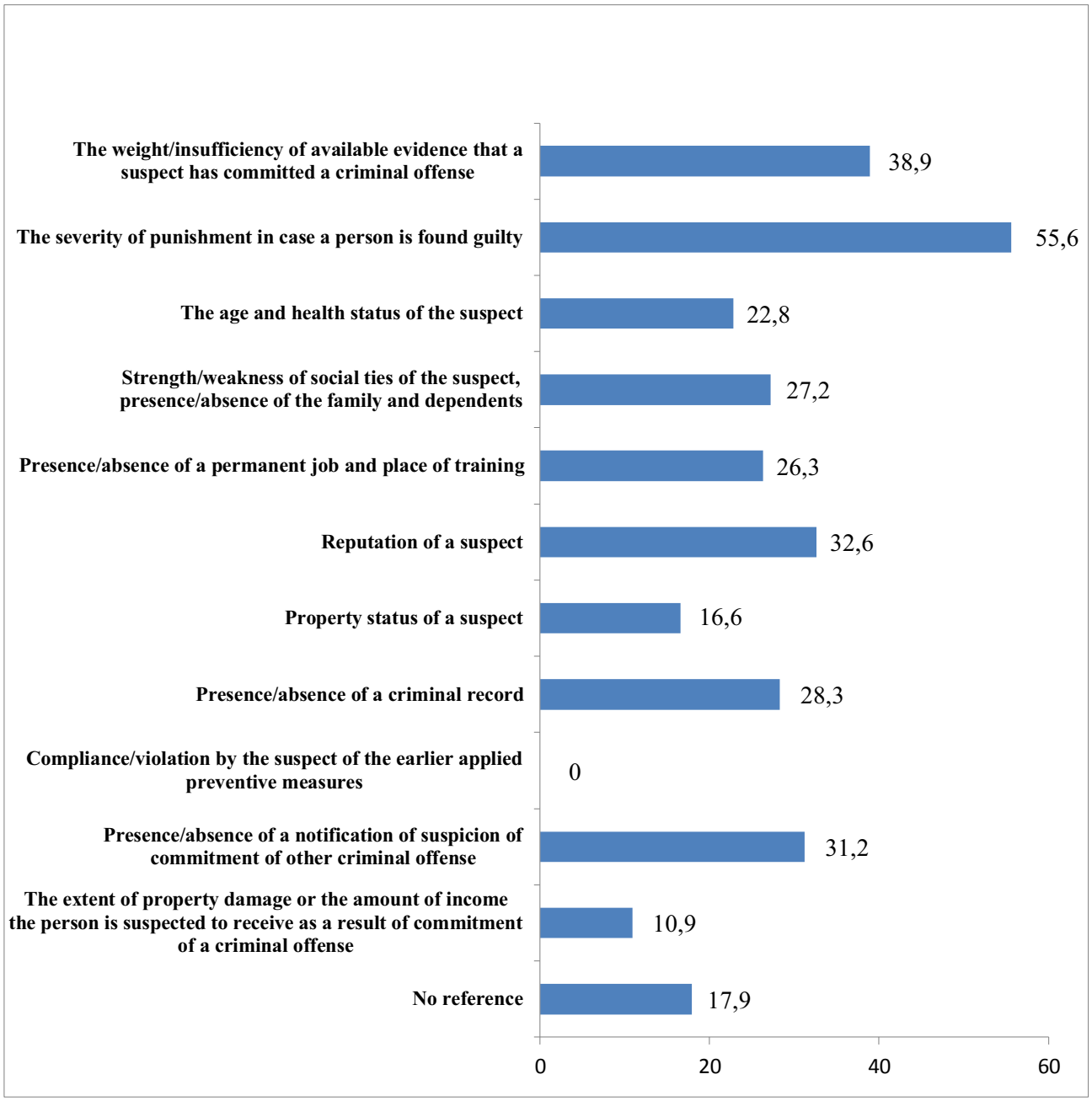
The above Table shows that the courts meeting the mentioned requests of investigators, prosecutors took into account their references to the severity of the criminal offenses (62.5% of cases), the specific facts and evidence presented to justify the relevance (58.9% of cases), the existence of reasonable suspicion according to the prosecutor (31.3% of cases) etc. However, in 12.4% of cases the courts justified their decisions referring to the facts and evidence other than those presented by the investigator, prosecutor.

The comparison of data presented in the Tables 3.1.-5. and 3.1.-6. gives reason to state that almost in one third of cases (30%) the judges ruled to apply the preventive measures based solely on the statements of the prosecutor on the presence of reasonable suspicion and risks necessitating the application of a preventive measure. This conclusion suggests that judges, contrary to the provisions of the CPC and the legal provisions of the ECHR, in a lot of situations adopt the rulings on the application of preventive measures in the absence of any evidence proving the relevance of the suspicion and/or presence of risks in case of non-application of preventive measures.

It should be noted that Article 178 of the CPC sets out that upon the selection of a preventive measure, in addition to the presence of risks referred to in Article 177 of the Code, the investigating judge, the court, on the basis of materials provided by the parties to the criminal proceedings, is required to assess collectively all the circumstances listed in this Article, including: the weight of available evidence that a person has committed a criminal offense; the severity of punishment in case a person is found guilty; the age and health status; reputation; criminal record; observance by the person of conditions of the applied preventive measures if they have been applied before etc.

During the monitoring the monitors were able to witness the investigation by the court of the circumstances envisaged by the above Article. The results are presented in the Table below.

Table 3.1.-7. The circumstances that have been taken into account by the investigating judge in considering the request for the preventive measure (%)



These observations indicate that the courts generally investigated and took into account all the circumstances envisaged by Article 178 of the CPC. Most often the judges justify their decisions on application of the preventive measures with reference to the severity of punishment if the person is found guilty (55.6% of cases), the weight of evidence of commitment of a crime (38.9% of cases), the reputation of a person (32.6 % of cases), the notification of a person of suspicion of commitment of other criminal offense (31.2% of cases), the strength of social ties (27.2% of cases) etc.

However, during the monitoring the monitors assessed the position of the court as to the possibility of application of a milder preventive measure than detention.

The monitors noted that this question in a quarter (23.5%) of cases was not raised; in the 11.8% of cases the question was raised by the party, but was not investigated by the court; in 64.7% of cases the question was investigated and reflected in the ruling.

Quite important is the information obtained during the monitoring of application by the court of bail as an alternative to detention.

In this regard, it should be recalled that under Article 182 of the CPC the bail is the transfer of funds to a special account in order to ensure the fulfillment by the suspect, the accused of the assigned obligations under the condition of transfer of the paid funds to the state proceeds in case of failure to fulfill these obligations. The applicability of the bail for the person with regard to which a preventive measure of detention is applied can be defined in the ruling of the investigating judge, the court in cases provided for in Article 183 of the CPC. The amount of bail is determined by the investigating judge, the court taking into account the circumstances of the criminal offense, property and family status of the suspect, the accused and other information about him as well as the risks under Article 177 of the CPC. The amount of the bail should be sufficient to guarantee the fulfillment by the suspect, the accused of the assigned obligations and ***cannot be predeterminedly exorbitant for a person.***

Consequently, in a quarter of the relevant proceedings the bail was not considered at all, in other cases - the amount of the bail was mainly determined as follows: a) up to 24 thousand UAH (5.9% of cases); b) from 25 to 97 thousand UAH (35.4% of cases); c) more than 365 thousand UAH (11.8% of cases). However, in the 23.8% of cases the bail was not applied due to the following circumstances: *no permanent job; no place of residence; previously committed crimes, inclusion in the wanted list. Such court practice directly contradicts the provisions of the CPC, according to which the investigating judge, the court in the ruling on choosing a preventive measure in the form of detention must determine the amount of bail, sufficient to ensure the fulfillment by the suspect, the accused of obligations under the CPC (Part 3 Art. 183 of the CPC). The investigating judge, the court in the ruling on choosing a preventive measure in the form of detention shall have the right not to determine the amount of bail in a criminal proceeding: 1) for the crime committed with violence or threat of violence; 2) for the crime that caused the death of a person; 3) for the person with regard to which the bail had already been applied as a preventive measure in the proceeding, but was violated.*

In cases of the application of a bail its size was justified by the following circumstances: a) circumstances of the offense - 38.8%; b) family and property status of a person - 81.0%; c) the sufficiency of the bail for the fulfillment of obligations of a person – 78.0 %.

However, according to monitors, it was observed that the investigating judges often established the amount of bail, which was predeterminedly exorbitant for the suspect.

Recommendations

The **Prosecutor General's Office of Ukraine**, **the Ministry of Internal Affairs of Ukraine**, **other bodies of pre-trial investigation** should bring to the attention of investigators, the prosecutors the obligation to justify the request for the application of preventive measures in accordance with Article 177 of the CPC.

The **High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should consider the need of strictly fulfillment by the judges of their obligation to take into account all the circumstances specified in Article 178 of the CPC in the selection of a preventive measure and on the application of bail in the amount as defined in Article 182 of the CPC.

3.1.4. Appeals against the decisions/actions/inaction of the investigator/prosecutor

The current CPC envisages the possibility to appeal during the pre-trial investigation against the decisions, actions or inaction of the investigator, the prosecutor. The list of such decisions, actions and inaction as well as persons that have the right to appeal, is defined in Article 303 of the CPC.

The Article 306 of the CPC sets out the procedure for the review of appeals against the decisions, actions or inaction of the investigator or prosecutor, according to which these appeals

are considered by the investigating judge of a local court given the compulsory participation of a complainant or complainant's defense lawyer, representative and the investigator or prosecutor the decisions, actions or inaction of which are being appealed against. The absence of the investigator or prosecutor shall not preclude the consideration of the appeals.

Under Article 307 of the CPC, based on the results of consideration of these appeals the ruling is adopted on: 1) the cancellation of the decision of the investigator or prosecutor; 2) the obligation on termination; 3) the obligation to perform a certain action; 4) the dismissal of an appeal.

The ruling of the investigating judge based on the consideration of these appeals cannot be appealed against, except for the ruling to dismiss the appeal against the decision to close the criminal proceedings.

When considering the appeals under Article 303 of the CPC the monitors noted the following observations.

The initiators of these appeals in most cases (91.0%) appeared in court; only in 9.0% of cases they were absent, which did not hinder the review of appeals by the investigating judges.

In cases when during the consideration of appeals the prosecutor or investigator whose actions were appealed against were absent, the court reviewed the appeals in their absence.

In most cases the court gave the parties the opportunity to submit evidence during the consideration of appeals. The lack of such an opportunity was recorded by the monitors in 7.1% of cases.

Based on the results of consideration of appeals the following decisions were adopted:

a) the actions, decisions or inaction of the investigator/prosecutor were found unlawful – 32.3 %;

b) assignment of obligation to perform certain actions – 41.1 %;

c) appeal denied – 39.0 %.

When considering the complaints of failure to enter the data in the Unified Register of Pre-Trial Investigations, the monitors recorded the following:

a) the court satisfied the complaint in case the applicant provided the evidence of submission of the relevant application;

b) the court denied the complaints in most cases due to the fact that the law enforcement agencies have already entered the relevant information to the Register, less frequently - due to the failure to provide the evidence of submission of the application on a crime.

When considering the complaints about the inaction of investigator/prosecutor in the form of failure to perform the proceedings within the statutory period, the monitors recorded the following circumstances:

a) in most cases (74.0%) the judges satisfied the complaints because the investigator/prosecutor failed to provide the negative evidence;

b) in about one third of cases the complaints were not satisfied because of the lack of adequate evidence.

These observations give reason to state that the participants of the criminal proceedings actively exercise the right to appeal against the decisions, actions or inaction of the investigator or prosecutor.

However, the monitors witnessed the 9% of cases when the investigating judges considered the complaints in the absence of the persons that filed them. In this regard, in view of the fact that the rulings of the investigating judges adopted in accordance with Article 303 of the CPC are not subject to further appeal, except in the case of appeal against the decisions of the investigators, prosecutors on terminating the criminal proceedings, there is a likelihood that the investigating judges in these cases violated the procedural law and the right to protection of persons that filed the complaints.

Recommendations

The **High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should pay attention to the provisions of Article 306 of the CPC on the consideration of appeals against the decisions, actions or inaction of the investigator or the prosecutor with the mandatory participation of the person that filed the complaint.

3.1.5. The implementation of the adversarial system

According to Article 129 of the Constitution of Ukraine and Article 7 of the CPC one of the general principles of judicial and criminal proceedings shall be the adversarial procedure and freedom of the parties in presenting their evidence to the court and in proving the cogency of the evidence before the court.

Each of the participants of the criminal proceedings shall have the rights and obligations defined by the CPC, in particular the right to collect and submit the evidence to the investigating judge, to take part in the proceedings, to ask questions, to submit comments and objections, to submit requests and recusals, to express their opinions on the requests of other participants of the criminal proceedings.

According to monitors, in all the proceedings the defense was not hindered (by the court) to comment and refute the evidence provided by the prosecution.

In addition, the parties also had an opportunity to ask each other questions. However, in this regard the parties did not show much activity, and to a greater extent - the prosecution. Thus, the defense had no questions for the prosecution – in 52.0% of the cases and the prosecution for the defense - in 73.9% of cases.

However, according to monitors, in almost 4.0% of the proceedings the judges limited the time accorded to the parties.

These observations confirm the arbitrary exercise by the parties to the criminal proceedings of their procedural rights on asking the questions or expressing their opinions on the evidence or explanations provided by the opposite party. However, the monitors observed a passivity of the parties to the criminal proceedings with regard to the dissent of justification or evidence provided by the opposite party.

Recommendations

*The **Prosecutor General's Office of Ukraine** should take measures to ensure the proper fulfillment by the prosecutors of the obligation to prove the circumstances relevant to the criminal proceedings and the active fulfillment of the accusation.*

*The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should bring to the attention of the lawyers their obligation to use all the remedies envisaged by the CPC of Ukraine to clarify the circumstances which refute the suspicion and mitigate or exclude the criminal liability of the suspect.*

3.1.6. Investigation of evidence

According to the CPC, during the pre - trial investigation, the investigator, prosecutor, applying to the investigating judge with a request on the need to apply the measures to ensure the criminal proceedings, preventive measures or conduct certain investigative actions, should attach to the request the copies of materials justifying the arguments. In addition, the investigator, prosecutor in order to resolve these issues may also apply to the investigating judge with a request to call the witnesses or relevant documents to substantiate the need to satisfy the request, or investigate other material evidence.

During the consideration of the above issues, the parties to the criminal proceedings, in case if these issues should be resolved with their participation, submit to the investigating judge or the court the evidence of circumstances to which they refer.

The procedure sources of evidence include the testimony, material evidence, documents, and expert opinions (Article 84 of the CPC).

During observation the monitors were able to observe the activity of the parties to the criminal proceedings related to proving their position during the consideration of various issues by the investigating judges.

Thus, it was recorded that the investigators, prosecutors only in 19.5% of cases addressed the investigating judges with requests on the need to call the witnesses, in 16% of cases – on the investigation of material evidence and in 27.3% of cases - on the call of documents, and all these requests were satisfied by the court. There were no cases of rejection of these requests.

In most proceedings that were the subject of study, the grounds for submission of such requests (in nearly equal proportions) were: the justification of the presence of risks to be taken into account when choosing the preventative measure and the proving of other circumstances to be considered when choosing the preventative measure.

The lawyers, in turn, also showed some activity. Thus, in 20% of cases the lawyers applied to the investigating judges with requests on the need to call the witnesses, of which the 15% of requests were satisfied, in 7.5% of cases – on the investigation of evidence, which were also satisfied, and in 60.3% of cases - concerning the call of documents, of which the 55.6% of requests were satisfied.

The motivation of requests of the defense had a more complex structure:

- proving the absence of a reasonable suspicion - 36.1% of cases;
- absence of risks to be considered while choosing the preventive measure - 53.0% of cases;
- other circumstances to be considered while choosing the preventive measure - 12.9% of cases.

Therefore, these observations prove the quite passive position of both the prosecution and the defense during the pre-trial investigation in the course of consideration by the investigating judges of issues concerning the application or continuation of the preventive measures. However, it should be noted that the investigating judges were biased during the consideration of requests of the parties on the investigation of evidence justifying their legal position. This is confirmed by the comparative statistics of the satisfied by the investigating judges requests of the prosecution and the defense: 100% of requests of the prosecution and 15 - 55% of requests of the defense were satisfied by the investigating judges.

Recommendations

The **High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should pay attention to the need for the judges to ensure the procedural equality of the parties in the collection and submission of evidence in the criminal proceedings.

The **Prosecutor General's Office of Ukraine**, **the Ministry of Internal Affairs of Ukraine**, **other bodies of pre-trial investigation** should take measures to ensure the proper fulfillment by the investigators, prosecutors of the obligation of proving the circumstances relevant to the criminal proceedings.

The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should bring to the attention of the lawyers their obligation to use all the remedies envisaged by the CPC of Ukraine to clarify the circumstances which refute the suspicion and mitigate or exclude the criminal liability of the suspect**.**

3.1.7. The inadmissibility of evidence

According to Article 86 of the CPC the evidence shall be considered admissible if it is received in the manner prescribed by this Code. The inadmissible evidence cannot be used in the adoption of procedural decisions; it cannot be referred to by the court in the adoption of a court decision.

According to Article 87 of the CPC the inadmissible evidence shall be the evidence obtained as a result of substantial violation of the human rights and freedoms.

Article 89 of the CPC sets out that the court shall decide on the admissibility of evidence during their evaluation in the chambers upon the adoption of the court decision. The parties to the criminal proceedings shall have the right, during the trial, to submit the request for the recognition of evidence inadmissible, and object to the recognition of evidence inadmissible.

According to the monitors, the defense in most of the observed cases (77.3%) did not raise the question of recognition of the evidence inadmissible. In the rest of the cases (22.7%) this question was raised but the court in 10% of cases decided to consider this issue later and only in a few cases found the relevant evidence inadmissible.

These observations indicate that the defense rather passively applies the provisions of the CPC with regard to the issue of inadmissibility of evidence provided by the prosecution.

Recommendations

The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should emphasize to the lawyers their right to object to the investigation of the inadmissible evidence and to submit the requests for recognition of the evidence inadmissible during the trial of the criminal proceedings.

3.1.8. The use of hearsay testimony

The CPC introduced the hearsay testimony. According to Article 97 of the Code the hearsay testimony is a statement, made either verbally, in writing or in other form, with regard to a certain fact, based on the explanation of another person. The court may recognize a hearsay testimony as admissible evidence, regardless of the opportunity to question the person which provided the initial explanation, in exceptional cases, if such testimony is an admissible evidence under other rules of admissibility of evidence. The court may recognize the hearsay testimony as evidence if the parties agree to recognize it as evidence. The hearsay testimony may not be considered an admissible evidence of facts or circumstances for the proving of which it was provided if the testimony is not confirmed by other evidence recognized as admissible under the rules different from the provisions of this Article.

In any case the hearsay testimony cannot be considered an admissible evidence if it is provided by the investigator, the prosecutor, the employee of the operating unit or any other person in respect of explanations of persons provided to the investigator, prosecutor or the employee of the operating unit during the conduct of criminal proceedings.

Approximately 4.2% of observations give reason to conclude that the hearsay testimony is used in the trial by the investigating judges. In most such cases, the defense did not state any objections to this.

However, in cases where there were such objections, the court took them into account and rejected the evidence due to the inconsistency with the procedural requirements for recognizing them admissible. There were also cases when the court of opted out of the assessment of such evidence and did not take a clear decision on this matter.

The above observations indicate that the participants of the criminal proceedings sometimes use the hearsay testimony, although according to the procedural law the court may find such testimony an inadmissible evidence.

In any case, this evidence is assessed by the investigating judge - in terms of its relevance, admissibility and reliability.

3.1.9. Passing and disclosure of the decision

In accordance with Articles 369, 370 of the CPC in the criminal proceedings the court decisions are set out in the form of sentence and in the form of a ruling. The court decision must be lawful, reasonable and reasoned.

Article 376 of the CPC sets out that the court decision should be disclosed immediately after the court leaves the chambers. The chairperson of the court session shall clarify the content of the decision, the procedure and term of the appeal. If the issuance of the court decision in the form of ruling requires considerable time, the court may issue and disclose its judicial disposition signed by all the judges. The full text of the ruling must be issued not later than within five days as of the date of disclosure of the judicial disposition and disclosed to the participants of the proceedings. The time of the disclosure of the full text of the ruling must be stated in the previously issued judicial disposition.

According to observations of the monitors the full text of the ruling was disclosed on the day of the hearing in 70.0% of cases.

In this regard, the monitors were able to assess the disclosed court decisions, which denied the satisfaction of complaints (requests) of the defense concerning the answers of the court to the arguments of the defense. Thus, almost one third of decisions (28.6%) did not contain this information, in 57.1% of decisions the court provided the relevant arguments. In other cases (14.3%) – it was impossible to identify it in the disclosed text.

In the disclosure of only the judicial disposition the court only in one third of cases appointed the day of disclosure of the full text of the decision.

Thus, the monitors noted that quite often the disclosure of the decision was affected by the presence of third persons. In particular, the judges read out the rulings so quickly and quietly that it was almost impossible for the audience to understand their content.

Also, the monitors noticed that in 12.9% of proceedings the investigating judges, during the trial, before going to the chambers, already expressed their position on the alleged decision in the proceedings.

These observations indicate a failure of the investigating judges, during the disclosure of the introductory and judicial dispositions of the ruling, to comply with the provisions of the procedural law on informing the participants of the trial and the specified in the ruling of the date of disclosure of the full text of the ruling, which in the future may affect the exercise of the right to the protection of the person concerned.

In addition, the behavior of judges in some cases indicated the violation by them of the Code of Judicial Ethics with regard to the diligent, unbiased, impartial fulfillment of their duties and respect for the trial participants.

Recommendations

The **High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should pay attention to the need to follow the order of disclosure of court decisions established by Article 376 of the CPC.

Subsection 3.2.

Consideration of appeals against the decisions of investigating judges

During the pre-trial investigation the investigating judge has the responsibility to consider the measures to ensure the criminal proceedings, to implement a number of investigative (search) actions, to verify the grounds for detention of the arrested and respect of their rights, to consider the appeals against the decisions, actions or inaction of the investigators, prosecutors.

In addition, only the rulings of the investigating judge listed in Article 309 of the CPC may be appealed against. Under Article 395 of the CPC, the appeal against the ruling of the investigating judge should be submitted directly to the court of appeal within five days as of its disclosure, and if the ruling was adopted without calling the person to appeal against it, the period for appeal is calculated as of the date such person receives the copy of the court decision.

Under Article 422 of the CPC, the reporting judge, having received an appeal against the ruling of the investigating judge, shall urgently require from the court of the first instance the relevant materials and not later than one day in advance notify the person that filed the appeal, the prosecutor and other stakeholders about the time, date and place of the appeal proceedings. The appeal against the ruling of the investigating judge shall be considered not later than within three days after its receipt by the court of appeal.

Under Article 407 of the CPC, based on the results of consideration of the appeal against the ruling of the investigating judge, the court of appeal may: 1) leave the ruling unchanged; 2) cancel the ruling and adopt a new ruling.

From July 1, 2014 to February 10, 2015 the monitors attended 123 court sessions of the Kyiv City Court of Appeal.

According to the statistical reporting, the Kyiv City Court of Appeal in 2014 reviewed 2.711 appeals against the rulings of the investigating judges.[3] Thus, the sample of observations constituted about 10% of all the proceedings for the monitoring period, which allows to consider the received data as relatively representative.

The rulings of the investigating judges that were appealed against, had the following structure with regard to their subject:

- the application, denial of application, extension, denial of extension of the preventive measure in the form of detention – **55.9 %;**
- the application, denial of application, extension, denial of extension of the preventive measure in the form of house arrest – **2.3 %;**
- the placement, denial of placement, extension of placement, denial of extension of placement of persons in the reception center for children – **1.9 %;**
- the refusal to satisfy an appeal against the ruling to close the criminal proceedings – **5.7%;**
- the arrest of property or denial of arrest of property – **11.7 %;**
- the application or denial of application of the temporary or extradition arrest – **4.4 %;**
- the cancellation of the decision on extradition or denial of extradition – **4.0 %;**
- other – **14.1 %.**

The monitors found it very difficult to determine within which period, as of the date the appeal was received by the court, the appeal was reviewed. In 88.6% of cases the monitors noted that it was impossible to determine from the content of the trial; in 4.5% of cases - the review took place within 2 days; in 4.0% of cases – the review took place within 2 days - 72 hours; in 1.9% of cases - from 72 hours to 5 days.

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[3]Kyiv City Court of Appeal. The information on the activities of the Trial Chamber related to the review of criminal cases in 2014. /http://kia.court.gov.ua/documents/719/75020/Kriminal%202014.pdf

A significant number of court sessions (15.4%) were postponed with the appointment of the next session: in 2-5 days - in 32.0% of cases; in 6-10 days - in 23.0% of cases; in 10-30 days - in 40.1% of cases.

It should be noted that the postponing of the trial for a period longer than the period envisaged by the procedural law is explained, for example, by the need to call the participants of the criminal proceedings, which were not involved in the case by the court of the first instance, or the need to ensure the trial participants' right to protection, which depending on the situation may take some time. Thus, there is no reason to state the obvious violation of the provisions of the CPC by the court in this case.

However, there was a problem in abiding by the schedule of the review of cases. For example, only 25.0% of sessions started on time, 62.3% of session were delayed for up to 1 hour.

The review of appeals against the rulings of the investigating judges in cases if they were scheduled for the end of the working day had certain "peculiarities" (according to the monitors):

a) "the trial, including the preparatory actions and presence of the judge in the chambers, lasted for 3 - 5 minutes";

b) "the sound recording in such cases was not carried out, as the chairman ordered the clerk of the court session without being noticed by the third parties".

This situation indicates the significant shortcomings in the organization and planning by judges of their work.

