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institutzakonodatelstva@gmail.com

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www.zqai.kz, E-mail: instzak-kz@mail.ru
institutzakonodatelstva@gmail.com

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www.zqai.kz, e-mail: instzak-kz@mail.ru
institutzakonodatelstva@gmail.com

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PROBLEMS OF THE EFFICIENCY OF THE CRIMINAL PROCEDURE CODE

IsmagulovKairat Eslyamkalievich[1]
Head of the Department of analysis of the effectiveness of legislation of the Institute of Legislation and Legal Information of the Republic of Kazakhstan, Candidate of Law, Nur-Sultan, Republic of Kazakhstan; e-mail: ismagulov.k@zqai.kz

Isaeva Klara Asangazievna
Professor of the Department of Criminal Procedure and Forensic Science of the Kyrgyz National University named after Zhusup Balasagyn, Doctor of Law, Professor, Bishkek, Kyrgyz Republic; e-mail: isaeva.k@mail.ru

Ziyatova Zhadra Ziyatovna
Senior lecturer of the Department of Law and International Relations of the Kazakh-American Free University, Master of Laws; Ust-Kamenogorsk, Republic of Kazakhstan; e-mail: Zhadraz@mail.ru

Abstract. *This article is the first part and the beginning in a series of publications devoted to the analysis of the effectiveness of the current Code of Criminal Procedure of the Republic of Kazakhstan, conducted by the authors.*

The results of the analysis show that changes and additions are often made to the criminal and criminal procedural legislation that violate their stability. The current frequency of amendments and additions to the above codes contributes to the occurrence of errors in law enforcement, as well as violations of the norms of these laws by persons who were not aware of the amendments.

The issues of protecting the constitutional rights and freedoms of citizens, the quality of criminal prosecution and the administration of justice by the courts continue to be relevant.

Departmental indicators (discovery, referral to court) still prevail over observance of human rights.

Negative factors in the field of criminal procedure are primarily due to the lack of clear criteria for the delimitation of powers and areas of responsibility between the pre-trial investigation bodies, the prosecutor's office and the court.

The quality of the activities of the defense side primarily depends on the range of its powers to collect evidence. The branch of criminal procedure legislation that regulates the authority to collect evidence by the defense is the most sensitive to criticism from the public, since there is an imbalance of opportunities between the defense and prosecution, which is contrary to the principle of competition and equality of the parties.

In conclusion, the authors set out proposals and recommendations, confirmed both by theoretical studies of scientists and practical examples.

Keywords: *criminal offense, Code of Criminal Procedure, criminal prosecution, police, prosecutor, pre-trial investigation, court*

[1] *The author for correspondence*

ПРОБЛЕМЫ ЭФФЕКТИВНОСТИ УГОЛОВНО-ПРОЦЕССУАЛЬНОГО КОДЕКСА

Исмагулов Кайрат Еслямкалиевич
Руководитель отдела анализа эффективности законодательства Института законодательства и правовой информации Республики Казахстан, кандидат юридических наук, г.Астана, Республика Казахстан; e-mail: ismagulov.k@zqai.kz

Исаева Клара Асангазиевна
Профессор кафедры уголовного процесса и судебной экспертизы Кыргызского национального университета им.Жусупа Баласагына, доктор юридических наук, профессор, г.Бишкек, Кыргызская Республика; e-mail: isaeva.k@mail.ru

Зиятова Жадра Зиятовна
Старший преподаватель кафедры права и международных отношений Казахстанско-Американского Свободного университета, магистр юриспруденции; Усть-Каменогорск, Республика Казахстан; e-mail: Zhadraz@mail.ru

Аннотация. *Настоящая статья является первой частью и началом в серии публикаций, посвященных анализу эффективности действующего Уголовно-процессуального кодекса Республики Казахстан, проведенного авторами.*

Результаты анализа показывают, что в уголовное и уголовно-процессуальное законодательство часто вносятся изменения и дополнения, нарушающие их стабильность. Текущая частота внесенияизменений и дополнений в вышеназванные кодексы способствует возникновению ошибок в правоприменительной деятельности, а также нарушению норм указанных законов лицами, не знавшими о внесенных изменениях.

