

PHENOMENON OF INTERFERENCE WITH PRIVATE COMMUNICATION AS THE CATEGORY OF THEORY AND PRACTICE OF CRIMINAL PROCEEDINGS

Vladyslav Teremetskyi, West Ukrainian National University
Ihor Tataryn, Lviv State University of Internal Affairs
Volodymyr Kovalenko, Luhansk State University of Internal Affairs named after E.O. Didorenko
Mykola Yakovenko, Luhansk State University of Internal Affairs named after E.O. Didorenko
Zhanna Udoenko, National University of "Kyiv-Mohyla Academy"
Oleksii Salmanov, Kharkiv National University of Internal Affairs

ABSTRACT

The paper is focused on theoretical substantiation of the interference with private communication while conducting covert investigative (search) actions as a category of criminal process. The analysis of theoretical and legal sources in the sphere of this scientific research leads to the conclusion, that provisions of the Criminal Procedural Code of Ukraine have established such a fundamentally new concept in Ukrainian criminal procedural law — the interference with private communication.

The systematic source analysis of scientific works and dissertations on the topic of the research shows that law and scientific backgrounds of the interference with private communication were studied fragmentary, existing scientific works, which covered the features of conducting the interference with private communication, have not solved the problem to lay its law and theoretical foundation, the independence of its existence as a criminal procedural legal category also has not been proved yet. The intensification of efforts to study the problems of legal and organizational backgrounds of the interference with private communication while conducting covert investigative (search) actions has not led to a comprehensive study of theoretical foundations for improving its implementation mechanism.

In order to establish the specificity of the content of the interference with private communication, improving the conceptual and categorical apparatus of the research, a number of definitions have been formulated, in particular: the interference with private communication; the principles of the interference with private communication; the means of the interference with private communication.

The focus is on defining the legal nature and grounds for the interference with private communication. In order to study the conceptual principles of the private communication interference while conducting covert investigating (search) actions, the principles were systematized as fundamental principles of its legal and organizational support. Theoretical and legal substantiation of the means of the interference with private communication was carried out and scientifically substantiated proposals were formulated aimed at improving the legal basis of the interference with private communication while conducting covert investigating (search) actions.

Keywords: Interference with Private Communication, Private Life, Human Rights and Freedoms, Covert Investigative (Search) Actions, Types of the Interference with Private Communication

INTRODUCTION

The recent transformation of criminal judicial system in many world countries has led to a radical revision of the methods for collecting evidence, which were proceedings results of the vast majority of investigative actions. Of course, Ukraine does not stand apart such processes, including significant reforms of the pre-trial investigation. Particular attention in the direction of reforming the criminal judicial system is paid to the pre-trial investigation of criminal offenses with the use of operative and search measures and covert investigative (search) actions. A variety of the latter is interference with private communication. Despite the fact that the term of “interference with private communication” was introduced by the legislator into legal circulation with the adoption of the current Criminal Procedural Code of Ukraine (hereinafter – the CPC of Ukraine) in 2012, there is still the need of in-depth study of theoretical and legal principles of the interference with private communication while conducting covert investigative (search) actions (hereinafter – CISA) in order to clarify the conceptual provisions laid down in its content.

The objective need for a systematic revision of theoretical, legal and organizational principles of the interference with private communication encourages scholars and practitioners to continually seek effective measures aimed at optimizing the covert retrieval of information that is relevant for the pre-trial investigation.

The authors of this article have clarified that the existing scientific works of Ukrainian scholars on the researched subject cover only some aspects of legal and theoretical provision of the interference with private communication and its place in the system of CISA. At the same time, the problems of the procedure of executing its types, the use of the obtained results in criminal proceedings have not been finally resolved, as well as the independence of its existence as a criminal procedural legal category has not been proved.

The relevance of developing theoretical and legal basis for interfering with private communication is due to the needs of scientific understanding and implementation of the conceptual provisions for obtaining evidence in criminal proceedings, as well as to the need of improving the procedure of conducting CISA, systematic updating of existing approaches to their legal provision. This indicates the relevance of the chosen research topic both for the theory of criminal proceedings and the practice of the interference with private communication.

