COMPARATIVE ANALYSIS OF THE CRIMINAL PROCEDURE LEGISLATION OF 1999, 2017, AND 2021 WITH THE FOCUS ON REGISTRATION PROCEDURE OF DOMESTIC VIOLENCE AND RAPE

by Saule Aripova

MA in Human Rights Final Thesis
SUPERVISOR: Karoly Bard
Central European University - Private University

[16.06.2022]

EXECUTIVE SUMMARY

Kyrgyzstan inherited a punitive criminal justice system with strong prosecution, weak defence and a lack of judicial independence from Soviet times. The criminal legislation of 1999 did not address the said issues. The State embarked on criminal justice reform to comply with a human-rights-based approach, adversarial principles and international standards after the 2010 constitutional reform when Kyrgyzstan became semi-parliamentary democracy. The reform resulted in 2017 criminal legislation. However, after yet another constitutional change initiated by the populist regime, Kyrgyzstan has a semi-presidential political system. The new criminal justice counter-reform was initiated. Among other things, it re-introduced an instigation of a criminal case and pre-investigation inquiry, which existed in the 1999 criminal procedure and was eliminated in the 2017 criminal justice reform.

This research attempts to shed light on these two mechanisms of pre-trail proceedings to identify the risks to victims' rights at these standalone stages of criminal proceedings regarding domestic violence and rape. Analysis of legislation, statistical analysis, and semi-structured interviews with experts in the field demonstrate that pre-investigation inquiry and instigation of a criminal case are mechanisms of the Soviet era that present a severe challenge to the integrity of human rights safeguards in pre-trial proceedings. The most pressing concerns concerning the said mechanisms, among other things, include an utter disregard for victims' rights, violation of fair trial rights, and reasonable time of proceedings.

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GLOSSARY

Pre-investigation inquiry - verification actions, inter alia, expert examination, interrogation of witnesses, an inspection of the scene, aimed at collecting information on a case prior to the formal instigation of an investigation

Instigation of a criminal case – formal start of a criminal investigation upon issuance of a decision on the instigation of a criminal case by an investigator or prosecutor

INTRODUCTION

The thesis will focus on analyzing law enforcement's legislative and institutional framework at the initial stage of criminal procedure, mainly the case registration. The analysis of legislation will cover the criminal procedure codes of 1999, 2019, and 2021 in Kyrgyzstan.

The chapter will provide background for this research, i.e., the legal and political setting for the criminal justice development in the Kyrgyz Republic. It will further concentrate on presenting the theoretical framework and research methodology for further analysis.

From the Soviet period, the Kyrgyz Republic inherited a punitive criminal justice system characterized by a lack of judicial independence, strong prosecutorial powers, and weak legal defence. The introduction of criminal legislation to replace Soviet codes (i.e. in 1999) did little to address said issues.

The ratification of a new Constitution in 2010[1] resulted in a move from a strictly presidential to a more semi-parliamentary political system. The Government embarked on reforming the criminal justice system, involving civil society and leading international organizations, which resulted in the introduction of the new criminal legislation in 2017. The implementation of the new criminal justice reform included decriminalization and depenalization, availability of legal aid, and increased judicial oversight over investigations, among other things.[2] One of the key innovations introduced by these laws, which entered into force in 2019, included abolishing

[1] 'The Kyrgyz Republic Constitutional Referendum OSCE/ODIHR Limited Referendum Observation Mission Report' (OSCE/ODIHR 2010) Limited Referendum Observation Mission Report <https://www.osce.org/files/f/documents/0/3/70936.pdf>.

[2] Aslan Kulbaev, *Criminal Procedure of the Kyrgyz Republic* (Soros Foundation Kyrgyzstan) <https://soros.kg/wp-content/uploads/2021/01/Soros_Ugolovnyi_Process_Web.pdf>.

the pre-investigation inquiry and instigating crime stages and introducing a "notifiable offence" concept and the immediate registration in the automated system Unified Register of crimes.[3]

Political turmoil following the October 2020[4] parliamentary elections resulted in constitutional change and a return to the presidential political system led by a populist regime. In March 2021, the Government launched a sweeping review of the criminal justice legislation. Concerning the Criminal Procedure Code, the revision of the legislation embodied the discontent of the law enforcement with the criminal legislation of 2017. Law enforcement never adapted to the new legislation, and the government failed to initiate a comprehensive institutional reform. Among other things, the criminal legislation of 2021 re-introduced the stage of instigation of a criminal case and pre-investigation inquiry – two mechanisms of the Soviet era that present a severe challenge to the integrity of human rights safeguards in pre-trial proceedings.[5] The procedure of 'instigation of a criminal case' and pre-investigation inquiry existed in the Criminal Procedure Codes of post-Soviet republics and vests the investigator with broad discretion to instigate a criminal investigation arbitrarily.

The Codes of 1999 and 2021 foresee an 'instigation of a case,' which is preceded by the pre-investigation inquiry carried out by the field detectives ('operativniki') upon the investigator's inquiry. The pre-investigation inquiry per CPC 2021 lasts from 10 to 30 days. Field detectives work separately from the investigators, who formally start the investigation by issuing a decision to instigate a case after the pre-investigation inquiry. The procedural rights of the case participants emerge only after the investigator officially instigated the case. The most concerning elements of the pre-investigation inquiry, among other things, include interrogation

[3] ibid.
[4] 'Kyrgyzstan's "Third Revolution" and the Road to Another Victor's Constitution' (*ConstitutionNet*) <https://constitutionnet.org/news/kyrgyzstans-third-revolution-and-road-another-victors-constitution> accessed 17 June 2022.
[5] 'Kyrgyzstan: Proposed Legal Changes Threaten Political Dissent' (*Human Rights Watch*, 3 May 2021) <https://www.hrw.org/news/2021/05/03/kyrgyzstan-proposed-legal-changes-threaten-political-dissent> accessed 17 June 2022.

of a suspect and victim in a procedural status of witness, use of interrogation protocols after the case is instigated, and initiation of expert examination outside the formal criminal procedure.

The 2019 Code completely changed the crime recording practice, making every incident registration mandatory and subject to registration within 24 hours. If the investigator found the case unsubstantiated, the option of dismissal of a case was possible. This reform abolished the pre-investigation inquiry, and the parties to the case acquired procedural rights from the moment of registration of a crime or misdemeanour in the Unified register of crimes. The reform extended judicial review at the pre-trial stage by introducing a specialized judge and vesting this procedural figure with significant powers.[6] The "operativniki" were withdrawn and could only act upon the investigator's request. As a result of the reform, the registration of incidents increased significantly. The increase in registration was also facilitated by introducing the Unified register of crimes – an automated information system for all the law enforcement agencies that reflects every procedure envisaged by the CPC.

In that regard, this study is limited to the analysis of crime reporting procedure with a focus on domestic violence and rape, crimes with traditionally high latency[7]. The central issue of this study is the analysis of the re-introduction of the pre-investigation inquiry and its impact on the underreporting of the mentioned crimes. The analysis will further research the legislative and institutional framework which potentially facilitates underreporting practices.

[6] Kulbaev (n 2).
[7] 'The United Nations Office on Drugs and Crime (UNODC) Programme Office in the Kyrgyz Republic. Results of a Victimological Study in the City of Bishkek and Pilot Housing Projects. Bishkek, 2019' (*National Statistical Committee of the Kyrgyz Republic*) <http://www.stat.kg/ru/publications/viktimologicheskoe-issledovanie-v-gbishkek-i-pilotnyh-novostrojkah/> accessed 17 June 2022.

The comparative analysis will focus on the analysis of the structure of the registration process and look into the institutional frameworks it is based on for the three sets of Codes in an attempt to answer the main research question:

Will the pre-investigation inquiry re-introduced in December 2021 contribute to the underreporting of gender-based violence?

And, continue to the sub-questions: *Will the pre-investigation inquiry facilitate violation of victims' rights?*

THEORETICAL FRAMEWORK

This Chapter will attempt to summarize the academic literature focusing on the research of the criminal proceedings at the case registration stage. The literature review will be structured around the discourse around criminal procedure, focusing on the crime registration procedure. Considering that the procedures in discussion exist in the post-Soviet countries, the literature review will cover the academic literature on the genesis of the 'pre-investigation inquiry' and 'instigation of a criminal case' procedural stages in post-Soviet countries in attempt to understand the historical reasons for the emergence of this additional procedure. The Chapter will further elaborate on the research methodology to further analyze the crime recording procedure and its implications for the registration of domestic violence and rape cases.

Literature review

The pre-investigation inquiry in essence are verification actions, inter alia, expert examination, interrogation of witnesses, inspection of the scene, aimed at collecting information on a case prior to the formal instigation of an investigation. This stage did not exist in the early Soviet criminal procedure. Before introducing the Criminal Procedure Code of the Soviet Union

Republics in the 1960s, the instigation of an investigation was formalized only by the issuance of an official decision by local tribunals after receiving a report of the "militia".

The scholars confirm that the simplification of the pre-trial proceedings in the mid-1930s led to a wave of mass repressions[8]. For instance, the Decree of the Central Executive Committee of the USSR "On Amending the Current Criminal Procedure Codes of the Union Republics," dated December 1, 1934, stated that in cases of terrorist organizations and terrorist acts against workers of the Soviet government, the investigation had to end in no more than ten days, the indictment was served to defendants a day before the trial of the case in Court, the trial was carried out without the parties to a case, the appeal of sentences was not allowed, petitions for pardon were not accepted, the sentence of capital punishment was carried out immediately after its announcement of a court decision.[9]

The introduction of a formal procedural decision to instigate an investigation as an independent stage of pre-trail proceedings, which included not just the issuance of a decision but also a pre-investigation inquiry, was, in fact, an attempt in the 50s and 60s to create an additional, albeit formal, guarantee against unreasonable and arbitrary criminal prosecution[10].