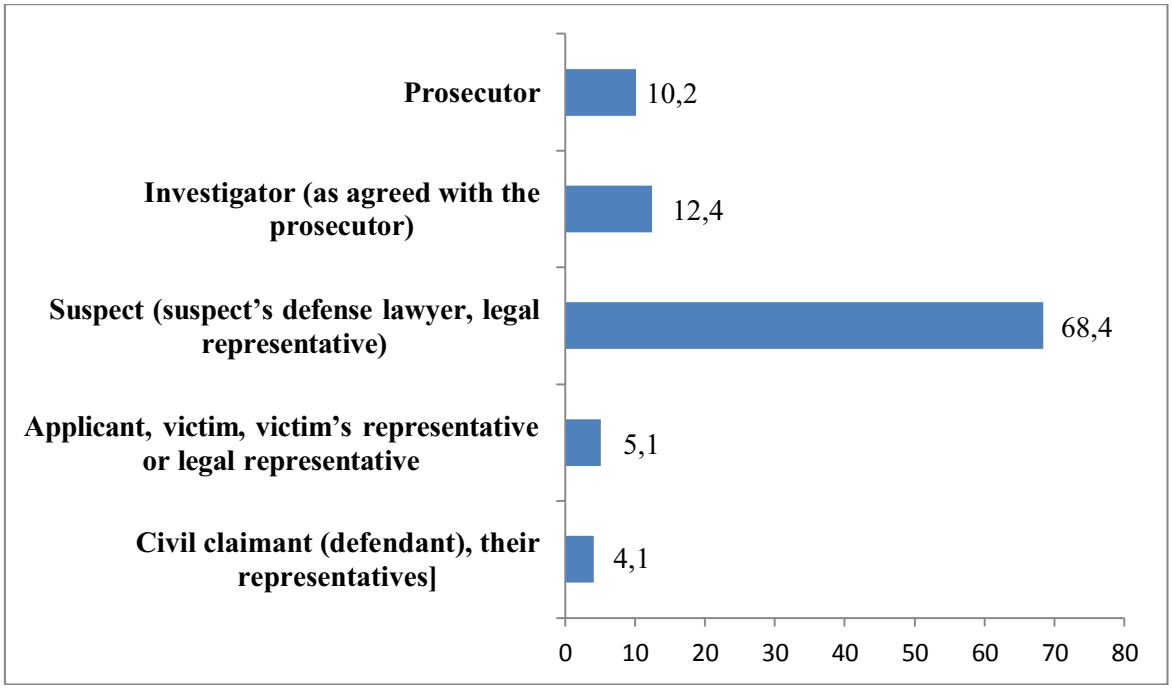
Recommendations

*The **State Judicial Administration of Ukraine**, **the Council of Judges of Ukraine**, **the Chairman and the judges of the Kyiv City Court of Appeal** should ensure the compliance with the schedule of appeal proceedings and the implementation of the principle of recording of the court sessions.*

3.2.1. Participants of the appeal proceedings

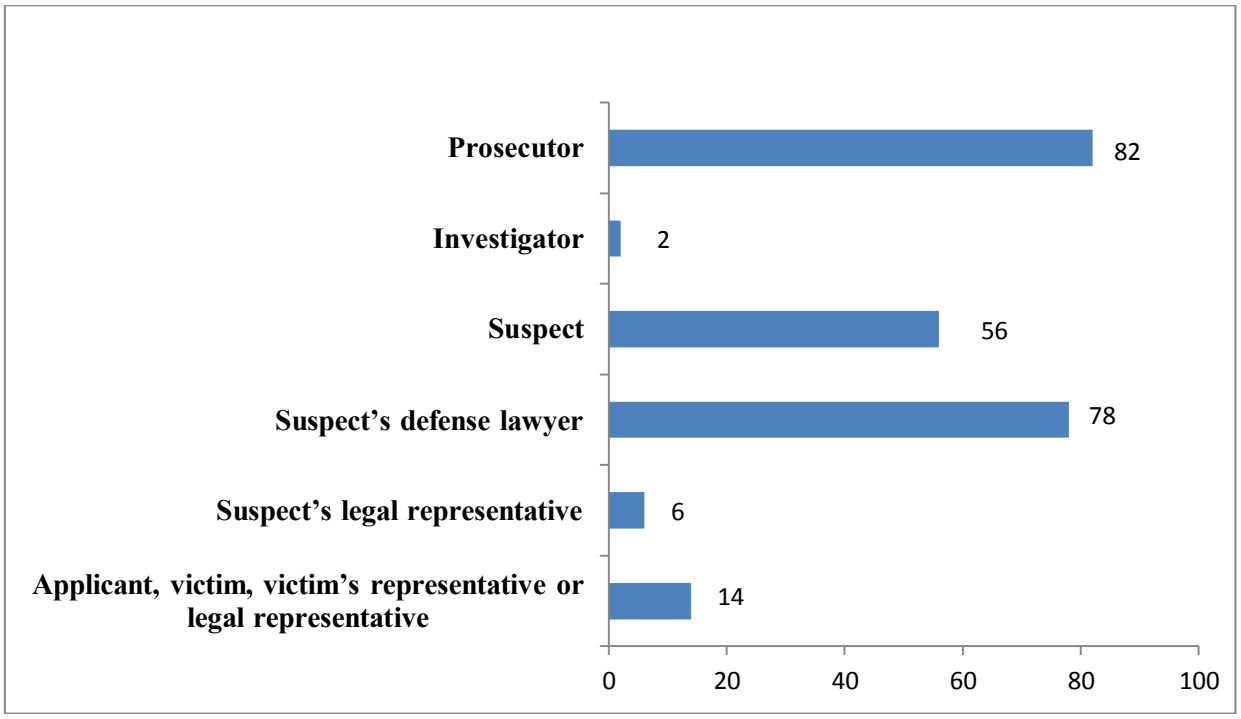
The below data indicate that all the participants of the criminal proceedings exercised the right to appeal against the rulings of investigating judges, and to a greater extent - the suspects for which a preventive measure – detention was chosen.

Table 3.2.-1. The initiator of the appeal against the ruling of the investigating judge (%)



In most cases the review of the appeals took place with the participation of persons that filed the complaints and with the calling of other participants of the criminal proceedings.

Table 3.2.-2. The presence of participants of the appeal proceedings (%)



It should be noted that almost a quarter of court sessions (26.0%) were held as videoconferences involving one of the suspects. However, it is important that in 19.5% of situations the monitors pointed to the lack of consent of the relevant participant.

These observations indicate that there is a violation by the court of the procedural law, which sets out that the court session may be held as videoconference only upon consent of the suspect, who is held in custody.

As for the review of appeals against the rulings of investigating judges in the absence of one of the parties to the criminal proceedings it should be noted that under Article 405 of the CPC the no-show of the parties or other participants of the criminal proceedings does not prevent the trial, if such persons have been duly notified of the date, time and place of the appeal proceedings and did not inform of the good reasons for their absence. If the participants of the criminal proceedings whose participation under this Code or the decision of the court of appeal is mandatory did not attend the court session, the appeal proceedings shall be postponed.

During the monitoring the monitors were to record the actions of the court in case of no-show of the participants in respect of which all the procedural requirements of call (summons) were met.

Thus, in most cases (55.6%) the court rescheduled the hearing to other date, in 27.8% of cases - the trial was held in the absence of the defense, in 14.7% of cases - in the absence of the prosecution.

The absence of the suspect was explained by the court referring to the following circumstances: the non-mandatory participation - 7.0% of cases; the availability of a written request for holding a trial without the suspect's participation - 28.6% of cases; the impossibility of bringing from the detention center - 14.2% of cases; other circumstances - 21.1% of cases. In other cases the information was not disclosed.

Regarding the postponement of the court hearings in the court of appeal it should be noted that Table 2.-6 presents the following reasons of postponement: the lack of proceedings materials to be received from the trial court - in 31.2% of cases, the no-show of the lawyer - in 23.3% of cases, the no-show of the prosecutor - in 17.6% of cases, technical issues related to holding the videoconference - in 7.3% of cases.

These observations confirm the improper organization of the work of local courts, the Kyiv City Court of Appeal and the Kyiv City Detention Center in terms of ensuring the holding of videoconferences as well as the malpractice of employees of the prosecution and of the defense.

Recommendations

The **Prosecutor General of Ukraine** should take measures to ensure the proper fulfillment by the prosecutors of duties established by the current CPC, including the prevention of the postponement of trials for reasons of the no-show of prosecutors to the court sessions.

The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should take measures to ensure the proper fulfillment by the lawyers of their professional duties, particularly in terms of ensuring the participation in the court sessions.

The **Ministry of Internal Affairs of Ukraine**, **the State Penitentiary Service of Ukraine** should take measures to ensure the timely bringing of persons in custody to the Kyiv City Court of Appeal for participation in the court sessions.

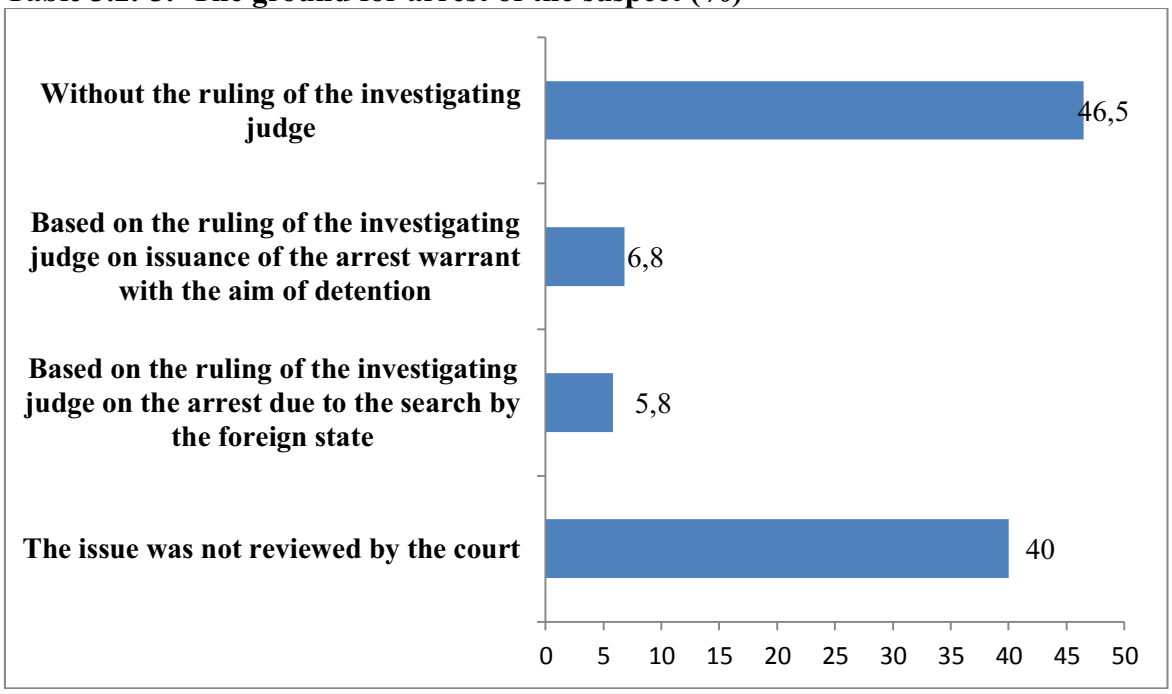
The **State Judicial Administration of Ukraine**, **the State Penitentiary Service of Ukraine**, **the Chairman of the Kyiv City Court of Appeal**, **the Kyiv City Detention Center** should take measures to ensure the proper organization of proceedings as videoconferences.

The **Chairman and the judges of the Kyiv City Court of Appeal**, **the chairmen and the judges of the Kyiv city district courts** should initiate the consideration of the responsibility of the prosecutor or lawyer, which did not show to the bodies authorized by law to bring them to disciplinary action.

3.2.2. Arrest

During the monitoring, the monitors attended the court sessions of the Kyiv City Court of Appeal, which reviewed the lawfulness of rulings of the investigating judges on the arrest or detention of persons.

Table 3.2.-3. The ground for arrest of the suspect (%)



According to monitors:

- in 78.6% of cases of arrest without the ruling of a judge the issue of the term of bringing before the investigating judge was not reviewed by the court of appeal or it was impossible to determine based on the facts of the hearing; in other cases the arrested person was brought within up to 60 hours;
- in all cases of arrest on the ground of the ruling of the investigating judge a person was brought to court within up to 36 hours, and if it happened in connection with the search by a foreign state – within up to 60 hours (although these data cannot be considered representative because of a small number of relevant situations);
- in 38.5% of court hearings in the court of appeal the court asked the arrested about the time of actual arrest; in some cases, the suspect declared a significant delay in the bringing to the investigating judge; in these cases, the court responded as follows: a) ignored such a statement - 14.3%; b) considered this remark, but did not recognize the violation - 7.2%; in 40% of cases this issue was not raised or it was difficult to determine it from the content of the hearing.

These observations indicate that the judges of the Kyiv City Court of Appeal in most cases don't review the rulings of the investigating judges in respect of the investigation by the investigating judges of the actual time of arrest of the suspects and timely bringing them to the investigating judges.

Under the given circumstances, the described situation raises doubts about the proper protection by the Kyiv City Court of Appeal of the right to liberty of the arrested or detained persons.

Recommendations

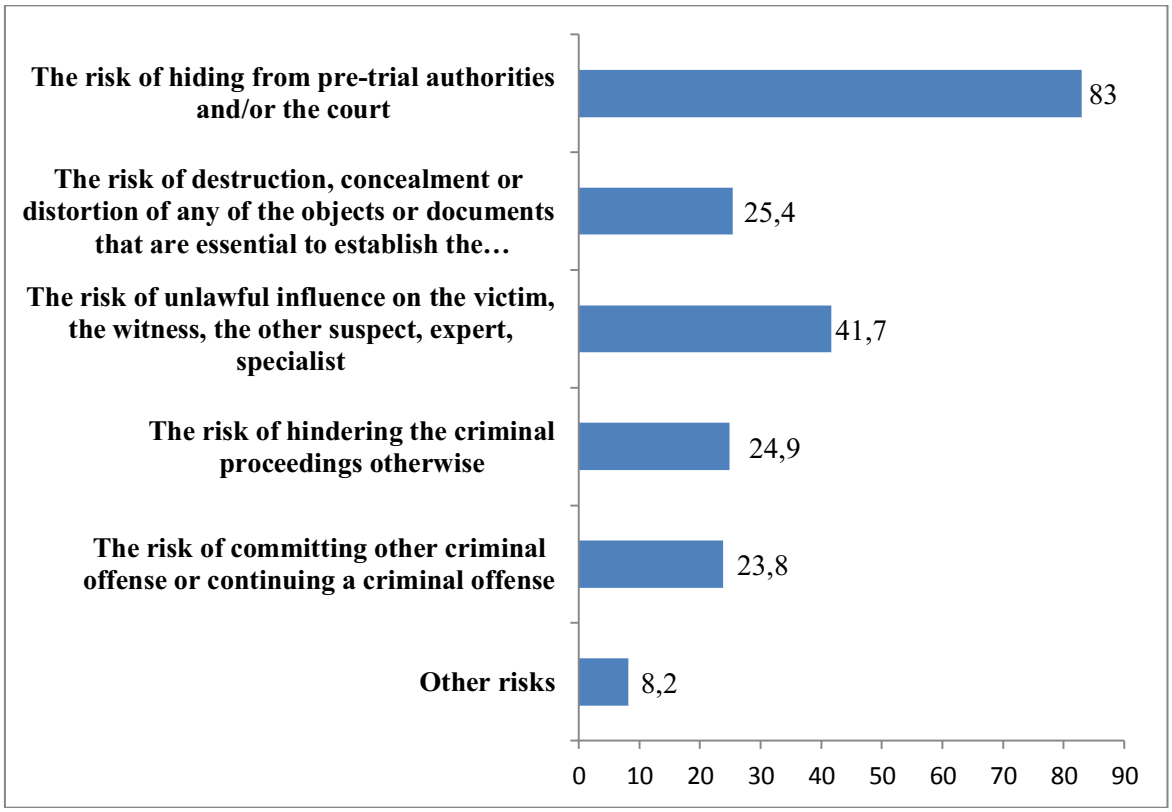
The **Chairman and the judges of the Kyiv City Court of Appeal** should pay attention to the fact that during the appeal proceedings of the appeals against the rulings of the investigating judges on choosing a preventive measure in the form of detention, which was preceded by the arrest, it is necessary to ascertain the observance of the rights of the arrested in terms of the period of the detention and in case of violations to respond accordingly, restoring the violated human rights.

3.2.3. The application of preventive measures

The main argument of justification by the prosecutor of a suspicion of commission of a crime was a reference to the content, classification and severity of the crime (it was recorded in all cases of appeal by the prosecutor); only in 12.9% of cases the additional specific facts and evidence were provided to prove the grounds for the suspicion.

The Table below presents the assessment by the prosecutor of risks that would need to be taken into account when choosing the preventive measure.

Table 3.2.-4. Assessment by the prosecutor of the risks that should be considered (%)

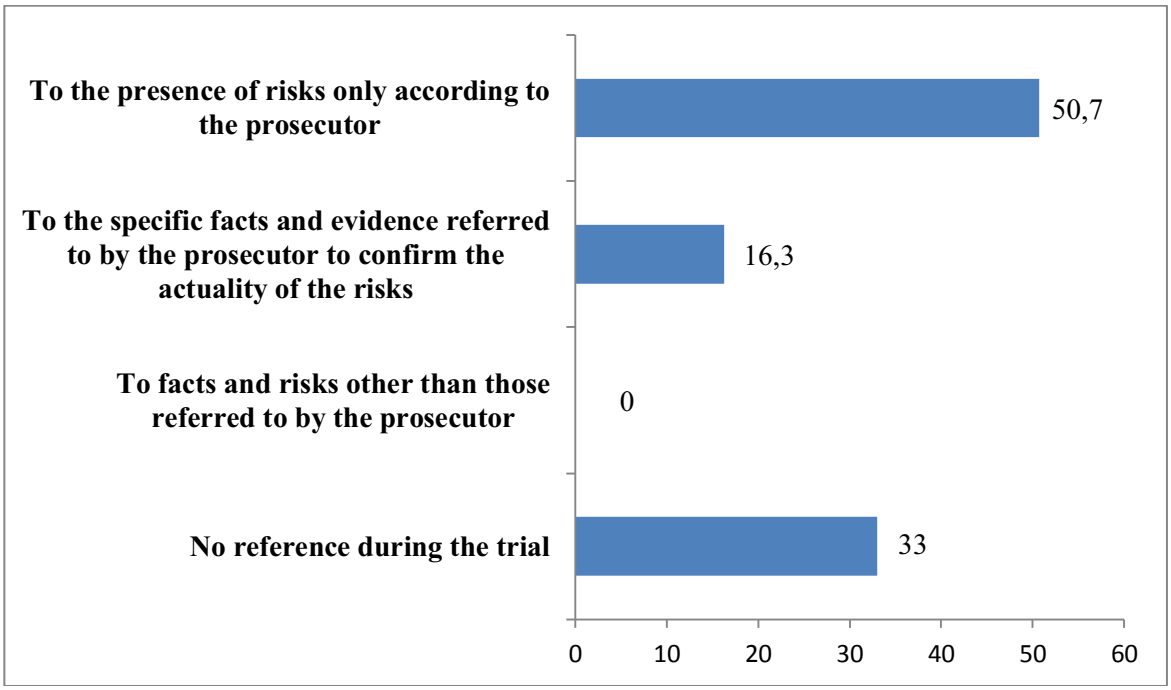


The proving of the above risks was carried out mainly with the reference on the risk itself and the severity of a criminal offense (in 86.7% of cases), rarely - with presentation of the specific facts and reference to the evidence confirming the actualness of the risk (33.0% of cases).

These observations indicate that prosecutors in the court of appeal often continue to substantiate the need for the application of the preventive measures with a risk of absconding from the pre-trial investigation bodies or the court - in 83% of cases; the risk of unlawful influence on the victim, the witness, the other suspect etc. - in 41.7% of cases, the risk of destruction (concealment, distortion) of objects or documents that are essential to the case - in 25.4% of cases; the risk of hindering the criminal proceedings otherwise - in 23.8% of cases etc.

The Table below presents the position of the court in cases where the decisions were adopted in favor of the prosecution on the basis of the existence of risks.

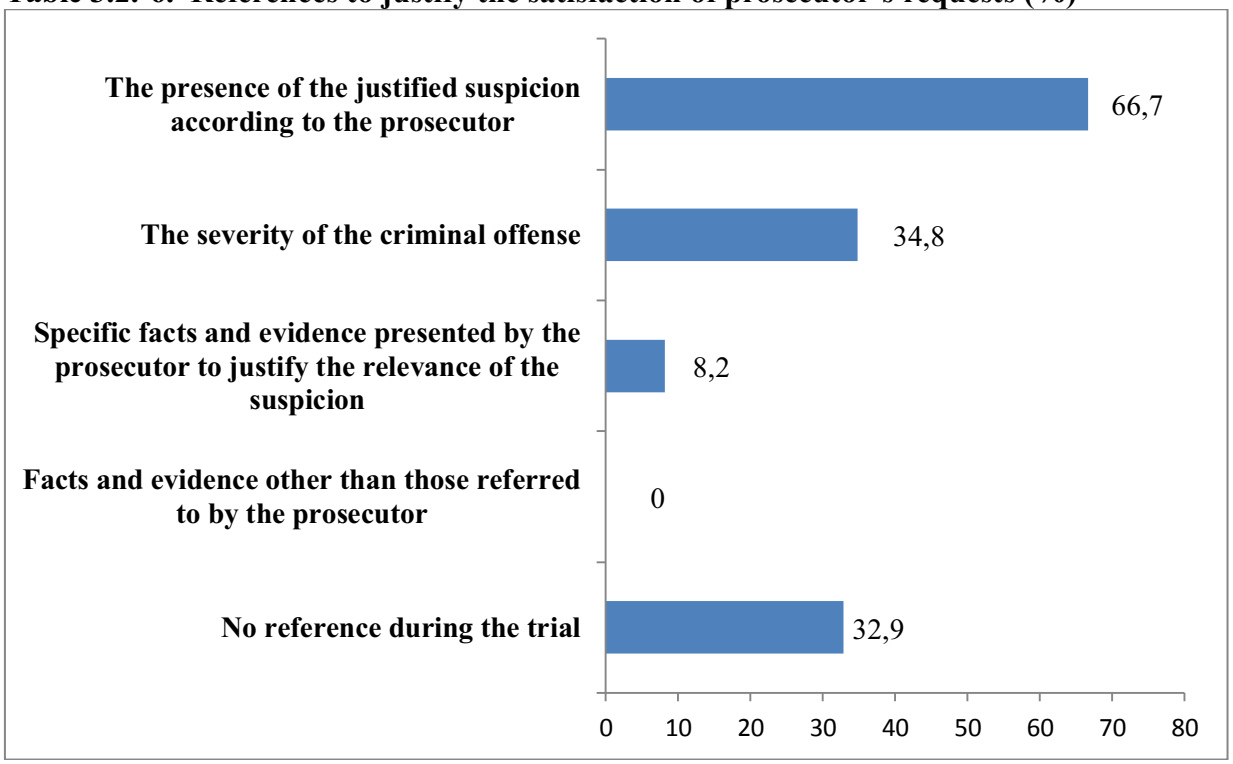
Table 3.2.-5. References of the court to justify the position on the assessment of risks (%)



The indicators in this Table show that in 50.7% of cases the court assessed the degree of the referred risks only according to the prosecutor and only in 16.3% of cases the references of the prosecutor were confirmed by the specific facts or evidence. In addition, in 33% of cases the court of appeal did mention the reference of the prosecutor to the presence of risks.

The justification by the court of the decision to satisfy the requests of the prosecutor is presented in the Table below.

Table 3.2.-6. References to justify the satisfaction of prosecutor's requests (%)

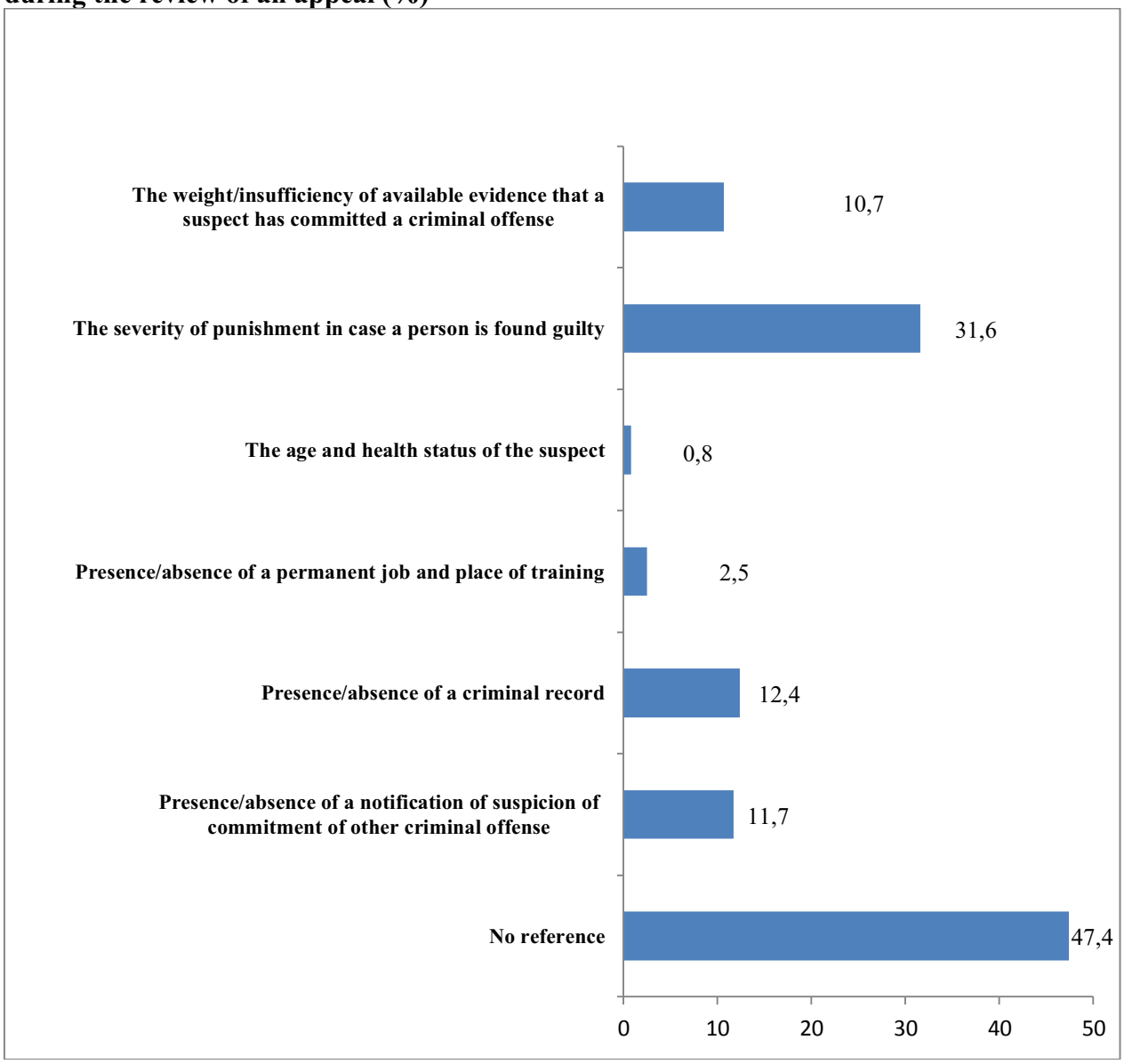


The data in this Table indicate that the Kyiv City Court of Appeal, leaving the ruling of the investigating judge on the application of a preventive measure unchanged, mainly referred to the existence of a justified suspicion according to the prosecutor - in 66.7% of cases and the severity of the criminal offense – in 34.8% of cases. However, in 32.9% of cases the court did not refer, during the court session, to the grounds set out in the request of the prosecutor for the application of the preventive measure.

Thus, the fact that in 30% of cases, during the appeal proceedings with regard to the rulings of the investigating judges on the application of the preventive measure the court of appeal referred neither to the justification by the prosecutor of the need for the preventive measure, nor to the risks, it can be concluded that either the prosecutor formally treats the provisions of the procedural law on the need to justify these requests or the court of appeal formally conducts the verification of the compliance of the investigating judge with the lawfulness and relevance of application of the preventive measure.

The monitors recorded the degree of consideration by the court of appeal of certain circumstances set out in the procedural law, to verify the appropriateness of application of the relevant preventive measure. The results are presented in the Table below.

