Experience in Regulating the Issue of Using Results of Secret Investigative (Search) Actions within European countries and the USA Laws and Possibility of its Application in Ukraine

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Abstract. The author of the article has carried out a scientific analysis of the legislation of European countries and the USA on legal regulation and practice of conducting the results of secret means of investigation (secret investigative (search) actions) and using their results while proving within criminal proceedings. The main areas of regulatory and legal provision for the regulation of conducting secret investigative (search) actions during the investigation, as well as the peculiarities of using their results in criminal proceedings, have been highlighted. It has been emphasized that legislation of the most countries of Europe and the USA provides for the possibility of conducting secret investigative (search) actions by law enforcement agencies in order to obtain evidentiary information. Such measures are recognized as effective means of preventing and detecting criminal offenses within the law enforcement practice of most countries. Having analyzed the legislation of the indicated countries, one can conclude that such measures are not only widely used in many of them, but also constitute a system of means of activity of state authorities for the prevention and detection of crimes. The purpose of conducting them is to obtain relevant information for the objectives of the investigation. At the same time, the legislation of the countries of Europe and the USA on conducting and using the results of secret investigative (search) actions does not necessarily distinguish between investigative actions and secret investigative (search) actions, and the obtained results are used by authorized agencies while proving at all stages of pre-trial and judicial proceedings. It has been proved that legislation of the countries of Europe and the USA has also paid considerable attention to the issues of ensuring the rule of law in conducting secret investigative (search) actions, as well as the legality of using the obtained results. The most effective means of ensuring the legality of secret investigative (search) actions in many countries are prosecutor's supervision and judicial control over the activities of law enforcement agencies. It has been determined that the nature of the control forms is also increased with the increase in the degree of interference into the rights and freedoms of a person due to the conduction of secret investigative (search) actions. The author has paid attention to the fact that the results of secret means of investigation in some European countries can be used while investigating criminal offenses of minor gravity. It has been concluded that there is the need to amend the Criminal Procedural Code of Ukraine (CPC) taking into account the experience of European countries and the USA, namely in terms of further improvement of the procedure for conducting secret investigative (search) actions (grounds, conditions), as well as strengthening the effectiveness of control over legality of their implementation and use of the obtained results, which should take into account the standards generally accepted in democratic countries in the field of criminal proceedings.

Key words: secret investigative (search) actions, evidence, prosecutor's supervision; judicial control, criminal proceedings, guarantees of the rights of a person, improvement of legislation.

1. Introduction

The problem of combating crime, which has no borders in today's world , is not limited to criminal and criminal procedural legislation and law-enforcement practice of a specific state. Such issues in one aspect or another are resolved both in the law of a certain country, their associations and in general at the global level. It stipulates that the forms and methods of law enforcement agencies activities in different countries must be constantly improved. The above is also applied to secret forms of combating crime. At the same time, the conduction of such actions should take into account the standards generally accepted in democratic countries in the field of criminal proceedings. Moreover, these standards, especially those enshrined in international legal acts, should be practically implemented into the legal basis of conducting secret investigative (search) actions and become part of the forms and methods of covert activities of law enforcement agencies of any state. Such a task is related to the fact that any state that considers itself democratic, social and legal must effectively combat crime, but at the same time ensure reliable protection and defense of constitutional rights and human freedoms. It is especially applied to those persons who are participants in criminal proceedings and in respect of whom secret investigative (search) actions are conducted and the materials obtained as a result of them are used.

2. Review of the literature

The use of secret methods of investigation was the subject of scientific research by such scholars as: M. V. Bahrii, V. V. Lutsyk, S. R. Tahiev and others. Separate issues of using evidence obtained as a result of such actions were studied by: O. V. Ihnatiuk, V. V. Nechai, D. S. Sergieieva and others. Besides, the provision of human rights while conducting such actions was studied by: A. A. Koval and others. However, these issues still need to be resolved in terms of introducing international experience of their legal regulation and implementation into the investigation practice in Ukraine.

3. Research purpose

The purpose of the article is to analyze the main approaches in the law of European countries and the USA to legal regulation of secret investigative (search) actions and the use of the obtained results while detecting criminal offenses.