The procedural control in the circumstances of the Soviet justice system, where the courts had no real independence from the executive power, had to be attributed to the law enforcement agencies themselves. [11] The Soviet officials responsible for the pre-trial inquiry were investigators who instigated the case only after the successful pre-investigation inquiry conducted by field detectives (operativniki)[12]. The investigators in the pre-trial phase were

[8] Daniyar Kanafin, 'Legal Analysis of the "Instigation of an Investigation" Stage of Pre-Trail Proceedings in the Draft Criminal Procedure Code of Kyryzstan'.
[9] Федорова И.А., 'Возбуждение Уголовного Дела – История Возникновения Стадии в Уголовном Процессе России' <https://cyberleninka.ru/article/n/vozbuzhdenie-ugolovnogo-dela-istoriya-vozniknoveniya-stadii-v-ugolovnom-protsesse-rossii/viewer> accessed 12 April 2022.
[10] Daniyar Kanafin (n 8).
[11] ibid.
[12] Федорова И.А. (n 9).

responsible for collecting evidence and constructing the case and lacked neutrality. Their accusatorial position of investigators and prosecutors was also very powerful due to the judiciary's weakness. Acquittals in Court were considered a "black mark" for the judges and marred the high-performance rates of administration of justice. The judiciary's performance, prosecution, and investigation relied on quantitative indicators and thereby spurred the accusatorial nature of the administration of justice.[13] Judges were constrained to reject indictment and hold the investigators accountable for violation of procedures after the State dedicated that many resources for the investigators to construct the case. In addition, the legislation did not envisage judicial review over the pre-trial phase, inter alia, detention, and searches. That was the responsibility of the prosecution. The accusatorial model that evolved in the USSR was an extreme version of a Crime control model, with practically non-existent judicial review of the evidence and arguments of the sides and a weak defense council. The whole state apparatus in the administration of justice, including investigation, prosecution, and judiciary, worked together to "fight crime."

All post-Soviet countries inherited criminal justice systems from the USSR, and the shift to a modern criminal justice system was not quick. Conviction bias was familiar to many post-Soviet countries.[14] The pre-investigation inquiry and instigation of the case facilitated the institutionalization of incentives for the prosecution of a large number of defendants to meet performance rates. The inquisitorial model with a solid accusatorial bias persisted for 20 more years in most of the countries of the former Soviet Union[15]. Scholars argue that with a rare exception of Estonia, these countries still have not succeeded in reforming the administration

[13] Гусев Л.Н.; Голунский С.А, *История Законодательства СССР и РСФСР По Уголовному Процессу и Организации Суда и Прокуратуры, 1917-1954 Гг.*. (Госюриздат 1955).
[14] Peter H Solomon, 'Post-Soviet Criminal Justice: The Persistence of Distorted Neo-Inquisitorialism' (2015) 19 Theoretical Criminology 159.
[15] Peter H Solomon, 'The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice' (1987) 39 Soviet Studies 531.

of criminal justice to fair trial standards, especially in terms of equality of arms, respect to human rights, and impartial judicial review.[16] The failure to carry out successful reforms is attributed to the dominant role of investigators and weak judicial systems, where the well-established institutions were averse to modernization and development.[17] The cases of criminal justice reforms in Russia, Ukraine, and Estonia demonstrated the models of reforms that represent all the stages of criminal justice transformation in other post-Soviet countries. [18]

The Russian Federation launched a reform of criminal justice in the early 1990s. The reform introduced important novelties, including adversarial principles, improvement of defense access to the case at the pre-trial stage, jury trials, better protection of judges, etc., albeit, at the pre-trial phase, investigators retained significant powers.[19] The pre-investigation inquiry in modern Russia still https://fparf.ru/polemic/opinions/dosledstvennye-proverki-ne-mogut-byt-uprazdneny/

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On the other hand, Estonia is a post-Soviet state that, in a democratic process, managed to construct a criminal justice system without accusatorial bias with "pre-trial procedure (led by prosecutors and judges) with an adversarial trial and judges who act impartially."[20] The transformation that started in the early 1990s accelerated in 2003 in Estonia's preparation for EU membership. The reform pillars included judicial reform, which started in 1991 and focused on the independence and impartiality of the Court. The reform of criminal procedure put the

[16] ibid.
[17] Solomon (n 14).
[18] ibid.
[19] ibid.
[20] ibid.

prosecutor in charge of investigation balanced with investigatory the judge, whose approval is needed for detention, searches, and covert measures increased the powers of defense, and introduced plea bargaining, summary trials, and penal orders.[21]

Ukraine was a case of reference for the attempted criminal justice reforms in Kyrgyzstan and Kazakhstan. The Ukrainian legislator eliminated the formal decision to open the case vested with the investigator. Instead, all reports of crimes had to be immediately registered in the Unified register of pre-trial proceedings which amounts to formal start of an investigation[22]. The new pre-trial procedure was meant to reduce the paperwork associated with the now eliminated preliminary investigation to stop investigators from ignoring the cases with no apparent suspects and change the incentives affecting investigators so that fear of negative assessments.[23] An important novelty was the introduction of judicial control at the pre-trial stage, which carried out judicial review and authorization of the requests for pre-trial detention, searches, and covert actions.[24]

Pre-investigation inquiry and the institutional framework inherited from the Soviet times facilitated faking the performance statistics contributing to the poor registration discipline and human rights abuses.[25] Officials from a variety of law enforcement agencies, seeking to "hit their numbers,"[26] developed techniques of selecting the "right" cases (and avoiding "wrong" ones), manipulating charges depending on the victim's and defendant's status.

[21] ibid.
[22] 'New Criminal Procedure Code of Ukraine / Новый Уголовно-Процессуальный Кодекс Вступил в Силу' (*Зеркало недели | Дзеркало тижня | Mirror Weekly*) <https://zn.ua/SOCIETY/novyy_ugolovno-protsessualnyy_kodeks_vstupil_v_silu.html> accessed 17 June 2022.
[23] Ella Paneyakh, 'Faking Performance Together: Systems of Performance Evaluation in Russian Enforcement Agencies and Production of Bias and Privilege' (2014) 30 Post-Soviet Affairs 115.
[24] Ukraine was main point of reference for the criminal justice reforms in Kazakhstan and Kyrgyzstan. Leading criminal justice experts actively participated in the working groups, several official delegations from Qazakhstan and Kyrgyzstan went to Ukraine with study visits, including on development of the Unified register of pre-trial proceedings
[25] Paneyakh (n 23).
[26] ibid.

There is scarce academic literature on the issue of pre-investigation inquiry and instigation of a case, although this particular stage creates many risks of the violations of human rights, that this research will cover in the next chapters. Therefore, there is a gap in academic discussion of the crime recording procedure in post-Soviet countries, all the more so, on criminal procedure legislation in the Kyrgyz Republic. The integrity of crime reporting is a crucial factor for ensuring public order, crime prevention, achieving justice, therefore, I hope that the results of this research will add to the discourse around legislative and institutional approaches in crime reporting procedure in Kyrgyzstan.

Research methodology

This analysis will attempt to address significant problems connected with the pre-trial inquiry and instigation of a case and demonstrate the risks of new criminal legislation in terms of access to justice for the victims of domestic violence and rape.

The study is limited to the registration stage and will not cover investigation, prosecution, court proceedings, and execution of the sentence. The key comparators in the framework of this study are the registration and opening of the case in the Criminal procedure codes of 1999, 2019, and 2021.

The analysis will also include semi-structured interviews with experts in the field (defense lawyers from Kyrgyzstan), local experts on GBV, and academics. In addition, the research will analyze the statistics on crime reporting of the mentioned crimes for three months of each year from 2005 until 2022 to examine the general trends over 17 years.

CRIMINAL PROCEDURE LEGISLATION IN THE KYRGYZ REPUBLIC IN 1999, 2017, AND 2021

This chapter contains analysis of development of the criminal procedure legislation in the Kyrgyz Republic over the span of thirty years with the focus on registration of the crime, specifically pre-investigation inquiry and formal instigation of a case.

Crime reporting procedure per Criminal Procedure Code of 1999, 2017, 2021

The evolution of the criminal procedure in the Kyrgyz Republic is tightly connected to the socio-political changes in general. The 2017 reform was initiated after the 2010 constitutional change when Kyrgyzstan transformed to semi-parliamentary democracy. Under the pressure of civil society and support of international organizations, the government started discussions of a criminal justice reform which would bring legislation in line with international standards and in compliance with human-rights based approach. The new criminal legislation was a significant development towards humanization, depenalization, and a victim-oriented criminal justice system; however, the full implementation of the reform did not follow. The institutional setting was still a heritage of Soviet Union, e.g., very centralized law enforcement with little transparency and accountability.

The Criminal Code, the Criminal Procedure Code, and the Code of Administrative offenses of 1999 was Soviet criminal legislation, much like in other post-Soviet countries. The Criminal procedure Code of 1999 tried to address punitive nature of the Code procedure Code of Union Republics of 1960 by introducing important guarantees like presumption of innocence and access to defense. However, implementation of the said mechanisms remained week. The pre-investigation inquiry and the instigation of case stage were a serious concern. An analysis of the investigative practice of the Internal Affairs Directorate of the Sverdlovsk district in Bishkek demonstrated official refusals to instigate a criminal investigation were issued in

regard to 41 robberies and 2 cases of plundering, while the crimes were committed[27]. Other study suggested that in average 75% of claimants were refused the instigation of criminal investigation, including upon reconciliation or revoking of a claim.[28]

As of January 1, 2019, a series of new codes came into effect in the Kyrgyz Republic. Adopted in 2017 to regulate criminal and administrative liability and procedure, these included the Criminal Code, the Criminal Procedure Code, the Penal Enforcement Code, the Code of Misdemeanours, and the Code of Violations. The new codes replaced those adopted in 1999. The 2019 reform made it possible for Kyrgyzstan to move away from the Soviet-era approach to legal regulation and build a modernized system consistent with the rule of law principles.

The most relevant to the presented analysis changes included, inter alia, the new categorization of crimes and a completely new registration procedure. Kyrgyzstan moved from a two-level system of classification of offenses (crime - administrative offenses) to a three-level system (crime - misdemeanor - violation). Socially harmful acts were divided into three categories, depending on public danger: crimes, misdemeanors, and violations. Each type is regulated by the relevant regulatory act with its system. Violations did not lead to a criminal record, and sanctions contained the shortest possible list of penalties, namely a warning and a fine. The commitment of a misdemeanor did not entail detention or a criminal record, and sanctions included fine community work and probation. Code on misdemeanor eliminated, inter alia, administrative arrests, and administrative detentions, widely practiced before .

