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Prospects of Development of Institute of Investigative Actions at the Present Stage in Kazakhstan and Kyrgyzstan

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Abstract: The study is devoted to complex research of theoretical and applied problems of development of institute of investigative actions at the present stage in Kazakhstan and Kyrgyzstan. Theoretical and methodological ideas of a basic change of the mechanism of development of investigative actions at the present stage in Kazakhstan and Kyrgyzstan are considered in this research. The basic concepts and categories, the principles and structural units of institute of investigative actions are opened, genesis of a becoming and the main tendencies of institute of investigative actions is presented, the analysis of the modern legislation regarding defining developments of institute of investigative actions at the present stage in Kazakhstan and Kyrgyzstan is made; problems of increase of effectiveness of their legal support are investigated. As a result of research, the theoretical regulations and recommendations about perfecting of institute of investigative actions at the present stage in Kazakhstan and Kyrgyzstan are formulated.

Key words: Criminal action, organized formations, investigative action, private life, judicial act, pre-judicial production, law enforcement agencies, criminal trial, proof

INTRODUCTION

The success of investigation of any criminal action, substantially is defined by a level of quality of the investigative actions which are carried out by representatives on that bodies than objectivity of research of circumstances of a crime and achievement of truth on business is provided.

Despite that a lot of attention is paid to this institute from a number of scientists in which works fundamental regulations of its contents and substance are shown some questions are not settled till now, demanding the permission.

Especially, it is become actual when now the increase in number of the encroachments made by organized formations testifies to considerable public danger of a number of crimes and also there is a tendency to merger of various criminal groups.

However, there are disturbed not only increase of especially, dangerous encroachments but also that thus, the crimes accomplished by an organized criminal group have high-organized character more and more. Along with it as the analysis of the studied criminal cases testifies, law enforcement agencies should interfere with well operate covertly groups and also with such factors as consolidation of criminals, their armament, manifestations of violence and special cruelty in relation to the victim.

It is known that in the modern conditions crime in general and its organized forms in particular, constantly are changed and are modified, thus, getting more and more sophisticated and dangerous not known earlier ways of commission of criminal acts by them.

And, therefore for example, it is not casual that the most heated debates in line with reforming of the criminal procedure legislation in the CIS countries go on introduction of new institute of special (secret) investigative actions.

Proceeding from "reformatory" approaches of this sort, it is possible to tell that at the present stage attempts of "modernizations" of different types of the state activity, namely in this case integration of criminal trial and Operational Search Activity (OSA) are made.

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It should be noted that such short stories as introduction of secret investigative actions it is provided and in the new projects of Criminal Procedure Code which is at a discussion stage in the Republic of Armenia where chapter 13 of the project contains six types of such actions and in recently accepted Criminal Procedure Code of the Republic of Kazakhstan where as of 2014, it is offered to settle ten types of secret investigative actions.

It is remarkable that the Kyrgyzstan working group stays at the same position which is created for development of the Criminal Procedure Code project of the republic where they also provided introduction of special investigative actions.

But at the same time, arguments on this institute between opponents and supporters about expediency and opportunity and also legitimacy of transferring of practice of all arsenal of Organization of Controlling Measures (OCM) to criminal trial are continued.

THE MAIN PART

So, the carried out analysis of various points of visions on this matter gives the basis about separation of the main problems opened by the opponents about mixing of operational search and investigative activity: first as Ginzburg (2013) specifies, each investigative action has to be rather legiblly and is fully regulated both in a form and according to the contents, i.e., process of "secret investigative actions" has to be regulated but it is difficult to do it as their facilities, methods and technologies are the state secret and they as we know are regulated by departmental (state) regulations coordinated with the Prosecutor General's Office of that or other country that can not be found the action in the Criminal Procedure Code.

Secondly, it is that procedure of secret investigative actions which can become secret and for persons who make a criminal trial. For example in this case, the main idea about the investigator who can not personally participate in carrying out such actions as "secret introduction on criminal environment", "operational infiltration", etc.

Thirdly, it concerning keeping of human rights as when carrying out secret investigative actions, they can concern not only suspects but also other persons.

Fourthly, the introduction of such investigative actions, breaks democratic principles including interfere with exercise of criminal trial on the basis of competitiveness and equality of the parties.

Fifthly, carrying out secret (operational search) investigative actions are broken the constitutional norms and the international acts concerning personal privacy of the person and his home.

Sixthly, there will be problems with acquaintance of materials of such investigative actions at the person who got to an orbit of the investigative procedure.

Seventhly, there is such cases where we have danger which can be from law enforcement agencies and after it can be followed "the provocation" of crimes.

