INVESTIGATIVE JUDGE AS A SUBJECT TO CRIMINAL PROCEDURE

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ABSTRACT

Purpose: The article is to analyze the current problems of judicial review over the observance of the law while conducting covert investigation (search) actions and to propose our own views on the ways to improve the judicial review over the observance of the law while conducting covert investigation (search) actions by the National Police of Ukraine, taking into account the positive of foreign countries.

The Subject of the Study: The subject of the study is foreign experience regarding judicial control over the observance of the law when conducting covert investigation (search) actions and the possibility of its implementation in Ukraine.

Methodology: The study used general scientific and special methods of legal science, in particular, analysis and synthesis method, logical method, historical and legal method, comparative and legal method, normative-dogmatic method, legal modeling method.

The Results of the Study: It was stated that the institution of covert investigation (search) actions is new to the domestic criminal process; it was borrowed from other countries, in which criminal prosecution of a person by authorized entities is ensured by conducting legal transparent and covert investigation (search) actions and fixation of the evidence. Some rules of criminal procedural law of foreign countries concerning this issue were considered with a view of their implementation in the criminal procedural legislation of Ukraine.

Practical Implications: The ways of improvement of the national legislation were proposed on the basis of the positive experience of the USA and the European countries regarding the judicial control over the observance of the law while conducting covert investigation (search) actions.

Value/Originality: The analysis of the main foreign approaches to the issue of investigating judge as a subject to criminal procedure, who exercises judicial control over the observance of the law while conducting covert investigation (search) actions, was made, and the ways to improve this issue in Ukrainian legislation were formulated and proposed.

Keywords: Investigating Judge, Judicial Review, Covert Investigation (Search) Actions, Foreign Experience.

INTRODUCTION

Transparency of legislative regulation and conducting of covert investigation (search) actions, the presence of statutory control mechanisms for their enforcement, combination of transparent and covert methods for obtaining information on crimes prepared and committed while strengthening the constitutional guarantees of the rights and freedoms of an individual becomes an effective tool against crime (Horodovenko, 2013).

In accordance with the rules of the new Criminal Procedural Code in the area of human rights and criminal justice, the role of court in the mechanism of protection of the rights and legitimate interests of an individual, which could be restricted at pre-trial stages of criminal proceedings, is increasing. This means that judicial review is a guarantee of law enforcement at the pre-trial stage of investigation, both for an individual and a citizen, as well as for criminal justice, as it is intended to prevent the unlawful restrict*i*on of the constitutional rights of the parties to criminal proceedings and, if necessary, swiftly and effectively restore them (Trofymenko & Tumaniants, 2004). At the present stage of inception of Ukraine as a European state, a set of strategic measures aimed at developing the economy in the context of European integration is being implemented (Yunin et al., 2018). Thus, the economic development of Ukraine requires, now more than ever, a sound and reasonable macroeconomic policy aimed at further stabilization, since the radical socio-economic transformations that have taken place over the last decade led to both positive and negative changes in Ukrainian society (Pavlenko et al., 2017). As a result of the changes taking place in society, along with the positive ones, some negative tendencies are emerging, which significantly impede the development of the world economy and cause serious problems of economic stability (Mohilevskyi et al., 2017).

The urgency of the problem under study is that Ukraine plays an important role in deterring organized crime from the East to the countries of Central and Western Europe and there is no mechanism for effective counteraction to organized crime groups.

MATERIALS AND METHODS

Research methods of the study are chosen based on its object, subject and purpose. The study used general scientific and special methods of legal science. Thus, the analysis and synthesis method as well as the logical method were used to formulate a holistic view on the procedural status of investigating judge, as well as to study his (her) authority in different countries. The historical and legal method was useful in studying the history of establishing the legislation on the determination of the procedural status of investigating judge in some foreign countries (the USA, the UK, France, Italy and Austria) and in Ukraine. The comparative and legal method was utilized when analyzing national legislation of Ukraine and foreign legislation of some States on the issue under consideration. With the help of the normative-dogmatic method, the content of regulations of domestic and foreign legislation governing the investigated issue was analyzed. The legal modeling method was applied to draw conclusions and to develop proposals for improving legislative regulation of the procedural status of investigating judge in Ukraine following the example of foreign countries.

The materials studied are the laws and regulations of Ukraine and some foreign countries governing the issue under consideration, as well as scientific works of domestic and foreign scientists, who studied this problem.

RESULTS

In this regard, it is necessary to analyze the existing legislative framework regulating innovation activity in Ukraine in detail and to make effective proposals to change such a base taking into account the tasks of modernization of law enforcement and judicial bodies (Yunin et al., 2018; Drozd et al., 2019).