4. Results

The investigation and detection of criminal offenses involves taking actions and measures that are different in nature, form and method of conduction. It includes taking such actions and measures that significantly affect the implementation by their nature or method of implementation, or may even lead to the restriction of constitutional human rights. They include secret investigative (search) actions or operative and search measures or measures of covert activity. We note that such measures play an extremely important role in crime detection. Thus, a third of all the evidence used by the French court to detect a person's guilt in committing a crime was obtained precisely with the help of actions carried out in a secret manner [1, p. 209]. Such a result of their application determines the widespread practice of including covert measures into the content of law enforcement activities of authorized state agencies. According to official data, new, as they were called, "special" investigative actions were in criminal procedural legislation of a number of European countries (Great Britain, Germany, France, the Netherlands, Denmark, Switzerland, etc.), in the late 1980s and early 1990s [2, p. 10]. Currently, the practice of their use proves their effectiveness, and the forms and cases of their application are spread in the law enforcement activities of many states.

That is the reason why the study and generalization of the experience of other countries both leads to the enrichment of national legislation and acts as a factor in its improvement. In this context, the fact that studying foreign experience is relevant in regard to Ukraine has been justified because a significant part of legal norms and institutions of the Criminal Procedural Code of Ukraine in 2012 was borrowed from foreign sources,without the creation of appropriate auxiliary legal institutions and the appropriate financial and technical base [3, p. 65]. One should agree with this position. And studying international experience in regulating the issue of conducting secret investigative (search) actions and using their results during the prevention and detection of criminal offenses is extremely relevant for the criminal procedural law of Ukraine. Such a statement is also due to the fact that the current criminal procedural legislation of Ukraine is largely integrated into the European legal space for the regulation of criminal procedural legal relations [4, p. 100]. Therefore, the issue of legal regulation of the measures of covert activities, as well as the use of their results during crime prevention activities, is a separate and quite relevant area of development of legal science, regulatory and law enforcement activities both for Ukraine and other countries.

Attention and recognition of the important role of the indicated actions, which are necessary in the modern law enforcement practice of many countries, are due to their high efficiency in providing the subjects of the investigation with evidence. There is the issue of balancing the interests of society and the state in detecting criminal offenses and observing human rights and freedoms along with this. We support the opinion that developed democratic countries try to preserve a wide range of civil rights and freedoms by ensuring the effectiveness of law enforcement activities, and the main features of such systems are the clear regulatory enshrinement (processualisation) of the procedure for conducting secret investigative and search actions, the judicial control over their proceedings, the possibility of a wide public discussion of the problems of using covert methods in the work of law enforcement agencies [3, p. 70]. The nature of the state can be determined by the degree of "proceduralization", the effectiveness of supervision and control, the reality of guaranteeing human rights, as well as the role of secret means of investigation, either means of preventing and detecting crimes, or means of state and authoritative influence on a person and society.

The specified feature of the role of the indicated actions, first of all, presupposes the need for their appropriate legal mediation. The latter refers to the proper and comprehensive normative and legal regulation of the conditions, grounds and procedure for carrying out such actions and the use of the information obtained as a result of their application. It has been noted that the main attention in foreign professional publications in the field of tacit cooperation was focused on the following aspects: analysis of the experience of legal regulation of tacit cooperation; increasing the effectiveness of such activities in own countries; analysis of the results of the practical application of legislation regulating tacit cooperation; the issue of voluntary assistance by individuals to the police and other law enforcement agencies; the issue of covert police activity [5, p. 83]. From this point of view, it can be noted that the problem of measures of covert activities is embodied in a rather wide list of issues, the proper legal regulation of which is the foundation for the possibility of applying the specified actions in criminal proceedings in a democratic society. In contrast to such societies, countries with the authoritarian political regime avoid detailed legal regulation of tacit investigative activities and are limited to departmental control over its conduction, and the procedure for conducting secret investigative actions is

determined by public officials in a closed regime outside court control [3, p. 70]. That is why the path defined in the Constitution of Ukraine as a democratic, social and legal state determines not only the need to comply with approaches to the regulation of secret investigation methods that are implemented in democratic countries, but most importantly, it requires the creation of the system of guarantees of human rights and the legality of using the obtained information as a result of such measures.