Продолжают оставаться актуальными вопросы защиты конституционных прав и свобод граждан, качества осуществления уголовного преследования и отправления судом правосудия.

По-прежнему превалируют ведомственные показатели (раскрываемость, направление в суд) над соблюдением прав человека.

Негативные факторы в сфере уголовного процесса обусловлены прежде всего отсутствием четких критериев разграничения полномочий и зон ответственности между органами досудебного расследования, прокуратуры исуда.

Качество деятельности стороны защиты в первую очередь зависит от спектра ее полномочий на сбор доказательств. Отрасль уголовно- процессуального законодательства, регламентирующая полномочия по сбору доказательств стороной защиты, является наиболее чувствительной для критики со стороны общества, поскольку наблюдается дисбаланс возможностей между сторонами защиты и обвинения, что противоречит принципу состязательности и равноправия сторон.

В заключении авторами изложены предложения и рекомендации, подтвержденные как теоретическими исследованиями ученых, так и практическими примерами.

Ключевые слова: *уголовное правонарушение, Уголовно-процессуальный кодекс, уголовное преследование, полиция, прокурор, досудебное расследование, суд*

ҚЫЛМЫСТЫҚ-ПРОЦЕСТІК КОДЕКСІНІҢ ТИІМДІЛІГІНІҢ МӘСЕЛЕЛЕРІ

Қайрат Еслямқалиұлы Исмагулов
Қазақстан Республикасы Заңнама және құқықтық ақпарат институтының заңнаманың тиімділігін талдау бөлімінің басшысы, заң ғылымдарының кандидаты, Қазақстан Республикасы, Нұр-Сұлтан; e-mail: ismagulov.k@zqai.kz

Клара Асанғазықызы Исаева
Жүсіп Баласағын атындағы Қырғыз ұлттық университетінің қылмыстық іс жүргізу және сот сараптамасы кафедрасының профессоры, заң ғылымдарының докторы, профессор, Бішкек қ., Қырғыз Республикасы; e-mail: isaeva.k@mail.ru

Жадра Зиятовна Зиятова
*Қазақстандық-Еркін университетінің құқық және халықаралық қатынастар кафедрасының аға оқытушысы, құқықтану магистрі;
Өскемен, Қазақстан Республикасы; e-mail: Zhadraz@mail.ru*

Аннотация. *Бұл мақала авторлар жүргізген Қазақстан Республикасының қолданыстағы Қылмыстық-процестік кодексінің тиімділігін талдауға арналған басылымдар топтамасының бірінші бөлімі және бастамасы болып табылады.*

Талдау нәтижелері қылмыстық және қылмыстық іс жүргізу заңнамаларына олардың тұрақтылығын бұзатын өзгерістер мен толықтырулардың жиі енгізілетінін көрсетеді. Жоғарыда аталған кодекстерге өзгерістер мен толықтырулардың ағымдағы жиілігі құқық қолдануда қателердің орын алуына, сондай-ақ енгізілген өзгерістер туралы хабардар болмаған тұлғалардың осы заңдардың нормаларын бұзуына ықпал етеді.

Азаматтардың конституциялық құқықтары мен бостандықтарын қорғау, қылмыстық құдалау сапасы мен соттардың сот төрелігін жүзеге асыру мәселелері өзекті болып отыр.

Ведомстволық көрсеткіштер (анықтау, сотқа жіберу) адам құқықтарын сақтаудан бұрынғысынша басым.

Қылмыстық іс жүргізу саласындағы келеңсіз факторлар, ең алдымен, сотқа дейінгі тергеп-тексеру органдары, прокуратура және сот арасында өкілеттіктерді және жауапкершілік салаларын шектеудің нақты өлшемдерінің болмауына байланысты.