Regarding the registration procedure, the Criminal procedure code introduced the Unified register of crimes and misdemeanors. The general prosecutor's office developed and

[27] 'Conceptual issues of reforming the criminal proceedings of the Kyrgyz Republic (Transcript expert forum)' (UNDP, UNODC, OHCHR, Soros Foundation Kyrgyzstan, OSCE, GIZ, USAID 2013).
[28] Leyla Sydykova and Aslan Kulbaev, 'Novels of the Criminal, Criminal procedural and Penal legislation of the Kyrgyz Republic: study guide: Part 1.'

maintained the system and accommodated 4 000 users from all the law enforcement agencies involved in pre-trial proceedings. According to the roles and procedural powers, the system reflected procedures envisaged by the Criminal procedure code. The registration procedure changed significantly. The incident registered in the police logbook was registered in the unified register of crimes and misdemeanors in 24 hours. The pre-trial proceedings started upon registration, and the procedural guarantees to the victims and suspected individuals were attributed to them from that moment on.

In May 2021, a working group set up by Kyrgyzstan's Presidential Council and the GPO on Improving Judicial and Law Enforcement Practices prepared draft codes to replace those of 2019 (abolishing the Code of Misdemeanors and replacing the Code of Violations with the Code of Offenses (similar to the Soviet Code on Administrative Offences). The draft new codes came into force on December 1. The new codes were conceived as a comprehensive reform of Kyrgyzstan's criminal legislation.

Per the Criminal Procedure Code of 2021, the pre-investigation inquiry, starting with the registration of the incident in the Unified Register of Crimes, includes such actions as the inspection of the scene, the interrogation of a witness, the production of expert examinations, the public receipt of samples for comparative research, the reclamation of documents and objects issuing orders to the body to conduct operational-search activities. This procedure means returning to the Soviet type of regulation at the beginning of pre-trial proceedings. The following contradictions of this procedural mechanism are striking.

The possibility of interrogating a witness at this stage of criminal proceedings creates conditions for manipulation and violations of such a fundamental human right as the right against self-incrimination. According to part 2 of article 198 of the Code of Criminal Procedure , those summoned for interrogation as a witness or victim are informed of criminal liability for

refusal or evasion from testifying and knowingly giving false testimony. The investigator is obliged to warn that a witness, victim, or a suspect has a right not to self-incriminate, according to Article 198, only after the case is instigated.

At the same time, there is no direct and unambiguous prohibition in the Code on the use of protocols of interrogations as a witness, who later in the criminal procedure becomes a suspect or defendant. That means procedural legislation gives a clear opportunity for law enforcement to collect testimonies from the witnesses with a very ambiguous procedural status and minimal procedural guarantees.

This stage of the pre-trial phase suggests a very questionable nature of the commission of examinations. Examinations can be conducted at the stage of pre-investigation inquiry and later when the investigation is instigated. In the latter case, the judge, prosecutor, or investigator can request the examination per Article 178. Article 181 provides guarantees to the defense, inter alia, suspect, accused, victim, witness, defense lawyer, and representative of the victim can get acquainted with the resolution on the appointment of an expert examination; challenge the expert; apply for the involvement of the persons indicated by them as experts, as well as for the production of an expert examination by a commission of experts; apply for the introduction of additional questions to the expert in the decision on the appointment of an expert examination or for clarification of the questions raised; be present with the permission of the prosecutor and investigator during the performance of the examination, to give explanations to the expert; get acquainted with the expert's opinion or the report on the impossibility to give an opinion, as well as with the protocol of the expert's interrogation.

However, the pre-investigation inquiry examination does not provide these since, at this stage, the suspect and the victim are simply absent as subjects of criminal procedural relations. The expertise obtained at this stage raises doubts about reliability and objectivity since the defense

and victim sides cannot exercise their rights during their appointment and production. The examination at this stage per article 153 includes inspection of the scene and inspection of the corpse, interrogation as a witness, appointment and production of expert examinations, including request of samples for comparative analysis, request official documents and items, and commission of the operational search measures (i.e., investigative measures). The latter is handled by the separate legislation, i.e., the Law on operational-search measures of 1998.

The commission of expert examinations, including request of samples for comparative analysis and request of official documents and items without sufficient grounds to believe that the crime took place and there was a need for a full-fledged investigation, is unjustified and prone to abuse by the law enforcement. These expert examinations are commissioned extra-judicially, i.e., without the authorization of a judge.

The implementation procedures for the examinations at the pre-investigation inquiry raise concerns as to the guarantees of the reliability of the results and the observance of the rights of participants, which are not regulated in any way in the Code. This procedure allows for abuse from the law enforcement, as it grants the possibility to commence a pre-investigation inquiry on a far-fetched or inspired pretext and commission all the checks and investigative procedures when the investigation has not officially started, and there are no opportunities to defend oneself.

According to Article 153 part 2, the decision on the instigation of the case investigation after the pre-investigation inquiry must be taken in 10 days. Given the very dubious list of restrictive actions, it is evident that the persons involved in the criminal procedure may be in an indefinite legal status during this very long time, while their rights will be limited. The main problem of this State of affairs violates the principle of equality of arms: the criminal prosecution authorities receive a wide range of tools for collecting evidence and a prolonged period for this

without any participation of the defense, and therefore without ensuring the rights of a suspect. The status of a victim is also absent at this stage, and therefore the victim and therefore a victim has to wait for ten days for a decision on a statement or report of a crime. The pre-investigation check can be prolonged for up to 20 more days by the prosecutor upon request of the investigator. Such prolongation is possible if the expert examination requires more time or the need to interrogate witnesses from remote areas or those who evade summons.

Below is the schematic demonstration of the crime reporting procedure based on the Criminal procedure Codes of 1999, 2017, and 2021.

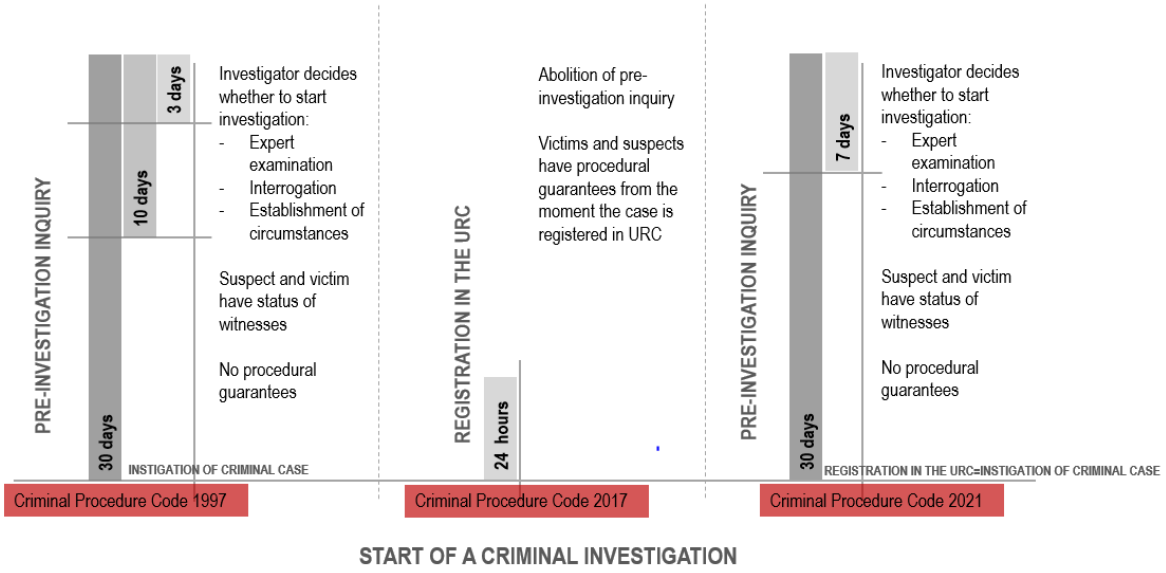


Figure 1Comparative scheme of crime reporting procedure per 1999, 2017 and 2021 legislation[29]

The presented scheme complements the analysis above and demonstrates the key differences of the crime reporting procedure per different sets of criminal legislation. The most concerning features of the 1999 and 2021 legislation is the prolonged pre-investigation inquiry, which can take up to 30 days. During this time the parties to a case are of undefined status and are not

[29] Developed based on the Article 153 of the Criminal Procedure Code 2021, Article 156 of the Criminal Procedure Code 1999 and Article 149 of the Criminal Procedure Code of 2017

provided any procedural guarantees. Although, the 2021 allows for access to qualified legal aid, the advocate do not have any procedural rights until the official decision to instigate a criminal case is issued. Another difference is the Unified register of crimes, which keeps the record of every registered incident and allows for better oversight of the refused instigations. However, this is still not a guarantee against abuse at this standalone stage of crime reporting. Of course, the 2017 legislation was a revolutionary for the country which persisted in its old ways in terms of its criminal justice policy. The law enforcement was raising the issue of underfinancing, lack of technical means, huge workload after the entry into force of the new legislation in 2019. The next part of this chapter will shed some light on the institutional setting of criminal justice in Kyrgyzstan.

VAW legislative response

The Kyrgyz Republic is one of the rare countries with specific legislation to address domestic violence - Law on the Prevention and Protection against Family Violence, 2017. At the same time, the adoption of this new legislation results from pressure from civil society and international organizations, the Law as it now does not provide a practical framework for tackling domestic violence. As of December 2021, Kyrgyzstan adopted a new set of criminal legislation, which was widely perceived as a significant deterioration of criminal justice regarding human rights safeguards for victims and the accused. This part of the essay will cover the most pressing issues connected with the State's response to domestic violence.