RESULTS AND DISCUSSION

Covert methods of obtaining information about the preparation and commission of crimes have been recently recognized by democratic societies as fully democratic and civilized. Temporary restriction of a person’s right to privacy (for example, audio, video surveillance of a person; information retrieval from transport telecommunication networks; information retrieval from electronic information systems) is perceived in the public consciousness as the need to ensure law and order, but not as unjustified interference with private life of a human being, since it is provided by the guarantees of legality established in the legislation of the leading countries. Therefore, modern states provide special units of law enforcement agencies with the powers to apply legal restrictive measures to ensure maximum efficiency in obtaining evidence in the interests of ensuring the security of society and individuals.

One of the results of the pre-trial investigation reform launched in 2012 in Ukraine was the introduction of a new institution into the CPC of Ukraine – CISA. They are carried out only in cases when information about the crime and the person who committed it cannot be obtained by conducting “open” investigative (search) actions. Most CISA involve the interference with private life, one of the main components of which is person’s private communication.

Modern scientific research in the field of the interference with private communication during CISA has no single position on the understanding of the concept and limits of the

indicated interference. This leads to the lack of a unified approach to the interpretation of the content of the indicated category enshrined by the norms of the CPC of Ukraine. In addition, Ukrainian scholars rightly emphasize the need to establish a single scientifically sound approach to the correlation between the terms of “privacy”, “private life” and “private communication” and rightly critically analyze the criterion for classifying CISA defined in Chapter 21 of the CPC of Ukraine into those that interfere with private communication, and other types of CISA (Kolesnyk, 2014; Tertishnik, 2013; Tkach, 2014; Chabaiovskyi, 2012). For example, the content of a person’s private communication may become known as a result of conducting CISA, which are not classified by the norms of the CPC of Ukraine as types of the interference with private communication, in particular: surveillance over a person, thing or place; audio and video control of the place, which will be reflected in the relevant minutes and enclosures compiled based on the results of the conducted CISA (Kolesnyk, 2014). The Article 267 of the CPC of Ukraine includes inspection of publicly inaccessible places, housing or other person’s property to other types of CISA. The investigator conducting such actions gets acquainted with their environment, finds, records, if necessary makes copies or samples of objects, documents, etc. In this case, it is also possible to raise doubts about the lack of the interference with private communication (Lukianchykov & Lukianchykov 2014).

There is a debate among scholars about the broad and narrow scope of the interference with private communication. Thus, according to Bilichak, the scope of the concept of privacy of communication, defined in the Art. 258 of the CPC of Ukraine, is sometimes interpreted broadly, which creates difficulties in the practical activities of pre-trial investigation agencies while conducting CISA (Bilichak, 2014). Tertishnik believes that the legislator actually means the interference with private life, which is surely a broader concept and should cover a wider range of both open investigative actions and CISA (Tertishnik, 2013). Chabaiovskyi points out that the concept of “privacy” stated in the scientific literature and legislation is equivalent to the concept of “private life”. The requirement of unification of the texts of regulatory legal acts presupposes the use of one of those terms (Chabaiovskyi, 2012). Therefore, it is fair to establish official definition of the categories of “right to privacy”, “privacy of communication” at the level of a separate legal act, as well as the grounds and procedure for their restriction in operative and search activities of authorized agencies and at the pre-trial investigation of criminal offenses (Bilichak, 2014).

The understanding of the interference with private communication is enshrined in paragraph 2 of the Chapter 21 of the CPC of Ukraine. Communication is considered private if the information is transmitted and stored under such physical or legal conditions, where the participants of the communication can rely on the protection of information from the interference of others (Law of Ukraine, 2012). We note that the classification of communication as private is quite conditional. Titko while studying the evaluative concepts in criminal procedural law, rightly points out that the conditions of “privacy” of communication are not enshrined in regulatory legal provisions, but are specified in the law-enforcement process taking into account the specifics of a specific life situation, when criminal procedural norm can be applied (Titko, 2010). Thus, the concept of the interference with private communication enshrined in the current CPC of Ukraine needs to be improved due to the requirement for a clear understanding of its essence, content and legal nature and since the fact that any type of the interference with private communication temporarily restricts human rights and freedoms.