It should be noted that each country, based on its legal traditions and experience in the organization and functioning of law enforcement agencies, solves the issue of legal regulation of the system of measures of covert activities in its own way. It determines their differences and peculiarities between the countries. Along with this, it is possible to talk about certain joint approaches in the organization and legal regulation of such covert activities taking into account the typical features of the nature, purpose, forms and methods of carrying out such actions. The main thing that unites them is that such actions are a mean of activity of state agencies, within the limits of which they implement the state and authoritative powers granted to them in order to obtain information important for the investigation. In this regard, it is rightly noted that secret investigative (search) activity is one of the specific types of state activity, the monopoly of which, like the use of force methods, is an important component of state sovereignty [3, p. 70]. That is why we note again that, on the one hand, we recognize the exclusive right of the state to carry out the specified actions, on the other hand, we should talk about their proper legal regulation and the introduction of guarantees of the compliance with human rights and freedoms during their implementation and the use of obtained materials as a result of such actions.

Thus, regarding the system of secret investigative (search) actions, the analysis of regulatory acts of foreign countries according to the experts shows that certain objects of regulation are most often such types of secret investigative and search activities of law enforcement agencies as: covert surveillance over an object (a person, vehicle or place); tacit operations related to penetration into publicly inaccessible places (covert inspection or search, obtaining samples, removing information from electronic media, etc.); tacit operations related to communications (control of correspondence, removing information from communication channels, establishing the location of radio-electronic means, etc.); covert operations related to the use of agents (obtaining confidential information, monitoring the commission of a crime, extracting samples, etc.); the use of agents and other forms of confidential cooperation in the prevention or detection of crimes [3, p. 66, 67]. Having analyzed this list, it can be concluded that such measures are not only widely used in many countries, but also constitute the system of means of activity of state agencies for the prevention and detection of crimes. The purpose of conducting them is to obtain relevant information for the goals of the investigation. It confirms the assumptions about the typical forms of existence and ways of carrying out secret methods of investigation in many countries. Similar in nature and method of conducting covert activities are used in the law of most countries during the investigation of criminal offenses. If they are compared with the provisions of Chapter 21 of the Criminal Procedural Code of Ukraine, it can be concluded that, in general, the domestic legislator included into the list of measures of covert activities their main types, which are inherent and worked out by the practice of many other states. We believe that it is the evidence of the process of unification of activities for the prevention and detection of criminal offenses, which also provides similar forms and consequences of using the obtained results. Accordingly, the forms and methods of their legal regulation, as well as practical techniques and methods of implementation, which have already been worked out, in particular, by European countries, may well be borrowed and used in the regulation of the application of measures of covert activity in the criminal proceedings of Ukraine.

At the same time, we would like to pay attention to a certain feature of legal regulation of such actions in certain countries. In general, the types of the indicated secret means of investigation are similarily determined in many states, but the issue of their status is resolved differently in their law: whether they are part of the actual criminal procedural activity or are exclusively means of investigative activity. In particular, it has been noted that the legislation of European countries regarding the conduction and use of the results of covert investigations is divided into two groups: 1) they are not demarcated into investigative actions and operative and search measures, and the obtained results during covert investigations are used in proving entitled as secret evidence (for example, in Great Britain); 2) is traditionally divided into operative and search activities and criminal proceedings, and their results are used at all stages of court proceedings (for example, in Latvia) [6, p. 301]. Such an approach is more likely due to national legal traditions and the practice of law enforcement activity than to the recognition of the need to distinguish operative and search (secret investigative (search) actions) and ordinary (open) investigative actions.For example, as experts note, there is an interesting feature upon careful study of the relevant paragraphs of the Chapter 8 of the Criminal Procedural Code of the Federal Republic of Germany: the German legislator does not draw a clear line between the actual operative and search measure and investigative action [4, p. 98; 7, p. 254]. A similar situation with legal regulation of the status of covert means of activity of law enforcement agencies is also observed in France, the inquiry of which is characterized by elements of both operative and search and criminal procedural activities, and there is no clear boundary between extra-procedural and procedural actions, therefore, such an action, according to the Criminal Procedural Code of France, as search for information on computers, in the online mode is carried out both during the investigation of serious crimes and in case of the commission of minor crimes by an organized criminal group (assistance in the entry and illegal stay of a foreigner on the territory of

France) [6, p. 297]. That is, the issue of distinguishing means of investigation into operative (covert) and ordinary means of investigation is not so relevant in such countries as Germany and France, whose law development significantly influenced the legal system of the countries of the European continent.