Table 3.2.-7. The circumstances that have been taken into consideration by the court during the review of an appeal (%)



The presented indicators show that, according to Article 178 of the CPC, the court of appeal in 31.6% of cases referred to the severity of the punishment in case a person is found guilty, in 12.4% of cases – to the presence or absence of a criminal record, in 11.7% of cases – to the presence or absence of a notification of suspicion of commitment of other criminal offense, in 2.5% of cases – to the presence or absence of a permanent job and place of training. However, in 47.4% of cases the court of appeal did not refer to the circumstances defined by the above Article.

In addition, the monitors were able to observe whether the court of appeal considered the application of a milder preventive measure, which is mandatory when adopting a decision on the application of a preventive measure. The monitors noted that this question in the 40.0% of cases was not raised by anyone; in 27.0% of cases the question was raised by the defense, but was not studied by the court. In other cases the question was studied but it was reflected in the decision in the 24.8% of cases.

Quite controversial is the information on:

- the verification of correctness of determining the bail as an alternative to detention; in half of the relevant proceedings this question was not raised at all, in other cases the bail was defined primarily in the following amounts: from 25 to 97 thousand UAH (26.0%); more than 365 thousand UAH – 32.0%. The monitors recognized the high prevalence of situations of determination of the *"absolutely unreal bail"*. Almost always the amount of bail was justified by the adequacy of the relevant amount for the fulfillment of obligations by the person. As additional circumstances, the court referred to the income of the person as the criterion for the determination of the *"feasibility of the bail"*;
- in one of the proceedings *"the prosecutor argued that the issue of alternative bail could not be raised because the suspect lived in Crimea"*.

Regarding the determination of the bail it should be noted that paragraph three of Article 183 of the CPC sets out that the investigating judge, the court upon the adoption of a ruling on application of the preventive measure in the form of detention should determine the amount of bail, sufficient to ensure the fulfillment by the suspect, the accused of obligations under this Code. The ruling of the investigating judge shall specify the obligations under Article 194 of the CPC to be assigned to the suspect, the accused in case of the bail, the consequences of their non-fulfillment, the justification of the chosen amount of the bail.

However, the observations of the monitors indicate that the courts often either do not determine the amount of the bail, which could be a violation of the above Article of the CPC, or deliberately overstate the amount of bail, which can be provided by neither the suspect, nor his family, aiming to leave the suspect in detention. In any case, there is arbitrary application of this provision by both the investigating judges and the judges of the Kyiv City Court of Appeal.

Whereas in accordance with paragraph four of Article 424 of the CPC, the rulings of the investigating judges, after their review in the appeal proceedings and the rulings of the court of appeal based on the consideration of appeal against such ruling are not subject to appeal in cassation, thus, according to the monitors it can be concluded that there are cases of detention with the application of unreasonably overstated amounts of bail or without the application of bail.

Recommendations

The **Chairman and the judges of the Kyiv City Court of Appeal** should pay attention to the fact that the court decision which is adopted with regard to an appeal against the ruling of the investigating judge on application of the preventive measure or the extension of its term, must be lawful, justified, motivated and meet the requirements established by the CPC of Ukraine. Particular attention should be paid to the need to cancel the ruling of the investigating judge on the application of a preventive measure in the absence of facts (evidence) proving the

grounds for the suspicion and the severity of the committed criminal offense. Also, the courts of appeal should carefully check the amounts of bail determined as the main preventive measure or as an alternative to detention, and in the cases of clearly unrealistic bail to determine other amounts for this measure. Also, the court of appeal should consider the application of a milder preventive measure to the suspect.

3.2.4. Investigation of evidence

During the observation of trials in the Kyiv City Court of Appeal, the monitors were able to assess the level of activity of the parties to the trial and the ensuring by the court of their competition.

Thus, the monitors witnessed that the prosecution in most cases did no appeal to the court of appeal with a request on the need to investigate the additional evidence. However, there were cases when the prosecutors filed the requests to court on calling the witnesses – in 1.5% of cases, with regard to the investigation of material evidence - in 11.5% of cases and with regard to the investigation of documents - in 22.2% of cases; the Court of Appeal satisfied these requests.

The main motive for filing such requests was the need to justify the presence of risks that need to be taken into account when choosing a preventive measure. Such motivation was recorded in 98% of cases. In 5.9% of cases the prosecutor pointed to the fact that he submitted the relevant requests to the investigating judge and they have been rejected, or that the existence of such evidence became known to him after the adoption of the ruling of the investigating judge.

It should be noted that the defense more actively represented its position in the court of appeal. Thus, in 48.2% of cases the lawyers indicated to the court the need to investigate the documents, of which in 43.8% of cases the court accepted the position of the defense and satisfied the relevant requests. The monitors also recorded 12.1% of cases when the lawyers submitted a request to call the witnesses of the defense, of which the 4.5% of requests were also satisfied by the court. Additionally, in 7.4% of cases, the court satisfied the request of the lawyers on the need to investigate the material evidence.

The motivation of the requests of the defense had a more complex structure:

- proving the absence of a reasonable suspicion - 16.2% of cases;
- absence of risks to be considered while choosing the preventive measure - 44.0% of cases;
- other circumstances to be considered while choosing the preventive measure - 32.9% of cases.

It should be noted that under Article 404 of the CPC, the court of appeal can investigate the evidence which were not investigated by the court of first instance, only if the investigation of such evidence was requested by the participants of the proceedings in the trial court or if they become known after the adoption of the court decision, which is appealed against.

The fact that the court of appeal in more than 50% of cases satisfied the request of the defense to call the witnesses, the documents or to investigate the material evidence indicates that the investigating judges often apply the unjustified rejection of said requests, which is an obvious violation of the right of the suspect to protection.

Recommendations

The **Chairman and the judges of the Kyiv City Court of Appeal**, **the chairmen and the judges of the Kyiv city district courts** should pay attention to their responsibility to create the necessary conditions for the exercise by the parties to the criminal proceedings of their procedural rights and fulfillment of procedural obligations, and the adoption by the results of the trial of the reasonable and reasoned decision.

3.2.5. The inadmissibility of evidence

During the appeal proceedings the defense in most cases (76.5%) did not request the court to recognize the evidence inadmissible. In other cases, this request was submitted, but the court of appeal found the evidence inadmissible only in 2.2% of cases, referring to the violation of the procedure of their receipt envisaged by the procedural law.

Quite rare were the cases of requesting the court of appeal to recognize the evidence on which the decision of the investigating judge was based, inadmissible and even more uncommon cases of satisfaction of such requests can be explained by the specific functions and responsibilities assigned to the investigating judge under the current CPC: the responsibility to allow the application of measures of the criminal proceedings, including the preventive measures and the conduct of certain investigative (search) actions, to exercise control over the lawfulness of deprivation of liberty, to consider the appeals against the decisions, actions or inaction of the investigator, prosecutor. This issue becomes more important at the stage of the trial, when parties to the criminal proceedings are required to provide the court with all the evidence proving and confirming their position.

3.2.6. The implementation of the adversarial system

According to monitors, in all the proceedings the parties had an equal opportunity to request the investigation of additional evidence in the case, to comment and refute the evidence provided by the other party, to ask questions, to give explanations or objections.

However, the monitors noted that the parties did not show much activity in the appeal proceedings. For example, the defense had no questions for the prosecution in 73.4% of cases, and the prosecution - in 75.6% of cases.

Consequently, in the court of appeal the parties had equal opportunity to argue before the court their position on the ruling of the investigating judge. A certain passivity of the parties can, again, be explained by the specific issues to be resolved by the court of appeal authorized to consider the appeals against the rulings of the investigating judges.

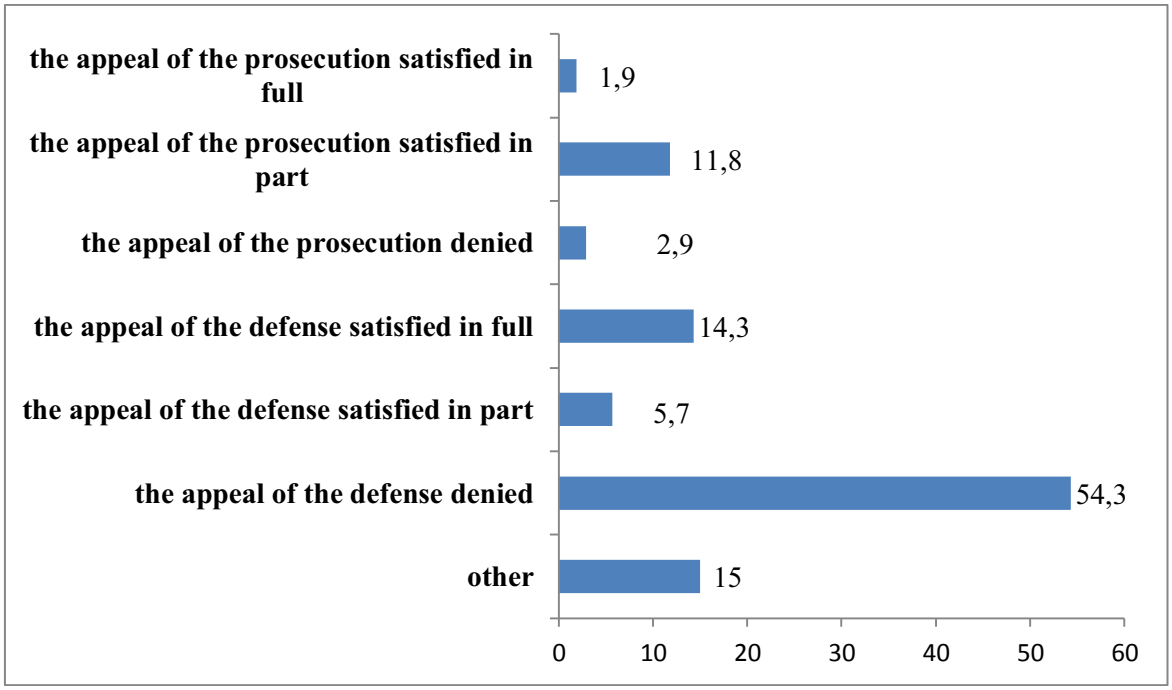
3.2.7. Legal debate

The monitors reported no cases of limitation of time of the parties in the legal debate. However, the opportunity to express the remarks was recorded in 64.5% of cases, and the opportunity to make the final statement for the suspect - in 35.64% of cases.

3.2.8. Passing and disclosure of the decision

During the monitoring of appeal proceedings the monitors were able to be present at the court proceedings in which the court passed and disclosed the court decisions. The content of the decisions based on the appeal proceedings is presented in the Table below.

Table 3.2.-8. Court decision (%)



This information indicates that the prosecution appealed against the rulings of the investigating judges in about 17% of cases, of which in the 14% of cases the court of appeal had fully or in part satisfied the appeals of prosecutors.

However, the defense appealed against the rulings of the investigating judges in about 74% of cases, of which only the 20% of appeals of the lawyers were fully or partially satisfied.

Thus, in 34% of cases the court of appeal found grounds for cancellation of rulings of the investigating judges.

In cases where the rulings of the investigating judges were canceled and a new ruling was adopted, the court stated the following grounds for such a decision:

- incompleteness of trial – 12.7 %;
- substantial violation of provisions of the criminal procedural law – 4.5 %;
- discrepancy between the conclusions of the trial and the circumstances of the case – 82.8%.

In view of monitoring data, according to which in the 35% of cases the court of appeal satisfied the requests of prosecutors on the call of witnesses, the investigation of material evidence and documents, and in 50% of cases the same request of the defense were satisfied, it is not surprising that in 34% of cases the monitors witnessed the cancellation of rulings of the investigating judges.

According to the monitors, the full text of the decision was disclosed on the day of the hearing in 64.7% of cases.

In particular, during the disclosure of decisions about the denial of appeals of the lawyers, the monitors had the opportunity to assess the presence of the response of the court to the arguments of the defense. Thus, the court of appeal did not provide a rebuttal for arguments of lawyers in almost half of the cases of the disclosure of such decisions. In the quarter of such cases, the monitors witnessed the necessary justification by the court, in other cases - the court decisions were disclosed in such a manner that it was impossible to understand its justification.

However, it should be noted that the rulings of the court of appeal deemed to not meet the requirements of Article 419 of the CPC given the absence of assessment of the arguments of the party to the criminal proceedings.

In 35.3% of cases the monitors witnessed the disclosure by the court of appeal of only the introductory and the judicial disposition of the decision, but only in one third of cases the court appointed a date of disclosure of the full text of the decision.

Recommendations

The **Chairman and the judges of the Kyiv City Court of Appeal**, **the chairmen and the judges of the Kyiv city district courts** should pay attention to the need for strict observance of the principles of the criminal proceedings, including the lawfulness, the right to protection, the competition of the parties and the freedom of representation to court their evidence and proving its credibility, and the adoption based on the results of the trial of a reasonable and reasoned decision.

Subsection 3.3.

Preparatory proceedings in the court of the first instance

Under Article 314 of the CPC, after receiving the indictment, the request to impose compulsory measures of medical or educational nature, or a request for exemption from criminal liability, the court, not later than within five days as of the receipt, shall appoint a preparatory court session and call the participants of the proceedings to take part in it.

The preparatory court session shall take place with the participation of the prosecutor, the accused, the defense lawyer, the victim, the victim's representative and legal representative, the civil claimant, the civil claimant's representative and legal representative, the civil defendant and his representative, the representative of the legal entity against which the proceedings were opened according to the rules envisaged by this Code for the trial.

Article 315 of the CPC sets out a list of issues to be decided by the court in the course of preparatory proceedings in order to prepare the case for trial: 1) to determine the date and place of the trial; 2) to determine whether the court proceedings should be open or closed; 3) to determine the composition of persons participating in the proceedings; 4) to consider the request of participants of the proceedings on the call of certain persons to court for questioning; the call for certain objects or documents; 5) to perform other actions necessary for preparation for the trial.

During the monitoring, the monitors attended 195 preparatory proceedings.

The monitors found it quite difficult to determine within which period as of the date of receipt of the indictment act (request), the court held the trial: 59% of monitors indicated that "it was not mentioned during the trial"; 14.8% - believe that it was "within 5 days"; 11.5% - "within 15 days"; 13.9% - "within more than 15 days".

A significant number of sessions (13.9%) were not opened and were postponed with the appointment of the next session: for the next day – 36.4%; within 2-5 days – 18.6%; within 6-10 days – 18.2%; within 10-30 days – 27.1%.

3.3.1. Participants of the preparatory proceedings

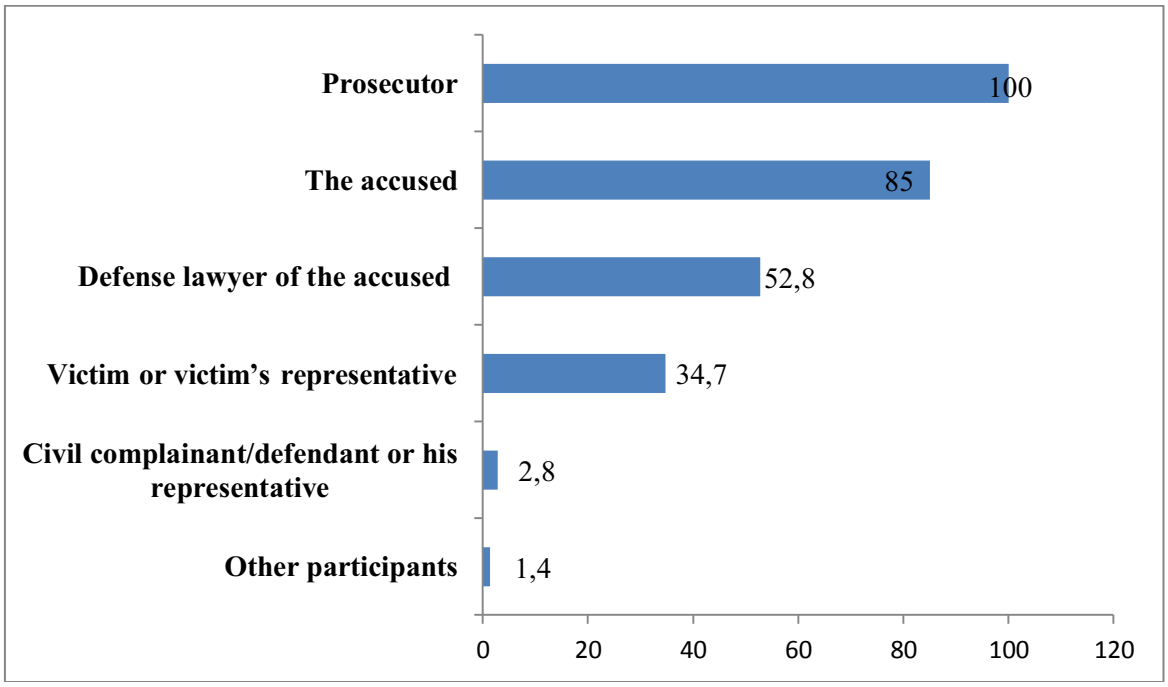
According to Article 3 of the CPC, participants of the trial are the parties to the criminal proceedings, the victim, the victim's representative and legal representative, the civil claimant, the civil claimant's representative and legal representative, the civil defendant and his representative, the representative of the legal entity against which the proceedings were opened and other persons at the request or complaint of which, in cases stipulated by this Code, the trial is held.

Under Article 314 of the CPC, the preparatory proceedings is participated by the prosecutor, the accused, the defense lawyer, the victim, the victim's representative and legal representative, the civil claimant, the civil claimant's representative, the representative of the legal entity against which the proceedings were opened according to the rules envisaged by

this Code for the trial. After meeting the requirements stipulated in Articles 342-345 of the Code, the Chairman asks the participants of the proceedings for their opinion on the possibility of appointing the trial.

Below is the structure of participants of the preparatory proceedings, whose trials had been initiated and attended by the monitors.

Table 3.3.-1. The presence of participants of the preparatory proceedings (%)



The above Table shows that in one third of cases the preparatory proceedings involve the parties to the criminal proceedings and other participants of the trial.

However, in other cases, the trials were often unattended by the victims (65.3%) and lawyers (47.2%). In 15% of cases the accused did not show or were not brought to the court.

The absence of lawyers and victims can be explained either by the inadequate notification of the court session, or by the presence of certain reasons to be informed to the court in advance. As for the accused, in case of their detention the responsibility for bringing them to court is borne by the relevant units of the MIA and SBSU.

The monitors recorded the actions of the court in the absence of participants, for which all the requirements for call (bringing) were met. The obtained results are quite controversial, because the monitors were not always able to get full information on the status of the present and the reasons for the absence of other participants.

The court, in one third of cases (35.3%), postponed the hearings to other dates, although in 41.2% of cases the consideration was performed in the absence of the defense, and in 23.5% - in the absence of other participants.

Separately the monitors assessed the situation with the absence of the accused, who was not in custody, but did not appear in court. In such cases the court acted as follows: the trial was held in the absence of the accused - 14.8%; the trial was postponed to other date - 28.5%; the ruling on the detention was adopted – 15.3%.

In view of these observations it can be concluded that the court, in numerous cases, in violation of Article 314 of the CPC held the preparatory proceedings in the absence of participants of the criminal proceedings whose presence is mandatory. This, in turn, can definitely affect the quality and adequacy of the subsequent proceedings, as the issues to be considered by the court under Article 315 of the CPC within the preparatory proceedings were resolved without taking into account the views and position of the absent participant.

Recommendations

The **Council of Judges of Ukraine, the High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should pay attention to the strict observance of the provisions of the criminal procedural law in terms of ensuring the exercise of the right to personal participation in the court proceedings of the participants of the criminal proceedings, including in the preparatory proceedings.

The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should take measures to ensure the proper performance by lawyers of their professional responsibilities, particularly in terms of ensuring the participation in court sessions.

The **Ministry of Internal Affairs of Ukraine**, **the State Penitentiary Service of Ukraine** should take measures to ensure the timely bringing of persons in custody to the Kyiv City courts for participation in the court sessions.

3.3.2. Procedural issues

Under Article 314 of the CPC, after meeting the requirements stipulated in Articles 342-345 of the Code, the Chairman asks the participants of the proceedings for their opinion on the possibility of appointing the trial.

In addition, under Article 315 of the CPC, during the preparatory proceedings, the court at the request of the participants of the trial shall have the right to choose, change or cancel the measures ensuring the criminal proceedings, including the preventive measure chosen in respect of the accused. In the absence of the given requests of the parties to criminal proceedings the application of measures to ensure the criminal proceedings chosen during the pre-trial investigation shall be considered extended.

The monitors provided the following characterization of the preparatory proceedings:

- in most cases (89.2%) the presiding judge asked the participants of the preparatory proceedings for their opinion on the possibility of appointing the trial; the majority of prosecutors did not submit to the court any prosecution evidence; only in 5.2% of cases the prosecution submitted such evidence to court and the court accepted it; in 1.8% of cases - the court did not accept such evidence; while the defense did not oppose the presentation of evidence by the prosecution during the preparatory proceedings; there were cases (14.5%) when the monitors noticed that before the trial the court already had all the prosecution evidence of the guilt of the accused;
- only in 17.7% of cases the issue of application of the preventive measure was considered. In most cases, the prosecutor was the initiator of the continued detention. In one third of the situations the issue of application of the preventive measure was considered at the initiative of the court, in another third - at the request of the defense. In some cases, this issue was brought up by the victim. The court, upon consideration of this issue, largely satisfied the request of the prosecutor and rejected the requests of lawyers. There was only one case where the court applied a milder preventive measure.
- According to the monitors, in 98.8% of cases the parties had the same opportunities to comment on the position and respond to the arguments of the opposite party. The monitors noticed that in 7.3% of cases the court did not respond to all the questions raised by the accused (his representative), the victim.

Among these observations the most noticeable is the fact that in over 80% of observations of the preparatory proceedings, none of the participants of the criminal proceedings raised the question before the court on the extension, change or even cancellation of the preventive measure chosen for the accused.

This may indicate both the inadequate performance of obligations by the prosecutor, the non-exercise of procedural rights by the defense lawyer and the failure to conduct judicial review of the grounds of deprivation of liberty of the accused.

Recommendations

The **chairmen and judges of the Kyiv city district courts** should strengthen the judicial control over the periods of detention of the accused and the presence of grounds for the extension of such periods.

The **Prosecutor General's Office of Ukraine** should take measures to ensure the proper exercise by the prosecutors of their procedural rights and performance of their professional duties, including with regard to the implementation of provisions of the CPC on the exercise of the human right to liberty and personal inviolability.

The **Ukrainian National Bar Association**, **the High Qualification and Disciplinary Bar Commission**, **the Coordination Center for the Free Secondary Legal Aid** should take measures to ensure the proper exercise by the lawyers of their procedural rights and performance of their professional duties designed to protect the rights, freedoms and interests of the suspect, the accused.

3.3.3. Passing and disclosure of the court decision

Under Article 314 of the CPC within the preparatory proceedings the court may adopt the following decisions: 1) to approve the agreement or refuse to approve the agreement and return the criminal proceedings to the prosecutor to continue the pre-trial investigation; 2) to close the proceedings in the presence of the defined grounds; 3) to return the indictment, the request to impose compulsory measures of medical or educational nature to the prosecutor, if they do not meet the requirements of the Code; 4) to refer the indictment, the request to impose compulsory measures of medical or educational nature to the appropriate court in order to determine the jurisdiction in case of determination of a lack of jurisdiction of the criminal proceedings; 5) to appoint the trial on the basis of the indictment, the request to impose compulsory measures of medical or educational nature.

The Article 316 of the CPC sets out that the trial should be appointed not later than within ten days after the adoption of the ruling on its appointment.

Observing this type of proceedings, the monitors reported that almost in one third of cases the preparatory proceedings lasted for several court sessions, and thus the court did not adopt any decisions in such cases.

In another third of cases the preparatory proceedings ended with the adoption of a decision to appoint the criminal proceedings before the trial. However, in most cases, the trial started later than within 10 days as of the date of adoption of the decision on its appointment.

However, **in 43% of cases** the monitors witnessed the court to adopt the decision to return the indictment to the prosecutor because of the shortcomings, which indicates the failure of the prosecutors to meet the requirements of the CPC on the issuance of the indictments. In particular, there was a typical situation where the court clarified that the indictment had been returned by the court for several times and each time the prosecutor partially eliminated the shortcomings previously identified by the court.

As for the widespread cases of the return of indictments to the prosecutors it should be noted that observations of the monitors on this issue coincided with observations of the Ombudsman. Thus, back in 2013, in the Annual Report of the Commissioner for Human Rights for 2013 it was stressed that due to systemic violations by the prosecutors of the requirements of the CPC on the proper issuance of indictments, the period of transfer of the indictment from the Prosecutor's Office to the court could last for more than one year, which in turn created the basis for unreasonable length of the criminal proceedings and the unjustified deprivation of liberty,

and therefore for the adoption by the European Court of Human Rights of the decisions against Ukraine in the future.

Recommendations

The **Council of Judges of Ukraine, the High Council of Justice of Ukraine**, **the High Qualification Commission of Judges of Ukraine**, **the chairmen and judges of the Kyiv city district courts** should pay attention to the inadequate organization and planning of trials of the criminal proceedings.

The **Prosecutor General's Office of Ukraine** should take systemic measures to enhance the quality of indictments prepared by the prosecutors in order to make it impossible to unduly delay the trial and violate the reasonable period of the trial in criminal proceedings.

Chapter 3.4.

Court proceedings based on agreements

CPC in force envisages an opportunity to conclude the following agreements in criminal proceedings: reconciliation agreements between the victim and a suspected or defendant and plea agreement between a prosecutor and suspected or defendant(Article 468 of the CPC).

Pursuant to the Article 469 of the CPC, reconciliation agreement may be concluded on the initiative of the victim, the suspect or the accused. Plea agreement may be concluded upon initiative of the public prosecutor or the suspect or the accused.

Pursuant to the Article 474 of the CPC, if an agreement was reached at the stage of pre-trial investigation, the indictment together with the agreement signed by the parties to it shall be referred to court without delay. The court shall examine the agreement during the preparatory court session with compulsory participation of the parties thereto and notification of other participants in court proceedings. Absence of other participants in court proceedings shall not preclude such examination.

If an agreement was reached during trial, the court shall immediately suspend the conduct of procedural actions and start examination of the agreement.

Prior to taking the decision on approval of the plea agreement, the court, during court session, must find out whether the accused or victim understands clearly enough the substance of the agreement and implications of its conclusion. It is also necessary to explain to the defendant the right for a fair trial, right to defense, as well as other important circumstances that the defendant should know before approval of such agreement.

As stated by Articles 394 and 424 of the CPC, failure to comply with this requirement will be a ground to appeal the judgement delivered on the basis of agreement in appellate or cassation court.

Besides, the court shall be required to make sure during court session that the agreement was concluded by the parties thereto voluntarily, i.e. without use of compulsion, threats or promises or any other circumstances other than those provided for in the agreement. In order to ascertain voluntariness of the agreement the court may, where necessary, request documents, including any complaints of the suspect or the defendant, filed by them during criminal proceedings and decision taken as a result of their consideration, as well as summon and interview persons in court.

78 court proceedings based on agreements were monitored. Generalization of practice compiled by the Appellate Court of the city of Kyiv stated that there were 250 proceedings based on agreements in average in the quarter in the second half year of 2013 and first quarter of 2014.[4]

[4]Generalization of Kyev courts practice to conduct court proceedings based on agreements over the second half of 2013 and first quarter of 2014. //http://kia.court.gov.ua/sud2690/uzah/28/

On the grounds of this information it is possible to estimate that 15% of the respective court proceedings have been monitored.