We believe that the interference with private communication within the system of covert investigative (search) actions regulated by the Art. 258 of the CPC of Ukraine is a general category, whose essence is a set of actions of authorized state agencies aimed at getting access to the content of information transmitted from one person to another directly or by means of communication of any type, and is maintained under the physical or legal conditions, when the participants of the communication think that the content of information is protected from the interference of others.

The content of the interference with private communication is the statutory actions of authorized entities carried out in order to obtain or verify evidence, as well as to establish other

circumstances relevant to a particular criminal proceeding and aimed at accessing the content of information transmitted by a person in the process of personal communication with another person (other persons), in particular by using technical means of information transmission, which, according to the participants of communication, is protected from dissemination to third parties.

Analysis of the current legislation determines that the interference with private communication is regulated by the norms of the Constitution of Ukraine (the Articles 30, 31) (Law of Ukraine, 1996) on the grounds and conditions of direct interference with private communication and the current CPC of Ukraine (the Art. 258), which contains its general provisions, specifies its definition and determines the types of implementation of the specified interference established by the law. At the same time, authorized operative units have the right in accordance with the CPC of Ukraine to carry out certain types of the interference with private communication (audio, video surveillance over a person; arrest, search and seizure of correspondence; information retrieval from transport telecommunication networks; information retrieval from electronic information systems) while conducting operative and search activities to perform the tasks assigned by the Law of Ukraine “On Operative and Search Activities”. Thus, depending on the grounds established by law, the interference with private communication may be carried out both during operative and search activities (if it is necessary to verify information obtained in the manner prescribed by law, about crimes being prepared; persons preparing to commit a crime or if there are other grounds specified by the Law of Ukraine “On Operative and Search Activities”) and during the pre-trial investigation (if it is necessary to obtain information about the crime and the person who committed it). Given that the interference with private communication is regulated by the norms of the current criminal procedural law, and implementation of its types defined by law is carried out by the usage of a number of other legal acts, including international law, there is reason to state the mixed legal nature of this phenomenon.

The mixed (heterogeneous) legal nature of the interference with private communication is also confirmed by the fact that it is regulated by the norms of substantive law (determine the general conditions of its implementation in the provisions of legislative acts) and procedural law (system of by-laws that determine the organizational and tactical basis of the interference with private communication, procedure of the organization and conduction of its types, as well as methods of using the means of such interference defined by the legislation). Since the legal nature of the interference with private communication is mixed (heterogeneous), then its sectoral affiliation is also mixed in nature: the types of the interference with private communication, depending on the scope and legal regime of implementation, the factual and legal grounds for the implementation, may be operative and search measures or covert investigative (search) actions.

Interference with private communication as a special type of state activity has the following features:

- 1) The state nature of the activities related to the interference with private communication. Interference with private communication should be carried out by authorized units of public authorities, *i.e.*, by a legally defined entity (entities) in order to obtain information relevant to the pre-trial investigation, if it cannot be done otherwise. Activities of authorized entities to interfere with private communication, in accordance with the Art. 246 of the CPC of Ukraine, should be the interconnected and interdependent system of actions, the basis for which must be justified decision of the authorized official adopted in accordance with the requirements of the law. According to the provisions of the law, interference with private communication as a type of CISA provided by the Chapter 21 of the CPC of Ukraine, must be carried out on the basis of a decision taken in accordance with the Articles 246, 248, 249 of the CPC of Ukraine by the investigating judge at the request of the prosecutor, the investigator agreed with the prosecutor (Parshutin, 2018);
- 2) The specified activity is exclusively carried out with the purpose provided by the current legislation – detection and prevention of a grave or extremely grievous crime, establishment of its circumstances, the person who committed a crime, if otherwise it is impossible to reach this purpose. Determining the legality of the purpose of interfering with private communication, it is important to take into account the position of the European Court of Human Rights. Thus, interference with private communication is