The new means of proceedings have emerged at the pre-trial stage of investigation, in particular, the system of covert investigation (search) actions. The institution of covert investigation (search) actions is new to the domestic criminal process; it was borrowed from other countries (USA, UK and Germany), in which criminal prosecution of a person by authorized entities is ensured by conducting legal transparent and covert investigation (search) actions and fixation of the evidence (Kaliuk, 2014). The introduction of new rules of evidence into the criminal process of Ukraine is based both on the domestic experience of using search operations of a similar legal nature, as well as on the experience of legislative regulation and practical implementation of such special (covert) investigation actions, known to criminal procedural law of many foreign countries (Lutsyk & Samarin, 2018). The emergence of new norms sparked an uncommon interest in the practice of using the results of search operations and covert investigation (search) actions in establishing the facts of a case (Kaluhin, 2016; Ryzhykov, 2015).

The implementation of international law is one of the main factors in the modern evolution of national law enforcement systems (Bahrii & Lutsyk, 2014). The impact of international law on the national regulatory system for investigative activities is either through the transformation of national law in accordance with the requirements of international law, or through the direct application of international law (Pohoretskyi, 2007). The numerous changes to national constitutional, criminal and criminal procedural legislation aimed at the implementation of such principles as the observance of natural human rights and freedoms in criminal investigations, ensuring judicial control, etc. are the example of the first approach (Zhalinskyi & Rerikht, 2001).

DISCUSSION

There is no single unified approach to judicial review over observance of the law when conducting covert investigation (search) actions in foreign science, since each State has followed different historical legal paths that have not contributed to a single standardization in this area. Today there are still a number of problems and uncertainty that need to be addressed by legislation (Holovatyi, 2014 & 2015).

We consider it necessary, first of all, to disclose foreign experience of judicial review of legislation when conducting covert investigation (search) actions in the United States of America.

It should be noted that US criminal procedural law is characterized by a rather complex form of pre-trial investigation, including the use of covert means of obtaining evidence in the investigation of crimes. This is primarily due to the large number of legal acts regulating criminal procedural relations in different States, which may be quite different from one State to another (Koval, 2019).

Judicial control in the United States is a manifestation of constitutionalism and a component of the system of checks and balances of the principle of power-sharing, proclaimed by the Basic Law. Judicial review in criminal proceedings is an element of the overall judicial oversight system in this country (Kniaziev, 2019).

There is also a procedure for obtaining internal authorization to conduct a series of covert investigation activities in the US in addition to judicial review. Prosecutors and investigators, who record telephone conversations and videotapes with court permission, should comply with federal law regarding the interception of information transmitted via wired or electronic communications systems (Rinhlier, 2000).

This approach should be accepted and used, given that many domestic scientists consider the absence of the established criterion for the seriousness of the criminal act, during the investigation of which the implementation of covert activities is possible and appropriate, as one of the problems associated with the introduction of the institution of covert investigation in pre-trial investigation in Ukraine (Kniaziev, 2019).

The definitions of judicial review at the pre-trial stage of investigation are used conditionally in the United Kingdom, given that there is no such independent stage of investigation in the criminal justice system of the UK. The review over the conduct of covert investigation (search) actions in this country is not limited to the sole provision of the relevant authorization and depends on the type of the action taken. The Minister of Internal Affairs, for example, issues a decree on seizure of correspondence. However, such regulations are implemented with the participation of senior government officials; in particular the UK Prime Minister appoints a specifically mandated person (a commissioner), who oversees the implementation and execution of authority and responsibilities by law enforcement. At the same time, authorization to monitor banking transactions in that country is granted by the Crown Court or the Supreme Court, given the nature of the investigation.

Judicial review in the United Kingdom is implemented through a special judicial body-Investigatory Powers Tribunal (IPT), which was set up to deal with complaints about the restriction of rights and freedom of an individual by investigators, law enforcement, or the security service. The advantage of IPT in that it may consider complaints, lawsuits or other claims for actual and probable restrictions on human rights and freedoms (e.g., a person complaints that he (she) is under watch), even if such restrictions are lawful, with violations or illegal (there is a right to make appropriate orders to law enforcement). The disadvantage is that a complainant may not be summoned, i.e. there is no automatic right to be present at the hearing, and the reasons for such a decision are not explained (there is no statutory requirement for IPT to state the reasons for not summoning) (Honcharenko, 2018).

In view of the experience of the countries with Romano-German legal tradition, it should be noted that the institution of investigating judge is actively used by such countries as the French Republic, Switzerland, Italy, the Kingdom of Belgium, the Kingdom of the Netherlands. The criminal procedural codes of these states introduce a procedural subject-an investigating judge, who resolves some issues concerning preliminary investigations into a criminal case, in particular authorization of conducting covert investigation actions without prosecuting the case (Bondiuk, 2017).

