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АЛЫС ШЕТЕЛДЕРДЕГІ ҚЫЛМЫСТЫҚ СОТ ІСІН ЖҮРГІЗУДЕ ЖАСЫРЫН ТЕРГЕУ ӘРЕКЕТТЕРІН ЖҮРГІЗУДІ ҚҰҚЫҚТЫҚ РЕТТЕУ ТӘЖІРИБЕСІ

Аннотация. Осы ғылыми мақала алыс шетелдердің қылмыстық сот ісін жүргізуде жасырын тергеу әрекеттерін жүргізуді құқықтық реттеу тәжірибесін талдауға арналған. Қылмыстық процесте жасырын тергеу әрекеттерін жүргізу барысында құқықтық реттеуді қалыптастыру және дамыту мәселелері қарастырылады. Қазақстан Республикасының қылмыстық процесіндегі жасырын тергеу әрекеттері бойынша барлық заңнамалық өзгерістер мен толықтырулар қаралды. Германияның қылмыстық процестік кодексінің VIII бөлімінде «жасырын тергеулерге» ерекше назар аударылған. Зерттеудің маңыздылығы мен өзектілігін көрсете отырып, авторлар Қазақстанның құқық қолдану қызметіндегі цифрландыруды іске асыру және оның барысы туралы бірнеше қорытындыға келіп отыр. Зерттеу материалдары оқу процесінде және заң оқыту орындарында, біліктілікті арттыру институттарында және қызметтік дайындық жүйесінде табысты қолданылуы мүмкін.

Түйінді сөздер: Қазақстан Республикасының қылмыстық процесі, Германияның қылмыстық процесі, жасырын тергеу әрекеттері, жасырын тергеу.

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ОПЫТ ПРАВОВОГО РЕГУЛИРОВАНИЯ ПРОВЕДЕНИЯ НЕГЛАСНЫХ СЛЕДСТВЕННЫХ ДЕЙСТВИЙ В УГОЛОВНОМ СУДОПРОИЗВОДСТВЕ ДАЛЬНЕГО ЗАРУБЕЖЬЯ

Аннотация. Настоящая научная статья посвящена анализу опыта правового регулирования проведения негласных следственных действий в уголовном судопроизводстве дальнего зарубежья. Рассмотрены вопросы становления и развития правового регулирования проведения негласных следственных действий в уголовном процессе и законодательные изменения и дополнения по негласным следственным действиям в уголовном процессе Республики Казахстан. Отдельное внимание уделено Разделу VIII, так называемых «скрытых расследований», Уголовно-процессуального кодекса Германии. Подчеркивая важность и актуальность исследования, авторы приходят к выводам о реализации и процессе цифровизации в правоприменительной деятельности Казахстана. Материал исследования может успешно использоваться в учебном процессе в юридических учебных заведениях, институтах повышения квалификации, в системе служебной подготовки.

Ключевые слова: уголовный процесс Республики Казахстан, уголовный процесс Германии, негласные следственные действия, скрытые расследования.

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EXPERIENCE OF LEGAL REGULATION OF SECRET INVESTIGATIVE ACTIONS IN CRIMINAL PROCEEDINGS ABROAD

Abstract: This scientific article is devoted to the analysis of the experience of legal regulation of secret investigative actions in criminal proceedings abroad. The issues related to formation and development of legal regulation for conducting secret investigative actions in the criminal process as well as the legislative changes and amendments to unofficial investigative actions in the criminal process of the Republic of Kazakhstan are being considered. Special attention is paid to the Criminal Procedure Code of Germany, Section VIII of the so-called «hidden investigations». By emphasizing the importance and relevance of the topic, the authors made a conclusion on implementation and process of digitalization in the law enforcement activities in Kazakhstan. The results of the study can be successfully used in the educational process in law schools, institutes of professional development and within the professional development system as well.

Key words: Criminal Procedure of the Republic of Kazakhstan, Criminal Procedure of Germany, unspoken investigations, covert investigation actions.

Almost five years have passed since new Criminal Procedure Code of the Republic of Kazakhstan (here in after – the Code of Criminal Procedure) (July 4, 2014) entered into force. During this period, scientists and practitioners have repeatedly raised some problematic issues of the current Criminal Procedure Code of the Republic of Kazakhstan, one of which is conducting secret investigations.

These issues are resolved within the framework of modernization of the procedural foundations of law enforcement, where Chapter 30 of the Criminal Procedure Code of the Republic of Kazakhstan “Secret Investigative Actions” was amended and supplemented by 5 amendments:

1) in part 1 of Art. 248 of the Criminal Procedure Code of the Republic of Kazakhstan the word “audio” is excluded [1];

2) article 231 of the Criminal Procedure Code of the Republic of Kazakhstan excludes clause 8 “Secret controlled delivery” [2];

3) in article 234 of the code of Criminal procedure of the Republic of Kazakhstan sanctions for conducting secret investigative actions are transferred to investigative judges [3];

4) article 234, 240 of the code of Criminal procedure of the Republic of Kazakhstan introduces “specialized investigative courts” and “specialized inter-district investigative courts” [4];

5) article 240 of the Criminal Procedure Code of the Republic of Kazakhstan contains paragraph 1-1, which states that ‘a person in respect of whom secret investigative actions were carried out must be notified of this by the criminal prosecution body without

familiarization with the results of secret investigative actions within a period not later than six months from the date of the final decision on the criminal case’ [5].