considered “necessary in a democratic society” if it complies with the principle of proportionality of the interference. This principle was formulated by the ECHR in its judgment in the case “Silver and Others v. the United Kingdom” in 1983, according to which: “...to be necessary in a democratic society” means to be compatible with the Convention. The interference must, inter alia, meet “urgent social need” and be “proportionate to the aim pursued”; and further – “... the law granting the power to restrictions, must provide their scope” (Silver and others v. the United Kingdom ECtHR, 1983). Given the above, interference with private communication during criminal proceedings should be of an exceptional nature and scope limited by criminal procedural law;

- 3) The list of entities authorized to carry out interference with private communication determined by the law. Interference with private communication, according to the Art. 246 of the CPC of Ukraine, should be carried out by the investigator conducting the pre-trial investigation of the crime, or on his behalf by other authorized persons specified in this Article;
- 4) The content of the interference with private communication is a set of actions of authorized entities aimed at gaining access to the content of information transmitted from one person to another directly or by means of communication of any type or stored under such physical or legal conditions, where the participants of communication can rely on the protection of information from the interference by others;
- 5) The covert nature of such activity, which provides access to information without the person’s consent that stores it or transmits it to another person. The covert nature of obtaining information about a crime and a person who committed it during the interference with private communication is the result of the interaction of three main factors: the covert nature of the purpose (conspiratorial access to information transmitted from one person to another without his consent); covert use of means to achieve the purpose (special technical equipment, software, etc., information about the fact and methods of application of which are not subject of dissemination); the need to provide covert conditions of counteraction between the entity (authorized operative unit/investigator) and the object (the person who committed the crime), which should facilitate the receipt of information that is essential for the pre-trial investigation (Parshutin, 2018). The expediency of introducing the institution of covert investigation in the legislation of the Council of Europe Member States (Ukraine became a member of this international organization in 1995), one of the main tasks of which is to protect human rights, pluralist democracy and the rule of law is confirmed by the Recommendation of the Council of Europe Committee of Ministers dated from April 20, 2005 No. 10 “On “special investigation techniques” in relation to serious crimes including acts of terrorism” (Council of Europe: Committee of Ministers, 2005).

The concept of the “interference with private life” is understood in foreign law-enforcement practice as actions aimed at lawful access to the object of the interference (information, communication, information resources, etc.). “Interference with private life” in international and Ukrainian law is characterized by the purpose and conditions of its implementation (implementation in exceptional cases, if there are grounds specified by law, in the manner prescribed by law, in compliance with statutory conditions). The specified is an attempt by legislators to strike a balance between the rights of individuals and the interests of the state (Parshutin, 2018).

Interference with private communication, depending on the purpose, grounds, persons who directly carry out actions aimed at gaining access to the content of communication, can be both legal and illegal. However, the actions of the pre-trial investigation entities related to the interference with private communication must be exclusively lawful, because the results obtained in the process of conducting one of the statutory types of the interference with private communication are aimed at collecting evidence or verifying already obtained evidence in specific criminal proceedings.

Interference with private communication should be carried out in the presence of: factual (availability of sufficient information indicating the possibility of obtaining (collecting) evidence or verification of already obtained evidence in a particular criminal proceeding on grave and extremely grievous crimes; lack of the possibility to obtain this information by other means) and legal grounds (a set of norms provided by the criminal procedural law, the relevant procedural documents regulating the conduction of the interference with private communication of a particular type and provide the right to specified by law entitle to their implementation).

The factual grounds for interfering with private communication are: investigation of grave and extremely grievous crimes; the presence of such a set of factual data that allows the investigator, prosecutor, investigating judge to conclude that there is an opportunity to obtain

information as a result of the interference with private communication that is relevant to the pre-trial investigation; this information cannot be obtained in any other way.