Қорғаныс тарапының қызметінің сапасы ең алдымен оның дәлелдемелерді жинау жөніндегі өкілеттіктерінің ауқымына байланысты. Қорғаушының дәлелдемелерді жинау өкілеттігін реттейтін қылмыстық іс жүргізу заңнамасының саласы қоғамның сынына ең сезімтал сала болып табылады, өйткені қорғау мен айыптаушы тараптың бәсекелестігі мен теңдігі қағидатына қайшы келетін мүмкіндіктердің теңгерімсіздігі бар. тараптар.

Қорытындылай келе, авторлар ғалымдардың теориялық зерттеулерімен де, практикалық мысалдармен де расталған ұсыныстар мен ұсыныстарды ортаға салды.

Түйінді сөздер: *қылмыстық құқық бұзушылық, Қылмыстық іс жүргізу кодексі, қылмыстық құдалау, полиция, прокурор, сотқа дейінгі тергеу, сот*

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Introduction

In the Message of the Head of State Kassym-Jomart Tokayev to the people of Kazakhstan dated September 1, 2022 «*The fair state. United nation. A prosperous society*» [2] noted «*It is necessary to revise the Criminal and* ***Criminal Procedure Codes****, get rid of everything that actually does not work or impedes justice.*

It is equally important that, once appropriately amended, they be not subject to endless adjustments.

Since 2015, more than 1,200 changes have already been made to the Criminal and Criminal Procedure Codes.

[2] *https://www.akorda.kz/ru/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-181130*

It is unacceptable for laws to be changed to suit momentary conjuncture or narrow corporate interests.

Therefore, the authority to correct the criminal and ***criminal procedure legislation*** *must be transferred to the Ministry of Justice.*

This will require strengthening human resources and improving the quality of the law-making activities of the department.».

From the moment the Code was adopted to the present, in a period of **8 years 6 months**, amendments and additions to the Law were made by 67 laws: in 2014 - 2, in 2015 - 4, in 2016 - 6, in 2017 - 8, in 2018 6 in 2019, 7 in 2019, 10 in 2020, 10 in 2021, and 14 in 2022.

The frequency of amendments and additions to the Code of Criminal Procedure is due to the general dynamics of ongoing transformations in the implementation of the strategic directions of development of Kazakhstan (*Strategy Kazakhstan-2030, Kazakhstan-2050, the Concept of the legal policy of the Republic of Kazakhstan until 2030, the National Development Plan of the Republic of Kazakhstan until 2025, etc.*).

Action plan for the implementation of the election program of the President of the Republic of Kazakhstan «Fair Kazakhstan - for everyone and for everyone. Now and Forever» provides for the completion of the revision of the Criminal and Criminal Procedure Codes in March 2023.

The systematization of legislation, as some scientists rightly believe, acts as an effective means of «clearing» the accumulated arrays of normative acts, revisions of the working legal system, helps to navigate the legislation, quickly and correctly find and interpret all the norms of the current legislation of the Republic of Kazakhstan [1].

Let us make a reservation in advance that in the further reformation of the Code of Criminal Procedure of the Republic of Kazakhstan with the formulation of foreign experience, an important difference should be taken into account that, unlike Kazakhstan, the prosecutor's office of most European countries performs exclusively the function of criminal prosecution and is not endowed with the right to exercise supreme supervision over the activities of the investigative bodies.

Without pursuing the goal of considering all the issues included in the subject of the audit, we will try to identify individual shortcomings of the current criminal procedure legislation that need to be changed and supplemented.