After abolishing the Codes of Misdemeanors (2017), domestic violence is considered both through the Code of Offenses (in reality is a revised soviet Code of Administrative Offenses) and the Criminal Code introduced in 2021. Under Article 70 of the Code of Offenses, domestic violence constitutes an "intentional use of physical, psychological, economic violence or the threat of physical violence." It is punishable by community work for 40 hours or administrative

arrest[30] for three to seven days. About the Law on the Prevention and Protection against Family Violence, which introduces the mechanism of the protection order, the failure to comply with the terms of the temporary protection order "in the absence of signs of a crime in the act" constitutes an offense under Article 71 of the Code of Offenses and is punishable by community work for 40 hours or application of arrest from three to seven days.

The aggravated domestic violence in the form of intentional actions of one family member towards another family member, causing physical or mental suffering resulting in less serious harm to health, constitutes a crime under Article 177 of the Criminal Code . It is punishable by community service from forty to one hundred hours or by deprivation of liberty for five years.

The decision to divide actus reus between the Code of (administrative) Offenses and the Criminal Code grants broad discretion to the police which procedure to follow in the proceedings. Under the Code of offenses, the decision is taken with minimal participation of prosecution and a total lack of judicial review. This is, in fact, decriminalization of domestic violence.

The decision to return the institution of administrative arrest as a sanction for domestic violence and for failure to comply with the conditions of a temporary protection order also raises concerns. Such an approach, in the absence of fundamental measures to ensure the safety of the victim and to monitor compliance with the conditions of the temporary protection order, may not only be practically useless but also create the risk of more dangerous violence against the victim as retribution for three to seven days in custody as foreseen by the Code.

[30] Arrest (administrative arrest) was abolished in 2017. It was returned in the framework of major reform of criminal justice in December 2021
The arrest is an interim deterrence measure, which does not foresee criminal record. The term foreseen is from 3 to 7 days. However, the conditions of the arrest are inhumane

In this regard, it seems relevant to clarify the provisions of the Law of the Kyrgyz Republic on Protection from Domestic Violence, according to which a temporary protection order provides, in particular, a ban on direct and indirect contact with a person who has experienced domestic violence. It is not clear what counts as indirect contact and whether approaching a victim of domestic violence is an example of such contact to ensure that a prohibition on approach can be established in the Law.

The approach recommended by authoritative international sources, in particular, the UN Women's Handbook for Legislating on Violence against Women, mentions that protection orders should "include the following measures: ordering the defendant/offender to keep a certain distance from the victim/survivor of violence and her children (and others, as appropriate) and the places they frequent." Regarding Article 71 of the Code of Offenses, the regulator completely ignores the practical issue of how to determine whether the conditions of the order are met and how to ensure that the response to its violation is not just a punitive measure but primarily a preventive measure designed to ensure the basic safety of the victim?

Under the current legislation, the victim has to seek justice under two different legislation sets with different procedures, safeguards, and timeframes. The relevant ECHR case law is the decision in the case "Volodina v. Russian Federation" with similar legislation and institutional framework. The Court considered such an approach to be inconsistent with the obligations of the Russian Federation under the European Convention on Human Rights, noting that "as a result of the 2017 amendments, it has become more difficult to punish the perpetrator of domestic violence because the victim must initiate two cases in a short time: first, to bring the violator to administrative responsibility, and then to instigate a criminal case as a private complaint offense for 'repeated battery".

Abolition of the Code of Misdemeanors resulted in moving certain misdemeanors which are regarded as criminal offenses under the international standards (including domestic violence and failure to comply with the terms of protection order) to the category of "administrative" offenses, which undermines the protection of human rights, as the procedural safeguards under the Code of offenses are substantially lower than those under the Criminal Procedure Code. The proceedings under the Code of Offenses provide no procedural guarantees both for defense and victims due to inadequate safeguards under the non-criminal procedure. Many international experts in the course of drafting the new Code mentioned that the "draft Code falls short of many fundamental fair trial guarantees, such as independence and impartiality of the court, equality of arms and adversarial proceedings, availability of legal assistance, adequate time and facilities for the preparation of one's defense, and implementation of victim's rights." Furthermore, under this Code, the Ministry of Interior is in charge of the facilities where the convicted offenders would serve the time of administrative arrest, which is an apparent conflict of interest. The Code granted the same authority the power to prosecute offenders and execute their punishment.

Regarding the criminal proceedings, the Criminal Procedure Code reincarnated the institution's return of pre-investigation inquiry. Article 5 of the Code of Criminal Procedure , pre-investigation verification is defined as "the stage of pre-trial proceedings from the moment an application or report of a crime is registered in the Unified Register of Crimes until a decision is made to initiate a criminal case or to refuse to initiate a criminal case." This could lead to a return of corrupt practices enabled by the broad discretionary powers the investigating authorities have to decide whether or not to institute criminal proceedings. The possibility of instituting – or refusing to institute – proceedings in a particular case and possibly appealing either decision later opens up new avenues for undue influence on the investigating authorities and prosecutors.

In this regard, it is a matter of concern that at the stage of the pre-investigation inquiry, the alleged victim does not yet have the procedural status of victim, which deprives the victim of the opportunity to defend the rights by all procedural means until the end of the pre-investigation check. Furthermore, under Article 24 of the Criminal Procedure Code, domestic violence as a less serious crime is a private complaint offence , which means that the investigation is only launched upon the official claim of the victim or the legal representative and may be terminated in connection with the reconciliation of the parties." The State went further; under the current criminal legislation, even rape (Criminal Code, Articles 154 and 155) is a crime that is not publicly prosecuted. The Istanbul convention unequivocally establishes that prosecution should not be "subordinated to the condition that the prosecution can only be initiated following the reporting by the victim of the offense."

Concerning the sanctions, the Criminal Code retains the approach of establishing a range of alternative sanctions of varying severity for many offenses. Many articles contain a wide range of options for criminal sanctions, which sometimes include a disproportionately small fine as an alternative to a custodial sentence for the same offense. This creates conditions for corrupt dealings and makes it easier for investigators and prosecutors to pressure suspects. In the case of domestic violence under the Criminal Code, the crime is punishable either by community service from forty to one hundred hours or by deprivation of liberty for a term of up to five years.

To conclude, the current legislative and institutional framework seems to fall short of the bare minimum of guarantees and safeguards for the victims of domestic violence. The major issues include, among other things, broad discretion of the police in choosing the "administrative" or criminal path of proceedings; second of all, in the case of criminal proceedings, choosing whether to instigate the case. Furthermore, being a private complaint offense, the criminal

proceedings in the case of domestic violence do not guarantee access to justice and fair trial safeguards to a victim. An alleged victim is instead targeted for corrupt practices or pressured for reconciliation. The situation is aggravated because a victim has to prove the offense and a crime in case of repeated violence in entirely different proceedings. The broader procedural issues include the return of pre-investigation inquiries. For up to the first 30 days from registration, the alleged victim does not have a clear status of a victim and relating procedural guarantees.

INSTITUTIONAL FRAMEWORK

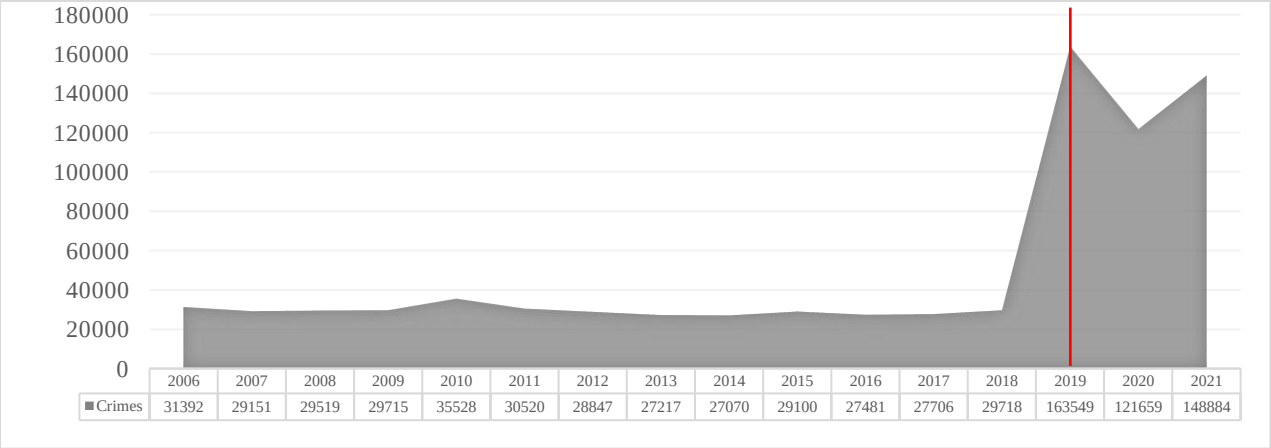
This chapter will address the two important institutional elements of the crime reporting procedure. It will first describe the newly established Unified register of crimes and then shed light on the institutional setting and current pressing issues of the law enforcement in Kyrgyz Republic.

Automated information system Unified Register of Crimes

The Unified register of crimes is an automated information system implemented in law enforcement agencies by the Office of the Prosecutor General since January 2019. The system reflects all criminal procedures at the pre-trial stage in a real-time mode. The introduction of the system was a novelty of the 2017 reform and was later kept in the 2021 reform. The system facilitated procedural novelties of the 2017 reform and contributed to increased crime reporting rates, even for traditionally underreported crimes, e.g., torture, rape, domestic violence.

Automatic commencement of pre-trial proceedings on registered claims predictably led to a significant increase in registered crimes, which does not reflect an actual increase in crime. It rather demonstrates a more realistic criminal statistics. At the same time, there has been an increase in the burden on law enforcement agencies – both in terms of human and financial

resources – and in the amount of time spent because the relevant authorities can no longer weed out "unpromising" cases, which in the past led to a decrease in the workload for by artificially inflating performance rates.