The legal grounds for interfering with private communication are: entering information about the commission of a grave or extremely grievous crime into the Unified Register of Pre-Trial Investigations; the decision of the investigating judge on the permission to conduct a specific CISA issued on the basis of a request of the prosecutor or the investigator in agreement with the prosecutor on the permission to interfere with private communication.

State interference with private communication, as well as any activity in the field of criminal proceedings should be based on conceptual principles. We talk about the system of regulatory requirements of the imperative nature of such activities. We believe that the system of principles of the interference with private communication consists of:

- a) General principles enshrined in the current legislation, which is the legal provision of the interference with private, communication (rule of law, respect for human rights and freedoms, secrecy of communication, non-interference in privacy, legality, and adequacy).
- b) Special principles – the fundamental principles of the implementation mechanism to conduct various types of interference in private communication by the entities of covert receipt of information relevant to a particular criminal proceeding, if otherwise prevents to obtain such information (conspiracy, rationality). The paper establishes that the principles of the interference with private communication are the fundamental backgrounds for its conducting by authorized state bodies in criminal proceedings, which reflect the objective laws of a covert access to the content of a communication, regardless of the forms of its implementation and means, used in communication, in legally prescribed types.

The possibility of using the means to conduct CISA, including the interference with private communication, is provided by the provisions of the current legislation. The legislator specified the means used during CISA in the Art. 273 of the CPC of Ukraine, the list of which includes “pre-identified (noticed) means or false (imitation) means” (Law of Ukraine, 2012). At the same time, it should be noted that the current legislation does not reveal the content of the specified categories. Due to this fact there is a certain inconsistency of positions in the scientific literature on this issue. The results of the analysis of the provisions of the Art. 273 of the CPC of Ukraine and the practices of their application indicate that they do not define the concept and system of means used while conducting CISA.

According to the authors of this research the means of the interference with the private communication are specially designed, adapted objects of the material world, as well as the methods, techniques, actions used by the authorized to interfere with the private communication state bodies to provide a confidential access to the content of the communication under the conditions, when there are reasonable grounds to believe that its content may contain information relevant to the pre-trial investigation.

Based on the analysis of the provisions of the CPC of Ukraine that regulate the conduction of CISA, on the means that can be used in carrying out certain types of the interference with private communication are:

- 1) Pre-identified (noticed) or false (imitation) means (specially made things, objects, documents and organizational structures that outwardly reproduce the features and properties of simulated objects) – the Art. 273 of the CPC of Ukraine.
- 2) Special technical means of control (the Art. 262 of the CPC of Ukraine), monitoring, selection and recording of information (the Art. 263 of the CPC of Ukraine), technical equipment for locating the location of electronic means, including mobile communication systems and other radio emitting devices activated in the networks of mobile operators, special software (the Art. 264 of the CPC of Ukraine), 3) confidential cooperation (the Art. 275 of the CPC of Ukraine).

Taking into account the provisions of the theory, the current legislation and practice of conducting CISA, the essential features of the means used during the interference with private communication are as follows:

- 1) Their development (formation, configuration, programming, etc.) is aimed at providing access to communication content if there are sufficient grounds to believe that its content may contain information relevant to the pre-trial investigation. Their use by lawful entities is carried out for the purpose of covert access to the content of information transmitted or stored under such physical or legal conditions, when persons transmitting or storing such information rely on its protection from the interference by others.
- 2) The investigator or on his behalf authorized operative units are subjects of their application; 3) the legality and procedure for their application is regulated by the provisions of the current legislation and by-laws; 4) methods of their use are aimed at conspiratorial access to the content of communication, if there are sufficient grounds to believe that its content may contain information that is relevant to the pre-trial investigation. As a rule, it is covert audio and video recording of the content of information transmitted from one person to another (others) during communication and surveillance over the behavior of persons whose private communication is interfered with.