Within the context of the study the authors note that national legislators while modernizing the procedural foundations of law enforcement mainly pay attention to the experience of foreign lawmaking: more often – Western Europe. This looks logical as continental legal system (Romano-German family) is close to national lawyers.

First of all, analyzing the Code of Criminal Procedure of foreign countries, attention is paid to the fact that the institution called as special investigative actions originates and is being developed in the late 80’s – early 90’s of the last century in the criminal procedure legislation of a number of European countries. It is regulated by the Criminal Procedure Law aimed at collecting evidence by secret means. The authors of the article discuss the legalization of use of secret actions and information in criminal process as well as development of new procedural forms based on secret actions (new investigative actions for collecting proofs) [6].

Such actions were not only formalized, but also detailed regulation in the code of Criminal procedure and other laws of Germany and a number of other States.

In the German code of Criminal procedure “covert investigations” are reflected in Section VIII “Seizure, control of telecommunications, computer search for possible criminals on the basis of common features, the use of technical means, the use of secret investigators and search»:



§ 99. Removal of postal and telegraph dispatches;

§100 a. Telecommunications control;

§100 b. Jurisdiction in connection with the issuance of an order to control telecommunications;

§100 c. Measures applied without the knowledge of the persons concerned;

§ 100f. Use of personal information;

§100 g. Obtaining information about communication in the framework of telecommunications;

§100 h. Other measures applied without the knowledge of the persons they affect;

§100 i. Measures applied to mobile phones;

§101. Notice; the destruction of personal data;

§110 a. Full time covert staff;

§110 c. Penetration into a dwelling [7].

The analysis of the procedures for conducting investigative actions in Germany (according to § 99 of the Criminal Procedure Code) illustrates that mail and telegrams sent to defendant can be taken out if it is proved that the accused is actual sender or addressee and the mail content is of interest to investigate.

However, according to Kazakhstan Criminal Procedure Code secret control of postal and other items is carried out if there are sufficient justification that letters, telegrams, radiograms, parcels, and other postal items may contain information, documents and items of importance for the case (part 1, art. 246 of the Criminal Procedure Code of the Republic of Kazakhstan).

According to part 2 of this rule provided that the investigator, the investigator recognizes the need for secret control of mail and other items, then a reasoned decision is made, which is submitted to the investigating judge and, in the case of giving them a sanction, sent by the investigator, the investigator to the post office or persons providing services for the delivery of items for execution.

According to the German Code of Criminal Procedure, postal and telegraph mail, the opening of which has not been decided, is immediately sent to the addressee. This rule also applies if, after opening, it is not necessary to retain the postal and telegraphic

mail. Part of the detained postal and Telegraph shipment, the retention of which is not necessary for the investigation, shall be sent to the specified addressee in a copy (para. 5-6 § 100 German code of Criminal procedure). That is, if there is a value for the investigation of the contents of the postal item is removed and may be presented to the court as evidence.

According to the code of Criminal procedure of the Republic of Kazakhstan, in each case of inspection and (or) familiarization with the postal and other items by the investigator, the investigator in compliance with the requirements of article 199 of this Code, a Protocol is drawn up, which reflects the data of persons involved in the production of the event, the name and type of postal and other items subjected to inspection and (or) familiarization, information on the further delivery of the shipment with the fixation of its content or without it (part 4 of article 246 of the code of Criminal procedure).

The article 246 of the Criminal Procedure Code of the Republic of Kazakhstan reflects the secret opening and fixation of postal and other items. Comparing these actions with the seizure, which is carried out according to the German Law, it can be noted that the seizure of mail recipient (accused) will not be able to get the content or receive only part of it. On the other hand, the accused being in court may refuse such evidence and imagine that he/she knows nothing about these mail and other items. While the control of mail and other items track the entire process of delivery of these exhibits, and the timely opening and fixation will preserve the content which can appear in court as evidence in the case of destruction of the accused content.

Thus, taking into account the abovementioned, the authors propose the article 246 of the Criminal Procedure Code of the Republic of Kazakhstan to amend as follows "Secret control, opening and fixation of postal and other items".