	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Crimes	31392	29151	29519	29715	35528	30520	28847	27217	27070	29100	27481	27706	29718	163549	121659	148884

Diagram 1 Crime reporting statistics for 2016 – 2021 in the Kyrgyz Republic based on data provided by the General Prosecutor's Office[31]

An important innovation was the provision making the registration of applications mandatory. In that regard, Art. 151 part 1 of the Criminal Procedure Code of the Kyrgyz Republic 2017 established the obligation of the law enforcement agencies responsible for conducting pre-trial proceedings to "accept and register a statement or report on any committed or impending crime and (or) committed a misdemeanor."[32] At the same time, "[a]ll the applicants are issued a document confirming the registration of the accepted statement or report on a crime and (or) misdemeanor, indicating the officer who accepted the statement or message, the time of its registration and the registration number in the Unified Register of Crimes and Misdemeanors."[33]

[31] Statistics for 2019 – 2021 include crimes and misdemeanors, 80% of the offenses qualified as crimes as per Penal Code 1999 became misdemeanors within the meaning of the Code of Misdemeanors of 2017
[32] 'Criminal Procedure Code 2017 Кодекс КР От 2 Февраля 2017 Года № 20 "Уголовно-Процессуальный Кодекс Кыргызской Республики"' <http://cbd.minjust.gov.kg/act/view/ru-ru/111530> accessed 27 May 2022.
[33] ibid.

The institution of instigation of a criminal case allowed the investigating authorities to delay the decision to recognize a person as a victim officially. This approach meant the impossibility of defending the legitimate rights and interests of the victim[34]. The introduction of the automatic start model helped solve this problem since the claimant was recognized as victim from the moment his / her application was registered in the Unified register of crimes, without the need to make any other decisions on the case.

At the same time, the legislation provides for a mechanism to protect against unsubstantiated claims. In that regard, it is possible to leave the application without consideration by writing the case off with an accompanying report from the relevant official to justify the reasons for leaving the case without consideration.

The reform of the Code of Criminal Procedure of the Kyrgyz Republic in 2017 entailed the elimination of the stage of pre-investigation inquiry. It is important to remember here that checking for signs of a crime or misdemeanor within 24 hours from the moment of registration in the police log is not identical to a pre-investigation check since it is not aimed at establishing facts but only at checking how much the statement of information fits into the paradigm of criminal law.

Thus, the Law allowed, for example, to write off an application if the complainant does not claim that there have been acts not punishable by law (for example, if the applicant, who is not familiar with criminal law, proposes to bring the person to criminal liability for libel - which not provided for as a criminal offense by the legislation of the Kyrgyz Republic). If the applicant claims that a criminally punishable act has taken place, the law enforcement agencies

[34] 'Conceptual issues of reforming the criminal proceedings of the Kyrgyz Republic (Transcript expert forum)' (n 27).

were obliged to register the application in the Unified register of crimes, which entailed an automatic start of pre-trial proceedings.

The current criminal procedure kept the Unified register of crimes and even expanded its procedural function, mentioning the registration of different procedural decisions at the pre-trial stage at least 19 times.[35] However, with the re-introduction of the pre-trial investigation, the unified registration is undermined, since only officially instigated cases are registered in the Unified register of crimes. However, the register has an important integrated sub-component – police logbook. All of the claims and refusals to instigate the criminal investigation are kept in the logbook, facilitating better oversight mechanism in comparison to 1999 legislation.

Interior agencies and crime reporting

The analysis of the interior agencies would definitely need separate fundamental research. The most relevant for the purposes of the research in question are the issues of organizational structure, public perception, especially in terms of trust of victims, and corruption.

In regard to the latter the media reports on extremely low level of trust of the public, e.g., in 2018, the Kyrgyzstanis rated the level of trust in the Ministry of Internal Affairs at 12.8 points out of 100, 18.4 points out of 100 for the quality of work and -8% for the level of corruption.[36] Reform of the police is a continuous discussion, over the last 20 years there the State developed six reform programs.[37] One political turmoil after other and frequent change of decision

[35] 'Criminal Procedure Code of the Kyrgyz Republic Кодекс КР От 28 Октября 2021 Года № 129 "Уголовно-Процессуальный Кодекс Кыргызской Республики"' <http://cbd.minjust.gov.kg/act/view/ru-ru/112308> accessed 30 March 2022.

[36] Yulia Kostenko, 'Rating. Which ministries are the most corrupted. Какие министерства Кыргызстана тонут в коррупции. Рейтинг' (*24.kg*, 3 October 2018) <https://24.kg/vlast/97779_kakie_ministerstva_kyirgyizstana_tonut_vkorruptsii_reyting/> accessed 17 June 2022.

[37] Zubenko, 'Police Reform in Kyrgyzstan: How To Make It Happen?' (*CABAR.asia*, 28 June 2019) <https://cabar.asia/en/police-reform-in-kyrgyzstan-how-to-make-it-happen> accessed 17 June 2022.

makers complicate this process even more. The experts identify lack financial resources, lack of vision to address systemic issues, highly centralized institutional setting of the Ministry of Internal Affairs, which consistently is responsible for own reform and is interested in maintaining status quo, are some of the reasons for failure to embark on a successful reform process.[38] In addition, the process was consistently handled behind closed doors, except for an initiative to introduce Bishkek patrol police in 2018. The reform involved leading NGOs in the field, media coverage, and was relatively transparent in terms of hiring officers and distributing finances. However, structurally, this unit was under the Republican Ministry of Internal Affairs, rather than the Chief Directorate of the Interior for the City of Bishkek, which impeded with the effective management of this unit.[39]

The Interior Ministry consistently approached change in a chaotic and unexpected manner, working with a variety of international organizations, NGOs, civic activists, and MPs. Civil society actors representing NGOs or communities did not have a consensus on a common vision of the future police either.[40] One of such examples is the support of the community policing concept by the OSCE Police program in Kyrgyzstan. While the idea of community policing is a very attractive goal, in reality, the implementation of the concept amounted to the donation vehicles and containers.[41] The precinct police officers are the closest unit to the local communities, however, this lowest in ranking officers have in average more than 20 functional responsibilities. Ideally, thus unit could be the closest in terms of reacting and rapidly recording a crime of domestic violence. In total, there are 73 precinct police stations in Bishkek housed

[38] ibid.
[39] Urumova Irina, 'Report. Mixed Functional Analysis of the Chief Directorate of the Interior for the City of Bishkek' (EU funded rule of Law Programme in the Kyrgyz Republic - phase 2 2020) <unpublished>.
[40] Erica Marat, *The Politics of Police Reform: Society against the State in Post-Soviet Countries. Kyrgyzstan*, vol 1 (Oxford University Press 2018) <https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190861490.001.0001/oso-9780190861490-chapter-5> accessed 17 June 2022.
[41] 'OSCE Strengthens Community Policing in Kyrgyzstan through Donation of Vehicles to the Interior Ministry' <https://www.osce.org/bishkek/220246> accessed 17 June 2022.

in containers and rooms in various buildings built for other purposes. The infrastructure is underdeveloped, rooms are not duly equipped, which includes lack of access to the Unified register of crimes.[42]

PPOs are also tasked with prevention of domestic violence. They can issue protective orders, however, no standardized tool for assessing risks, including lethality screening (identifying victims in whose respect there is a real risk of death), is available. The need for a protective order is supposed to be identified based on gut feeling. Neither are there any protocols to be used in detected domestic violence cases, including those of violence against children. Police officers do not have any means to monitor individuals against whom protective orders have been issued, electronically or otherwise. There are no checkups on victims' wellbeing by social services either. All work is centered around responding to calls, and there are no site visits unless there is a call by the victim.[43] In that regard, the reasonable question is why Bishkek needs almost 2000 PPOs[44] and how their work can be organized in a more efficient manner.

Kyrgyzstan's law enforcement agencies, like those in other post-Soviet countries, is structured and run on the Soviet model. Internal Affairs is a highly centralized agency. Although the system's structure is sound, but the public opinion continuous to deteriorate. And the PPOs is only a small example of ineffective management of human resources. The society considers law enforcement to be a component of the corrupt governmental apparatus, rather than an organization tasked with protecting citizens from crime.[45]

[42] Urumova Irina (n 39).
[43] ibid.
[44] 'MIA. At a meeting of the Cabinet of Ministers of the Kyrgyz Republic, Ulan Niyazbekov informed about the state of law and order and the work done in the field of ensuring road safety' <https://mvd.gov.kg/rus/news/352> accessed 17 June 2022.
[45] PhD Chyngyz Kambarov, 'Organized Criminal Groups in Kyrgyzstan and the Role of Law Enforcement' (2015) #20 *CAP Central Asia Program Voices from Central Asia*.

ANALYSIS OF STATISTICS AND INTERVIEWS

This part of the thesis will analyze the available statistical data on domestic violence and rape pursuant to Criminal procedure codes of 1999, 2017, and 2021 to compare the registration and case instigation rates. This exercise will attempt to determine whether law enforcement tries to "hide" the crimes and the comparison of criminal statistics will show underreporting of domestic violence and rape. The analysis is complemented with data on performance rates of law enforcement for the relevant years

Statistical analysis

The criminal statistics from 2019 were transferred from the Ministry of Interior to the General Prosecutor's Office. Although the gradual introduction of the Unified register of crimes, among other things, pursued the aim of providing more detailed and complete statistics, the GPO only publishes very fragmented data. The accumulated statistical reports published by the National statistics committee significantly lag. These factors are a significant limitation to the policy development in the field and for the current analysis.

The presented analysis is based on the data accessed on the official website of the Office of the Prosecutor General, National Statistical Committee, and the data received from the Legal Statistics department of the GPO at my request.

The chart presented below demonstrates the number of investigations for the cases of sexual violence against women. All three sets of Penal Codes include rape, sexual assault, compulsion to act of a sexual nature, acts of a sexual nature with a person under the age of sixteen, and indecent acts. In 2016 – 2018 criminal statistics demonstrates only instigated cases, i.e., after the pre-investigation inquiry. The difference between the 2019 and 2020 numbers is drastic; the statistics show double the increase in the investigations after introducing the new criminal

legislation. This could be explained by the fact that pre-investigation inquiry was used as a tool to filter out the "unwanted" cases. In contrast, the Criminal procedure code of 2017 obliged to register all cases within 24 hours from the moment of receipt of a complaint, notification of a committed crime or misdemeanor, or upon direct discovery of circumstances that indicate a committed crime.