The Constitution of Ukraine stipulates that a person's right to privacy is an inalienable complex right that is strictly protected by law. In particular, the Art. 30 of the Constitution of Ukraine guarantees the inviolability of dwelling place (territorial privacy), the Art. 31 – The privacy of mail, telephone conversations, telegraph and other correspondence (communicative privacy), the Art. 32 – The protection from the interference with personal and family life (information privacy) (Law of Ukraine, 1996). This gives grounds to conclude that the right to privacy includes territorial, communication, information, physical privacy. Given the content of the interference with private communication determined by the norms of the CPC of Ukraine, it is expedient to pay attention to the fact that the latter provides the possibility of temporary restriction of communication privacy provided by the Constitution of Ukraine. Such a conclusion can be made by analyzing the provisions of the Constitution of Ukraine, according to which privacy of mail, telephone conversations, telegraph and other correspondence may be temporarily restricted in exceptional cases provided by law and established by the court, in order to prevent crime or clarify the truth during a criminal investigation, if otherwise it is impossible to obtain information (Law of Ukraine, 1996). Thus, the interference with private communication can be both an effective tool for obtaining evidence in criminal proceedings and a mean of restricting human rights and freedoms under the Constitution of Ukraine (Serhieieva, 2017), which requires the state to establish effective procedural guarantees of legality in this area. We believe that the system of these guarantees includes the grounds for the interference with private communication, which must be enshrined in law. Therefore, the Art. 258 of the CPC of Ukraine, taking into account the requirements of the rule of law principle, determines the general principles, grounds and procedure for interfering with private communication.

The results of studying scientific research on the existing types of the interference with private communication indicate the importance of theoretical and legal definition of the grounds of procedural actions for the theory and practice of criminal proceedings. Interference with private communication is no exception; the grounds for conducting its types also require to be analyzed. The legislator generally defines the cases and conditions for conducting CISA, including those that constitute the types of the interference with private communication, namely:

- a) Information about the crime and the person who committed it cannot be obtained in any other way.
- b) The crime belongs to the category of grave or extremely grievous.
- c) They are exclusively conducted within criminal proceedings.
- d) They are conducted on the basis of the decision of the investigating judge (Tagiev, 2015).

Given the scientific discussion on the grounds of conducting procedural actions in general and the types of the interference with private communication in particular, we offer to divide them into legal and factual. The legal grounds for conducting various types of the interference with private communication are a set of the norms provided by the criminal procedural law (the Articles 258–264 of the CPC), relevant procedural documents regulating the conduction of a specific type of the interference with private communication and giving the right to the entities defined by law to its implementation. It is a matter of entering information

on the commission of a grave or extremely grievous crime into the Unified Register of Pre-trial Investigation; the decision of the investigating judge on the permission to conduct a specific CISA, issued on the basis of a request of the prosecutor or the investigator agreed by the prosecutor about the permission to interfere with private communication. The factual grounds for interfering with private communication are the availability of sufficient information indicating the possibility of obtaining (collecting) evidence or verification of already obtained evidence in a particular criminal proceeding on grave and extremely grievous crimes with the help of these CISA; the inability to obtain this information by another way. The factual grounds include: investigation of grave and extremely grievous crimes; the presence of such a set of factual data that allows the investigator, prosecutor, investigating judge to conclude that there is an opportunity to obtain information relevant to the pre-trial investigation as a result of the interference with private communication. This information cannot be obtained by any other way.

We believe that the provisions of the CPC of Ukraine provide a high level of guarantees that determine the legality of conducting CISA, which constitute the exceptional acts of the interference with private communication of a person by the investigator, prosecutor or by authorized operative units on their written behalf. Confirmation of this opinion is reflected in the Art. 258 of the CPC of Ukraine, which establishes the general provisions of the interference with private communication and determines CISA, which are its varieties and can be conducted only by the decision of the investigating judge, in the manner prescribed by law. By empowering the pre-trial investigation agencies with broad powers to use covert means of obtaining evidence in a particular criminal proceeding by conducting CISA, the Ukrainian legislator imposes appropriate restrictions and prohibitions on their unjustified use.