Eighthly that there is no guarantee of that from authorities will not follow the abuse concerning so-called "custom-made" collection of information concerning "objectionable" to them opponents.

Certainly, the opened above problems have a questions for thinking and opponents of introduction of this institute to criminal legal proceedings have the basis about that. But at the same time, we are close to the position of supporters of this "modernization". Also, Bogunov (2012) is absolutely right when writes that "where there is no stage of initiation of legal proceedings and criminal prosecution of the person (and respectively calculation of reasonable terms of investigation), begins from the moment of the message about suspicion and quite allows particular unification of forms of action of OSA and a pretrial investigation. Moreover, ensuring compliance with human rights to be exact their lawful restriction, assumes need to detail law of actions of carrying out secret measures at the law level" (Bogunov, 2012).

Unfortunately in our opinion, proposals of the Criminal Procedure Code developers of Kazakhstan are hadn't a basis (which formed the basis of the accepted Criminal Procedure Code of RK) where it is provided to carry out secret investigative actions from the sanction of the prosecutor by them. Thus, we proceed from the following positions: first, the bodies of prosecutor's office which are falling into to the party of charge can be interested in adoption of this types of the decision and here, it is not excluded from their party and abuse concerning the questions concerning validity of carrying out terms, etc. Secondly, considering that when it is carrying out the secret investigative actions, the constitutional rights of citizens are affected and it is required the decision-making by the independent bodies doing the control of such actions. So in this case, it can be only judicial monitoring and therefore such decision has to be made by the specialized judge who does not participate in judicial proceedings on case.

It is necessary to emphasize that such requirements are provided by the European standards of human rights and are kept in all European countries of the continent. Thirdly, at such approach the fundamental principles of criminal trial, namely competitiveness and equal rights of the parties will be broken.

The following argument about expediency of introduction of this institute is difficult to realize in the

existing standards of the Criminal Procedure Code of the Republic of Kazakhstan and the Kyrgyz Republic the concerning uses of results of OSA in proof.

So, according to p. 4-1, p. 2 Art. 81 of the Criminal Procedure Code of the Kyrgyz Republic the proofs are the actual data, obtained in the order established by the law as a result of operational search activity. This aspect was regulated in earlier existing Criminal Procedure Code of the Republic of Kazakhstan and more detailed where also the conditions of realization besides ascertaining of such procedural situation were given in Art. 130 in the Criminal Procedure Code of the Republic of Kazakhstan.

But at the same time in our opinion such situation changes a situation mainly from a formality. And, first of all it is bound to the following circumstances.

OSA and production of the invistigations are carried out in various legal regimes. About that is testified fact that legal base for carrying out pre-judicial proceeding by the investigator is the criminal procedure law, OSA is carried out on a basis and according to the law about OSA. In this connection, received information on the basis of OSA is not procedural and can become the proof in the matter of later their fixing with a procedural path. It is known that not procedural information serves only for promotion of versions, definition of the direction of investigation and for preparatory activities to carrying out investigative actions.

At such situation, authorized bodies will continue to collect proofs in circumvention of the criminal procedure legislation and to confirm their character with carrying out the formal investigative actions by the investigator for the purpose of obtaining protocols which are source on proof case.

The standards of the Criminal Procedure Code of the Kyrgyz Republic stated above and earlier existing Criminal Procedure Code of the Republic of Kazakhstan do not give and did not give definition OSA do not establish and did not establish legible criteria for the purpose of determination of validity of carrying out OCM and also do not regulate and did not regulate legal grounds to carrying out OSA.

Thus, incorporation of original positions of OSA in the form of special investigative actions in the criminal procedure law that removes the available contradictions will be the most right decision as well as the "Legislator" of the Republic of Kazakhstan did in case to proceed from the content of the analyzed standards of the Criminal Procedure Code of the Kyrgyz Republic.

The analysis of the available Criminal Procedure Code project of the Kyrgyz Republic and the new Criminal Procedure Code of the Republic of Kazakhstan was showed existence coincident and distinctiveness of the considered regulations of institute. For example, names of new institute of investigative actions are terminologically differed, so in Kazakhstan it is secret investigative actions and in Kyrgyzstan it is special investigative actions. In our opinion, the position of developers of the Criminal Procedure Code project of Kyrgyzstan is more valid as such name does not contradict the principles of criminal trial and more truly captures their essence of carrying out. Besides, there is also distinctiveness by their quantity and on a substantial component.