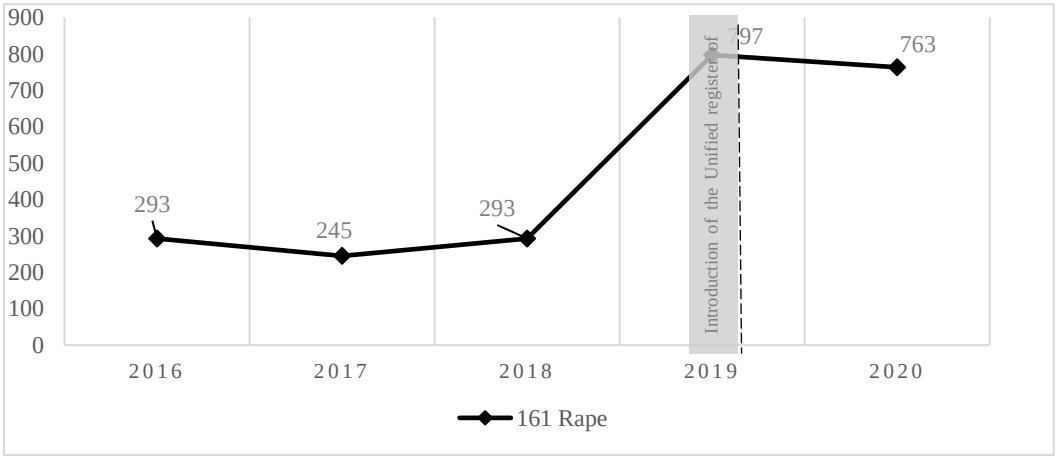


Diagram 2. Crime reporting statistics 2016 - 2020. Rape. Based on the data provided by the Office of the Prosecutor general

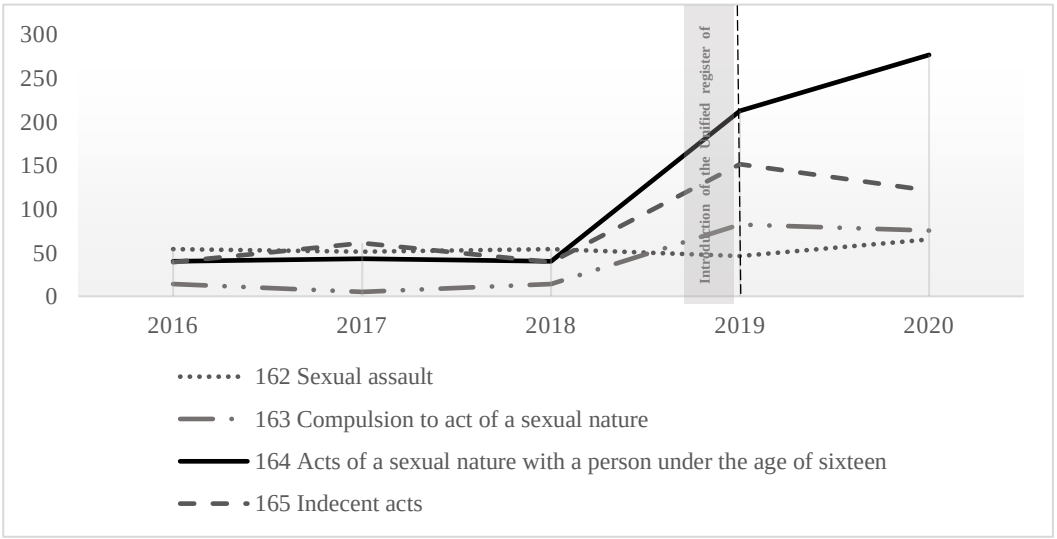


Diagram 3. Crime reporting statistics 2016 – 2020. Gender based violence. Based on the data provided by the Office of the Prosecutor general

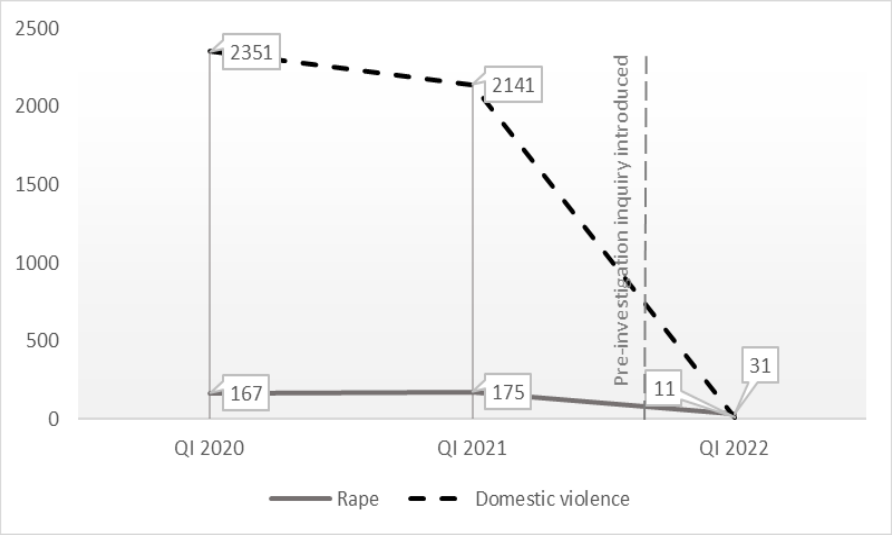


Diagram 4 Rape and Domestic violence cases registered in the first quarters of 2020, 2021, 2022[46]

The diagram demonstrates an almost seventyfold reduction in registration of domestic violence cases and an almost sixteenfold reduction in registration of rape.

While we see a drastic decrease in the performance rate for 2019 – 2021, this indicator was consistently high in the previous year. The performance rate is calculated as a ratio of instigated cases after January 2019 as cases registered in the Unified register of crimes and misdemeanors to the cases sent to the Court. It is reasonable to assume that law enforcement conveniently used the pre-investigation inquiry to manage the performance rate.

While the general performance rate on all registered crimes increased in 2020 after a twofold fall in 2019, the crime detection rate for the cases of Rape and Domestic violence remained consistently low after the fall in 2019. Latter can be attributed to the increased registration rate due to the more straightforward process of claiming an incident and eliminating the pre-investigation inquiry.

[46] 'Statistics' (*Official website of the General Prosecutor's office*) <https://prokuror.kg/ru>.

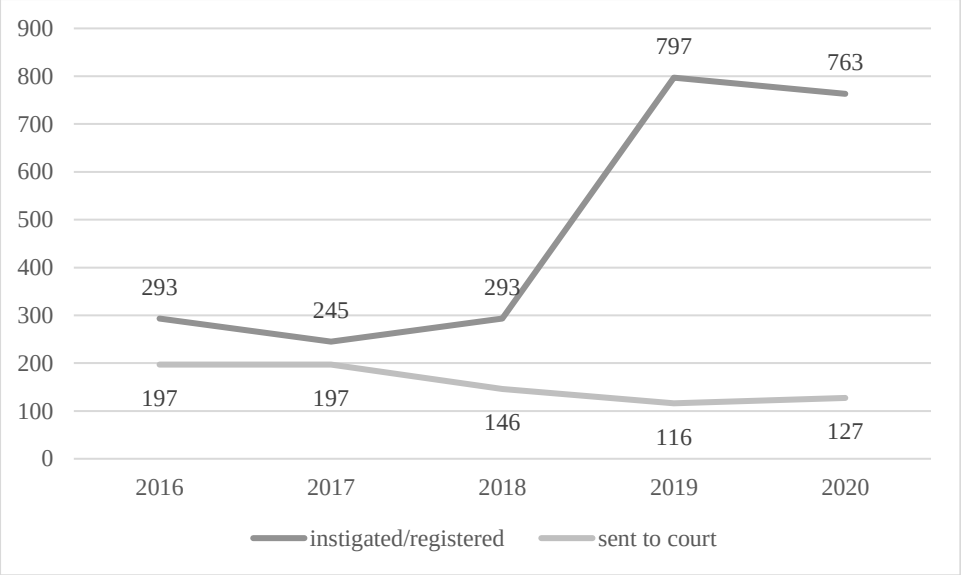


Diagram 5. Number of Rape cases sent to court, or indictments. Based on the data provided by the Office of the Prosecutor general

However, as the Diagram 5 demonstrates, the increase in reporting did not result in the increase of indictments. One could reasonably assume, that most of the cases were unsubstantiated and the law enforcement indeed needs the pre-investigation inquiry and a formal instigation of case as a standalone procedure. However, it is also reasonable to presume, that more indictments did not follow, because law enforcement agencies did not reform. The workload increased manyfold, whereas all the issues of understaffed units, low salaries, lack of technical and logistical infrastructure stayed. Moreover, all those units, like PPO or operational investigative department remained outside criminal procedure and the investigation was not reinforced adequately. The combination of managerial, infrastructural and financial issues resulted in a low effectiveness of the law enforcement.

It is also reasonable to assume that the more straightforward crime reporting procedure introduced in 2019, actually demonstrated a close to real picture of criminal statistics. For example, a victimology study in Bishkek conducted in 2018, showed that the population's real

criminal victimization for sexual crimes is 55 times higher than the official statistics suggest.[47] The Medical and Demographic Study, presented in June 2018 at the National Conference Achievements and Further Steps by the KR Interior Agencies in a Systemic Approach to the Prevention of Gender and Family Violence[48], suggests that only two of every five women sought help after violence they had survived. Every fourth woman aged 15–49 experienced physical violence at least once since they were 15 years old; 4 percent experienced sexual violence, and more than half (56 percent) of women who experienced physical or sexual violence reported that they sustained physical injuries.

Analysis of interviews

The purpose of this Chapter is to confirm the hypothesis posed. The interviews were held with the leading experts in criminal justice, both substantive and procedural law. The study included three academics, including one from the Ministry of Interior Academy, assuming that she will understand and be able to justify the return of the pre-investigation inquiry.

Description of the interviews

The interviews covered the following academics and practitioners in the field:

Mr. Aslan Kulbaev, Ph.D. in Law, one of the authors of the Criminal Procedure Code 2017, and a practicing lawyer. He was involved as an expert in the NGOs and international organizations, sits on the Disciplinary Commission of the Supreme Court, and teaches criminal procedural Law at the Kyrgyz National University.