As a result of the conducted analysis of legal basis and procedure of the interference with private communication while carrying out CISA according to the legislation of Ukraine, the authors of this article have revealed their imperfection and existence of the problems influencing the efficiency of its realization, namely: 1) ambiguity of clear understanding in the norms of the criminal procedural law of the status of the interference with private communication within the system of CISA: as an independent CISA, which can be carried out in the statutory varieties, or a general concept containing four independent CISAs defined by the norms of the CPC of Ukraine as types of the interference with private communication. The outlined problem must be solved in the provisions of the Art. 258 of the CPC of Ukraine and the introduction of the separate Article into the Chapter 21 of the CPC of Ukraine, which would contain a list of CISAs; 2) a broad interpretation of the concept of private communication, as well as the content of the interference with such communication enshrined in the provisions of the Art. 258 of the CPC of Ukraine, poses certain difficulties in the practical activities of the pre-trial investigation agencies regarding the conduction of CISA. Therefore, it is expedient to consolidate the official interpretation of the categories “private communication”, “interference with private communication” at the level of a separate legal act (Resolution of the Plenum of the Supreme Court of Ukraine, the Cabinet of Ministers of Ukraine, etc.); 3) inconsistency of the content of the Art. 246 of the CPC of Ukraine “Grounds for conducting covert investigative (search) actions” in its title, due to the lack of a specific list of grounds for conducting CISA, which may create ambiguous practice of granting permission to conduct them, including the types of the interference with private communication. Amendments to the Art. 246 of the CPC of Ukraine, which should provide a clear list of grounds (legal and factual) for conducting CISA may be the mean to optimize the legal basis for the interference with private communication; 4) the lack of a certain position in the norms of the current criminal procedural law on the simultaneous conduction of CISA by the investigator together with the authorized operative unit that allows the investigator to be an active participant in the CISA process, but not just get the appropriate results. This provision must be enshrined in the Art. 246 of the Criminal Procedure Code of Ukraine; 5) taking into account the current needs of the authorized entities of the pre-trial investigation and the need to ensure proper investigation of crimes and in some cases timely prevention of damnification to national security of Ukraine, it is advisable that criminal

procedural law should establish an exceptional procedure for conducting CISA that is carried out by the investigating judge in urgent cases.

CONCLUSION & RECOMMENDATION

The authors of the article have studied scientific approaches to understanding the interference with private communication as a generalizing concept, the content of which consists of certain forms defined in the CPC of Ukraine: audio, video control over a person; arrest, search and seizure of correspondence; information retrieval from transport telecommunication networks; information retrieval from electronic information systems.

It has been emphasized that the legal nature of the interference with private communication is heterogeneous, which affects the nature of the sectoral affiliation of the interference: depending on the scope and legal regime of the implementation, factual and legal grounds, etc., the types of the interference with private communication can be operative and search measures and covert investigative (search) actions. At the same time, the interference with private communication, as a generalizing legal category, is characterized by the independent nature.

The authors have formulated the definition of basic terms in the field of the interference with private communication in the interests of the pre-trial investigation, namely: “interference with private communication”, “principles of the interference with private communication”, “means of the interference with private communication”, which should streamline the conceptual and categorical apparatus forming theoretical and legal principles of the interference with private communication while conducting covert investigative (search) actions.

The content of the interference with private communication is the statutory actions of authorized entities carried out in order to obtain or verify evidence, as well as to establish other circumstances relevant to a particular criminal proceeding and aimed at accessing the content of information transmitted by a person in the process of personal communication with another person (other persons), in particular with the use of technical means of information transmission, which according to the participants of communication is protected from dissemination to third parties.