Investigating judge of the French criminal justice model is given a wide range of competencies to commit most procedural actions on his (her) own initiative. Pursuant to the Criminal Procedural Code of the French Republic (Law of France, 1958), an investigating judge

can authorize the officers of the judicial police acting following a court order, to install any technical device to detect, store, transmit or record any words said by everybody in private or confidential text in private or public places, in cars, or to capture anybody in a private place without the consent of the persons concerned, based on the reasoned decision after soliciting the opinion of the prosecutor (Bahrii & Lutsyk, 2017).

The possibility and necessity of conducting covert investigation (search) actions authorized by the court are conditioned by specific crimes in legislation of the European countries. Thus, articles 706^{73}, 706^{74} of the Criminal Procedural Code of France contain a list of particularly dangerous crimes, by which the judicial police can conduct the following actions with the court permission at the request of the prosecutor: monitoring (Article 706^{80}), infiltration (Articles 706^{81}–706^{87}), interception of telephone conversations, correspondence by means of telecommunication (Article 706^{95}), video or audio control of negotiations or other actions in a certain place (Article 706^{96}), interception of data contained in computer systems (Articles $706^{102\text{-}1}$–$706^{102\text{-}6}$).

The authorization for telephone-tapping and record of telephone conversations is given only by court. Such authorization is granted for a term that does not exceed four months and is competent for offences, for which a sentence of imprisonment of more than two years may be imposed (Uvarov, 2017). It should be noted, however, that the Criminal Procedural Code of the French Republic contains appropriate prohibitions on the use of special technical devices of concealed detection in the office or a house of a lawyer (Article 56-1) and a doctor (Article 56-3).

The Constitution of the Italian Republic (Law of Italy, 1947) states that freedom and secrecy of correspondence and all other communications are inviolable and their restriction may be enforced only by a reasoned act of the judiciary, subject to the guarantees laid down by law. A prosecutor gives the police an authorization for telephone-tapping or interception of other personal information, when it is necessary to carry out these actions, but he (she) is obliged to get the consent of the judge within 24 hours after the interception (tapping) has begun. If such consent is not provided, all the information thus obtained loses its procedural value. Such authorization from the investigating judge in Ukraine is generally obtained prior to an audition (Article 260 of the Criminal Procedural Code of Ukraine) or other interference with private communication (paragraph 3, Article 246 of the Criminal Procedural Code of Ukraine), and may be started before making the relevant order only in exceptional cases (Article 250 of the Criminal Procedural Code of Ukraine) (Tahiiev, 2015; Law of Ukraine, 2012).

In Italy, the final decision on applying any other restrictions or coercive measures in addition to telephone-tapping or interception of other personal information is made by an investigating judge at the request of the prosecutor.

When the prosecutor considers that all the necessary evidence of the person's guilt has been collected and the investigation can be completed, he (she) sends the case file to the judge for a preliminary hearing, who decides whether there is sufficient evidence to prosecute. In case of its sufficiency, the trial begins, where, as it was already mentioned, the prosecutor acts as the accuser. The telephone-tapping may be authorized by the judge as a result of the preliminary investigation if there are serious grounds to believe that a crime has been committed or is being committed, and only if such a method is absolutely necessary to continue the investigation (Bradley, 2007). In other words, law enforcement agencies are required to demonstrate the judge

that the use of telephone tapping is not only a desirable method of investigation, but an absolutely necessary one, that is, without it, it is impossible to continue the investigation.

Austrian criminal procedure law also has an institution of investigating judge. In accordance with the requirements of the Criminal Procedural Code of Austria (Law of Austria, 1975), the decision to control the transmission of messages by means of communication is made by the court of the first instance, which oversees the conduct of inquiry and investigation. At the same time, such a decision may be taken individually by an investigating judge in urgent cases and subsequent obtaining permission from the court of first instance (Tahiiev, 2015). Two sections of the Criminal Procedural Code of Austria are designed to regulate legal relations regarding the use of the results of operational and investigative activity in proving criminal cases–Section V "*Control (observation) of the transmission of information by means of communication"* and Section VI "*Optical and acoustic controlling (monitoring) the persons through technical means"* respectively. In Austria, the use of undercover agents is permitted only to deal with organized crime, or crimes involving the use of weapons, unless the crime can be stopped otherwise.

In the context of our study, the provisions of the criminal procedure legislation of Georgia should also be considered. The Criminal Procedural Code of Georgia (Law of Georgia, 2009) also contains norms that provide for the possibility of using covert measures to obtain information when investigating the crimes. These norms are enshrined in various chapters of this legal act. Thus, Chapter XV "*Investigative actions*" contains Article 124-1 "*Monitoring of bank accounts".* The Georgian legislature attributes the monitoring of bank accounts to investigative actions, although it has all traits of covert investigation (search) action.