Structure of proceedings that were monitored was as follows:

- reconciliation agreements – 68.6 %;
- plea agreements – 31.4 %.

While comparing these data with statistical information regarding types of agreements which were considered by courts in the city of Kyiv in the first quarter of 2014 (250 altogether including 111 of reconciliation agreements and 139 of plea agreements)[5], it is noticeable that monitors had less opportunities to monitor court proceedings based on plea agreements.

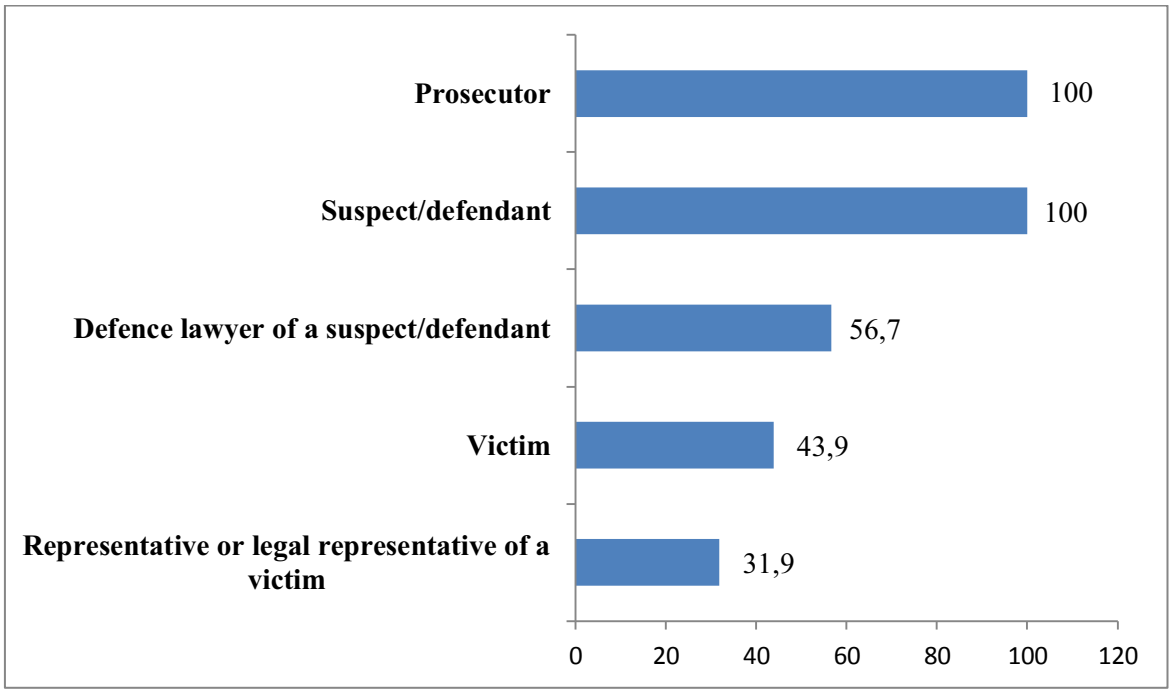
In particular, it can be explained by the fact that court proceedings based on agreements are usually characterized by monitors as those with *«certain secrecy»* and *«lack of sufficient information»*. If speaking about plea agreements, these proceedings are in general considered by courts *"with doors closed"* and it is pretty difficult to be present at these proceedings.

According to the results of monitoring, agreements are mostly concluded at the stage of preparatory proceedings (72.3% of cases) and less often during consideration substance of the proceedings (27.7%).

3.4.1. Participants of court proceedings based on agreements

Please, find herebelow structure of participants of proceedings based on agreements (according to the results of monitoring).

Table 3.4.-1. Presence of participants of proceedings based on agreements (%)



The table shows that defense lawyers were absent in court proceedings based on agreements in 34.3% of cases. Absence of defense lawyers can be explained either by the fact that s/he was not involved in the case at all, or that the lawyer was not informed in a due order, or if there are objective reasons about which the defense lawyer should have warned the court in advance. If the agreement had been approved without presence of a defense lawyer that participated in court proceedings, it can be deemed as violation of the right for defense.

[5]The same source

3.4.2. Procedural issues

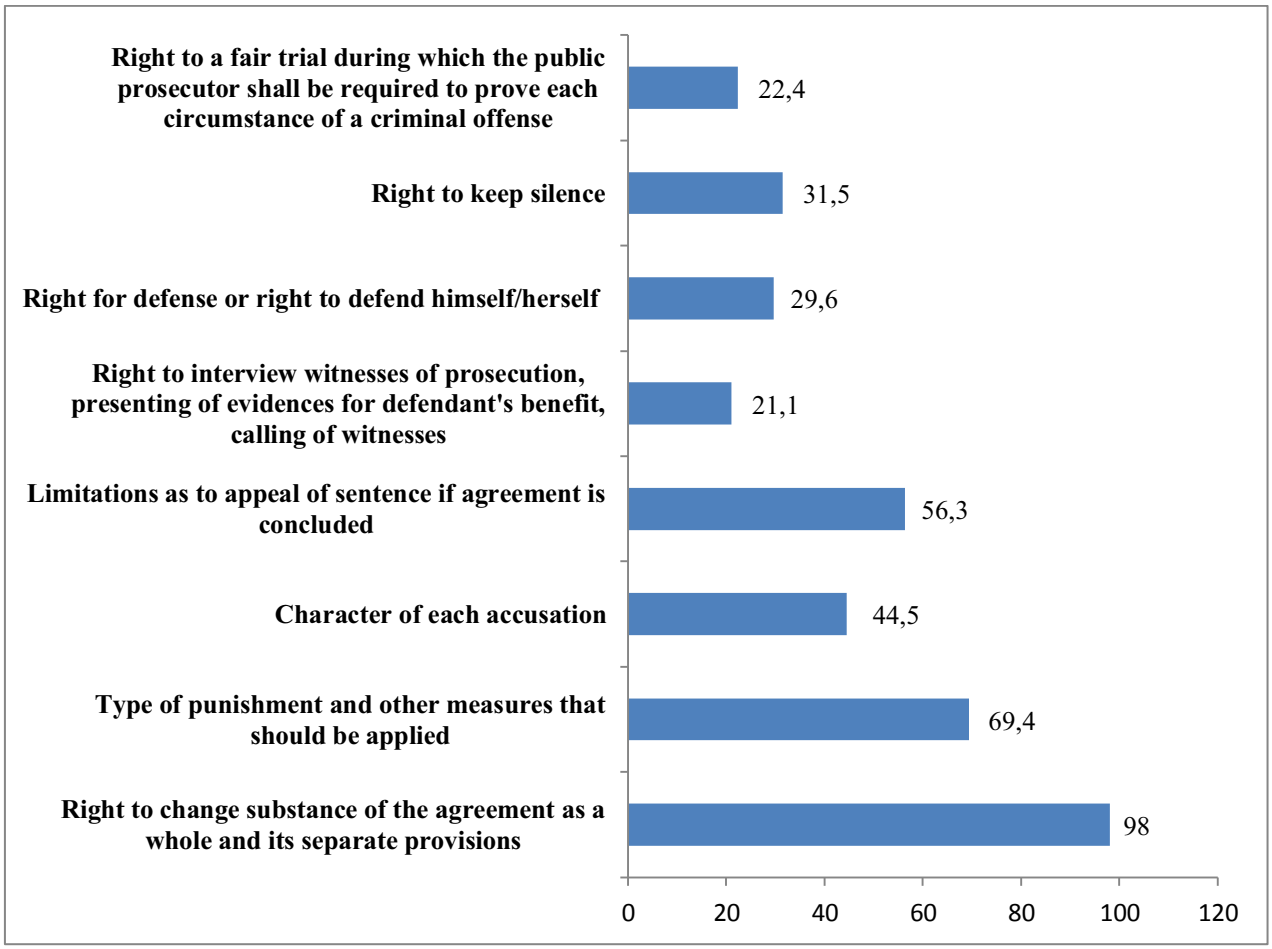
Monitors paid attention to the following characteristics of court proceedings based on agreements:

- activity of parties was different in presenting evidences to substantiate the concluded agreement: prosecution provided evidences in 61.4% of cases, while defense provided evidences only in 25.6% of cases; the court requested evidences to substantiate concluded agreements on its own initiative in 15.7% of cases;
- in all cases when agreements were concluded the court asked a suspect (defendant) whether the decision was voluntary; victims were asked this question only in 62% of proceedings;
- to find out voluntariness of concluded agreements court requested documents, called and interviewed witnesses in 38.5% of proceedings;
- monitors fixed only several cases (7.2%) when court asked the defendant whether s/he had an opportunity to discuss the agreement with a defense lawyer;
- during consideration of plea agreements monitors observed several cases of direct threats from a prosecutor who demanded from a defendant to sign the mentioned agreement without any changes. Court did not respond to such circumstances.

Information herebelow was calculated from the number of monitored court proceedings based on agreements (by types).

3.4.3. Reconciliation agreements

Table 3.4.-2. Ascertaining by the court whether defendant is correct in understanding essential characteristics of proceedings (%)

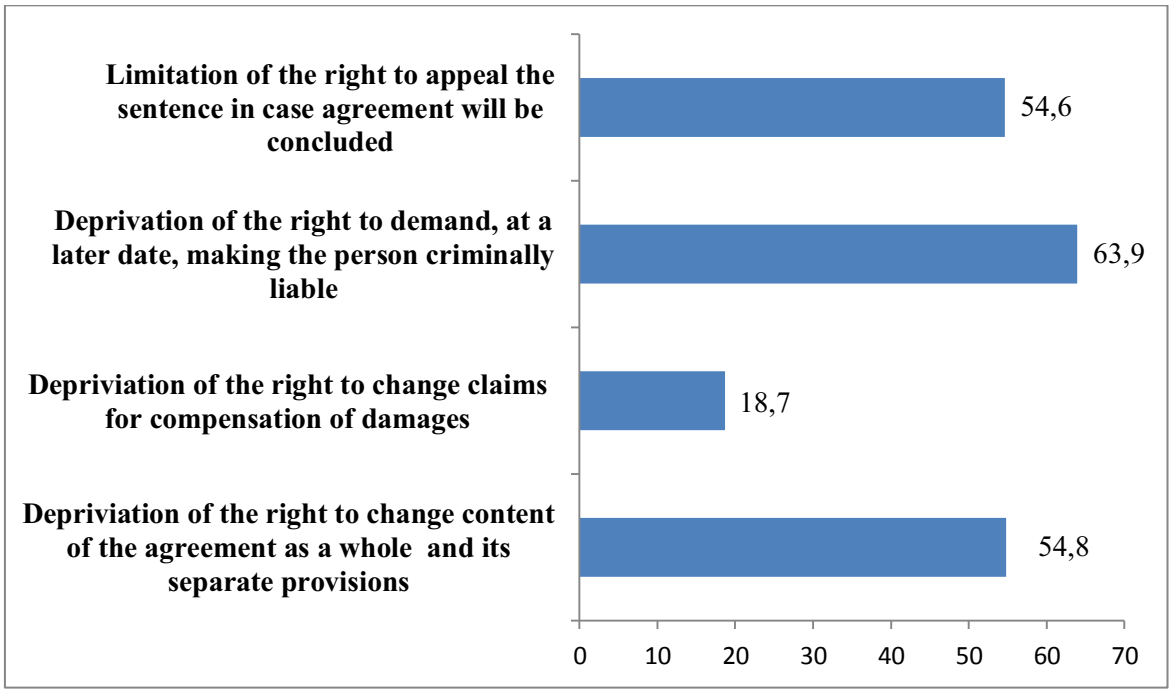


These speculations prove that almost in all cases court found out from a defendant whether s/he understood the essence of reconciliation agreement in full and of its separate provisions.

Meanwhile, court adhered to requirements of Article 474 of the CPC in full only in 21.1% - it found out from a defendant whether s/he fully understood that s/he has the right to a fair trial with application of all procedural rights envisaged by the CPC; whether s/he understood the consequences of the agreement conclusion; nature of the charge and type of punishment which would be applied to him/her in case court would approve the agreement.

This figure proves that other 78.9% of cases when monitors witnessed conclusion of reconciliation agreements may be cancelled by appellate court, because court did not find out all above listed circumstances from defendants and pursuant to Articles 394 and 424 of the CPC it is a reason to cancel a judgement approved on the basis of such agreement.

Table 3.4.-3. How the court found out whether defendant clearly enough understands essential matters of proceedings (%)

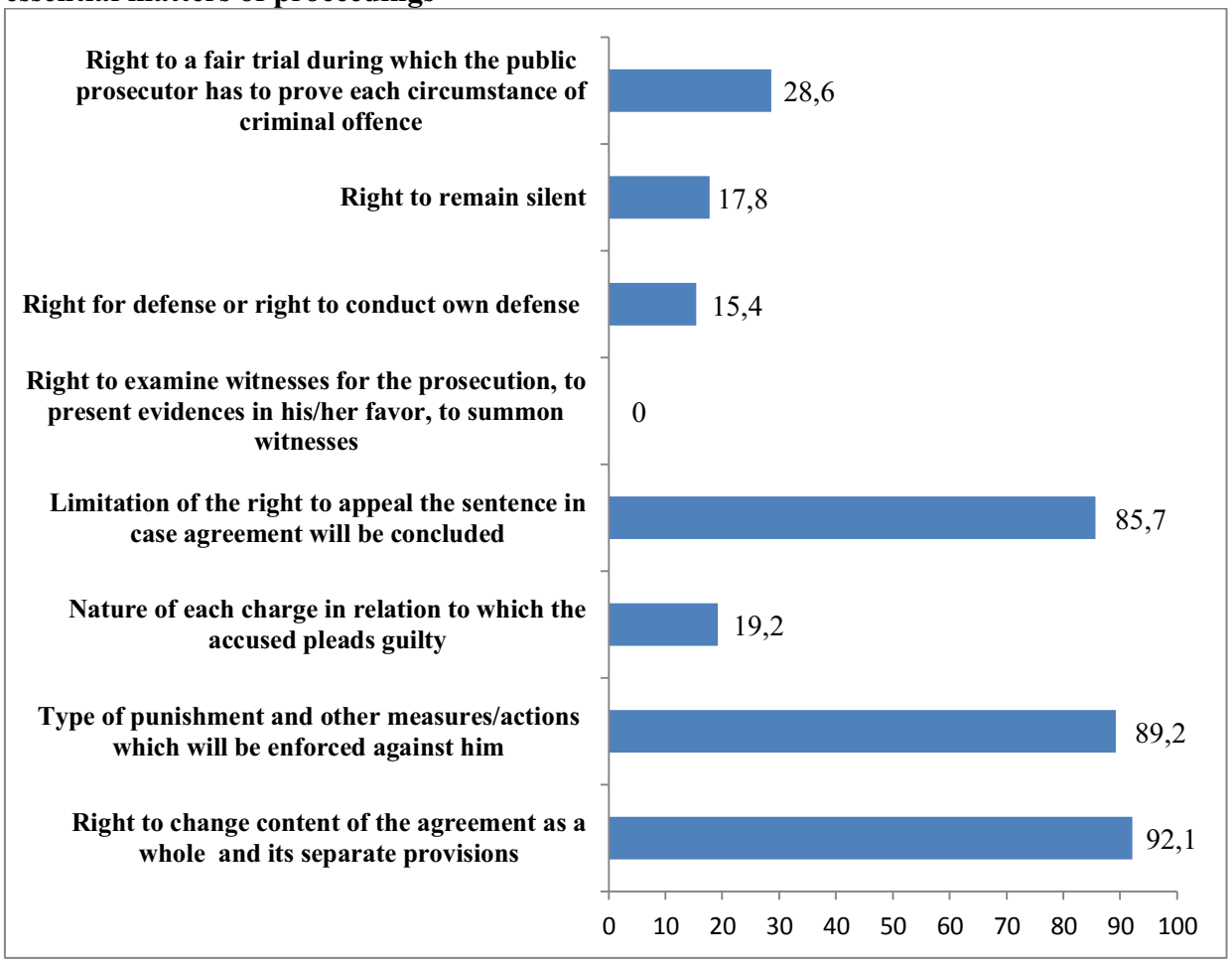


Pursuant to the provided information the court found out whether a defendant clearly understands implications of conclusion and approval of a reconciliation agreement only in 54% of cases.

Consequently, judgements passed on the basis of reconciliation agreements in other 46% of cases may be cancelled by appellate court due to not meeting requirements of the Article 474.5 of the CPC by the court.

3.4.4. Plea agreement

Table 3.4.-4. How the court found out whether defendant clearly enough understands essential matters of proceedings



Information of this table shows that in most cases court found out from the defendant whether s/he clearly understood content of the plea agreement and its separate provisions as well as implications of conclusion and approval of a plea agreement. In addition the court explained type of punishment and other measures/actions which will be enforced against him/her if the court would approve the agreement.

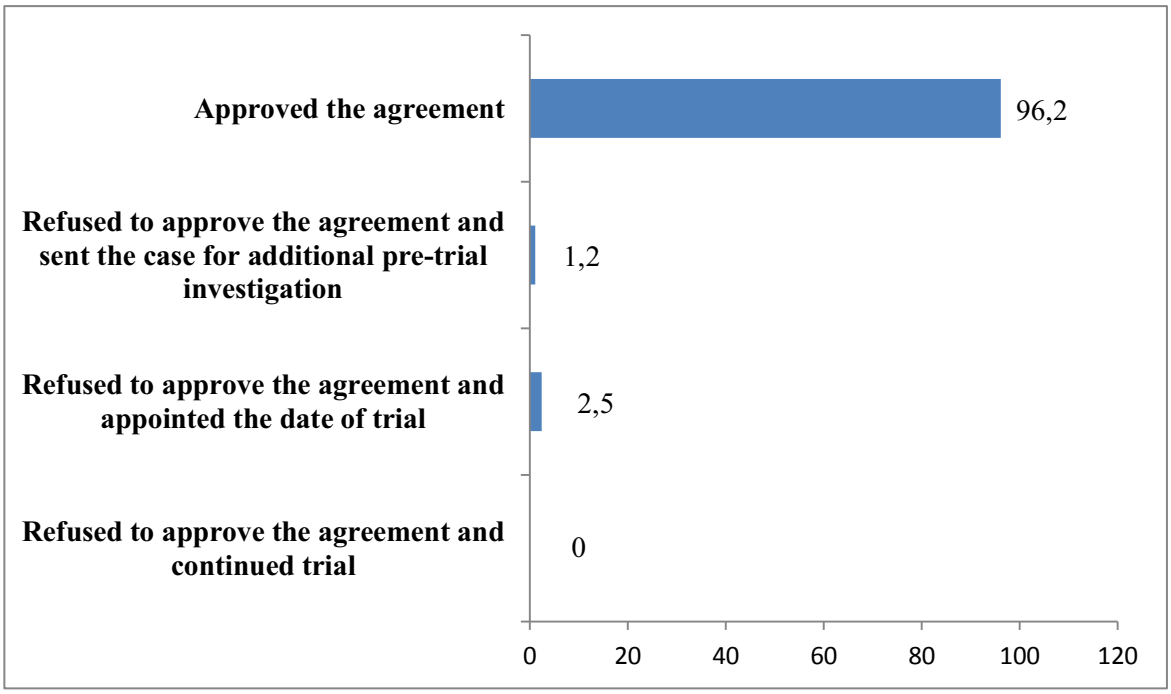
At the same time, despite requirements of the Article 474.4 of the CPC, in more than 70% the court did not explain to defendants their right to a fair trial during which the public prosecutor has to prove each circumstance of criminal offence of which he is accused; that defendant during court trial has the right to keep silence and to be represented by the defense counsel, including getting legal assistance free of charge; as well as the right to examine witnesses for the prosecution, file motions to summon witnesses, and produce evidence in his/her favor. Besides, the court did not explain to defendants nature of each charge in relation to which the accused pleads guilty.

All these facts prove that judgements passed based on plea agreements are approved with violation of procedural law and consequently can be reversed by appeal or cassation.

3.4.5. Adoption and pronouncement of judgement

According to the results of trials, courts in overwhelming majority approved these agreements. Meanwhile, monitors certified that there were cases when court denied in approval of the agreement and returned the case for additional pre-trial investigation or continued trial.

Table 3.4.-5. Decisions (%)



Results obtained correlate with general statistics and results of practice generalization: courts in the city of Kyiv refused to adopt agreements only in 18 cases (out of 250) in the first quarter of 2014.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Head and judges of the Appellate Court of the city of Kyiv, as well as heads and judges of first instance courts of the city of Kyiv should pay attention to the list of requirements set by the Article 474 of the CPC which should be met during trial based on agreements as well as requirement to create necessary conditions for parties to exercise their procedural rights and perform their procedural duties.

Prosecutors' General Office of Ukraine should inform prosecutors about steadfast necessity to comply with requirements of Article 474 of the CPC as to concluding of the agreement voluntarily.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to fulfil their professional duties in a due manner, in particular, as to be present during court trials.

Chapter 3.5.

Court trial on its merits (first instance)

After all the issues determined by the Article 315 of the CPC have been resolved, court assigns the date of trial.

At the beginning of trial presiding judge and secretary of the court session conduct certain preparatory actions determined by the Articles 342 – 346 of the CPC.

Trial begins with public prosecutor reading operative part of indictment unless participants of the court proceedings lodged a motion to announce indictment in whole and briefs on civil claim if it was presented to a defendant.

Then presiding judge explains the substance of charges to the defendant, finds out opinion of participants of court proceedings as to which evidences should be examined and the order of examination and reviews motions of trial participants.

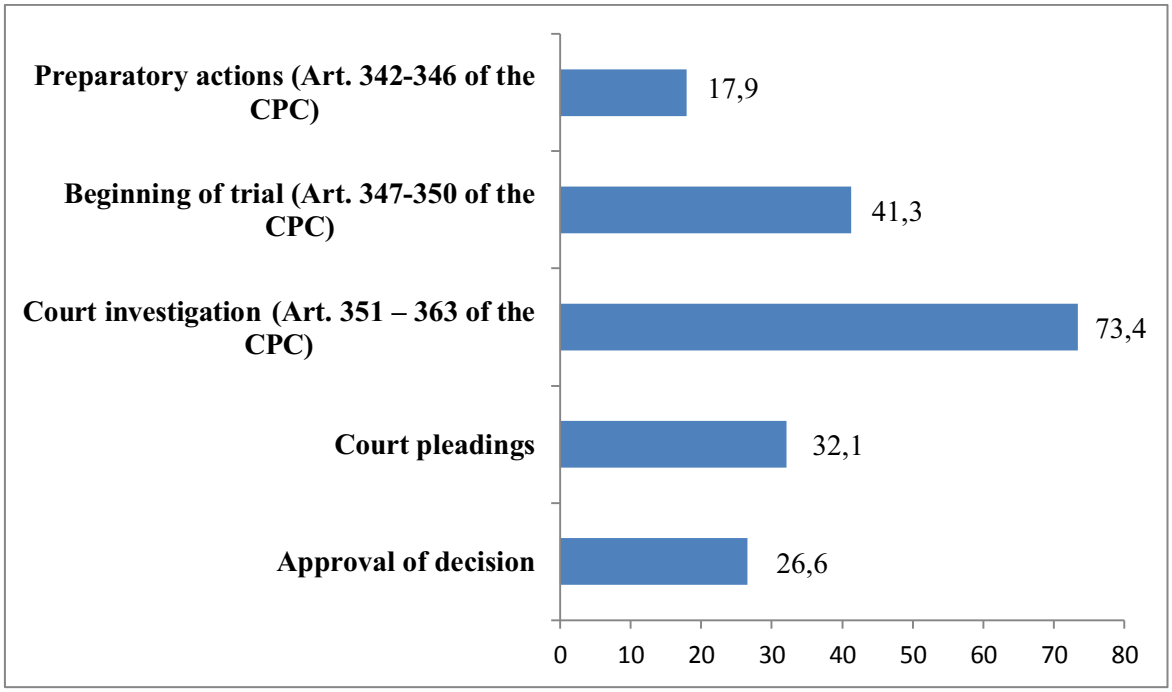
After all these actions are fulfilled, presiding judge starts examination of a defendant, witnesses, victim, and other participants of proceedings. Then court examines exhibits, documents, audio and video recordings. After having ascertained circumstances established in the course of criminal proceedings and having verified them with evidence, court passes to pleadings. After pleadings have been announced closed, court gives the accused the possibility to make the last plea. Then the court immediately retires in deliberation room to pass a judgment which the presiding judge announces to those present in courtroom.

544 monitorings of court trials were conducted for the period from July 1, 2014 to February 10, 2015. It allows to estimate received results as quite representative by key indexes of the research.

It is very important to take into consideration that monitors were present at only one court session of court proceedings to interpret obtained results. According to the monitoring more than one third of court sessions (43.5%) were postponed with appointment of the next session to the next day (13.4%), in 2-5 days (4.9%), in 6-10 days (22.0%), in 10-30 days (52.1%), and in more than 30 days (9.0%). These circumstances have created a risk of “fragmentation” and non-completeness of information. Additional index – stage of court trial in criminal proceedings – has been used with the purpose to partially mitigate this methodological problem in the analysis.

The following table shows distribution of conducted monitorings by stages of trial in criminal proceedings.

Table 3.5.-1. Stages of trial in criminal proceedings that were monitored (%)

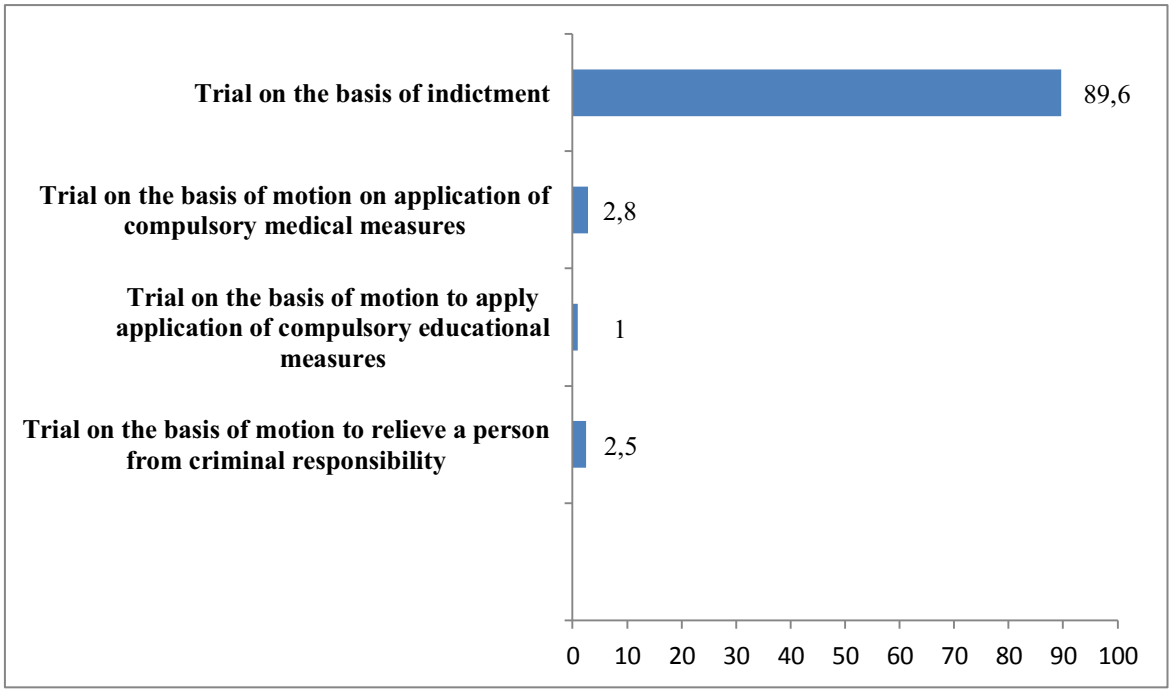


Provided results show that results of monitoring give enough information about real procedure of trial at all stages.