At the same time, in the content of part 1 and part 2, add the words "opening and fixation", which, in the authors' opinion, are the most effective procedures for conducting investigative actions and are important for the investigation. Hence, part 1 art. 246 the Criminal Procedure Code of the Republic of

Kazakhstan will be amended as follows: “If there are sufficient grounds to believe that letters, telegrams, radiograms, parcels, parcels and other postal items may contain information, documents and items of relevance to the case, they may be subject to secret control, opening and fixation of postal and other items”. There fore, part 2 art. 246 the Criminal Procedure Code of the Republic of Kazakhstan will be amended as follows: “having Recognized the need for unspoken control, opening and fixation of postal and other items, the investigator, the investigator shall make a reasoned decision ...”. The authors believes that this version of the rule will more accurately regulate the procedure for conducting investigative actions, as well as, for example, secret control, interception and removal of information transmitted over networks of electric (telecommunication) communications (article 243 of the Criminal procedure code).

As specified in part 1 of article 243 of the Criminal Procedure Code of the Republic of Kazakhstan, secret listening and (or) recording of voice information has to be carried out using scientific and technical means and (or) computer programs transmitted by telephone or other devices that allow to transmit voice information produced, if necessary, by secret penetration and (or) examination. Also, signs, signals, voice information, written text, images, video images, sounds and other information transmitted by wire, radio, optical and other electromagnetic systems can be intercepted and removed. Thus the investigator, the investigator give the corresponding order to body of inquiry to operational services (h. 2). In turn, the results of the secret investigative action according to CH. 3 are fixed on the corresponding material carrier which is Packed, sealed and certified by signatures of the official of authorized body who carried out secret investigative action.

At the same time, the conditions and grounds for carrying out such secret investigative actions are specified in part 3 of article 232 of the Criminal procedure code of the Republic of Kazakhstan, where these investigative actions are carried out in the presence of cases of crimes, the sanction for which provides for punishment in the form of imprisonment from one year and above, as

well as crimes prepared or committed by a criminal group.

This provision is similar to §100a of the German Code of Criminal Procedure which states that the control of telecommunications is carried out without the knowledge of persons, if there is a suspicion, on the basis of specific facts about the Commission by a person of a serious criminal act as an executor or participant, or an attempt on a criminal act, or prepared such a criminal act.

However, the German legislator in paragraph 100i separately identified the application of measures as a result of hidden investigations on mobile phones, where it is allowed to use, for example, the “IMSI direction finder” to establish the identification number of the device (IMEI) and the subscriber identifier (IMSI), as well as the location of the mobile phone in order to investigate the circumstances of the case or to establish the location of the accused (para.1 § 100i German code of Criminal procedure).

In addition, the Criminal Procedure Laws of Germany are described in more detail all the procedures of those or other actions related to the control of telecommunications — § 100b “Jurisdiction in connection with the issuance of the decision on the control of telecommunications”; § 100g “Getting information about connections in the framework of telecommunications”; § 100h “Other measures implemented without the knowledge of the persons whom they affect”.

For example, article 242 of the code of Criminal procedure of the Republic of Kazakhstan “Unspoken audio and (or) video control of a person or place”. Part 1 defines the conduct of unspoken audio and (or) video control of the person, and part 2 of the unspoken audio and (or) video control of the place. For carrying out these investigative actions the investigator, the investigator give the corresponding order to body of inquiry (h. 3) and the Protocol of delivery of technical means is certified by signatures of the person to whom it is handed, the employee of body of inquiry and (or) the investigator, the investigator (h. 4). Upon completion of the unspoken audio, video control of the person or place, the authorized body shall submit to the investigator, the investigator relevant to the case sound, video recordings in a sealed



form with a cover letter, which shall indicate the basis, the start and end time, the duration of the recording (part 5).

Similar investigations in the German code of Criminal procedure are provided for in § 100c “Wiretapping and recording by technical means”, where, as in the other paragraphs, it is stated that this covert investigation is applied without the knowledge of persons on suspicion, based on specific facts, that a certain person has committed particularly serious criminal acts, as a perpetrator or participant, or attempted such criminal act, also if the attempt is a criminal act (para.1).

To conclude the authors stress that German legal scholars, the German criminal process, on the one hand, serves as an effective measure in the fight against crime, and, on the other, protects the rights of the accused, being the basis of the modern state of law. Since the state effectively applies substantive criminal law and always guarantees the constitutional rights of the accused. Therefore, in Germany, the Criminal Procedure Law is often referred to as “constitutional law in

action”. The principle of the rule of law is enshrined in Art. 20 of the Basic law of Germany, as in art. 6 of the European Convention on human rights, guaranteeing fair criminal proceedings, consistent with the principle of the rule of law [8].

However, during the analysis of investigative actions, the so-called “hidden investigations” under the Criminal Procedure Code of Germany, with secret investigative actions under the Criminal Procedure Code of the Republic of Kazakhstan, it can be concluded that each of them has its own specifics.

Finally, this paper concludes that the German experience in the disclosure and investigation of crimes and the study of the legal principles of the collection of evidence, its secret status, forms of collection and recording of factual data, in our opinion, will provide significant material not only for scientific generalizations, but also to determine the areas of improvement of the organization and activities of law enforcement agencies of the Republic of Kazakhstan.

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