The distinction between the nature of evidence actions and the way of their conduction in the countries of the Anglo-Saxon legal family is not as clear as in the Criminal Procedural Code of Ukraine. For example, there is actually no distinction between an investigative action and an operative and search measure in Great Britain according to the rules of police investigation [1, p. 213], and therefore, the results of operative activities within the criminal proceedings of Great Britain are allowed as evidence, if their authenticity is proved, while their use is not affected by possible violations of the rights of other persons, against whom there is no criminal prosecution [6, p. 297]. A similar approach can be observed in the US law-enforcement practice. Thus, secret measures in this country are recognized as legal methods of investigation, where all means that allow to obtain procedurally significant information are given equal legal force, and their results acquire the status of full-fledged arguments in court, although the right to recognize the latter as court evidence belongs to the court as before, although the right to recognize the latter as court evidence belongs to the court as before; that is the reason why operative and search information in the American judicial system does not pass through the "filter" of pre-trial investigation, but ends up directly in the court, where they decided the issue of its admissibility [7, p. 252]. As scholars note by analyzing such legal approaches, there is no judicial evidence as a result of a police investigation, and the police does not make decisions on the subject matter of a criminal and legal dispute between the accused and the state, because at this stage there is only the search and identification of evidence carriers, which will be subsequently presented to the court [1, p. 205]. That is, the nature of the origin or the method of collecting factual data about a criminal offense do not have such fundamental legal significance in the law of these countries. As you can see, it is more important whether such factual data will be recognized as evidence by the court in the future, as well as whether the relevant evidence was obtained in a legal way without violating human rights and freedoms.

We believe that this approach is based on the concept of understanding the relationship between the concepts of "procedural evidence", "pre-trial evidence", "court evidence", "materials of criminal proceedings that can be recognized as evidence". It has been noted that there is a division of evidence within such an approach into pre-trial evidence – recognized as evidence by the party to the criminal proceedings, which substantiates its conclusions in the procedural activity by them, and is not such evidence for the court; court – recognized as such by the court, and therefore all documents and other materials related to the pre-trial investigation of a criminal offense are recognized as criminal proceedings materials without exception [8, p. 205]. As we can see on the examples from the legislation of certain countries, materials collected by using secret methods of investigation are "materials related to the pre-trial investigation of a criminal offense", but which are not court evidence. This approach deserves attention. In particular, it consists of the fact that law enforcement agencies are empowered by law to take all possible and necessary (open and secret) actions to establish all the circumstances of a criminal offense with the aim of its termination and detection. But at the same time, only those results of their activities that meet the relevant criteria (relevance, admissibility, credibility) are recognized as evidence by authorized independent agencies (courts). And only such evidence can be relied upon to justify a certain legal decision. We believe that this concept, which has found its implementation in the law of other countries, is also perspective for the implementation within criminal procedural law of Ukraine.

A separate aspect of foreign law enforcement practice for the implementation of secret methods of investigation and the use of the obtained results is the issue of ensuring their legality. As experts note, the legislation of most of the Council of Europe Member States, provides the need for their law enforcement agencies to obtain a court order to conduct measures of collecting information within the aspect of interference in a person's private and family life, such as the norms of the Art. 258 of the Criminal Procedural Code of Ukraine [6, p. 301]. It should be noted that such control is a necessary condition for conducting covert actions and further using their results in the investigation as evidence. Although approaches to its organization in different countries are somewhat different. Thus, § 100-a of the Criminal Procedural Code of the Federal Republic of Germany contains grounds for monitoring telephone conversations, while at the same time it is hardly possible to call the list of these grounds exhaustive, since the wording of the norm itself provides for an ambiguous interpretation, and in addition, the range of persons, who may be the subjects of telephone conversations monitoring is practically unlimited [4, p. 98]. And such an approach seems a bit vague. In this regard, scholars directly note that there are no clear grounds for the implementation of covert actions in the Criminal Procedural Code of the Federal Republic of Germany (in particular, depending on the type of crime), which can create a problem while using materials obtained in the process of covert actions in evidence procedures [7, p. 254]. We note that it is a manifestation of the broad discretionary powers that police authorities have while investigating criminal offenses in Germany. But at the same time, such actions are not uncontrolled. Particular attention has been paid to the fact that all open and covert actions of authorized agencies in the Federal Republic of Germany are carried out with the aim of detecting crimes, in the manner specified by the Criminal