As court investigation is the longest stage of trial which can last even more than a year, it is understandable that monitors most frequently visited court sessions where court investigation was conducted.

Results of observations mainly embrace court sessions based on indictment that completely corresponds to the structure of proceedings as presented in statistical reports.

Table 3.5.-2. Type of proceedings (%)



The provided table supposes that courts mainly consider criminal proceedings with indictment.

At the same time, in 2.5% of cases monitors witnessed considerations by courts of prosecutorial motions to relieve persons from criminal responsibility.

3.5.1. Participants of trial

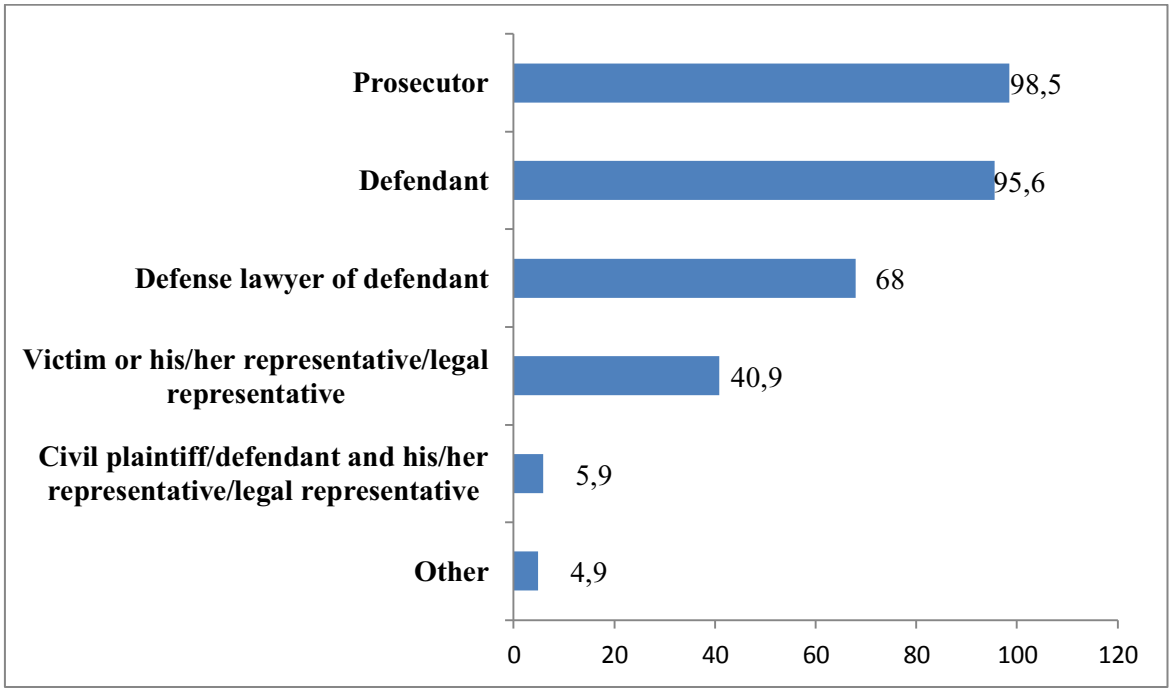
As mentioned before, pursuant to the Article 3 of the CPC parties to criminal proceedings are the victim, his/her representative and legal representative, civil plaintiff, his/her representative and legal representative, civil defendant and his/her representative, representative of legal entity as to which proceedings are being conducted as well as any other persons upon whose request or complaint, where so provided for by this Code, court proceedings are held.

Pursuant to the Article 318 of the CPC, trial is held in court session with mandatory participation of parties to criminal proceedings, except in cases provided for in the present Code. Victim and other participants in criminal proceedings shall be summoned to appear in court session.

Pursuant to the Articles 323-327 of the CPC, if participants of criminal proceedings participation of whose is mandatory fail to come to proceedings, the court postpones the trial, fixes date, time and place of a new court session, and takes measures to ensure their appearance in court.

The following table shows composition of participants of court trial.

Table 3.5.-3. Participants of trial (%)



Data of this table show that in most cases trial is conducted with participation of parties to criminal proceedings.

During the monitoring observers fixed actions of the court when participants of criminal proceedings were absent if all requirements as to their summon (bringing) were met. In particular, in 43.5% of cases court postponed the trial for the other date, in 35.3% of cases trial was conducted without defense party, and in 5.9% cases trial was conducted without a prosecutor.

The following is the most frequent reason why defendant was absent in the court session: impossibility to bring him/her from detention facilities (66.7%). In certain cases (12.3%) court

explained that that defendant's presence is not necessary and in 16/3% - that there were other reasons. In many cases information about reasons of absence were not pronounced.

To summarize, provided observations give grounds to state that cases of violation of procedural law by judges as to conducting of court sessions without participants of criminal proceedings, whose participation is necessary, are possible.

Recommendations

Ministry of internal affairs, and State penitentiary service of Ukraine should take measures to bring people in custody to the courts of Kiev in due time for their participation in trials.

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, as well as heads and judges of first instance courts of the city of Kyiv should pay attention to requirements of the Articles 318, 323-327 of the CPC as to conducting of trials in criminal proceedings with mandatory participation of parties to it and other participants, when their participation is deemed mandatory by the court.

Prosecutors' General Office of Ukraine should inform prosecutors about necessity to fulfil their professional duties in due manner, in particular, as to enforcement of participation in court sessions.

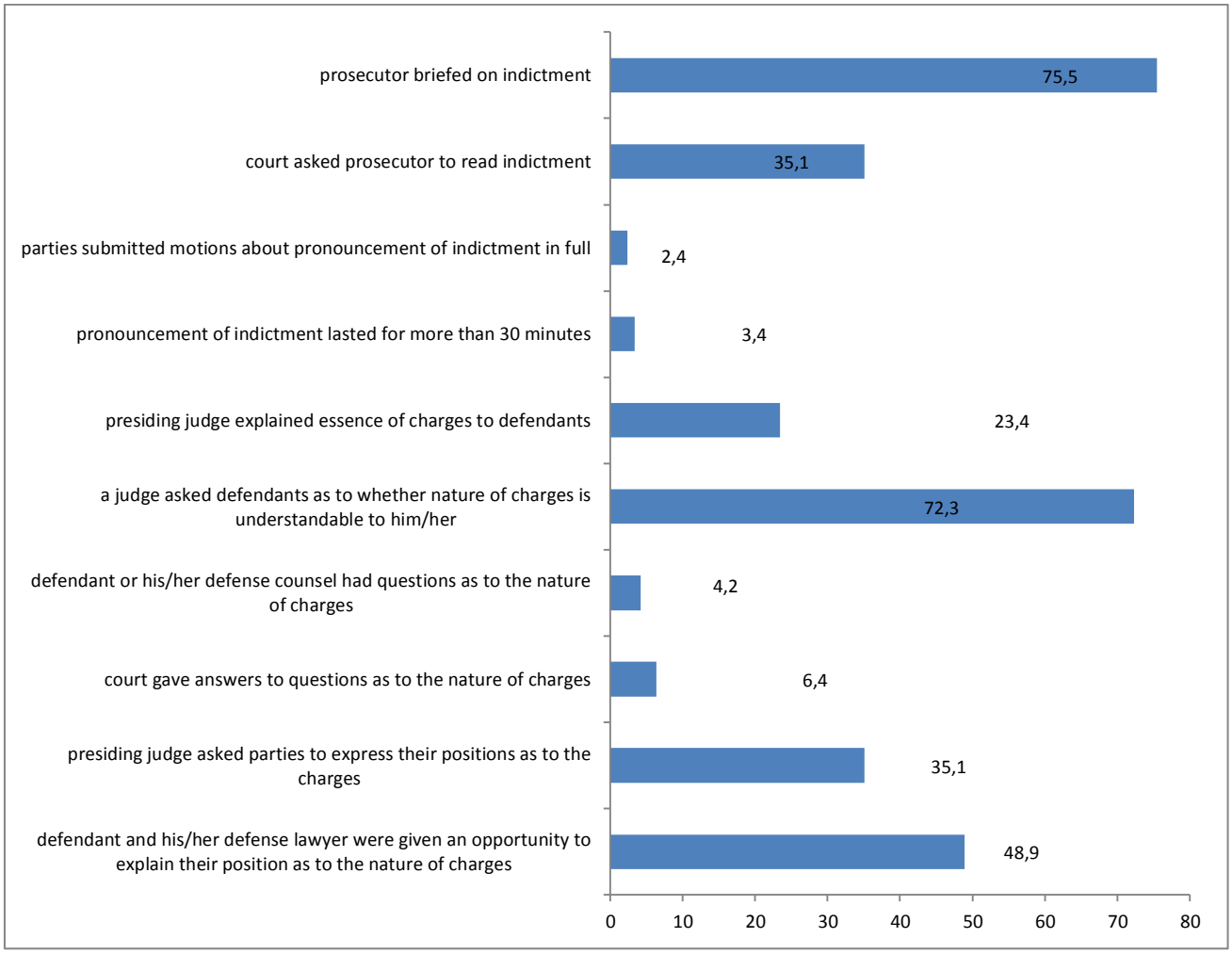
National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to fulfil their professional duties in a due manner, in particular, as to enforcement of participation in court sessions.

3.5.2. Pronouncement of indictment

Pursuant to the Article 348 of the CPC after the indictment has been read, presiding judge in particular explains to the accused the substance of charges and asks him/her whether he/she pleads guilty and whether s/he wishes to testify.

Results of observations of indictment pronouncement stage are reflected in the following table where the share of proceedings when monitors fixed certain actions of the court is shown.

Table 3.5.-4. Circumstances of indictment pronouncement (%)



As seen in whole, information from this table provides for certain picture how trial started.

At the same time it is necessary to stress that only in 23.4% of observations presiding judge fulfilled requirements of the Article 348 of the CPC as to explaining the essence of charges to defendants.

Besides, it is impossible to refrain from noticing essential violation of criminal procedural law as to finding out positions of parties regarding volume of evidence that should be examined during trial. Court asked parties to express their opinions on the matter only in 43.6% of cases.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, as well as heads and judges of first instance courts of the city of Kyiv should take into consideration requirements of the Article 348 of the CPC as to necessity to explain the essence of charges to defendant.

3.5.3. Examination of evidences and implementation of adversarial principle

It is necessary to remind that adversariality of parties as well as their freedom in providing evidences to the court and in proving who is more convincing before the court are several general principles of criminal proceedings.

Pursuant to the Article 315 of the CPC at the stage of preparatory court session with the purpose to prepare to trial, court in particular considers motions of the participants in court

proceedings on citing certain persons for examination in court and demanding and obtaining certain objects or documents.

Article 349 of the CPC establishes that after pronouncement of the indictment presiding judge finds out the opinion of the participants in court proceedings as to what kind of evidence shall be examined and the way in which they shall be examined. The scope of evidence to be examined and the way in which it shall be examined are set in court's ruling and, if necessary, can be changed.

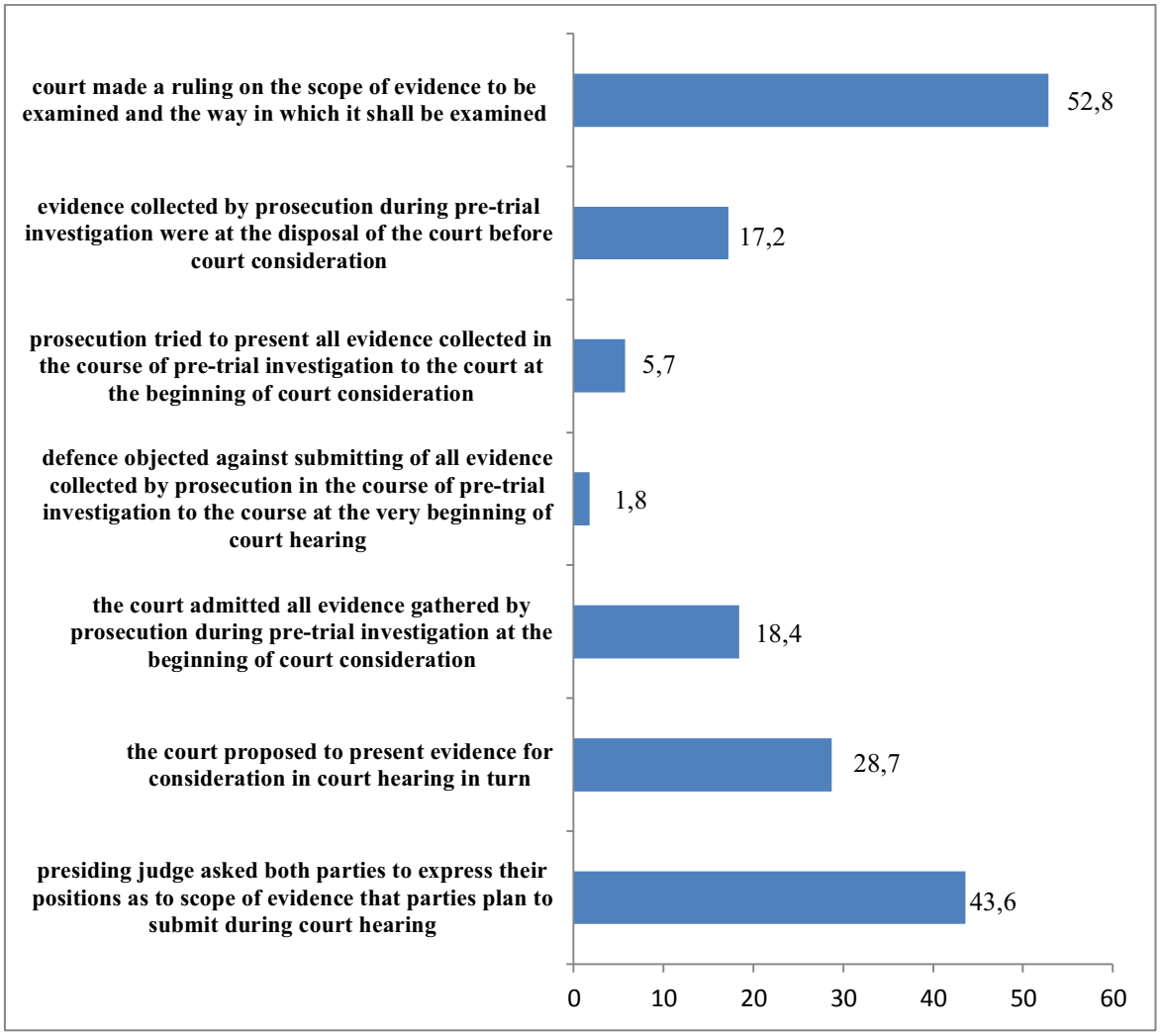
The court has the right, if the participants in court proceedings do not object thereto, to find that examination of evidence in respect of indisputable circumstances is unnecessary. In so doing, the court ascertains whether said persons understand correctly the contents of such circumstances, whether there are no doubts regarding voluntary nature of their position, as well as explains to them that in such a case they will be deprived of the right to challenge these circumstances by way of appeal.

According to the Article 92 of the CPC, the burden of proving circumstances of criminal violation shall be placed upon investigator, public prosecutor and, in cases specified by the present Code, on the victim.

Pursuant to the Article 93 of the CPC collection of evidence is carried out by parties to criminal proceedings, victim as well as representative of legal entity in accordance with the procedure laid down in by the present Code.

Results of observation over the first stage of evidences' examination are reflected in the following table where share of proceedings when monitors fixed certain actions of court is shown.

Table 3.5.-5. Circumstances of the beginning stage of evidences' examination (%)



Information stated in this table shows that court considered the issue on the scope of evidence subject to examination and the way it should be examined at the beginning of court hearing only in 52.8% of cases. A special ruling has been set in this respect. In other cases there was no court decision in this respect proving that courts do not adhere to provisions of the Article 349 of the CPC.

These figures also show active position of prosecutors as to presenting evidence of prosecution gathered during pre-trial investigation as well as inactivity of defense lawyers and absence of their attempts to provide evidence for defense of defendant to the court.

Monitors noted that party of defense did not experience any essential obstacles from the court to comment and overturn evidences presented by prosecution. At the same time, monitors paid attention to pretty low activity of defense party. In particular, practically in half of situations (42.3%) defense lawyers were not eager to provide any explanations or comments as to position of prosecutors. Activity of the party of defense was even lower as to objecting against examination of evidence submitted by prosecution. Such objections were submitted only in 16.9% of cases.

In the overwhelming number of cases parties could ask questions, though there were cases when court limited the party of defense (3.4%) and party of prosecution (1.1%). When parties asked each other, there activity was as follows: party of defense put questions in 56% of cases and prosecution – in 29.7% of cases.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, as well as heads and judges of first instance courts of the city of Kyiv should pay attention to adhering to the procedure of court consideration, providing equal procedural opportunities to parties, in particular to adhere to requirements to the beginning of court consideration as to what kind of evidence shall be examined and the way in which they shall be examined.

Prosecutor General Office of Ukraine should inform prosecutors about steadfast adherence to the requirement of criminal procedural law as to what kind of evidence shall be examined and the way in which they shall be examined during court consideration and necessity to efficiently accomplish function of prosecution.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to fulfil their professional duties in a due manner, namely to actively accomplish function of defense as to adherence to procedural order of submitting and examining evidences during court consideration as well as to objecting to submitting of inadmissible and irrelevant evidence by prosecution.

3.5.3.1. Examination of an accused

Article 351 of the CPC determines the order of examination of an accused person which starts with the presiding judge's proposal to testify about criminal proceedings, after which the accused is first examined by public prosecutor, then by defense counsel. Next, the accused may be asked questions by victim, other defendants, civil plaintiff, civil defendant, representative of a legal person the party of the proceedings as well as by presiding judge and judges. In addition, presiding judge may during the entire examination of the accused, ask him/her questions in order to clarify and supplement his/her answers.

As to the examination of an accused (this procedural action was monitored in almost one third of all observations), the following information can be provided:

- *in the majority of cases (85.3%) the court asked the accused whether he/she wishes to testify;*
- *on more rare occasions the court reminded the accused on his/her right to remain silence (it was fixed in 46.7% of cases);*
- *the accused testified in 89.3% of cases.*

Article 94 of the CPC states that court evaluates evidence based on his own moral certainty grounded in comprehensive, complete, and impartial examination of all circumstances in criminal proceedings being guided by law, evaluates any evidence from the point of view of adequacy, admissibility, reliability and in respect of the aggregate of collected evidence, sufficiency and correlation, in order to take a proper procedural decision. No evidence shall have any predetermined probative value.

Pursuant to the CPC, testimony of the accused, including those where he/she pleads guilty in committing a crime, which were obtained during pre-trial investigation, shall not be an evidence in court. So, such type of evidence cannot be taken into consideration during court examination of evidences.

In the majority of proceedings (78.3% of all proceedings with examination of evidences by court) prosecutors did not use admission of guilt by the accused obtained during pre-trial investigation as an element of evidences.

Meanwhile, this was the case in 10.4%, though neither court nor party of defense reacted to this. There were objections from the party of defense in 9.4% of cases. Only in 1.9% of cases the court overruled reference of prosecution to such admitting of guilt.

Provided observations show that sometimes the party of prosecution tries to prove guilt of the accused by his/her testimonies obtained during pre-trial investigation, as back in the times of the CPC adopted in 1960s. What is alerting in such cases, is not only the fact that prosecutors try

to prove the case in such a way, but rather passive position of courts and defense lawyers in most cases, who in fact do not react at such attempts and do not object such evidences.

Recommendations:

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Head and judges of the Appellate court of the city of Kyiv, as well as heads and judges of first instance courts of the city of Kyiv should pay attention to necessity to strict adhering to the CPC provisions as to admissibility of evidences that should be examined during court consideration.

Prosecutor General Office of Ukraine, Ministry of Interior of Ukraine, other bodies of pre-trial investigation should take measures for investigators and prosecutors to fulfil the duty of proving circumstances of importance for criminal proceedings in due manner.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to fulfil their professional duties in a due manner, in particular as to efficient protection of rights of accused including by objecting if prosecution, court or other participants of court proceedings violate procedural rules.

3.5.3.2. Summoning and examination of witnesses

As we have already mentioned, pursuant to the Article 315 of the CPC at the preparatory stage the court in particular considers motions of the participants in court proceedings on citing certain persons for examination in court. At the same time, parties of criminal proceedings have the right to submit motion to summon witnesses at the stage of court consideration of criminal proceedings as well.

According to the Article 350 of the CPC herewith motions of the participants in court proceedings shall be considered by the court after having heard the opinions on them of the rest of participants in court proceedings, and a ruling shall be passed on that. Refusal to grant a motion shall not preclude repeated filing of the same on different grounds.

The following tables contain information on the position of the court as to submitted motions on summoning witnesses. This information also demonstrates level of equality of parties and impartiality of the court.

Table 3.5.-6. Decisions of the court as to motions of defense party on summoning and examination of witnesses (%)

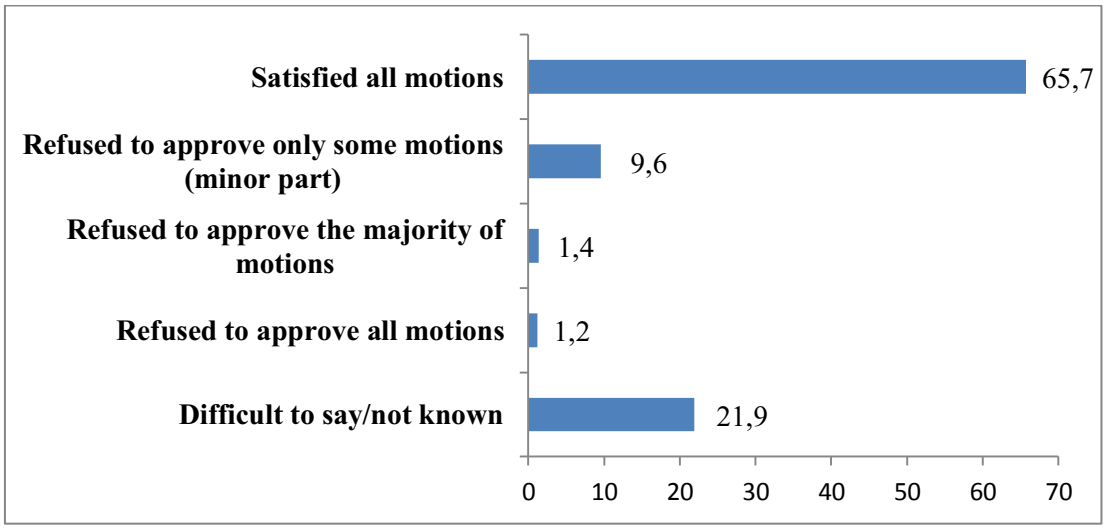
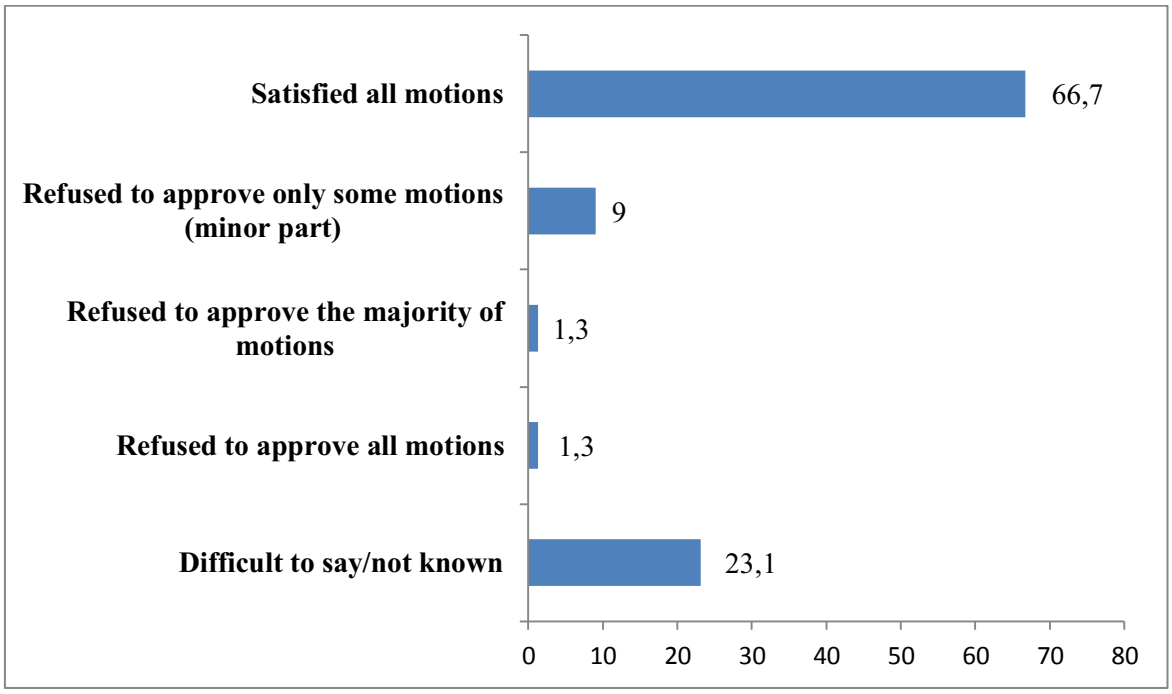


Table 3.5.-7. Decisions of the court as to motions of the party of prosecution on summoning and examination of witnesses (%)



Information from both tables demonstrates that position of the court is quite well balanced at this stage of the process, because both parties got almost equal opportunities to summon witnesses.

Further information reflects activity of the parties as to making objections during examination of witnesses and court reaction to such objections.