[47] 'The United Nations Office on Drugs and Crime (UNODC) Programme Office in the Kyrgyz Republic. Results of a Victimological Study in the City of Bishkek and Pilot Housing Projects.'
[48] Urumova Irina (n 39).

Ms. Leila Sydykova, Ph.D. law professor, is one of the authors of the Penal Code 2017. Ms. Sydykova on of the rare experts in material Law, widely published in the region, and involved as an expert by leading NGOs and international organizations.

Ms. Nazgul Sharshenova, Ph.D. in Law, teaches criminal procedure at the Ministry of Interior Academy – a specialized university that provides training for police officers. She also worked as an investigator for ten years.

Ms. Aijan Orozbekova and Ms. Nazira Abdumominovna are practicing lawyers and pro bono advocates. In this capacity, they worked extensively with rape and domestic violence victims.

Ms. Tolkun Tulekova is a director of the Association of crisis centers and a leading gender expert, widely involved in the international organizations working on gender equality and combatting gender-based violence.

The interviews were held online in the form of open and ad hoc questions. The questions focused on the status of the involved parties at the pre-investigation inquiry stage, procedural guarantees and time limits, and roles of the investigator, prosecutor, and defense lawyer. The interviews also included discussions about the risks for the victims' and defendants' rights at the stage of pre-investigation inquiry and the general effects of the pre-investigation inquiry.

Results of the interviews

Impact on statistics

The results of the interviews confirmed that law enforcement uses pre-investigation inquiry as a filter. Mr. Aslan Kulbaev affirmed that such "manipulation of statistics by the law enforcement is largely attributed to the attempt to increase the performance rate." This "grey

zone" is also instrumental in corruption attempts. It vests an investigator and a prosecutor with significant powers to bargain with the parties before deciding whether to instigate the case.

The decrease in the registration of crimes was predictable and was raised on different platforms in the development of 2021 criminal legislation. These concerns were raised, among other experts, by Mrs. Leyla Sydykova. She affirmed that statistics are almost inaccessible and hard to analyze. She distinguished two factors in decreasing the statistics: "norms in substantive law and procedural mechanisms that hinder the possibility of achieving fair justice, especially for these two categories of crimes."

Domestic violence as a crime was divided into two different types: violence punishable under the Code of Offenses and, in the event of significant harm, is punished under the Penal Code. It followed from the discussion that the competition of norms allows law enforcement to qualify domestic violence under one of the two different legislations. She affirmed that the norms are in the gray zone because sanctions are not consistent too. Under the Code of Offences, the punishment for domestic violence is an arrest for up to 7 days, and here she raised important questions. "Are the goals of the punishment achieved by imposing administrative arrest? Are we punishing or isolating from society? What is the purpose of punishment? Are they achievable in this situation? If not, then there is no point in using them?"

Under the Code of Offenses, the punishment implies forty hours of community service or arrest for up to 7 days; however, the Code does not address the accused's failure to perform community service. He cannot be arrested again. In the Criminal Code, the punishment includes community service and imprisonment for up to five years. The difference is vast and creates an immense corruption risk. If failed, community service changes to corrective and house arrest. In practice, the convicted leads a normal life and is not punished for the committed crime.

The second major factor which affects criminal statistics on rape and domestic violence is the procedural mechanism of the pre-investigation inquiry. Mrs. Sydykova confirmed the hypothesis and what has been affirmed by Mr. Kulbaev, that pre-investigation inquiry creates a "grey zone" and eliminates the unified registration procedure previously introduced by the reform of 2017. She added that "the increased period of pre-investigation inquiry is a period for the perpetrator and the investigator to begin establishing a connection with the victim, to put pressure on the victim."

The situation is exacerbated by the fact that the crime can be registered only if a victim officially claims an incident. If the claim is revoked, the crime will not be investigated and prosecuted, which confirms the concerns raised previously in this work.

Mrs. Sydykova observed that crimes like rape and domestic violence are very sensitive to public perception. The victim is faced with a dilemma of whether "to be drawn into the criminal process, or to receive informal compensation from the part of the accused and close the situation."

The registration procedure of the 2017 reform pulled all the crimes, especially sensitive crimes like rape, domestic violence, or torture, to the surface. Moreover, the return of pre-investigation inquiry will once again undermine criminal statistics. The law enforcement will "get rid of this crime overall," and violence will perpetuate because it will remain unpunished.

The discussions with Ms. Sharshenova, a lecturer at the Ministry of Interior Academy, former investigator, and a colonel of the Ministry of Interior, a working group member on developing Penal Code and Criminal Procedure Code of 2021. Regarding statistics and the impact of the pre-investigation inquiry, her stance was that the state policy and informational campaigns against violence contributed to a drastic decrease in the statistic. She, however, confirmed, to my surprise, that the pre-investigation inquiry is a "grey zone" and accommodates many

violations of human rights. She affirmed that during her days as an investigator, during the pre-investigation inquiry, "operativniki" would initiatively look for evidence, i.e., conduct fishing exercises. She mentioned many instances of suspects being kidnapped and tortured on the premises of police until the guilty plea is received, and then the case is instigated.

She confirmed that the return to the pre-investigation inquiry would undoubtedly affect the observation of rights of the parties in the pre-trial proceedings, although not at the same scale as before 2019. Partially because "operativniki" according to the current legislation, act only upon the investigator's request in the framework of the pre-investigation inquiry and participate in the covert activities and special investigative measures only sanctioned by the judiciary.

She admitted that there are and will be more refusals to instigate the case, and she sees a stronger oversight of prosecutors as a solution. Ms. Leyla Sydykova raised the same idea as the only measure to control investigation – oversight of investigation by the prosecution.

Ms. Sharshenova also observed that the workload on investigation significantly decreased with the return of pre-investigation inquiries. "Pre-investigation inquiry is an additional filter, because before (in 2019 – 2021 with the unified registration procedure, comment of the author), there were many cases". She also mentioned that the mechanism of instigation and refusal to instigate the case is used to increase crime detection rates and named the general tendency to artificially raise the detection rates as one of the main issues in that regard. The main criterion is the ratio of the number of cases received and the amount sent to the Court.

Ms. Aijan Orozakunova, a defense lawyer, also often involved as a pro-bono advocate for the cases of rape and domestic violence, formed director of the Training center of advocates and backed up the concerns of other experts. "The pre-investigation inquiry is often used to persuade a victim to revoke a claim and refuse from the prosecution under pressure from relatives, economic situation, level of education, religious views. It is shameful in our country

to accept that one was raped" . She reminded that victims could be older people, children, or persons with disabilities in domestic violence cases. Therefore, they cannot protect themselves, and if the advocates are not involved, the law enforcement will not protect them either.

Status of the parties: victim, suspect, investigator, prosecutor, and advocates

"Per criminal legislation of 1999 and 2021, at the pre-investigation inquiry stage, both defendant and a victim have a witness status, like any other witness summoned to interrogation. Only after an investigator instigates the case, the parties get procedural statuses as per procedural legislation and accordingly gain procedural rights."

The interrogation protocols retrieved at this stage are often used as evidence after the case is formally instigated. In this case, the fundamental principle of a fair trial – the right not to self-incriminate – is violated.

"There are no clear regulations for the pre-investigation inquiry. Still many open questions as to what are the powers of an advocate. For example, the advocate cannot initiate expert examination, as neither victim nor defender has no procedural status and are formally witnesses and investigation has not yet started". The expert examination is subject to judicial approval if requested by an advocate.

The procedure to appeal against refusal to instigate a case is not addressed in the criminal procedure legislation. If a prosecutor recognizes the refusal to instigate a criminal case as illegal or unreasonable, the prosecutor issues a decision to cancel that refusal. That, in turn, leads either to instigating a criminal case or sending an additional pre-investigation inquiry. However, the Code does not provide precise regulation on what refusal is considered unreasonable and illegal and how the victim can appeal against the prosecutor's refusal upholds the investigator's decision.

Professor Sydykova confirmed in her interview that a "pre-investigation inquiry is an extra-procedural activity," which means there is no procedural status of a victim or suspect. Everyone at this stage has a witness status; however, the Code in Article 153 fails to describe the procedural rights of a witness at this stage. She affirmed that there are no legal guarantees or mechanisms for observing human rights.

Once again, the interviewee calls this stage a "grey zone" since the procedures for these ten days are not described. All the procedural rights, obligations, and guarantees are attributed to the parties only after the case is officially instigated.

One of such loopholes is that it cannot be appealed in the Court. Rejected case, as a result of the refusal to instigate the case, is not a procedural document, which means it cannot be appealed. The victim can request the prosecutor, and then the prosecutor either confirms the refusal or cancels the refusal. If the refusal is canceled, the case is either considered instigated or can be sent for additional verification. "But how does the investigator conduct additional verification in the non-procedural sphere? Evidence is very often lost, as it has no procedural formalization" .

Ms. Nazgul Sharshenova also mentioned the shift of rape and domestic violence cases to private-public complaint offence category, stating that approximately 40% of victims refuse to claim the crime because of the shame, humiliation, and isolation from society. She also brought up a lack of trust in law enforcement.

The status of a victim following Article 40, part 2 of the Criminal procedure code is attributed from the moment "a decision is made to recognize him /her as a victim," i.e., when a case is officially instigated. Ms. Sharshenova confirmed that until then, the parties involved have the status of witnesses. However, she emphasized that the current criminal procedures allow for more guarantees than the criminal legislation of 1999, especially when it comes to the powers

of advocates. She attributed this change to the rights and guarantees provided by the 2017 reform, which introduced Free legal aid and increased defense lawyers' access at every stage of pre-trial proceedings. In her opinion, the current legislation preserved most of the positive changes introduced by the 2017 criminal reform.

Although, she admits that there is a grey zone when it comes to the rights of a witness who is potentially a suspect. The investigator, as a rule, interrogates a witness before the arrival of the defense lawyer and later uses the protocol, especially when the witness changes his/her testimony. “These protocols, to some extent, are used as a measure of pressure on the suspect or victim” in the interest of the investigator.