According to the Art. 231 of the new Criminal Procedure Code of Kazakhstan given institute includes ten types of secret investigative actions, namely:

- Secret audio-monitoring and (or) video monitoring of the person or place
- Secret monitoring, interception and removal of information which is transferred on networks of electric (telecommunication) communication
- Secret obtaining information on connections between subscribers and (or) subscriber devices
- Secret removal of information from the computers, servers and other devices intended for collecting, processing, accumulation and storing of information
- Secret monitoring of post and other posting
- Secret penetration and (or) inspection of a place
- Secret observation of the person or place
- Secret controlled delivery
- Secret control purchase
- Secret introduction on criminal area and (or) imitation of criminal activity

According to the Criminal Procedure Code Project of the Kyrgyzstan Republic (Art. 235) twelve types of special investigative actions are provided:

- Seizure of post and cable departures and their survey and (or) seizure
- Listening of negotiations
- Obtaining information on connections between subscribers and subscriber devices
- Removal of information from computers, server and other devices
- Audio, video monitoring of the person or place
- Observation of the person or place
- Penetration and inspection of a non-residential premise or other possession of the person
- Receiving exemplars for comparative research by the special way, expert opinion
- Special investigative experiment
- Introduction on criminal area and (or) imitation of criminal activity

- Controlled delivery
- Control purchase

Proceeding from above-mentioned types of express investigative actions, it is followed that though separate names have different meanings but their semantic contents remains identical, except for some of them. For example in the new Criminal Procedure Code of the Republic of Kazakhstan, "Secret monitoring of post and other posting", unlike the Criminal Procedure Code Project of the Kyrgyz Republic where this type of special investigative action is called "Seizure of post and cable posting and their survey and (or) seizure", considers only acquaintance with the content of posting and in case of need with fixing of their contents without seizure of it. Besides, seizure of post and cable correspondence, thus is not provided in the new Criminal Procedure Code of the Republic of Kazakhstan unlike developers of the Criminal Procedure Code Project of the Kyrgyz Republic that possibly on a plan of the Kazakh Criminal Procedure Code developers is planned to carry out within traditional investigative actions. It would be expedient the seizure to consider within of the considered secret investigative action in cases of need that would provides its completeness and efficiency of the held events at a stage of pre-judicial production.

A little differently the Criminal Procedure Code developers of the named above countries approached and such type of secret investigative actions as "Secret penetration and (or) inspection of a place" (according to the Criminal Procedure Code of RK) and "Penetration and inspection of a non-residential premise or other possession of the person" (according to the Criminal Procedure Code of KR). The analysis of the name and the contents shows that the secret penetration into the dwelling of the suspect of commission a crime can be made by the authorized staff of bodies of inquiry. In difference from it, Kyrgyzstan developers decided expedient to limit secret inspection of objects by possible penetration only into non-residential premises and other possession of the person.

Thus, developers of Kyrgyzstan were guided by that the premises are the object which is especially, protected by the constitution of any country and therefore, its examination has to be conducted only is public and in the presence of the persons provided by standards of the Criminal Procedure Code. We were thought that the given argument have the basis, considering also that factor that in this case can be abuses of law enforcement agencies are taken a place.

In the new Criminal Procedure Code of the Republic of Kazakhstan, unlike the Criminal Procedure Code Project of the Kyrgyz Republic such types of secret investigative actions as are not provided:

- Receiving exemplars for comparative investigation in the special way, the expert opinion
- Special investigative experiment

In this regard, it is represented that developers of the Republic of Kazakhstan decided to be limited to receiving samples for comparative research within traditional investigative actions. But in the opinion, there is a reasonable question how to withdraw necessary samples for research in the conditions of refusal of a stage of initiation of legal proceedings and expediency of observance of concealment of the held cases, how to provide legality of their receiving. Therefore, developers of the Criminal Procedure Code Project of the Kyrgyz Republic are right which provided this OCM within special investigative actions. It should be noted that the same type of secret investigative action is provided in the Criminal Procedure Code of Latvia and Ukraine.

But at the same time, developers of the Criminal Procedure Code Project of the Kyrgyz Republic added the considered special investigative action such action as "The conclusion of the expert" unlike the above legislators. As the analysis proves in our opinion, researchers of the project recognized that collecting samples for comparative research is not investigative action and it is necessary the completeness that this purpose that for them formed the basis for its addition in the form of carrying out research and receiving a source of proofs in the form of "the conclusion of the expert".

Certainly, "the conclusion of the expert" itself as a source of proofs causes many disputes among scientists. But at the same time, the carried-out analysis of various points of view on the matter, allows us to tell about need of inclusion it in one of types of proofs.