The authors have offered own approach to the specification of legal and factual grounds for the interference with private communication while conducting CISA. We offer to supplement the Art. 246 of the CPC of Ukraine “Grounds for conducting covert investigative (search) actions” with a new paragraph in the following wording: “The grounds for conducting covert investigative (search) actions are:

- 1) The need to obtain information about the crime and the person who committed it within criminal proceedings concerning grave and extremely grievous crimes is substantiated by the authorized persons to make a decision on the need to conduct a covert investigative (search) action by officials.
- 2) A ruling of the investigator or prosecutor for conducting a covert investigative (search) action, and in cases provided by this Code – a decision of the investigating judge, issued at the request of the prosecutor or at the request of the investigator agreed with the prosecutor.

The authors have suggested a new theoretical and legal approach to the formation of the system of means of the interference with private communication by defining their essential features as criteria for classifying objects of the material world, methods, techniques, actions used by entities authorized to conduct the interference with private communication to ensure the conspiratorial access to the content of the communication, if there are sufficient grounds to believe that its content may contain information relevant to the pre-trial investigation.

It has been indicated that the system of principles of the interference with private communication while conducting covert investigative (search) actions consists of general principles (enshrined in law) and special principles (grounds of the implementation mechanism).

In order to overcome the identified problems of legal regulation of the interference with private communication while conducting CISA, we offer to develop an interagency regulatory legal act, which should determine the basic principles for conducting different types of the

interference with private communication and the use of their results in criminal proceedings. The specified document should be of interdepartmental nature and directed on the application of its norms by all authorized entities to carry out the specified CISA.

Further areas of scientific research should include: development of the problem of the functional purpose of the interference with private communication within the system of CISA defined by the Chapter 21 of the CPC of Ukraine; theoretical substantiation of systematization and classification of CISA of theoretical and legal model of the activity of authorized persons to carry out the interference with private communication directed on covert receipt of the information in the interests of the pre-trial investigation.

REFERENCES

- Bilichak, O. (2014). General provisions on interference in private communication in accordance with CPC of Ukraine. *Scientific Bulletin of the International Humanities University. Series: Jurisprudence*, 9(1), 201–204.
- Chabaiovskiy, T.V. (2012). *Grounds and limits of criminal procedural interference with private life of citizens*. Unpublished doctoral dissertation, National Academy of Sciences of Ukraine.
- Silver and others v. the United Kingdom ECtHR (1983).
- Kolesnyk, V. (2014). Interference in private communication and providing for individual rights in course of conducting of covert investigative (Detective) actions. *The Bulletin of the Academy of Advocacy of Ukraine*, 11(31), C. 37–44.
- Law of Ukraine. (1984). *The Criminal Code of Ukraine* of April 13, 2012.
- Law of Ukraine. (1996). *Constitution of Ukraine* of June 28.
- Lukianchykov, Y.D., & Lukianchykov, B.Y. (2014). Improvement of the system of covert investigative (search) actions. *Problematic issues of applying the CPC of Ukraine in modern conditions*, 29-32.
- Parshutin, A.B. (2018). Concept of the interference with private communication: Theoretical and legal nature. *Law and Society*, 5(2), 227-232.
- Council of Europe: Committee of Ministers (2005). *Recommendation Rec (2005)10 of the committee of ministers to member states on "special investigation techniques" in relation to serious crimes including acts of terrorism*.
- Serhieieva, D. (2017). The legal and factual grounds of the conduct of cover investigative (search) actions. *Herald of criminal justice*, 4, 56-65.
- Tagiev, S.R (2015). The grounds for secret investigative (search) actions prosecution. *Herald of Zaporizhzhia National University, Jurisprudence*, 2(1), 233-239.
- Tertishnik, V. (2013). The conceptual problems of the reform of criminal justice. *Law and Society*, 1, 136-140.
- Titko, I.A. *Estimative concepts in criminal procedural law of Ukraine*. Kharkiv: Law Publishing.
- Tkach, O.V. (2014). Limits of the interference with private life in criminal proceedings of Ukraine. *Scientific Notes of Lviv University of Business and Law*, 12, 236-239.