Table 3.5.-8. Objections of the prosecution party during witness examination (%)

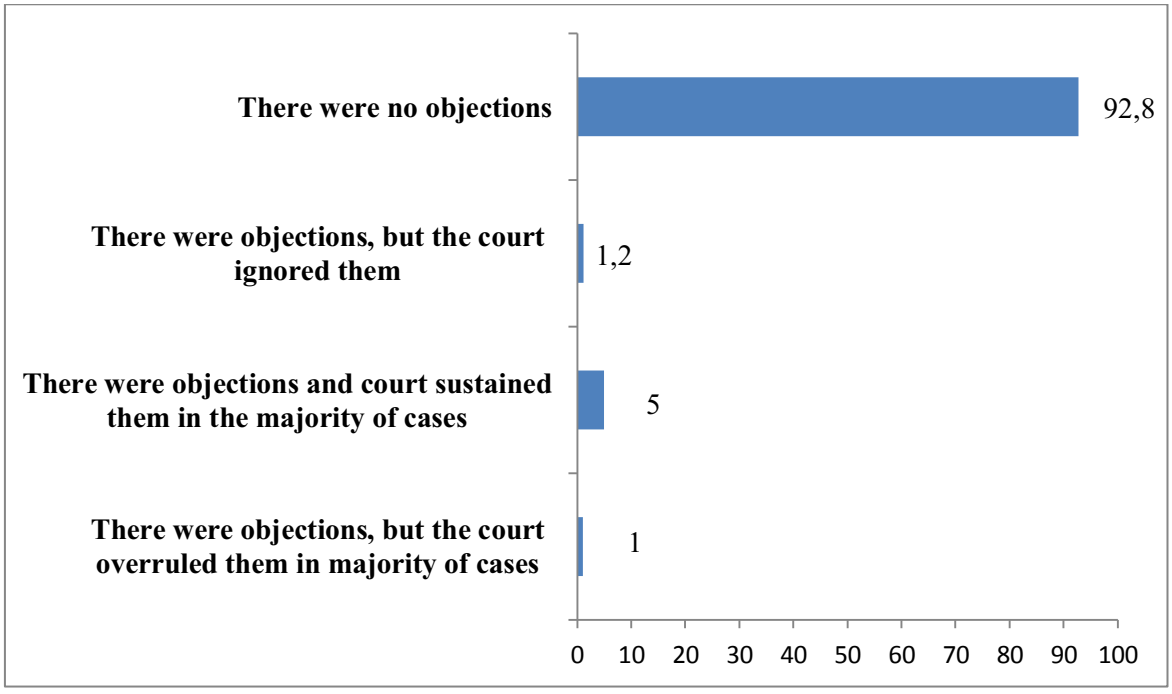
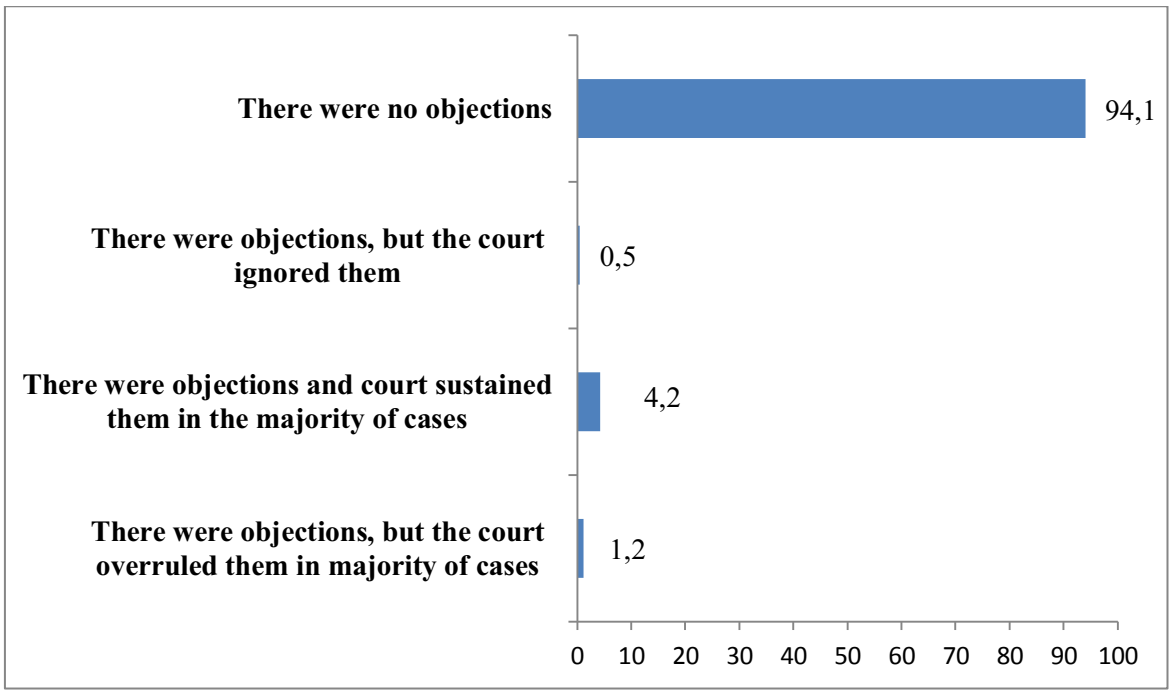


Table 3.5.-9. Objections of the party of defense during examination of witnesses (%)



As we already mentioned, each party of criminal proceedings have a duty to prove the circumstances it cites. Therefore, it is understandable that parties actively utilized their right to summon witnesses to court proceedings which will reject position of the opposite party as well as the right to express their opinion as to testimonies given by any witness.

In this case again we should pay attention to the passive position of parties as to objecting testimonies of witnesses.

In case there were such objections, parties explained them in rare cases. Monitors estimated that prosecution objected in 25% of monitored cases and defense party – in 16.2% of the monitored cases.

Article 352 of the CPC determines that each witness is examined separately. Witnesses who have not yet testified may not be present in courtroom during trial. Examined witness, upon court's request, may remain in courtroom.

Monitors informed that in 6.5% of criminal proceedings witnesses that were yet not examined by the court were present in the courtroom.

This information proves that there are cases of significant violation of procedural laws which can challenge objectivity and impartiality of criminal court proceedings.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Heads and judges of first instance courts of the city of Kyiv should pay attention to duty of judges to enforce objective, impartial, full and comprehensive court consideration while adhering to requirements as to the order of witnesses' examination.

Prosecutor General Office of Ukraine should take measures for prosecutors to fulfil the duty of prosecution in court, including by utilizing the right to object the actions of the party of defense during examination of witnesses in due manner.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to fulfil their professional duties to defend accused in a due manner, including by utilizing the right to object actions of the party of prosecution during examination of witnesses.

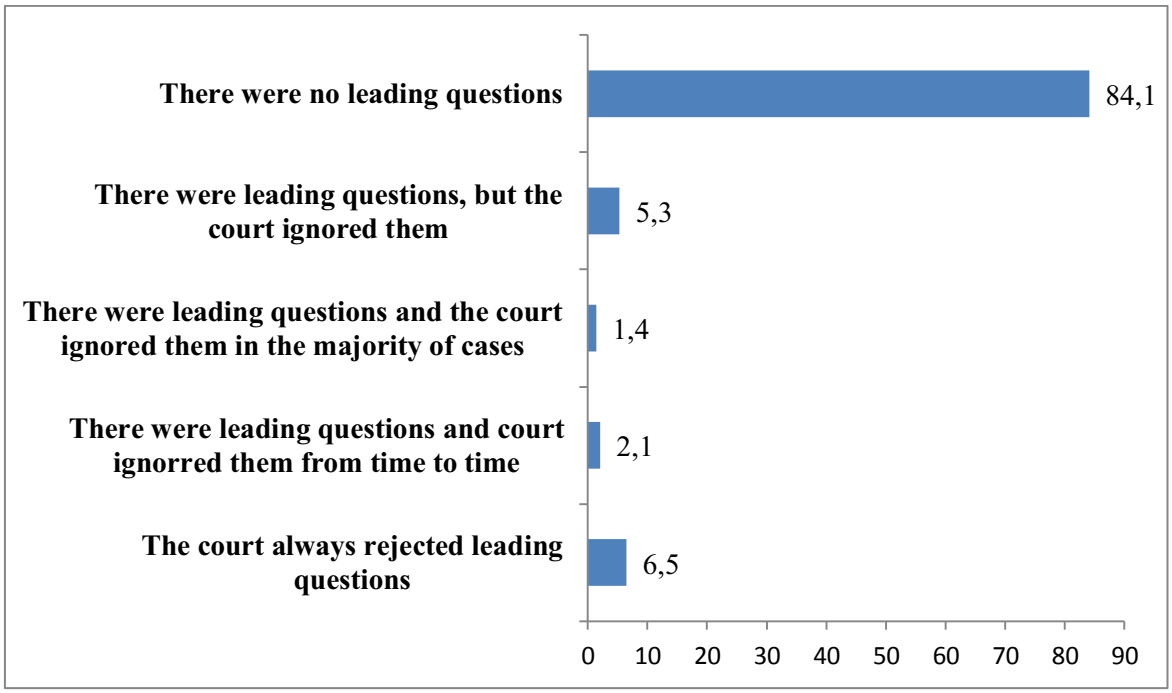
3.5.3.3. Certain procedural issues on examinations during court hearings

3.5.3.3.1. Leading questions

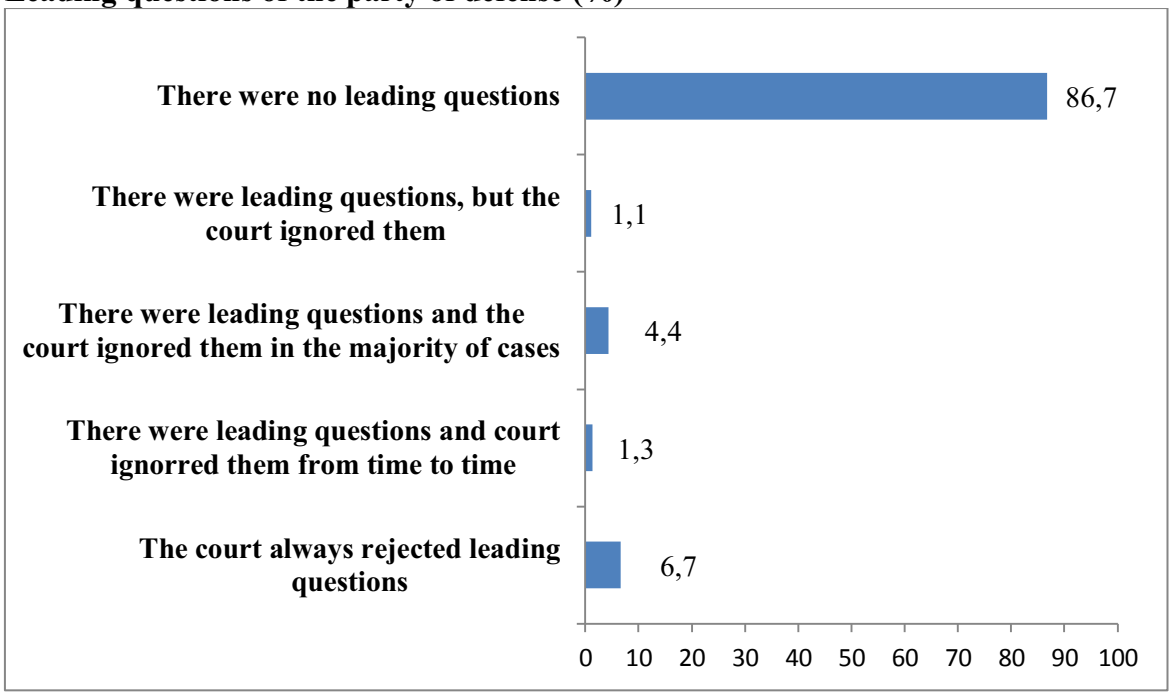
Article 352 of the CPC determines order of the witness examination. In particular, the witness for the prosecution is examined first by public prosecutor, and the witness for the defense is examined first by the defense counsel or, if the accused defends himself / herself, by the accused (direct examination). ***During direct examination, leading questions are not allowed*** *i.e. questions which contain an answer, a part thereof or prompt thereto. After direct examination, the opposite party to criminal proceedings is given the opportunity of cross examination of the witness.* ***During cross examination, leading questions are allowed.*** *During examination of witness by parties to criminal proceedings, presiding judge, upon protest of a party, may dismiss questions which do not relate to the substance of the criminal proceedings.*

The following table shows the reaction of court at leading questions during direct examination of witnesses.

Table 3.5.-10. Reaction of the court to leading questions of parties during direct examination of witnesses.
Leading questions of prosecutors (%)



Leading questions of the party of defense (%)



Judging from the information from the above tables, we can conclude that in prevailing majority of cases parties did not apply leading questions during direct examination. At the same time, monitors witnesses that leading questions were sometimes put by both prosecutors and defense lawyers. Court herewith rejected these questions in approximately 6.6% of cases and ignored leading questions in about 8% of cases.

No doubts, the fact that court allows the parties of criminal proceedings to violate the order of witness examination can be the evidence of nonobjective and non-impartial consideration of the case.

3.5.3.3.2. Use of witness testimony submitted during pre-trial investigation to an investigative judge

CPC envisages possibilities to examine a witness or a victim during pre-trial investigation in a court hearing in exceptional cases determined by the Article 225 of the CPC. To do this an interested party of criminal proceedings should file a motion to an investigative judge to examine such witness or victim in a court hearing. In such a case, the witness or victim concerned shall be interrogated in court session at the place of the court-house or where the ill witness, victim is, in the presence of parties to criminal proceedings with full respect for rules governing examination during trial. Interrogation of a person in line with the provisions of this Article may also be conducted in absence of defense if at the time of its conduct no one has been informed of suspicion in these criminal proceedings.

At the stage of court consideration of criminal proceedings if necessary the court has the right to examine the witness, victim, who was examined pursuant to the rules of the abovementioned article.

Monitors fixed 7.9% of criminal proceedings where party of prosecution referred to testimonies of persons given at the stage of pre-trial investigation to an investigative judge. In 4.7% the court admitted these testimonies and party of defense did not object such decision. In 3.2% of cases the party of defense requested the court to declare such testimonies inadmissible.

These observations prove that parties (mainly, party of prosecution) practice to refer to investigative judges during pre-trial investigation with a motion to examine witnesses and victims, which will not be able to testify in the future during court hearing of criminal

proceedings due to valid reasons. The fact that monitors in 3.2% of cases evidenced filing of motions by the party of defense to declare these testimonies inadmissible may be the evidence of possible violations of the order of witness/victim during pre-trial investigation which is established by the Article 225 of the CPC.

3.5.3.3.3. Hearsay

Hearsay is one of the evidences utilized in criminal proceedings. Article 97 of the CPC describes the order of admitting such testimonies by the court. In particular, the court shall have the right to recognize as admissible evidence hearsay testimony irrespective of the possibility to examine the person who provided the initial explanations, in exceptional cases if such are admissible evidence in accordance with other rules of evidence admissibility.

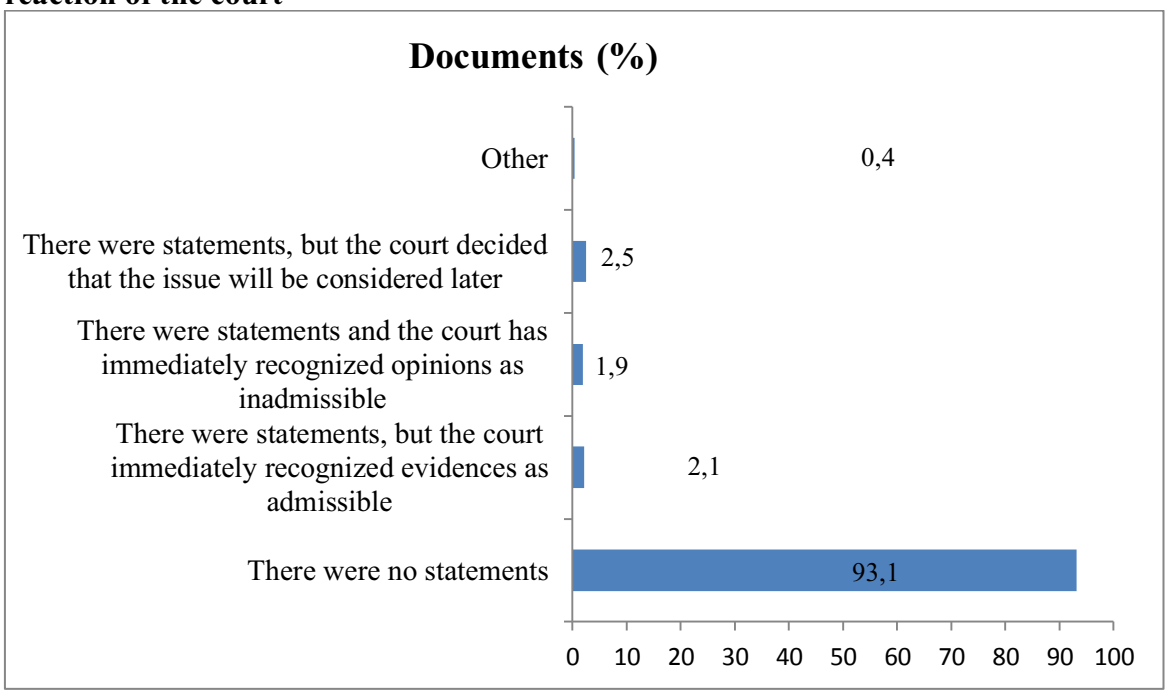
Hearsay was used in approximately 10% of criminal proceedings. Monitors estimated that the court admitted such testimonies in 7% of proceedings having referred to exceptional circumstances to recognize them as admissible evidences. In other cases these testimonies were rejected due to inconsistency with established requirements.

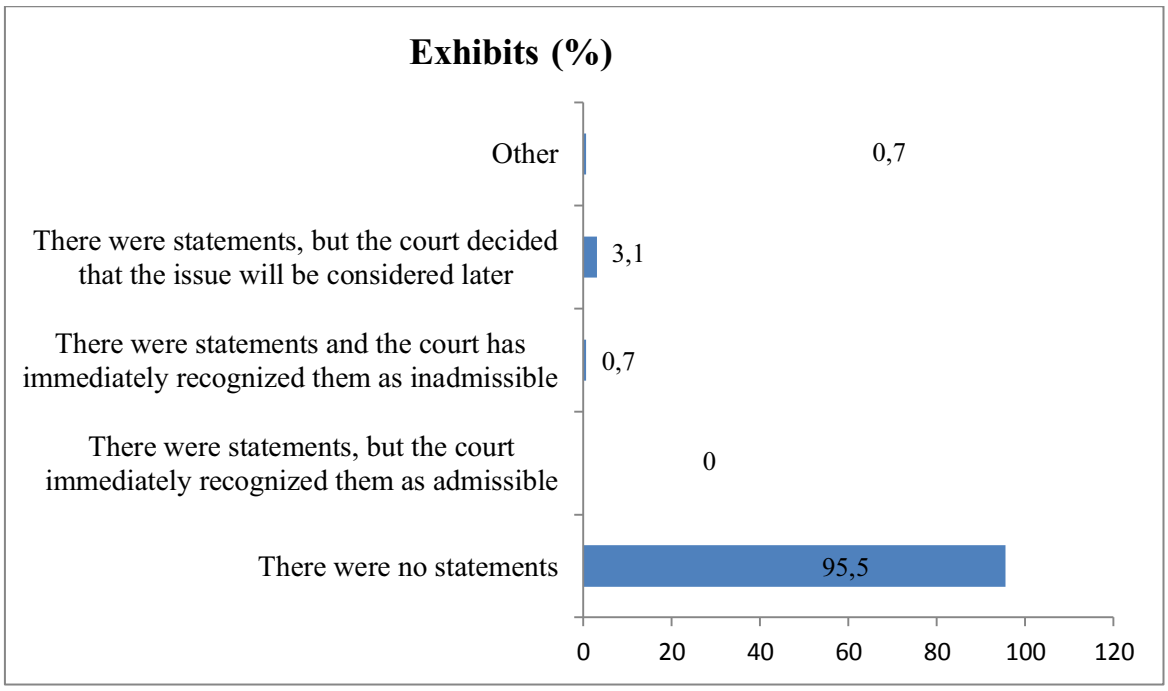
3.5.3.4. *Issues of inadmissibility of evidences*

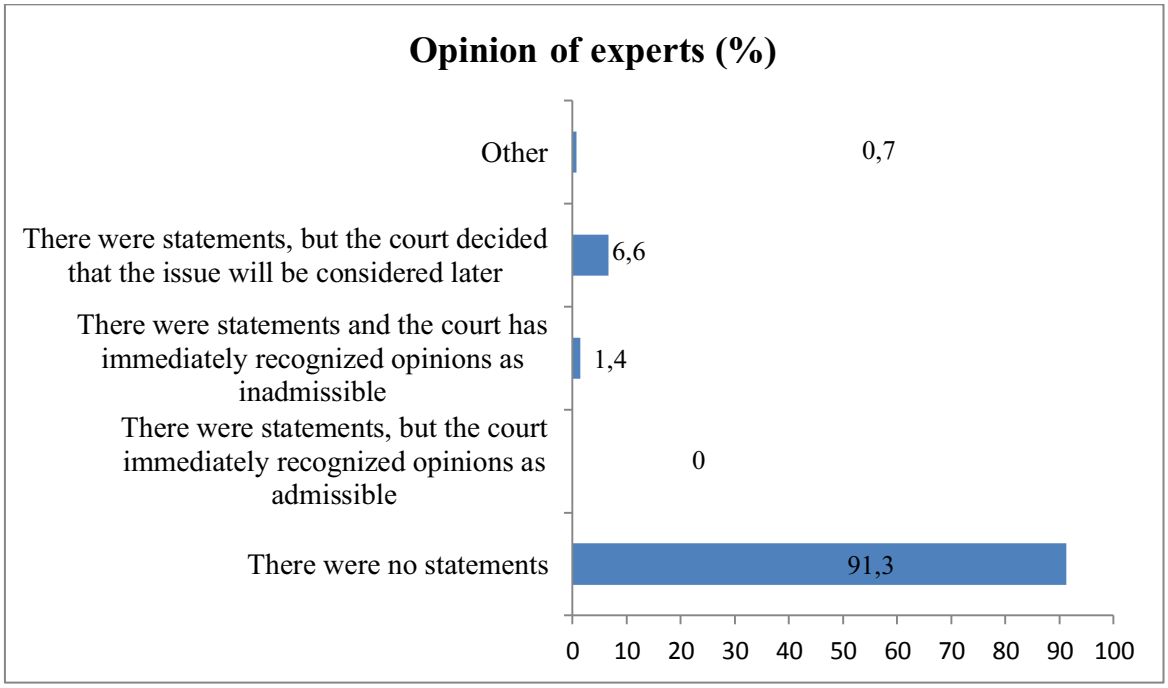
Pursuant to the Article 84 of the CPC the evidence which has been obtained in a procedure prescribed in the CPC shall be deemed admissible. Inadmissible evidence may not be used in adoption of procedural decisions. The court cannot refer to such evidence during issuing of a judgement. Article 87 of the CPC determines the list of essential violations of human rights and fundamental freedoms. If this is the case, evidences will be considered as inadmissible by the court.

The following table reflects activity of the party of defense as to recognizing inadmissible of evidences provided by the party of prosecution.

Table 3.5.-11. Statements of the party of defense on inadmissibility of evidences and reaction of the court







These tables visualize passive position of defense lawyers as to evaluating evidences provided by the party of prosecution. It was noted in more than 90% of monitorings.

Only in certain cases the party of defense filed motions to the court to recognize evidences inadmissible. In particular, monitors evidenced 4.5% of cases when defense lawyers filed motions to recognize documents inadmissible. Out of these, in 1.9% of cases the court immediately satisfied these motions, in 2.5% of cases the court informed that the motions will be considered later. There were 3.2% of cases when motions were filed to recognize exhibits inadmissible. Out of these, in 0.7% of cases the court immediately satisfied these motions, in 2.5% of cases the court informed that the motions will be considered later. There were 8% of cases when motions were filed to recognize opinions of experts inadmissible. Out of these, in 1.4% of cases the court immediately satisfied these motions, in 6.6% of cases the court informed that the motions will be considered later.

In other words, the court immediately recognized the evidence inadmissible in 4% of monitored cases and in 11.6% of cases consideration of this case was postponed.

Monitors informed that the following were the grounds why the court recognized the evidences as inadmissible: violation of the order of procedural actions envisaged by the CPC; fulfillment of procedural actions which need prior court permission without such permission or with substantial violation of its main conditions.

Thus, provided observations confirm the fact that bodies of pre-trial investigation continue to gather evidences in a manner which contradicts procedural laws.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Head and judges of the Appellate Court of the city of Kyiv, heads and judges of the first instance courts of the city of Kyiv should pay attention to expansion of the practice to recognize the evidences inadmissible if there are evident violations of the CPC requirements in the process of getting these evidences by parties.

Prosecutor General Office of Ukraine, Ministry of Interior of Ukraine, other bodies of pre-trial investigation should pay attention to the necessity to strictly adhere to the CPC requirements as to gathering of evidences in criminal proceedings.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures for defense lawyers to be more active as to initiating determination whether evidences are admissible.

3.5.3.5. Presenting of evidences that were not disclosed prior to court hearing

Article 290 of the CPC envisages the order of disclosing materials to the other party.

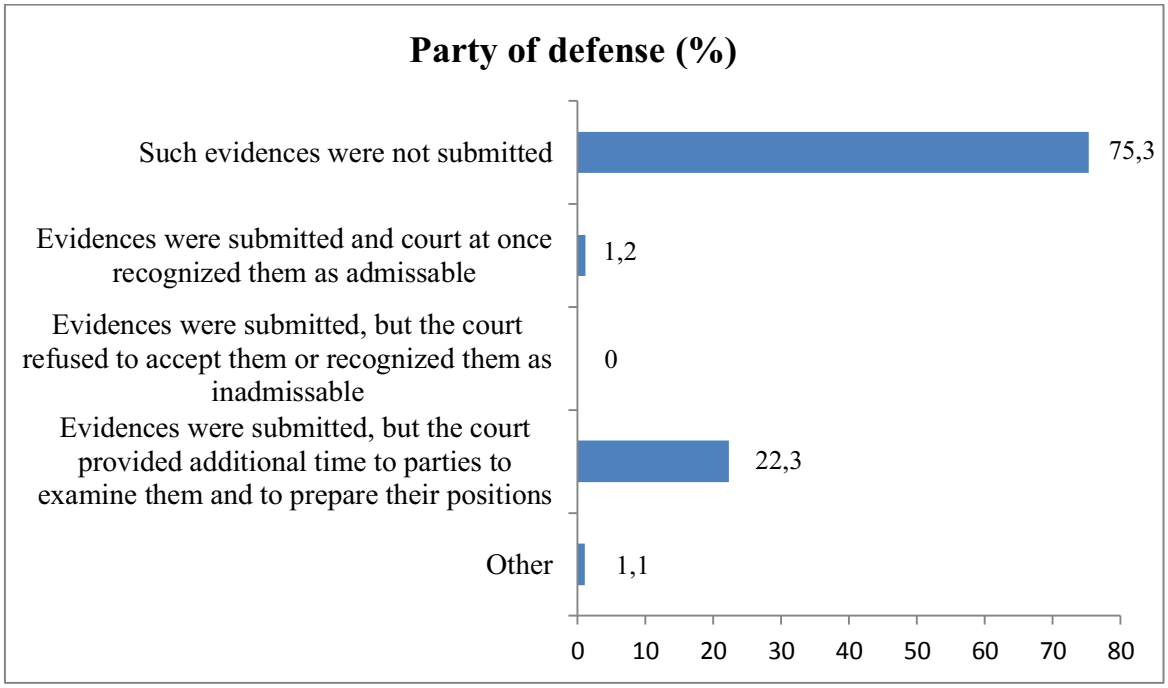
Prosecutor or investigator as directed by prosecutor upon recognizing that evidence collected in the course of pre-trial investigation is sufficient for drawing up of an indictment, shall be required to notify the party of defense on completion of pre-trial investigation and on granting access to materials of pre-trial investigation. Prosecutor or investigator as directed by prosecutor is required to grant access to materials of pre-trial investigation s/he has in his/her possession. The defense, upon public prosecutor's request, is required to grant access and possibility to copy or appropriately reproduce any exhibits or parts thereof, documents or copies thereof.