In our opinion, the main reason for the failure of the modernization of legislation is its lack of system and the lack of a clear plan for strategic development, poor work in the preparation of draft legal acts by state bodies and the scientific community. Often, ignoring the comments and suggestions of government agencies from the Institute of Legislation and Legal Information of the Republic of Kazakhstan, as well as the pursuit of populism and the desire to solve one problem at the expense of another, leads to conflicts in legislation, the emergence of unviable norms. The result is constant improvement. Thus, the number of amendments made since 2014 to the Criminal Code and the Code of Criminal Procedure is in the tens. The paradox is also that from July 4, 2014, that is, from the moment of adoption and until the entry into force of the newly adopted Criminal Code and Code of Criminal Procedure (until January 1, 2015), amendments to some articles were made twice.

Practice has shown that each ministry is trying to pursue or is pursuing its own rule-making policy, not coordinated with anyone, without taking into account the interests and realities of the system as a whole. Thus, part one of Article 179 of the Code of Criminal Procedure states that the beginning of a pre-trial investigation is the registration of an application, a report on a criminal offense in the Unified Register of Pre-trial Investigations (*hereinafter – URPtI*) or the first urgent investigative action. At the same time, as a rule, an application for an economic offense is required to be accompanied by an act of a tax or audit, and the appointment of such an audit is possible only after the initiation of a criminal case. That is, a «vicious circle» is obtained, when without an act of verification they cannot start a pre-trial investigation, without a pre-trial investigation they cannot appoint an audit. Moreover, the URPtI turned out to have a «local flavor»: in it, the duty officer can single-handedly simply write off the received application without making any procedural decision.

As you know, earlier the initiation of a criminal case consisted of several stages: the receipt of an application, a check for the presence of corpus delicti, the issuance of a decision to initiate a criminal case or to refuse it. This model was logical, transparent and delineated responsibility, which was lost due to the constant amendments to the Code of Criminal Procedure.

As a result, both the interests of society and the state suffer. The law enforcement system continues to work on indicators, causing fair criticism in its address, and the executive system is lame.

Methods

The article uses formal-logical and dialectical methods, comparative legal, empirical analysis, as well as quantitative, qualitative and special methods of scientific research.

Results and discussion

Therefore, at present in the world there are many different models of the criminal process. As is known, the Romano-Germanic and Anglo-Saxon legal systems played a decisive role for the domestic model of the criminal process.

It should be noted that one of the most common criteria for distinguishing between these models is the mechanism for separating the police, prosecutorial and judicial functions in the criminal process.

The course of the world community, aimed at the globalization of all processes, leads to the emergence of a trend towards convergence of these models. Moreover, the current practice shows that the ideal model of the criminal process should be considered mixed criminal proceedings, when it contains both investigative and adversarial principles.

Regarding the German model of pre-trial investigation. Investigative bodies - that is, bodies authorized to conduct investigations - do not have independence. The Prosecutor's Office supervises the police during the pre-trial investigation.

§152 of the German Judiciary Act [GVG] states that police officers who have reached the age of 21 and have at least two years of experience in the relevant law enforcement structures are entitled to conduct investigations on behalf of the prosecutor's office [2].

The police, financial departments authorized to investigate crimes, as well as the prosecutor, are among the investigating bodies that carry out criminal prosecution. In cases of minor crimes, proceedings are carried out in a simplified manner, where the police perform the functions of the prosecutor's office in the district court. That is, both the police and the prosecutor put forward, present and support charges, being the state bodies of the accusatory power in Germany[3].

In practice, the police themselves carry out the vast majority of investigations. During court hearings, the police act as witnesses. Based on the testimony of police officers and the documents read out (or mentioned), a typical investigation can be recreated. The police go to the scene of the incident on a call or receive a statement at the station / on the street.

At the scene, they interrogate witnesses, detain suspects, and seize items that may carry important information, organize an examination for the presence of alcohol or drugs in the body (if necessary). The results of the initial actions are recorded in the police report [3].

It should be emphasized here that the role of the police in Germany is of a service nature, which the Kazakh legislator is striving for.