Eremin was expressed at the same time the opinion that "the judgment of the expert in the form of the conclusion should be considered not simply as logical and as the logical and gnosiological category, characterizing the relations between the facts of a real and statements about these facts". And further: "there are all bases to claim that the judgment of the expert in the form of the conclusion has to be result of his research". That it is testified that the scientist considers that there will be expedience to allocate the expert with the right to conduct researches and to give the conclusion on it.

Expediency of inclusion of the conclusion of the expert in a circle of a source of proofs is caused in our opinion, the following positions: first, this type of proofs

provided in the Criminal Procedure Code Project of the Kyrgyz Republic assumes the considerable expansion of border of control actions and to use them in proof without carrying out examination. Secondly, at preliminary research of objects by the expert his results allows the person making investigation on business to receive data for definition of its, further course to put forward versions and to define tactics of carrying out traditional investigative actions. Thirdly, thus, permission of the question concerning differentiation of expert opinions and the conclusion of experts is required. Undoubtedly, there have to be distinctiveness concerning nature of the conducted researches and it means, first of all, existence of norms introduced restrictions on use of methods and receptions by means of which can be destroyed or lead to the considerable to irreversible changes of the objects, presented on research (to change of their main properties and their appearance) and also in situations when the received objects do not demand the difficult researches. Fourthly, at such approach of power and possibility of the party of protection which on the questions interesting him and not demanding difficult researches are extend and there can be received the answer in the form of the conclusion of the expert that a source of proofs on business will be also.

Approach of developers of the Republic of Kazakhstan excluding application of such action as "express investigative experiment" is not absolutely clear. Perhaps, developers considered to leave this action within OCM which is carried out on the basis of the law "About Operational Search Activity".

As for concept of this investigative action, we are as developers of the KR of Criminal Procedure Code project, offered the following definition: "Special investigative experiment consists in creation or a recreation by the investigator and operational division of the corresponding simulated conditions (situation) where in a situation which is most approached to actual for the purpose of check of the true intentions of the suspected person (faces), it is made the overseeing on his behavior where there are seen the signs of his actions, commission or the committed". It should be noted that this offer was assumed by them as a basis.

Besides the special investigative experiment, control purchase, a controlled delivery can be carried out "for identification, the prevention, suppression and disclosure of crimes" concerning "subjects, substances and production where free realization is forbidden or which turn is limited and also other subjects which are the path or subje instrument or mean of commission of crime or the subjects were got in the criminal cts are illegal acts which are smuggling" (Kovalyov, 2014).

It should be noted that the special investigative experiment (called and as "operational experiment") along with a secret controlled delivery, controlled purchase, unite mainly in one group in attempt of the argument of validity and validity of their carrying out. And, it is not casual, so at their carrying out concerning objects of OSA, the methods of deception and so-called "traps" are used. Often, it can be entailed from operatives (who are involved for data of OCM, confidential persons) the provocation of a crime with the purpose to bring to trial of object of OSA.

It is possible to agree with opinion that "provocation is more probable in the countries in whose legislation there are no legible and clear procedures for authorization of OSA and also there is no independent monitoring of law enforcement agencies. In particular in the decisions on cases against the Russian Federation, the European Court of Human Rights, there were especially, emphasized that neither the OSA law nor any other acts do not provide sufficient guarantees concerning such OCM as teat purchase and indicated the need of judicial or other independent authorization and supervision".

Also, it is emphasized that "despite attempts of Post-Soviet scientists-jurists to differentiate provocation from "lawful" OSA", "the law enforcement agencies often abuse the situation in practice and provoke the persons to commission of crimes. Legislator of the Kyrgyz Republic has to accept "a number of concrete changes in the legislation" for purpose to prevent use of provocation, traps and baits by the bodies which are carrying out by OSA. An researcher offers to bring in acting criminal article the providing responsibility for provocation of crimes from law enforcement agencies and to enter an article the providing criminal responsibility for provocation of any crime from the bodies which are carrying out such OCM. And, it is certainly would be supported by developers and there will be made the changes as in standards of the Criminal Procedure Code project of Kyrgyzstan, regulating these aspects as it is made the offer to developers of the bill.

CONCLUSION

In this regard, U.H. Azimov writes who is absolutely right that: "the state has to give in a charge of justice guilty of commission of crime. However, legal proceedings have to be carried out and decisions have to be made in rigorous compliance with norms of the substantive and procedural law, meeting the requirements of a fair trial. And the order of production established by the law has to provide protection against unreasonable charge and condemnation of pirate restriction of the rights and freedoms of the person and citizen". Therefore, it is not casual that the European Court of Human Rights give a number of criteria which can confirm about provocation existence that certainly involves violation of the rights for objective and fair justice.

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