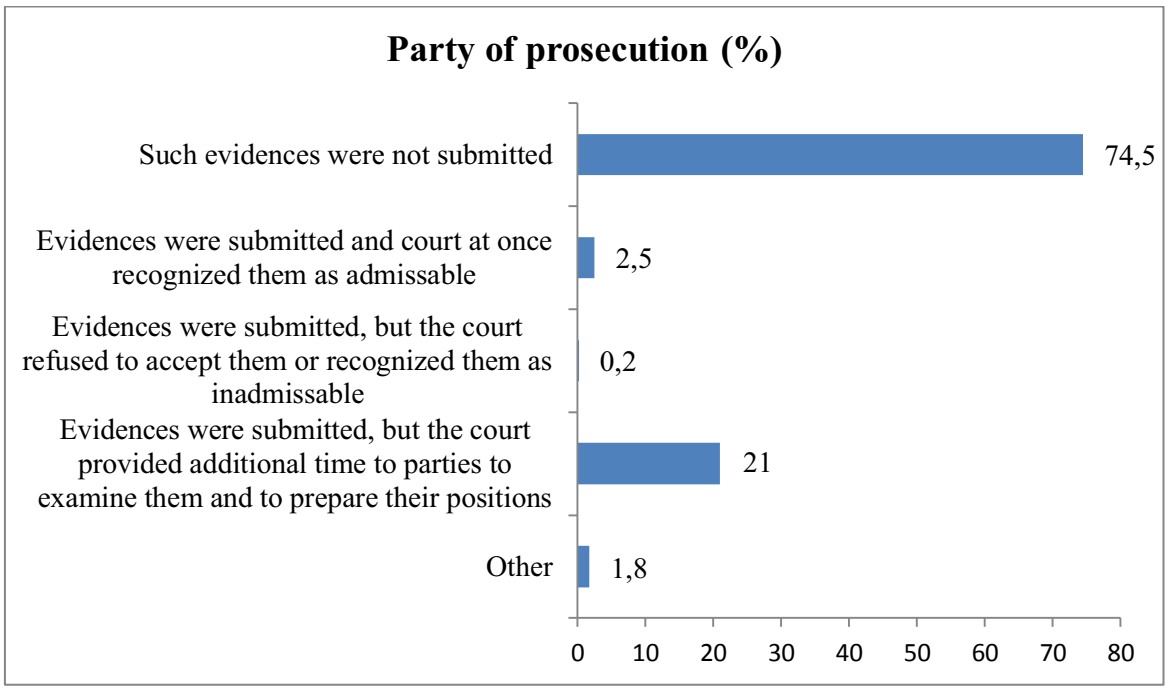
Parties to criminal proceedings are required to disclose, one to another, additional materials obtained before or during trial.

If either of the parties to criminal proceedings does not disclose materials under the present Article, the court shall have no right to accept information contained therein as evidence.

The provided tables contain information as to submitting of evidences by parties that were not previously disclosed as prescribed by the Article 290 of the CPC.

Table 3.5.-12. Reaction of the court when either party submitted evidences that were not previously disclosed to the other party





Information provided in the tables certifies that in overwhelming majority of cases (in more than 70% of cases) parties of criminal proceedings have disclosed materials of the case prior to submitting indictment to the court.

At the same time, monitors witnessed that both party of prosecution (23.7% of cases) and party of defense (23.5% of cases) have asked the court to enclose evidences not preliminary disclosed to the other party to the records of criminal proceedings. The court herewith at once recognized such evidences of the party of defense as admissible in 1.2% of cases (in 2.5% of cases with the party of prosecution). In other cases the court provided additional time to examine provided evidences and to prepare position as to them to both parties.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Head and judges of the Appellate Court of the city of Kyiv, heads and judges of the first instance courts of the city of Kyiv should pay attention to procedural requirements as to the duty of parties to disclose materials to the other party and to impossibility to use as evidence of information that was not disclosed to the other party of criminal proceedings.

Prosecutor General Office of Ukraine should inform prosecutors about the necessity to strictly adhere to the requirements of the Article 290 of the CPC as to disclosure of evidences in criminal proceedings to the party of defense.

National Association of Advocates of Ukraine, Highest Qualification Disciplinary Commission of the Bar, and Coordination Center to provide free secondary legal aid should take measures to explain to defense lawyers their obligation to disclose materials of criminal proceedings to the party of prosecution.

3.5.4. Extension of the period of keeping in the custody during court consideration

Article 331 of the CPC envisages that during trial, the court, upon motion of the prosecution or defense, has the right, by its ruling, to change, revoke or impose a measure of restraint in respect of the accused. Meanwhile, irrespective of the presence of motions, the court shall be required to dispose the issue of expedience to extend the period of keeping the accused in custody until the expiry of the two-month period after the receipt by the court of the indictment, a motion to enforce compulsory medical or educational measures, or after the day of enforcing in respect of the accused of the measure of restraint in the form of keeping in custody. Upon results of consideration of the issue, the court shall by its motivated ruling, repeal or change the measure of restraint in the form of keeping in custody, or extent its validity for a period that may not exceed two months. Before the expiry of the extended period of custody, the court shall be required to consider again the issue of expedience to extend the period of keeping the accused in custody, if the trial has not ended before the expiry thereof.

This issue has been considered by court in 7.8% of hearings. These are the results:

- in 61.0% of cases the party of defense had an opportunity to provide arguments against extension of period of custody;
- in 72.5% of cases ruling of the court was motivated;
- in 53.4% of cases ruling on extension of the period of custody had an exact date to which the period was extended.

These monitoring results evidence that there are essential violations while considering the issue of extending period of custody of the accused, because in any case court ruling on extension of period in custody should be motivated. At the same time, provided information certifies that in more than a third of cases a judge did not motivate the ruling or, what is also probable, did not declare motivated part of the ruling in the court hearing, thus violating rights of the accused. In addition, there are violations of the criminal procedure as to not determining the specific date until which the term in custody is extended.

Recommendations

Council of Judges of Ukraine, Supreme Council of Justice of Ukraine, Highest Qualification Commission of Judges of Ukraine, Head and judges of the Appellate Court of the city of Kyiv, heads and judges of the first instance courts of the city of Kyiv should pay attention to necessity to strictly adhere to the requirements of the criminal procedural legislation as to enforcement of the right of accused to liberty and personal inviolability.

3.5.5. Pleadings

Article 364 of the CPC determines the order of pleadings. In particular, pursuant to the mentioned regulation in pleadings, there shall speak the public prosecutor, victim, his/her representative and legal representative, civil plaintiff, his/her representative and legal representative, civil defendant, his/her representative, the defendant, his/her legal representative and the defense counsel, and representative of a legal entity which is a party of criminal proceedings.

In pleadings, participants in court proceedings may invoke only such evidence as has been examined in court session. If during pleadings, a need should arise to present new evidence, the court shall resume the ascertaining of circumstances established in the course of criminal proceedings, and verification with evidence thereof, after which re-opens pleadings in respect of additionally examined circumstances.

The court shall not have the right to limit duration of pleadings by a certain time. After speeches have been completed, participants in pleadings shall have the right to exchange rejoinders. The accused or his defense counsel shall have the privilege of the last rejoinder.

Pursuant to the Article 365, after pleadings have been announced closed, court gives the accused the possibility to make the last plea. The court shall not have the right to limit duration of the last plea of the accused by a certain time.

Pleadings were monitored in 20% of monitors; visits. The following circumstances were fixed during monitoring:

- the party of prosecution referred to evidences which were not examined in court proceedings in 6.4% of cases;
- the party of defense referred to evidences which were not examined in court proceedings in 2.2% of cases;
- other participant on the court proceedings referred to evidences that were not considered in court hearing in 4.3% of cases (most often it was done by victims or their representatives);
- in 6.8% of cases the court limited time of taking the floor;
- in 46.8% of cases participants of pleadings were allowed to exchange rejoinders after speeches have been completed;
- in 83% of cases the accused was given the possibility to make the last plea.

The fact from the monitorings that participants of court proceedings referred to evidences that were not examined during court hearing and thus violated Article 364 of the CPC draws attention. At the same time, such referring can be explained by the fact that first instance court possibly denied the motion of corresponding party of proceedings to examine or submit the mentioned evidence, though the participant of proceedings still considers such evidence as an essential one.

3.5.6. Adoption and pronouncement of court decision

Pursuant to the Article 369 of the CPC, court decision in which the court decides on the substance of litigation is formulated in the form of judgment. Court decision in which the court decides other matters is formulated in the form of a ruling.

According to the Article 371 of the CPC judgment shall be rendered in deliberation room by composition of court which conducted trial. Rulings passed without retiring to deliberation room shall be recorded in the journal of court session by secretary of court session.

Article 376 of the CPC states that a court decision is pronounced immediately after the court has left deliberation room. Where issuance of court of a decision in the form of ruling requires significant time, the court may confine itself to the issuance and pronouncement of a part of judicial disposition (operative part of decision) to be signed by all judges. The time of

pronouncement of full text of the ruling should be indicated in a previously issued judicial disposition (operative part of decision).

After the sentence has been pronounced, presiding judge shall advise the defendant, defense counsel, his/her legal representative, victim, his/her representative of their right to file a plea for pardon, the right to review journal of court session and submit written comments thereto. The defendant committed to custody as a measure of restraint is advised of the right to submit motion to be brought to the court session of the court of appellate instance.

A copy of judgment shall be handed over to the defendant, representative of a legal person subject to trial and prosecutor immediately after pronouncement thereof.

Adoption of court decision has been monitored in 26.6% of cases. Statistical results follow (calculated from the mentioned number of monitored cases):

- Judgement of conviction was delivered in 54.8% of situations, while judgement of acquittal was stated just in 1 case (1.5%); different types of rulings were delivered in other cases;
- In most cases when judgement of conviction was delivered, qualification of the crime was the same as in indictment (92.2%), in other cases it was changed or added;
- In most cases punishment was imposed as proposed by prosecution (76.7%), meanwhile in almost one quarter of decisions (23.3%) the court imposed milder punishment;
- In case of acquittal or imposition of punishment other than deprivation of freedom, defendants were released from custody in the courtroom immediately after receiving a copy of judgement.

Pronouncement of the judgement was characterized by following facts:

- In 72.1% of cases complete text of judgement was pronounced in public immediately after return of the court from deliberation room;
- In one third of cases (34.9%) copy of judgement was received by the defendant immediately after pronouncement;
- In 20.9% of cases the court advised the defendant while pronouncing the judgement of his/her right to review journal of court session and submit written comments thereto;
- Only in 4.7% of cases the court advised defendant committed to custody about his/her right to submit motion to be brought to the court session of the court of appellate instance.

These results give grounds to state that the court not always advised defendants of their right to review journal of court session and submit written comments thereto as well as the right to submit motion to be brought to the court session of the court of appellate instance after pronouncement of the judgement. It violates provisions of the Article 376 of the CPC.

Recommendations

Council of Judges of Ukraine, High Council of Justice of Ukraine, High Qualification Commission of Judges of Ukraine, heads and judges of first instance courts of Kyiv should pay attention to their duty to pronounce court judgement in compliance with requirements envisaged by the Article 376 of the CPC, namely to advise defendants on their rights to review journal of court session and right to submit comments in writing thereto as well as the right to submit motion to be brought to the court session of the appellate instance court.

Subsection 3.6.

Consideration of appeals against the sentences and rulings of the court of the first instance

Chapter 31 of the CPC sets out the procedure for holding the appeal proceedings. In particular, Article 392 sets out the list of court decisions that can be appealed against, and Article 395 – the procedure and terms of appeal. Thus, the appeal may be filed against: 1) the sentence or ruling on the application or denial of application of compulsory measures of medical or educational nature - within thirty days as of the date of the disclosure; 2) other rulings of the court of first instance - within seven days as of the date of disclosure.

In accordance with Articles 397, 398 of the CPC, the trial court, within three days after the expiration of the term of appeal shall send the received appeals together with the materials of the criminal proceedings to the court of appeal, to be handed over to the reporting judge not later than within the next day. The reporting judge shall within three days check the compliance of the appeal with the established requirements and in the absence of obstacles decide on opening of the appeal proceedings.

Under Article 401 of the CPC, the reporting judge, within ten days as of the opening of the appeal proceedings on the appeal against the sentence or ruling of the court of first instance shall perform the preparatory actions and resolve the issues relating to the appeal proceedings, and then decide on the termination of preparation and the appointment of the appeal proceedings.

The duration of the appeal proceedings is not limited to specific period.

The total number of proceedings of the Kyiv City Court of Appeal for the period from July 1, 2014 to February 1, 2015 was around 900. During the monitoring the 210 observations were conducted, which suggests the representativeness of the obtained data.

In some cases, the monitors attended the "high-profile sessions" (e.g., involving the activists of the Maidan or other social movements) in which it was impossible to ensure the appropriate conditions for the public, and the overcrowded room hindered the holding of the trial in the prescribed manner. However, the monitors noticed the *"excessive loyalty of judges to the violators of procedural discipline - participants of such proceedings"*.

The monitors found it quite difficult to determine "within which period as of the receipt of an appeal the court exercised its consideration". The 54.3% of monitors indicated that "it was impossible to determine based on the content of the trial"; 36.2% - believed that it was "within a month"; 9.5% - "in excess of the two-month period".

A significant number of hearings (22.1%) were postponed with the appointment of the next session: for the next day - 6.7%; within 2-5 days - 13.2%; within 6-10 days - 33%; within 10-30 days – 44.6 %.

The most problematic issue was the compliance with the schedule of review of cases: only 17.2% of sessions started on time, 68% - with a 1 hour delay, the rest - with a delay of more than 1 hour.

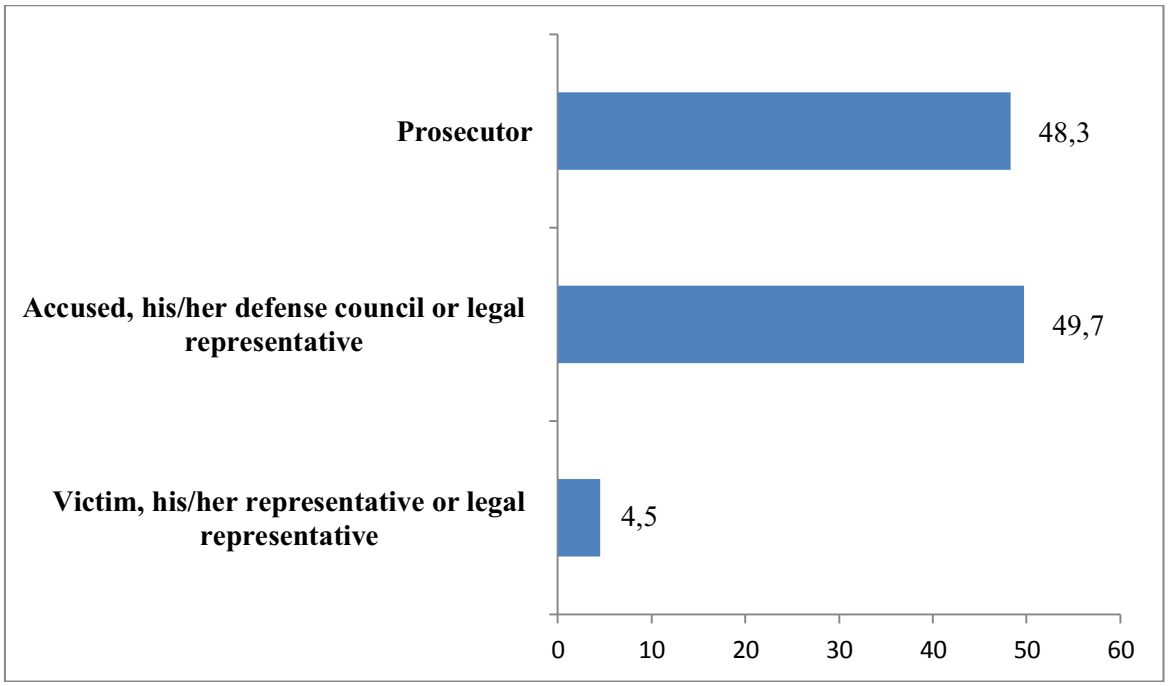
Recommendations

The **chairmen and judges of the Kyiv City Court of Appeal** should take measures to ensure the proper organization and planning of the appeal proceedings of the criminal proceedings in order to prevent the infringement of reasonable periods of appeal proceedings and ensure the observance of the rights of participants of the criminal proceedings to personal participation in the appeal proceedings

3.6.1. Participants of appeal trial

Article 393 of the CPC establishes a list of persons who have the right to appeal decisions of the courts of first instance. This list, in particular, includes suspect, defendant, his/her legal representative or defense counsel, the prosecutor, the victim or his legal representative or representative, civil plaintiff and civil defendant or their representatives.

Tab. 3.6.-1. Initiator of appeal of the court's decision (%)

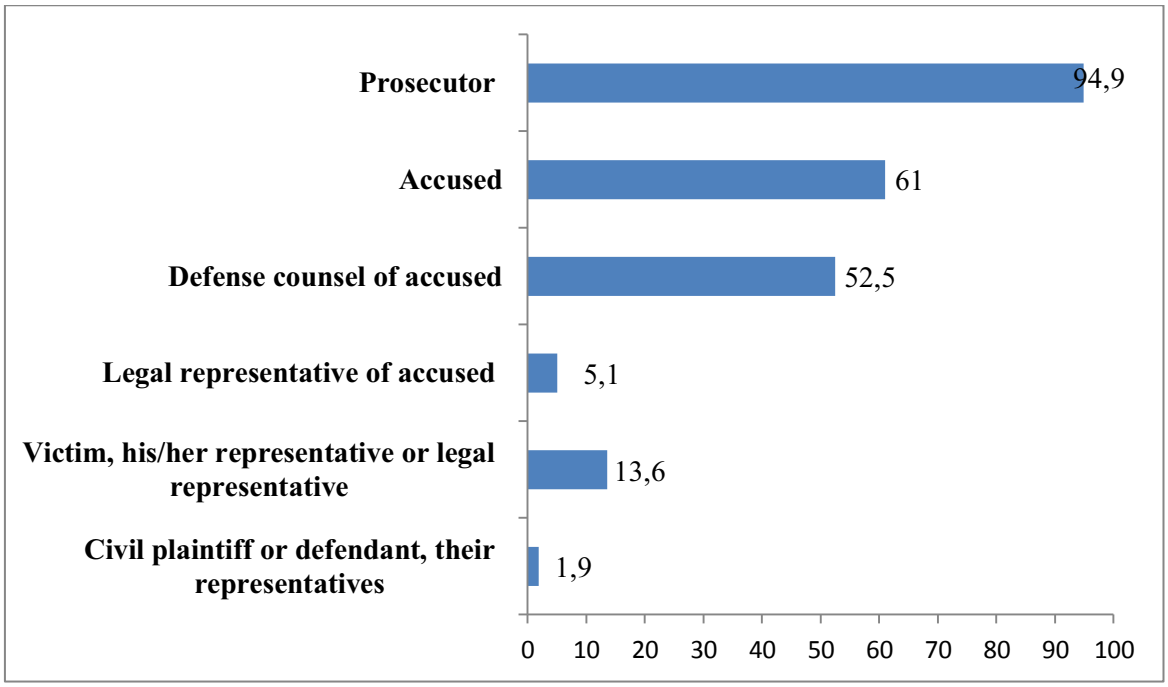


Indicators of this table show that decisions taken by courts of first instance are challenged through appeal to the same extent both by prosecutors and defendant, indicating that both sides of criminal proceedings disagree with the decisions taken.

However there is interesting observation on use by victims or their representatives of their right to appeal. Thus, only in 4.5% of cases monitors witnessed appeal trials initiated by victims. We can assume that in most cases victims either agree with the decisions of local courts adopted in criminal proceedings with their participation, or they rely on the appeals of prosecutors.

Under Article 405 of the CPC the trial in the court of appeal takes place according to the rules of the trial at first instance considering stipulated peculiarities. In particular, the trial carried out in the court with mandatory participation of parties to criminal proceedings, except as provided by the CPC. Victim and other participants of criminal proceedings are summoned to the trial. Failure to show before the court of the parties or other participants in criminal proceedings does not prevent to hear the case if such persons have been duly notified of the date, time and place of the appeal and they have not informed of their good reasons not to show. If participants of criminal proceedings whose participation in accordance with the CPC or appellate court's decision is mandatory have not showed up for participation in the proceedings in court, appellate hearing is postponed.

Tab. 3.6.-2. The presence of participants of appeal (%)



These observations show that appellate hearing in criminal proceedings generally is conducted with presence of participants of the trial.

At the same time, indicators of the table show that quite often both defendants and their counsels failed to show in court hearings, which is the ground to postpone of the court hearing and, to some extent, causes delays of appeal trial in criminal proceedings.

In addition, some passivity or indifference on the part of victims and their representatives is witnessed.

Recommendations

National Association of Advocates of Ukraine, the Higher Qualification-Disciplinary Bar Commission, Coordination Center of Free Secondary Legal Aid shall take measures for the proper performance of professional duties by advocates, particularly in terms of ensuring participation in court hearings.

Ministry of Internal Affairs of Ukraine, State Penitentiary Service of Ukraine shall take measures for timely delivery of persons in custody to courts in Kyiv for participation of such persons in court hearings.

3.6.2. Research evidence

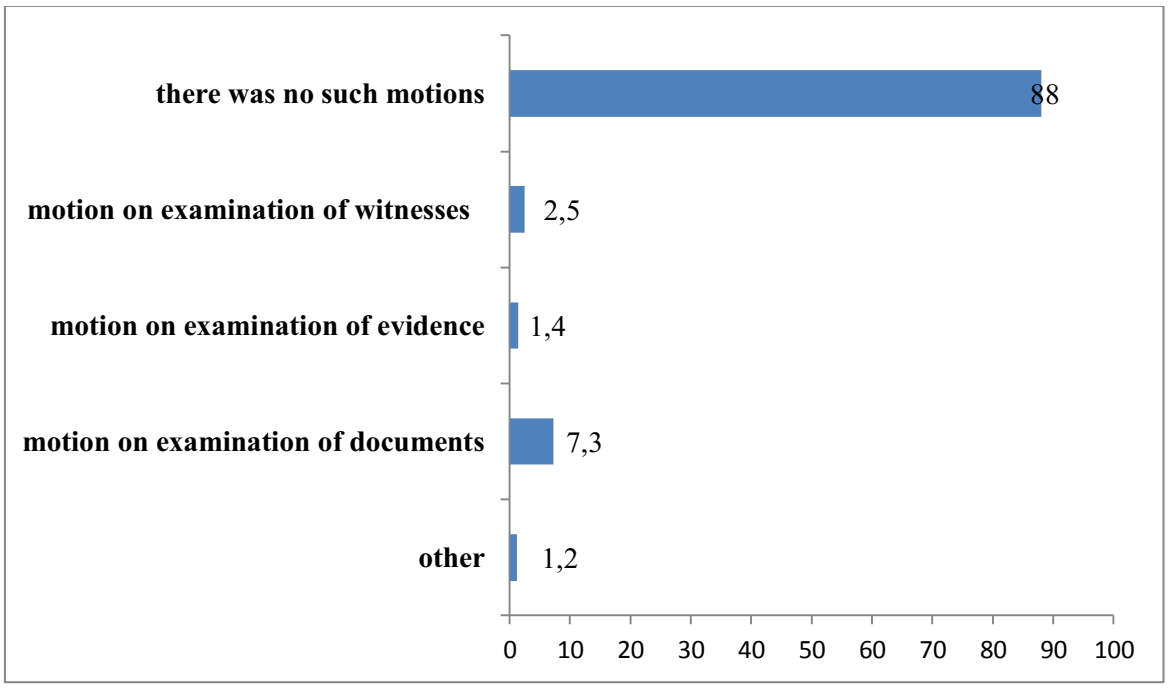
Under Article 401 of the CPC, while preparing for the appeal hearing, a judge rapporteur, in particular, offers participants of the proceedings to submit new evidence to which they refer or requests them upon motion of the person who filed the appeal.

Under Article 404 of the CPC, the appellate court at the request of the participants of the proceedings may examine evidence which were not examined by the court of first instance, only if the participants of the proceedings filed motion on such examination during hearings in the

court of first instance or if they become known after enactment of the court decision which is challenged.

Results of observations over motions of parties to criminal proceedings on examination of evidence and of the principle of adversarial proceedings are reflected in the following tables.

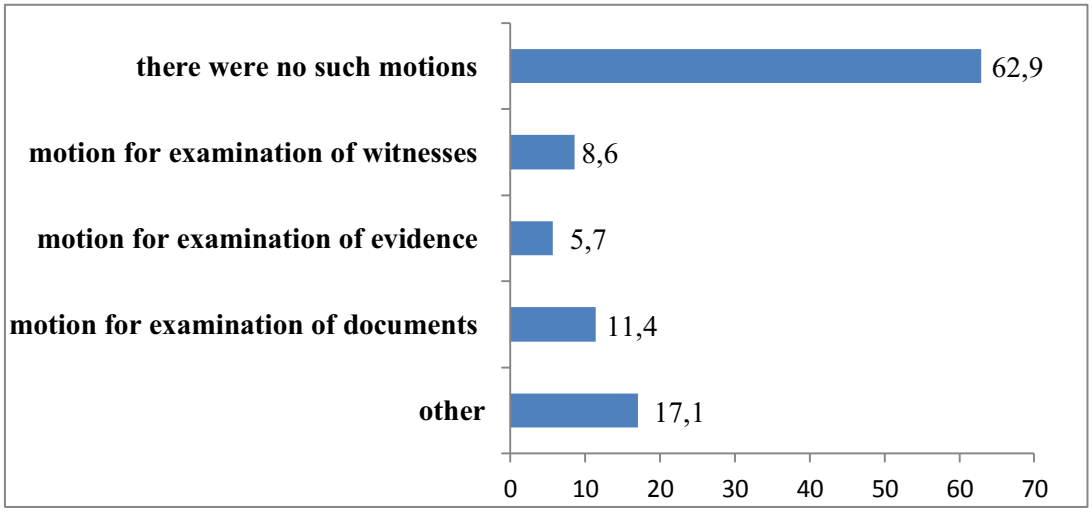
Tab. 3.6.-3. Motion of prosecutor on examination of evidence (%)



As seen in the table, in the majority of observations prosecutors have not raise before the court an issue of examination of additional evidence.

Only in 11.2% of cases prosecutors filed a motion to the appellate court on examination of witnesses, examination of documents and evidence. At the same time, monitors witnessed that while submitting such motions the prosecutor did not point out that he filed similar motions for examination of these evidence in court of first instance and that they have been rejected or that the he learned about existence of such evidence after adoption of the judgment being challenged. However, all such motions of the prosecutor were satisfied by the court.

Tab. 3.6.-4. The motion of the defense on examination of evidence (%)



As seen in the table, the defense party in most cases also did not raise before the court of appeal the issue of the need to examine new evidence.

However, the monitors recorded 25.7% of cases where defense lawyers filed a motion on examination of witnesses, the examination of documents and evidence.

According to observers, while submitting the motion, the defense lawyers almost in one third of cases indicated that such motions have been already filed at first instance and they have been rejected or that they learned about existence of such evidence after adoption of the challenged judgment.

The Court responded to the request of the defense as follows: out of the total number of motions submitted 54.8% of motions were completely satisfied; partially satisfied - 6, 2%; declined - 14%. The situation in other cases was not clear.