In addition to Germany, we analyzed the legislation of foreign countries (France [4], Austria [5] and Italy [6]) on the issues of criminal prosecution and the functions of the criminal prosecution authorities. An analysis of the role of the judiciary in the criminal process demonstrates that, in contrast to the stage of pre-trial proceedings, where the powers of the main subjects (police officer, prosecutor) in European states can be similar (the only form of preliminary investigation is inquiry, the role of the police as a service model), the device and the functions of judges in OECD countries vary. A variety of models of the criminal process in the OECD member countries represent, among other things, effective legal institutions that can be formulated by Kazakhstani law as part of further reforms.

Meanwhile, when defining the conceptual model of criminal procedural interaction between the key subjects of the prosecution, Kazakh scientists and practitioners have many controversial issues, both theoretical and practical. The main ones are whether the new wording of paragraph 1 of Article 83 of the Constitution means that only the prosecution authorities have the right to carry out criminal prosecution? How does this amendment correlate with the norms of the Code of Criminal Procedure, and is there any need to make the last necessary amendments? These and other questions require a detailed scientific and practical analysis.

It is appropriate to cite the position of Spirin A.V., who believes that «the main function for the prosecutor in pre-trial proceedings is the function of supervision, which is of a constitutional and legal nature and is not characteristic of any other state bodies and officials involved in the criminal process» [7, p.54 -60].

It seems reasonable to define «the essence of departmental procedural control in organizing an investigation, assisting the investigator (interrogator) in drawing up an investigation

[3] *Официальный сайт Федерального министерства юстиции Германии. https://www.bmj.de [дата обращения: 28.12.2022]*

plan for a specific criminal case, monitoring the implementation of this plan, monitoring the rational use of working time by investigators, and the proper organization of their work [8, p. .76-77], in the management of the investigation of a crime in order to correctly determine the direction of the investigation and prevent violations of the law» [9, p.161].

As suggestions for optimizing the ratio of the supervisory powers of the prosecutor and the control powers of officials of the investigation and inquiry bodies, scientists propose the following [8, p.8-18].

Firstly, the concept of «departmental procedural control of the head of an investigative body, body of inquiry» should be introduced into the Code of Criminal Procedure of Kazakhstan. At the same time, a clear separation of organizational and procedural powers exercised within the framework of departmental control should be fixed.

Secondly, it is important to provide the prosecutor with the possibility of immediate, without any kind of approvals and permits, access in the format of electronic criminal proceedings to cases that are in the production of the investigation and inquiry bodies, terminated criminal cases and for which the investigation period has been interrupted.

Thirdly, the issues of planning and organizing the process of pre-trial investigation, determining the direction of the preliminary investigation and inquiry, putting forward versions, choosing tactics and methods of investigation, etc. should remain within the competence of the head of the investigative body and the inquiry unit.

Such an approach, A.N. Akhpanov, Z.G. Kaziev and others suggest, will form a consistent, effective and balanced system of powers of the prosecutor to oversee the procedural activities of the pre-trial investigation bodies, as well as the control powers of the heads of the investigation and inquiry bodies.

At the same time, prosecutorial supervision and departmental procedural control in pre-trial investigation will complement each other, ensuring compliance with the law in the investigation of criminal cases, protecting the rights and legitimate interests of participants in the criminal process.

Regarding the analysis of the domestic Code of Criminal Procedure, defects were identified that contribute to the formation of various practices for the application of the current legislation.

1. It is necessary to include in the definition of the term «actual detention» an element of short duration and submit subparagraph 29) of Article 7 of the Code of Criminal Procedure in the following wording: «*29) actual detention is a* ***short-term*** *restriction by an authorized official of the criminal prosecution body ...*» and further in the text.