The advocate Ms. Nazira Abdumominovna admitted that the procedure was more straightforward and transparent in 2019 – 2021. The parties were attributed all the rights and responsibilities from the moment of registration in the Unified register of crimes and misdemeanors. “Now Kyrgyzstan is back in Soviet times” for this period of 10 – 30 days; everyone has a status of a witness. “They are not recognized as victims; respectively, the investigation refuses to give access to protocols of interrogations.” She also confirmed that the pre-investigation inquiry is prolonged mainly because of the expert examination and affirmed that the investigator refuses to instigate the case without the expert opinion.

Ms. Tolkun Tulekova shared an observation that at the pre-investigation stage an investigator often expects a victim to provide evidence and very often during the prolonged time of inquiry victims are tired and don’t want to pursue with the investigation. She also confirmed that in cases of rape, investigators rely only on the results of the medical expert examination. She also mentioned that very often investigators don’t even try to find any other evidence, e.g., in one of the cases a crime location was a car, and the police only found it on the third day, when the car was washed and clean.

She also specifically said that it is totally up to investigator to inform on the rights of a victim or accused. As a witness, a victim signs a certificate that she is liable for the provision of wring evidence, which is an additional pressure. Ms. Tulekova said that victim-oriented approach is non-existent, and a decent attitude towards victim is totally up to an investigator. She specifically mentioned a lack of trust to the law enforcement and it's a serious restraining factor for a victim to persist on criminal prosecution. At this moment, many victims give up and agree for informal compensation from the side of a suspect, hence the crimes remain unpunished.

Impact on rape and DV victims

Victims of sexual violence are subjected to interrogation at least twice. First as a witness at the pre-investigation inquiry stage and then as a victim after the case was formally instigated. That, in turn, re-traumatizes a victim. An interrogation by the police in Kyrgyzstan is a traumatizing experience in itself. The media reports on many blatant victim-blaming and humiliation by the police. As a practicing advocate, Mr. Kulbaev brought up a case where a juvenile victim of rape was interrogated, then had to undergo an expert examination. The result of such a medical examination usually takes 30 days. As 30 days passed, the result of an examination was not ready, and therefore the investigator requested a prosecutor to issue a refusal to instigate the case as lacking the grounds. And this is not an isolated case.

Leyla Sydykova confirmed that a victim is subjected to interrogation as a witness as many times as the investigation deems necessary. The evidence is collected again if the case is officially instigated. She finds it "illogical for investigators to wait for the result of expertise in the prima facie cases"; however, investigators more often than not decide to wait for the official expert examination. Ms. Sharshenova confirmed that this practice is established, even though the Criminal Procedure Code does not require it.

Mrs. Sydykova expects that crime rates will drop sharply and, hence, increase crime detection rates. This registration procedure is very selective and largely depends on the investigator.

The question raised during the interviews was whether any protection is provided to the victims at the pre-investigation inquiry stage. The general answer was that no protection was offered. The temporary protection orders are outside the criminal procedure and are issued in the framework of the Code of Offences to the victims of domestic violence. When it comes to the pre-investigation inquiry, a victim is exposed and can be pressured and threatened to revoke the claim. The only defense lawyer, Aijan Orozakunova, mentioned that the matter of protection depends mainly on the advocate.

Ms. Nazira Abdumominovna confirmed that at the pre-investigation inquiry, "the investigation starts negotiations with the parties, extortion of a bribe, pressure a victim to revoke a claim and then refuse to instigate the case." "An examination for rape cases takes longer; there will be no initiation of a case if there is no examination. In 90% of cases, the investigator does not detain the suspected person, only in case of broad media coverage or the victim is a minor. During this time, the victim is subjected to persuasion and pressure." She specifically emphasized that victims are not provided any psychological support or protection. Ms. Abdumominovna complained that "nobody wants to set up the work so that the victim is not afraid of anything."

Ms. Aijan Orozakunova upheld these concerns. She said that "victims do not trust law enforcement, and trust will decline. Not only did she dare to file a report of rape, now law enforcement will persuade her to reconcile or ensure that she withdraws the report."

All of the interviewees confirmed that the period of pre-investigation inquiry is prolonged almost for every case under the pretext of conducting an expert examination. The interviews

revealed that there is a practice of mandatory examination even for apparent crimes, although the Criminal procedure code does not require this.

The defense, in turn, can challenge the results of the examination or conduct its examination only after the case is officially instigated. The interviewees, especially practicing advocates, confirmed that cancellation of refusal to instigate criminal proceedings does not mean automatic instigation of a case. The pre-investigation inquiry can start again, delaying the time and effectively denying a victim of justice.

The experts confirmed that the protocols acquired during interrogation at the pre-investigation inquiry stage could be used further after the case is instigated. Aijan Orozokunova observed that "the interrogation itself is a very stressful experience, especially for the victim," and many times investigator does not warn about the possibility of calling a lawyer. The victim is traumatized and can be "re-traumatized by interrogations at the pre-investigation inquiry stage. If the case is instigated, she will be interrogated again, and more if the case gets to a trial," and very often, a victim gives up and revokes a claim.

To conclude this chapter, all of the interviews seem to agree on the comparison of the pre-investigation inquiry to a "grey zone". It seems that the law enforcement indeed uses pre-investigation inquiry as a filter to "manipulate statistics in an attempt to increase the performance rate,"[49] as well as it is instrumental to corrupt practices. It vests an investigator and a prosecutor with significant powers and allows to bargain with the parties before deciding whether to instigate the case or not.

All of the interviewees agreed that "the increased period of pre-investigation inquiry is a period for the perpetrator and the investigator to begin establishing a connection with the victim, to

[49] Interview with Aslan Kulbaev, 'Interview with Mr. Aslan Kulbaev' (22 May 2022).

put pressure on the victim".[50] The situation is exacerbated by the fact that the crime can be registered only if a victim officially claims an incident. If the claim is revoked, the crime will not be investigated and prosecuted. In addition, at this stage victims are not provided with any psychological support or protection. Another problematic practice, in terms of victims' needs is the fact, that they are subjected to interrogation at least twice. First as a witness at the pre-investigation inquiry stage and then as a victim after the case was formally instigated. That, in turn, re-traumatizes a victim. And interrogation by the police in Kyrgyzstan is a traumatizing experience in itself. The victim very often is exposed to victim blaming

It also became obvious that the period of pre-investigation inquiry is prolonged almost for every case under the pretext of conducting an expert examination. The interviews revealed that there is a practice of mandatory examination even for apparent crimes, although the Criminal procedure code does not require this.

One of the most concerning findings is that per criminal legislation of 2021, at the pre-investigation inquiry stage, both defendant and a victim have a witness status, like any other witness summoned to interrogation. Only after an investigator instigates the case, the parties get procedural statuses respective procedural rights and guarantees. The interrogation protocols retrieved at this stage are often used as evidence after the case is formally instigated. In this case, the fundamental principle of a fair trial – the right not to self-incriminate – is violated.

[50] Interview with Sydykova Leyla, 'Interview with Mrs. Leyla Sydykova, PhD in Law' (24 May 2022).

CONCLUSION

This work is a small contribution to a discussion on the risks of the current criminal legislation and specifically pre-investigation inquiry. The discussion was shut down in Kyrgyzstan, including by threats to the foremost experts in the field. Therefore, no comprehensive study or monitoring was conducted, nor was it addressed by the international organizations working in the field.

Seven months of the new criminal legislation already show the considerable risks to all the parties involved. It is clear that more comprehensive monitoring is needed, including a closer look at more detailed statistics, the study of the cases and their development at every stage of pre-trial proceedings, focus group discussions, etc.

Pre-investigation inquiry is a 10-30 days period at the beginning of the pre-trial proceedings. It has a non-procedural half-formal nature with no clear status of the involved parties, no clear description of procedures, and immense risks to victims' and defence rights. Besides the apparent concealment of the statistics, which confuses society regarding the accurate picture of crime statistics and does not allow for adequate and informed policy measures, the pre-investigation inquiry creates a grey zone where victims are exposed to pressure and bargaining. It extends the time limits for investigation, creating uncertainty to the point that victims are denied justice. They are targeted by pressure from the side of law enforcement, suspects, relatives, and society. Over the last seven months, the practice has established that the investigation waits for the conclusion of the examination, even in prima facie cases.

All of the raised concerns are confirmed by the presented statistics and results of the interviews. The pre-investigation inquiry is not a “grey zone” but a “black hole” where hope to achieve justice dies. It does not allow the restoration of victims' rights; in fact, it prevents it and creates corruption risks, which are mentioned in every interview, and this is a widely known fact. This study focuses only on the procedural part. It partially reveals the problems of substantive Law and the regulation of these norms, the division of the composition of domestic violence, and sanctions issues.

In the case of an apparent crime, it depends on the investigator whether the case will be instigated or the examination results will be needed, and the pre-investigation inquiry will be prolonged. Moreover, this is a significant discretion to manage the timespan arbitrarily, where time is of critical importance. This amounts to a violation of reasonable time of proceedings procedural guarantee and, in some cases, denial of justice and violation of the principle of inevitability of punishment.

Based on the presented analysis, I think it is necessary to introduce a more detailed regulation of the pre-investigation inquiry stage if the regulator does not want to get rid of it. It is necessary to develop a legal act covering, among other things, that in the case of an obvious crime, the instigation of a criminal investigation should be handled immediately so that both the victim and the accused receive procedural rights and guarantees. The following recommendation would be to remove the expert examination at the stage of the pre-investigation inquiry; then, there would be no need to extend the terms of the pre-investigation inquiry for up to 30 days. It is also necessary to limit interrogations to one time and only in the presence of a lawyer.

Of course, the introduction of the Unified register of crimes and crime reporting procedure of 2019 did not solve and probably will not immediately solve the problems identified during the analysis. However, as the statistics for 2019-2021 demonstrate, such a crime reporting

procedure made it possible to see an approximate accurate picture. This, in turn, affected the burden on law enforcement agencies and showed the need for more radical structural and comprehensive reform, which would enable the transition to due process and victim-oriented criminal procedure.

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