Most often motion were declined motions for summoning of witnesses and the reason for decline was the failure to file such motion to the court of first instance.

The defense party submitted other motions as well. For example, in several proceedings the motions were filed "*for the involvement of the documents describing the identity of the defendant*".

Thus, the fact that the court of appeal in more than 60% of cases satisfied the motion of the defense for examination of new evidence, indicates that local courts heard criminal proceedings not objectively or even with prejudice, declined without justification such motions which is an obvious violation of the rights of the defense to submit evidence to the court and prove the credibility of their position to the court. However, since the motions of the prosecutor were satisfied by the court of appeal without considering the need to justify reasons of not examining them at the court of first instance, we can assume to a certain extent that judges were prejudiced while hearing respective criminal proceedings.

Recommendations

Council of Judges of Ukraine, the High Council of Justice of Ukraine, the Higher Qualification Commission of Judges of Ukraine, Chairman and judges of the Court of Appeal of Kyiv shall note that examination by an appeal court of new evidence in violation of article 404 of the CPC indicates prejudiced and biased hearing of criminal proceedings.

Chairmen and judges of the district courts of Kyiv shall pay attention to their responsibility to create the necessary conditions for the implementation by the parties of criminal proceedings of their procedural rights and fulfillment of procedural obligations, including through the review and satisfying justified motions to examine evidence.

3.6.3. The issue of the inadmissibility of evidence

It should be recalled that according to Article 84 of the CPC evidence is deemed admissible if it is received in the order established by the CPC. Inadmissible evidence can not be used while taking procedural decisions, court can not refer to it in a judgment. Article 87 of the CPC defines the list of infringements of human rights and fundamental freedoms in case of which evidence shall be anyway declared inadmissible by the court.

The defense in most cases (80.1%) have not raised before the court of appeal the issue of deeming evidence inadmissible. In the remaining cases such issue was raised. The court found the evidence inadmissible only in a few cases, in 11% of cases this issue had to be considered by the court later, in other - evidence were deemed admissible.

Recommendations

Chairmen and judges of the district courts of Kyiv shall pay attention to their obligation to deem the evidence inadmissible if they are obtained in a manner not stipulated by procedural law and not to take them into account in making a judgment as provided in § 2 of Chapter 4 of Section 1 of the CPC.

3.6.4. The implementation of the principle of competition

According to the Article 22 of the CPC, criminal proceedings shall be based on competition which envisions self-assertion by the prosecution and the defense of their legal positions, rights, freedoms and legal interests by means provided by this Code.

According to observers, in all proceedings the defense party had no significant interference from the court to comment and refute the evidence provided by the prosecution. However, observers noted the low activity of the defense party - almost 70% of situations were characterized by lack of desire of the defense to provide such comments. Even lower activity had place in part of the filing of objections against examination of evidence submitted by the prosecution. These objections were recorded only in 2.2% of situations. No cases of obstructing such actions by the court were recorded.

The parties had the opportunity to pose questions to each other. However, the parties did not show significant activity. Especially "passivity" was again noted by observers on the defense side. Observations show that there were no questions to the other side: from the defense - in 68.2% of cases; the prosecution - in 58.1% of cases.

Recommendations

National Association of Advocates of Ukraine, the Higher Qualification-Disciplinary Bar Commission, Coordination Center of Free Secondary Legal Aid shall take steps for proper use of their procedural rights by advocates and performance of their professional duties, more active use of the criminal procedural instruments to protect the rights, freedoms and the interests of the defendant.

3.6.5. Pleadings

Article 364 of the CPC determines the procedure of conducting pleadings, according to which in the pleadings participate parties of the criminal proceedings and other participants of the trial. The court may not limit the duration of pleadings by a certain time. After pronouncing the speeches the participants of the pleadings have the right to exchange remarks. Right to the last remark belongs to the defendant or his counsel.

Under Article 365 of the CPC after announcing the pleadings finished court gives the defendant the last word.

Pleadings were the subject of observations in 25.6% of court hearings in the court of appeal, which was attended by monitors. Thus, observers recorded the following circumstances (data calculated from the 25.6% of cases):

• in 1.4% of cases the court limited the speeches of the parties with a certain time;

• in 52.1% of cases the participants of the pleadings following completion pf their speeches had the opportunity to express remarks;

• in 94.3% of cases the defendant had the opportunity to say last word.

3.6.6. Adopting the decision and its announcement

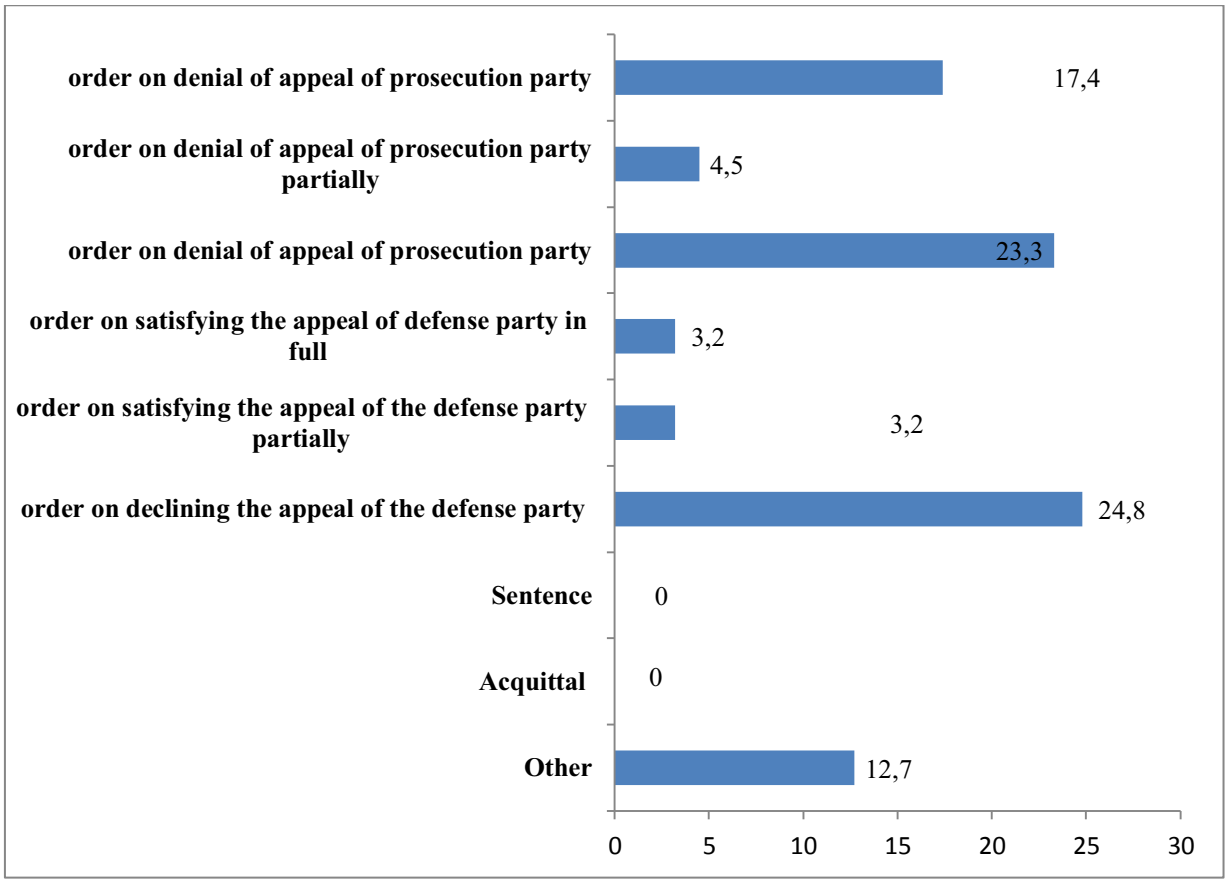
Article 407 of the CPC defines authorities of the appellate court upon hearing the appeal.

In particular, as a consequence of appeal hearings challenging the sentence or the order of the court of first instance, appellate court may: 1) leave the sentence or order unchanged; 2) change the sentence or order; 3) revoke the sentence wholly or partly and adopt new sentence; 4) revoke the order in full or in part and to adopt a new order; 5) Revoke the sentence or the order and close the criminal proceedings; 6) Revoke the sentence or the order and appoint a new trial in the court of first instance.

Under Article 409 of the CPC grounds for revoking or changing a judgment as a result of heating the case in the court of appeal are: 1) incomplete court hearing; 2) mismatch of court's findings set out in the judgment with actual facts of the criminal proceedings; 3) substantial violation of criminal procedure requirements; 4) incorrect application of the law of Ukraine on criminal liability. The grounds for revoking or changing a sentence of the first instance court may also be inadequacy of the sentence adopted and the severity of criminal offense, the personality of defendant.

Decision making was the subject of observations in 22.2% of cases. Summary of decisions is shown in the following table.

Tab. 3.6.-5. Decisions upon results of hearings(%)

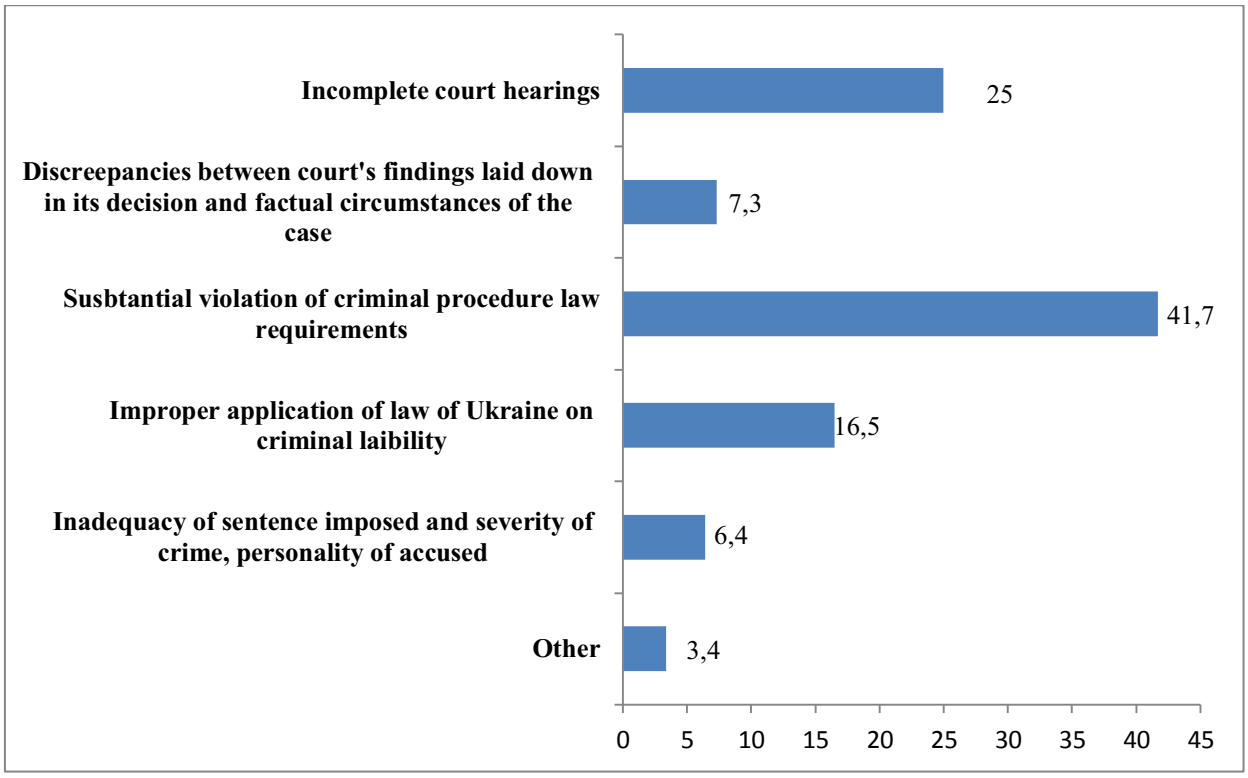


Indicators of this table show that the court of appeal in 48.1% of cases completely rejected the appeals of both parties, but in 32.5% of cases satisfied the appeals of prosecutors and defense lawyers and in 7.7% of cases - partly allowed.

Latest figures indicate that the court of appeals in more than 40% cases revoked in full or partially decisions of local courts which is quite serious indication of what quality decisions are taken in courts of first instance.

A large number of decisions envisioned a change or cancellation of decision of first instance court. The following table shows which motivation was used by the court to make such decisions (% is shown from cancelled decisions).

Tab. 3.6.-6. Grounds for cancellation or change of decision of first instance court (%)



Since most often the basis for canceling or changing a judgment of first instance was the presence of significant violations of procedural rules, observers recorded some typical examples of such violations:

• "no court records on the day of pleadings and sentence";

• "Court had no right to approve the agreement between the victim and the defendant under part 3 of article 469 of the CPC (grave crime)";

• "sentencing in the absence of the victim";

• "court trial of first instance conducted without the defendant."

In certain cases (14.1% of the total number of decisions where the appeal of defense was rejected) observers drew attention to the fact that the court of appeal in its judgment has not provided answers to the arguments of the defense.

Recent evidence indicates that the court of appeal have breached part two of Article 419 of the CPC, according to which when leaving the appeal without satisfaction, the appellate court ruling shall contain grounds upon which appeal deemed unreasonable.

So, summarizing the above, it can be asserted that in most observations decisions of local courts have been cancelled (fully or partially) or changed because of: substantial violations of procedural law in 41.7% of cases, incomplete trial in 25% of cases, incorrect application of the law Ukraine on criminal liability in 16.5% of cases, the discrepancies between the findings of the court and the facts of the case in 7.3% of cases, etc.

In evaluating the circumstances of the situation of the decision's announcement observers drew attention to the following facts:

• in 52% of situations the full text of the sentence was announced publicly immediately after the court went out from jury room;

• in other cases only resolving part was announced and set the date and time of the announcement of the full text of the decision;

• in 15.1% of situations court after announcement of the sentence clarified to the defendant the right to get familiar with register of court hearings and submit written comments to it.

Recommendations

Chairman and judges of the Court of Appeal of Kyiv to point out that under the CPC judgment must be legitimate, justified and motivated, and its content shall meet the requirements of Articles 374, 419 of the CPC.

GENERAL RECOMMENDATIONS

To Verkhovna Rada of Ukraine:

take measures to bring the legislation in line with the CPC to protect the rights, freedoms and lawful interests of individuals and legal entities, state and society and effective implementation of the objectives of criminal proceedings, including those regarding replacement of metal cages, which separate accused from judges and public present at the hearing, with glass or organic glass (plexiglass) barriers in first instance courts.

To Cabinet of Ministers of Ukraine:

take measures to bring the legislation into line with the CPC to protect the rights, freedoms and lawful interests of individuals and legal entities, state and society and effective implementation of the objectives of criminal proceedings, including those regarding replacement of metal cages, which separate accused from judges and public present at the hearing, with glass or organic glass (plexiglass) barriers in first instance courts.

Council of Judges of Ukraine, the High Council of Justice, the Higher Qualification Commission of Judges of Ukraine, the Supreme Court of Ukraine, the High Specialized Court of Ukraine for Civil and Criminal Cases (within the competence and powers):

take note of the above-mentioned recommendations, to investigate the concerns raised and take steps to avoid future revealed shortcomings in the organization of the courts and violations of procedural law.

To State Judicial Administration of Ukraine:

take measures to provide courts with premises that meet the requirements to hold hearings in specially equipped rooms;

take steps for proper organization of proceedings in the videoconference mode;

provide courts with necessary number of printed materials that contain handbooks on the rights and obligations of participants in criminal proceedings;

introduce organizational and technical measures directed at delivering timely and accurate information on the schedule of the courts, judges and court hearings schedule.

To National School of Judges of Ukraine:

take note and include programs for training and retraining of judges specific issues on the organization and planning of the trial by judges, and issues listed in recommendations for the courts.

To Appeal Court of Kyiv:

organize access of ordinary citizens to the court premises in a manner that would not limit their right of access to justice;

strengthen control and to take measures to fill with qualitative content information stands in courthouses and webpages of courts on movement of cases, the day, time and place, the status of their hearings in the respective court proceedings to the current date;

pay attention to the violations of the general principles of criminal proceedings and take steps to ensure transparency and openness of the court proceedings in the manner stipulated by procedural law;

take steps for optimal use of available space of courthouses to create appropriate conditions for judges to administer justice in the manner stipulated by the current legislation of Ukraine and for members of the criminal proceedings to implement their procedural rights and duties;

pay attention to the inadequate organization and planning of trial in the criminal proceedings by judges;

take steps for proper organization of proceedings in the videoconference mode;

take steps for conducting the court hearings of criminal proceedings in the manner and method provided by the CPC, in particular as regards to the implementation of technical recording of the trial;

pay attention to strict compliance with the CPC on the distribution to participants of the proceedings memos of their procedural rights and obligations and the need to clarify these rights to each participant of the proceedings;

continue to work on improving knowledge of international treaties ratified by the Verkhovna Rada of Ukraine and the European Court of Human Rights practice;

strengthen control over the performance by investigative judges of general obligations of a judge stipulated by Article 206 of the CPC and aimed at the protection of human rights;

take note of and to strengthen control over the performance by judges of duty to comply with the rules of judicial conduct while administering justice established by the Code of Judicial Ethics;

take note of the need for strict performance by judges of their duty to consider while choosing a preventive measure all circumstances specified in Article 178 of the CPC and regarding application of bail in the amount specified in Article 182 of the CPC;

strengthen judicial control over the terms of detention of suspects, the defendant and the grounds for the continuation of these terms;

strengthen control over performance by investigative judges of the requirements of Article 306 of the CPC to hear complaints against decisions, actions or inactivity of the investigator or prosecutor with mandatory participation of the person who filed the complaint;

to draw attention to the need of keeping up the procedure of the announcement of judgment established by Article 376 of the CPC;

pay attention to the requirements of Article 336 of the CPC regarding the possibility of conducting proceedings in a videoconference mode only upon consent of the suspect (the defendant);

pay particular attention to the proceedings, where appealed is the decision of investigating judge about custody of a person or extension of his/her custody which must meet the requirements set out in particular by Articles 178, 183 of the CPC;

pay attention to the obligation to create the necessary conditions for the implementation by the parties of criminal proceedings of their procedural rights and fulfill procedural obligations;

to draw attention to the need for strict observance of the principles of the criminal proceedings, including the rule of law, ensuring the right to protection, competition and freedom in presenting their to court and to prove before the court their persuasiveness;

take steps for conducting court hearings in criminal proceedings in the order and manner stipulated in the CPC, subject to the rights and freedoms proclaimed by the Constitution and international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine;

pay attention to the list of responsibilities established by Article 474 of the CPC which the court has to comply with during the proceedings on the basis of agreements;

take measures to prevent the occurrence of investigations by the court of appeal of new evidence in violation of Article 404 of the CPC;

note that the judgment shall be legitimate, justified and motivated, and its content shall meet the requirements of Articles 374, 419 of the CPC.

To chairmen and judges of the district courts of Kyiv:

organize access of ordinary citizens to the court premises in a manner that would not limit their right of access to justice;

strengthen control and to take measures to fill with qualitative content information stands in courthouses and webpages of courts on movement of cases, the day, time and place, the status of their hearings in the respective court proceedings to the current date;

pay attention to the violations of the general principles of criminal proceedings and take steps to ensure transparency and openness of the court proceedings in the manner stipulated by procedural law;

take steps for optimal use of available space of courthouses to create appropriate conditions for judges to administer justice in the manner stipulated by the current legislation of Ukraine and for members of the criminal proceedings to implement their procedural rights and duties;

pay attention to the inadequate organization and planning of trial in the criminal proceedings by judges;

take steps for proper organization of proceedings in the videoconference mode;

take steps for conducting the court hearings of criminal proceedings in the manner and method provided by the CPC, in particular as regards to the implementation of technical recording of the trial;

pay attention to strict compliance with the CPC on the distribution to participants of the proceedings memos of their procedural rights and obligations and the need to clarify these rights to each participant of the proceedings;

continue to work on improving knowledge of international treaties ratified by the Verkhovna Rada of Ukraine and the European Court of Human Rights practice;

strengthen control over the performance by investigative judges of general obligations of a judge stipulated by Article 206 of the CPC and aimed at the protection of human rights;

take note of and to strengthen control over the performance by judges of duty to comply with the rules of judicial conduct while administering justice established by the Code of Judicial Ethics;

take note of the need for strict performance by judges of their duty to consider while choosing a preventive measure all circumstances specified in Article 178 of the CPC and regarding application of bail in the amount specified in Article 182 of the CPC;

strengthen judicial control over the terms of detention of suspects, the defendant and the grounds for the continuation of these terms;

strengthen control over performance by investigative judges of the requirements of Article 306 of the CPC to hear complaints against decisions, actions or inactivity of the investigator or prosecutor with mandatory participation of the person who filed the complaint;

to draw attention to the need of keeping up the procedure of the announcement of judgment established by Article 376 of the CPC;

pay attention to the requirements of Article 336 of the CPC regarding the possibility of conducting proceedings in a videoconference mode only upon consent of the suspect (the defendant);

pay particular attention to the proceedings, where appealed is the decision of investigating judge about custody of a person or extension of his/her custody which must meet the requirements set out in particular by Articles 178, 183 of the CPC;

pay attention to the obligation to create the necessary conditions for the implementation by the parties of criminal proceedings of their procedural rights and fulfill procedural obligations;

to draw attention to the need for strict observance of the principles of the criminal proceedings, including the rule of law, ensuring the right to protection, competition and freedom in presenting their to court and to prove before the court their persuasiveness;

take steps for conducting court hearings in criminal proceedings in the order and manner stipulated in the CPC, subject to the rights and freedoms proclaimed by the Constitution and international treaties of Ukraine ratified by the Verkhovna Rada of Ukraine;

pay attention to the list of responsibilities established by Article 474 of the CPC which the court has to comply with during the proceedings on the basis of agreements;

pay attention to the requirements of Articles 318, 323-327 of the CPC to conduct court hearings in criminal proceedings with compulsory participation of its parties and other participants whose participation is recognized as mandatory by the court;

take note of the requirement of the Article 348of the CPC regarding the need to explain to the defendant essence of the charges;

pay attention to the requirements for the procedure of the trial, particularly in determining the amount of evidence subject to examination and the order of their examination;

pay attention to the upholding requirements of the procedure for the examination of witnesses;

pay attention to the obligation to make the announcement of judgment in compliance with Article 376 of the CPC, particularly in terms of clarifying the defendant his right to read the register of court hearing and the right to submit written comments on it and the right to file motions for its delivery to the court hearings in the court of appeal;

pay attention to the obligation of the court to admit evidence inadmissible if they are obtained in a manner not stipulated by procedural law.

To Prosecutor General's Office of Ukraine:

take measures on proper administration of prosecution in court by prosecutors including prevention of cases of postponing of the trial for reasons of absence of prosecutors in the trial;

take steps to strict compliance with the Constitution of Ukraine, requirements of the CPC, the provisions of the European Convention on Human Rights, European Court of Human Rights practice regarding upholding the rights and freedoms of a person during his/her detention both without decision of investigative judge and on the basis of the relevant judgment;

inform prosecutors of the obligation to justify the motion for application of preventive measures in accordance with Article 177 of the CPC;

take steps to proper implementation of the burden of proof by prosecutors of circumstances which are significant for criminal proceedings;

inform about requirement of the Article 474 of the CPC on plea bargain agreement on voluntarily basis;

collect evidence in criminal proceedings in the manner stipulated by the CPC.

To National Prosecution Academy of Ukraine:

take note of and include into programs of training and retraining of prosecutors special issues listed in the recommendations to the Prosecutor General's Office of Ukraine.

Ministry of Internal Affairs of Ukraine, other authorities of pretrial investigation:

take measures for timely delivery of persons taken into custody to the courts for their participation in court proceedings;

take steps to strict compliance with the Constitution of Ukraine, requirements of the CPC, the provisions of the European Convention on Human Rights, European Court of Human Rights practice regarding upholding the rights and freedoms of a person during his/her detention both without decision of investigative judge and on the basis of the relevant judgment;

inform investigators of the obligation to justify the motion for application of preventive measures in accordance with Article 177 of the CPC;

take steps to proper implementation of the burden of proof by investigators of circumstances which are significant for criminal proceedings;

take note of the requirement of Article 474 of the CPC on plea bargain agreement on voluntarily basis;

collect evidence in criminal proceedings in the manner stipulated by the CPC.

State Penitentiary Service of Ukraine:

take measures for timely delivery of persons taken into custody to the courts for their participation in court proceedings;

take steps for proper organization of proceedings in the videoconference mode in the Kiev prison and other institutions for holding people in custody.

To National Association of Advocates of Ukraine, the Higher Qualification-Disciplinary Bar Commission, Free Legal Aid Coordination (within their jurisdiction and powers):

take note of and take measures for the proper performance by lawyers of their professional responsibilities, in particular regarding ensuring their participation in court proceedings;

to inform lawyers about unacceptability of misuse of their procedural rights;

to inform lawyers about their obligation to use all the remedies of defense provided by the CPC of Ukraine in order to clarify the circumstances which refute the suspicion and mitigate or exclude criminal liability of the suspect;

emphasize to lawyers their right to collect and submit to the investigator, the prosecutor, the investigative judge, court evidence to refute suspicion, accusation and mitigate or exclude criminal liability of the suspect, defendant;

take steps for proper use by lawyers of their procedural rights and performance of their professional duties aimed to protect the rights, freedoms and interests of the suspect, the defendant.

OVERALL CONCLUSION

Adoption of the CPC is one of the most important steps towards reform of the criminal justice system in Ukraine, which brought norms of the criminal procedure law to international standards of human rights.

However, since its entry into force, the important question raised whether the CPC has provided sufficient number of measures and whether they are effective to avoid and prevent violations of rights and freedoms of any participant of criminal proceedings.

In this regard, with the support of the UN Development Program in Ukraine (UNDP), the Council of Europe project "Support to the Criminal Justice Reform in Ukraine", funded by the Government of Denmark and the US Justice Department and the US Embassy in Ukraine, Commissioner initiated a pilot project "Monitoring of implementation of the the new Criminal Procedure Code of Ukraine."

The main purpose of the said monitoring is determining the effectiveness of the CPC application and the possibility of ~~need to improve~~enhancing the effectiveness by means ~~it by~~of making appropriate amendments of the CPC text or practices of implementation.

From the beginning of the monitoring a number of shortcomings were discovered that were related to organization of the court staff's work, the organization and planning by the trial judges of the criminal proceedings, conducting hearings in videoconference mode, etc.

Later, during observation of the course of court hearings it was noted that often judges both of the first and appeal instances resorted to violations of certain norms of the CPC, showed prejudice and partiality, and sometimes not ethical attitude towards the parties.

Moreover, it was noted that during the trial prosecutors and to the greater extent lawyers more passively carried out their professional duties, which affected the length, fullness and comprehensiveness of court hearings in criminal proceedings, in particular the rights and freedoms of persons taken into custody.

Thus, the ~~M~~monitoring showed that today completeness, objectivity, comprehensiveness, duration of the trial depends mainly on the practices, that is, the implementation of all the participants of criminal proceedings of their procedural rights and fulfillment of procedural obligations stipulated by the CPC.

Therefore, ensuring of ~~-~~the quality of public prosecution, the quality of defense and the quality of justice in general currently requires further training of prosecutors, lawyers and judges, as well as improving the organization of the courts' operation.