Such an approach will be determined by the following circumstances: 1) the Code of Criminal Procedure differentiates the terms of detention of a suspect; 2) the total period of detention is not subject to extension; 3) the amendment focuses the criminal prosecution authorities on the minimum reasonable limitation of the period of actual detention, while providing the investigation authorities with sufficient time in time pressure to collect evidence; 4) establishing signs of a criminal offense and the grounds for detention up to 72 hours and subsequent possible arrest (detention). In addition, the current part five of Article 128 of the Code of Criminal Procedure includes the period of actual detention in the 72-hour period of detention.

2. We propose to supplement subparagraph 29) of Article 7 of the Code of Criminal Procedure with a provision on the beginning of the period of actual detention, setting it out as follows:

«*The beginning of the period of actual detention is calculated from the moment the person is brought to the criminal prosecution body».*

In practice, the investigator, the interrogator may need more than three hours to inspect the scene, collect a large amount of initial evidence, perform a number of urgent investigative actions, delay in which may lead to the loss of evidentiary information. Moreover, Article 129 of the Code of Criminal Procedure refers 3 hours to the concept of «delivery» and does not connect this time with the actual detention.

3. Part one of Article 119 of the Code of Criminal Procedure reads:

«*1. Evidence in a criminal case is the actual data contained in the protocols of investigative actions drawn up in accordance with the rules of this Code, the protocol drawn up in accordance with the requirements provided for in Article 527 of this Code, certifying the circumstances directly perceived by the person conducting the criminal proceedings, as well as established during examination, examination, seizure, search, detention, seizure of property, presentation for identification, obtaining samples, exhumation of a corpse, verification*

of testimony on the spot, presentation of documents, investigative experiment, study of the results of covert investigative actions, examination of material evidence conducted by a specialist in the course of investigative action, as well as contained in the minutes of the court session, reflecting the course of judicial actions, and their results».

It should be taken into account that factual data in itself cannot be evidence. It is necessary to speak specifically about the facts that may be contained in the protocols of investigative actions, this is, firstly. Secondly, along with this, it is necessary to use the term «***and other documents (objects)***», which can also be evidence, since a wide variety of evidence can take place in the material world and their list should not be subject to restrictive interpretation. This will make it difficult to collect evidence.

4. Part 6 of Article 158 of the Code of Criminal Procedure provides:

«*6. The decision on the temporary suspension of the suspect, the accused, the defendant from office is sent to the place of his work to the head of the organization, who,* ***within three days after*** *receiving it, is obliged to execute the decision and notify the person who filed the petition for removal from office».*

In accordance with Article 155 of the Code of Criminal Procedure, measures of procedural coercion are appointed in order to ensure the procedure for investigation, criminal proceedings, and proper execution of the sentence provided for by the Code of Criminal Procedure. In a number of cases, when the suspect, the accused work as a law enforcement officer and can oppose the ongoing investigation using their official position, temporary removal from office ***should be carried out immediately***, and not within three days.

With this in mind, we propose in Part 6 of Article 158 of the Criminal Procedure Code of the Republic of Kazakhstan to provide for immediate suspension from office.

5. In accordance with Article 136 of the Code of Criminal Procedure, the body conducting the criminal procedure, within its powers, has the right to apply one of the preventive measures provided for in Article 137 of the Code of Criminal Procedure to the suspects, the accused.

Along with this, such preventive measures and additional restrictions as a written undertaking not to leave and proper behavior, personal guarantee, transfer of a serviceman under the supervision of the command of a military unit, transfer of a minor under supervision, use of electronic surveillance tools are applied on the basis of a decision of the body conducting the criminal process.

One of the measures of criminal procedural coercion provided for by law is the drive, regulated by Article 157 of the Code of Criminal Procedure. In accordance with this provision, the person conducting the pre-trial investigation, the court may subject the suspect, the accused, the defendant, as well as the witness who has suffered to be summoned.

In other words, the prosecution decides to restrict the rights and freedoms of the defense, which is fundamentally at odds with the adversarial principle, which implies that all preventive measures, regardless of their severity and degree of interference with human rights and freedoms, must be subject to judicial control.