Chapter XVI "*Investigative actions related to computer data*" of the CPC of Georgia enshrines the following covert investigation (search) actions, in particular: (1) requesting a document or information (Article 136 of the CPC of Georgia). If there is a reasonable cause to believe that information or documents essential to the criminal case are stored in a computer system or on a computer data carrier, the prosecutor may file a motion with a court, according to the place of investigation, to issue a ruling requesting the provision of the relevant information or document. If there exists reasonable cause to believe that a person is carrying out a criminal act through a computer system, the prosecutor may request a court, according to the place of investigation, to deliver a ruling ordering the service provider to provide information about the user; (2) real time collection of internet traffic data (Article 137 of the Criminal Procedure Code of Georgia). If there is reasonable cause to believe that a person is carrying out a criminal act through a computer system, the prosecutor may, according to the place of investigation, file a motion with a court for a ruling authorizing a real-time collection of internet traffic data; under the ruling the service provider is obliged to collaborate with the investigation authorities and assist them, in real time, in the collection or recording of those internet traffic data that are related to specific communications performed in the territory of Georgia and transmitted through a computer system; (3) obtaining content data (Article 138 of the CPC of Georgia). If there exists reasonable cause to believe that a person is carrying out a criminal act through a computer system, the prosecutor may, according to the place of investigation, file a motion with a court for a ruling authorizing the collection of content data in real time; under the ruling the service provider is obliged to collaborate with the investigation authorities and assist them, in real time, in the collection or recording of content data related to specific communications performed in the territory of Georgia and transmitted through a computer system (Law of Georgia, 2009).

The law provides for law enforcement agencies to obtain a court order to collect information, connected with interference with a person's private and family life, in most Member States of the Council of Europe. For example, the provision of Article 258 of the Criminal Procedural Code of Ukraine, which stipulates that the prosecutor, the investigator by agreement with the prosecutor, are obliged to apply to the investigating judge for the permission to intervene in private communication (Honcharenko, 2018).

Therefore, it is possible to distinguish the basic mechanisms provided for in the criminal procedural legislation of European countries to ensure the protection of human rights and freedoms during the conduct of unlawful activity at the stage of pre-trial investigation. Such mechanisms are: judicial (prosecutorial) sanctioning of covert actions; the admissibility of performing covert actions only in case of the impossibility or substantial complication of obtaining the necessary data in another way; the possibility of performing such actions only during the investigation of particularly dangerous acts; limiting the ability to use the results of covert actions solely for the purposes authorized by the court; implementation of the procedure of notification of persons about the conduct of covert actions and their results; the restrictions on the ability to control communication of certain categories of persons (close relatives, priests, trust counselors, advocates, and physicians); the duty of the investigating authorities to immediately destroy the results of covert actions, which are not relevant to the specific proceedings and are not of probative value; minimizing the possibility of interference with the privacy of individuals (Kyslyi, 2016; Shvets et al., 2013).

The analysis of the European experience in granting the permit for conduct covert investigative (search) actions by a judge (investigating judge), as well as exercising judicial review over such actions, shows that there is no uniform approach to the functions of judicial control, the role of the subjects, which are empowered to make decisions on conducting covert investigation (search) actions. But in both cases, in our opinion, the investigating judge plays the key role, as he (she) ensures the observance of human rights and freedoms and authorizes covert actions.

CONCLUSION

By way of conclusion we state that the following rules of criminal procedural law of foreign countries can be considered with a view of their implementation in the criminal procedural legislation of Ukraine:

1. The right to open handed postal movements and to inspect them belongs to the court or prosecutor (the Republic of Germany);
2. The existence of an imperative norm to include the information on the fact of receipt and destruction of the information obtained as a result of unspoken measures that are not intended to be used as evidence in the case file (Germany);
3. Notification of the court, which gave the permission to hold covert action, about its results (Germany);
4. An annual report of the Prosecutor General on the covert actions, which took place throughout the Federal Republic of Germany for the reporting year to the Federal Office of Justice, and its publication on the Internet (Germany);
5. The right of the accused persons and individual citizens to file an application for the verification of the legality of the order to conduct covert actions, as well as the manner of their implementation (Germany);

6. The possibility to appeal the decision of the Minister of Internal Affairs on the permission to hold covert actions in order to determine its legality following the conduct (United Kingdom);
7. Consolidation of an exhaustive list of categories of persons and places, for which covert investigation (search) actions can be conducted in the Criminal Procedural Code (Republic of Kazakhstan);
8. Determination of the specific principles for conducting covert investigation (search) actions in the Criminal Procedural Code (Georgia);
9. The right of a person who, in the course of the proceedings in the case, became aware of the conduct of a covert investigative action with regard to him (her), to appeal the decision on a covert investigation action to the investigative panel of the relevant appellate court as a matter of course (Georgia);
10. Keeping the register of covert investigation (search) actions by the Supreme Court of Georgia, which records statistical information related to the conduct of such actions (Georgia) (Koval, 2019).

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