Procedural Code, where the inquiry is carried out by a prosecutor, and the police conducts operative and search activities; and it should be stressed that the legislator of the Federal Republic of Germany pays considerable attention to the provision of human rights when carrying out covert measures to investigate crimes [1, p. 206, 207], and supervision over the observance of human rights and freedoms during the preliminary investigation is carried out by a specialized judge, as it is provided by the Criminal Procedural Code of Germany [6, p. 299]. That is, the broad freedom of choice of investigation means in this country is controlled by a prosecutor and the court, and such activity itself is generally limited by regulatory provisions that act as guarantees for a person against unjustified interference with his / her rights as a result of conducting covert measures.

Thus, the approaches to the introduction of mechanisms of control over the initiation and conduction of secret investigative actions, as well as the use of the obtained results, are characteristic for most democratic countries in Europe. It has been noted that the permission to carry out secret measures to obtain information for the investigation of crimes in accordance with the Criminal Procedural Code of the French Republic is granted by the investigating judge at the request of the prosecutor [1, p. 210]. The specified mechanisms for guaranteeing the legality of secret investigative actions (normative regulation, prosecutor's supervision and court control) are part of the legal regulation of both the grounds and conditions for conducting covert investigative actions, and the use of the results obtained as a result of their investigation. For example, the decision to use covert means in the investigation is made by the court under Portuguese law, but in case of obtaining computer data, it is made by the head of the criminal police, and the obtained information is transferred to the court for research [6, p. 300]. In Great Britain, for example, court control is not carried out at the stage of obtaining permits/sanctions for interference in a person's private communication, but a special judicial agency – the Investigatory Powers Tribunal (IPT) has been created to consider complaints about any claims related to the restriction of a person's rights and freedoms by investigators, law enforcement agencies or the security service [6, p. 297]. The US experience is somewhat specific in this area. As noted, the US legislation does not provide an appeal to the court to conduct covert means during a pre-trial investigation, such powers are vested to the head of operative and search activities, who is the head of a police unit authorized to coordinate the activities of police officers subordinated to him, who use covert means of obtaining evidence during a preliminary investigation. however, if it is necessary to carry out those procedural actions that may temporarily limit the constitutional rights of a person, the permission of the court is required [1, p. 206]. That is, various forms of supervision (control) over the legality of such actions are used in order to ensure the legality of the use of the results of covert means of investigation, where the nature of the form of control increases with the degree of interference with individual rights.

Thus, in relation to international experience of regulating the issue of the use of the results of secret investigative (search) actions during the prevention and detection of criminal offenses, it can be noted that: these measures are recognized in many countries as means of ensuring the receipt of evidentiary information important for the prevention and detection of criminal offenses; many countries have a well-established practice of using such secret means in criminal proceedings and using the evidence obtained as a result of them; regardless of the difference in the legal status of these actions, appropriate attention has been paid to their legal regulation; the fact of conducting secret actions during the investigation and the process of using the obtained results is under the supervision of a prosecutor and the control of a court, which act as guarantees of legality in criminal proceedings. Accordingly, the further improvement of the procedure of their conduction (grounds, conditions), as well as strengthening the effectiveness of control over the legality of their conduction and the use of the obtained results is an urgent area for the development of applying secret investigative (search) actions during the investigation for the national criminal procedural law of Ukraine. This approach corresponds to the path of Ukraine's development as a democratic, social and legal state. That is why the legal basis for the regulation of such actions and the process of applying the results of their implementation in Ukraine should take into account the standards generally accepted in democratic countries in the field of criminal proceedings.

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