It should be noted that the drive, in its essence, is the same preventive measure as the additional restrictions specified in Article 137 of the Code of Criminal Procedure.

It is required to fix at the legislative level that the application of all preventive measures, electronic means of tracking to suspects, accused persons and bringing to other persons, solely on the basis of the decision of the investigating judge, court.

6. In addition, the gaps in resolving the issue of appointing the main trial and preparatory actions for the court session indicate the presence of problems of competitiveness of the parties and equality of the participants in the criminal process, not only in legislative, but also in law enforcement practice.

Thus, in the first part of Article 321 of the Code of Criminal Procedure, the obligatory holding of a preliminary hearing in cases of especially grave crimes is enshrined. In other cases, such a hearing is held if it is necessary to make a decision to refer the case to jurisdiction, refer the case to the prosecutor, terminate the case, suspend the proceedings, join and separate criminal cases, as well as consider the petitions of the parties.

In order to exclude the privileges of the prosecution, the preliminary hearing procedure is recommended to extend this provision to not only cases of especially grave, but also to minor and medium-gravity crimes.

7. In the current Code of Criminal Procedure, Article 193 stipulates that the prosecutor during the pre-trial investigation «*12) withdraws cases from the body conducting the pre-trial investigation and transfers them to another pre-trial investigation body in*

accordance with the investigative jurisdiction established by this Code; in exceptional cases related to the need to ensure the objectivity and sufficiency of the investigation, at the written request of the criminal prosecution body or a participant in the criminal process, transfers cases from one body to another or accepts them for its own proceedings and investigates them regardless of the investigative jurisdiction established by this Code;

12-1) has the right to carry out pre-trial investigation in cases of torture, criminal offenses provided for by Chapter 17 of the Criminal Code of the Republic of Kazakhstan.

The Prosecutor General has the right, in exceptional cases, on his own initiative, to entrust the conduct of a pre-trial investigation to a prosecutor, regardless of the investigative jurisdiction established by this Code».

At the same time, investigative jurisdiction is not defined in Article 187 of the Code of Criminal Procedure, which is a violation of the criminal procedure law.

We propose to introduce the investigative apparatus into the prosecutor's office and to determine in article 187 of the Code of Criminal Procedure the jurisdiction of investigators of the prosecutor's office, as it was in the old days. The investigative divisions of the prosecutor's office were liquidated in connection with the creation of an independent Investigative Committee, which lasted only 2 years. The exclusion of the investigative divisions of the prosecutor's office and the closure of the Investigative Committee has sharply reduced the level of pre-trial investigation, which is beneficial for criminal elements, since the shortcomings of the pre-trial investigation are always used by their lawyers to return criminal cases to the prosecutor, most of which are then terminated.

Conclusion

Based on the analysis of the Code of Criminal Procedure, the following conclusions were made:

Amendments and additions to the Code of Criminal Procedure lead to a tendency to increase the number of adopted laws that change and supplement the above Code, which is a consequence of reforms aimed at improving national legislation.

The studied legislative act is unstable. Changes were made to it by laws on amendments and additions as part of ongoing reforms in the field of criminal procedure legislation in the Republic of Kazakhstan.

The greatest number of changes and additions made can be explained by the intensity of work on legislative initiatives in these years.

In the above legislative act, the facts of amendments and additions are noted with a significant time interval between the laws on amendments and additions.

Further improvement of the legislation will allow the Republic of Kazakhstan to respond in a timely manner to the challenges of modern times, which are more related to the digitalization processes in the country and the world.

The frequency of amendments and additions to the Code of Criminal Procedure is due to the general dynamics of the ongoing transformations in the implementation of the strategic directions of development of Kazakhstan (Strategies «Kazakhstan-2030», «Kazakhstan-2050», the Concept of the legal policy of the Republic of Kazakhstan until 2030, the National Development Plan of the Republic of Kazakhstan until 2025 and etc.).

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