Judicial control as a guarantee of non-interference in private life during the pre-trial investigation: An observation under the European Court of Human Rights

El control judicial como garantía de no injerencia en la vida privada durante la instrucción: Una observación en el marco del Tribunal Europeo de Derechos Humanos

Controle judicial como garantia de não-interferência na vida privada durante a investigação pré-julgamento: Uma observação no âmbito do Tribunal Europeu de Direitos Humanos

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Abstract

The article is devoted to the topical issue of judicial control over non-interference in the private (personal and family) life of participants in criminal proceedings. The study was conducted in the context of the analysis of the practice of the European Court of Human Rights, the legal positions of which should be consistently applied in criminal proceedings; evidence of this are the legal requirements on this issue. The notion and concept of judicial control is a necessity component that helps to guarantee the respect of human dignity and integrity. It is a common and established principle that, during the pre-trial process, it is the position of those ensuring justice in making sure that the life of people is respected and safeguarded. It is noted that in accordance with the national legislation of Ukraine, judicial control is a separate function of the court's activities at the stage of pre-trial investigation, directly carried out by the investigating judge. The situation will become precarious and detrimental when the private life of people is not respected to the fullest.

Therefore, it is the responsibility of those ensuring public order during the pre-trial investigation phase to ensure the respect of the private life of the presumed suspect for the proper implementation of the justice process. In ensuring this right, it is established that the empirical and analytical methods of research are necessary, in order to show the effective role played by the European Court of Human Rights in respecting the right to private life during the interrogative phase of inquiry. From the findings, it is seen that, though the Court has played a prominent and pertinent role in the respect of private life, the suspect continues experiencing difficulties when his/her private life is at stake, and it always affects the extent of the justice system.

Keywords: European Court of Human Rights, judicial control, non-interference, pre-trial investigation, private life.

Resumen

El artículo está dedicado a la cuestión de actualidad del control judicial sobre la no injerencia en la vida privada (personal y familiar) de los participantes en los procesos penales. El estudio se ha realizado en el contexto del análisis de la práctica del Tribunal Europeo de Derechos Humanos, cuyas posiciones jurídicas deben aplicarse de forma coherente en los procesos penales; prueba de ello son los requisitos legales sobre esta cuestión. La noción y el concepto de control judicial es un componente necesario que contribuye a garantizar el respeto de la dignidad y la integridad humanas. Es un principio común y establecido que, durante el proceso previo al juicio, es la posición de aquellos que aseguran la justicia en hacer que la vida de las personas sea respetada y salvaguardada. Cabe señalar que, de acuerdo con la legislación nacional de Ucrania, el control judicial es una función separada de las actividades del tribunal en la fase de investigación previa al juicio, llevada a cabo directamente por el juez de instrucción. La situación será precaria y perjudicial cuando no se respete al máximo la vida privada de las personas.

Por lo tanto, es responsabilidad de quienes velan por el orden público durante la fase de investigación previa al juicio garantizar el respeto de la vida privada del presunto sospechoso para el correcto desarrollo del proceso de justicia. Para garantizar este derecho, se establece que los métodos empíricos y analíticos de la investigación son necesarios, con el fin de mostrar el papel efectivo desempeñado por el Tribunal Europeo de Derechos Humanos en el respeto del derecho a la vida privada durante la fase de interrogatorio de la investigación. De las conclusiones se desprende que, aunque el Tribunal ha desempeñado un papel destacado y pertinente en el respeto de la vida privada, el sospechoso sigue experimentando dificultades cuando su vida privada está en juego, y ello afecta siempre al alcance del sistema judicial.

Palabras clave: Tribunal Europeo de Derechos Humanos, control judicial, no injerencia, investigación previa al juicio, vida privada.

Resumo

O artigo é dedicado à questão atual do controle judicial sobre a não-interferência na vida privada (pessoal e familiar) dos participantes em processos criminais. O estudo foi conduzido no contexto da análise da prática da Corte Européia de Direitos Humanos, cujas posições legais devem ser aplicadas consistentemente em processos criminais; a prova disto são as exigências legais sobre esta questão. A noção e o conceito de controle judicial é um componente necessário que ajuda a garantir o respeito à dignidade e integridade humanas. É um princípio comum e estabelecido que, durante o processo de pré-julgamento, é a posição daqueles que garantem a justiça ao assegurar que a vida das pessoas seja respeitada e salvaguardada. Observa-se que, de acordo com a legislação nacional da Ucrânia, o controle judicial é uma função separada das atividades do tribunal na fase de investigação pré-julgamento, realizada diretamente pelo juiz investigador. A situação se tornará precária e prejudicial quando a vida privada das pessoas não for respeitada ao máximo.

Portanto, é responsabilidade daqueles que asseguram a ordem pública durante a fase de investigação pré-julgamento assegurar o respeito à vida privada do presumível suspeito para a correta implementação do processo de justiça. Ao assegurar este direito, estabelece-se que os métodos empíricos e analíticos de pesquisa são necessários, a fim de mostrar o papel efetivo desempenhado pela Corte Européia de Direitos Humanos no respeito ao direito à vida privada durante a fase interrogativa de investigação. A partir das constatações, verifica-se que, embora a Corte tenha desempenhado um papel proeminente e pertinente no respeito à vida privada, o suspeito continua passando por dificuldades quando sua vida privada está em jogo e isso sempre afeta a extensão do sistema de justiça.

Palavras-chave: Tribunal Europeu de Direitos Humanos, controle judicial, não-interferência, investigação pré-julgamento, vida privada.

I. Introduction and relevance of the research issues

In a law-based state, the investigation of criminal offenses must be carried out in compliance with human rights and freedoms, the rule of law and legality. Given the importance and significance of this aspect, in Part 2 of Article 8, Part 5 of Article 9 of the Criminal Procedure Code (*hereinafter* CPC) of Ukraine it is defined that the principles of the rule of law and legality in criminal proceedings are applied taking into account the case law of the European Court of Human Rights (*hereinafter* ECTHR)[1], the legal positions of which are based on the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (*hereinafter* Convention). Therefore, taking into account the restrictive nature and specifics of the criminal procedural activity of the pre-trial investigation bodies, the Prosecutor's Office, the legislator provided for judicial control over its legality, which is carried out by investigating judges.

1 Criminal Procedure Code of Ukraine of 13 April 2012. Available at: https://zakon.rada.gov.ua/laws/show/4651-17#Text

A systematic analysis of the legislation of Ukraine makes it possible to state that judicial control is a separate function of the court at the stage of pre-trial investigation. Judicial control by the investigating judge is also of great importance when guaranteeing non-interference in private (personal and family) life of participants in criminal proceedings (Article 15 of the CPC). The ECTHR also emphasized this, in particular, in Paragraph 42 of the judgment in the case of Mikhalkova and Others v. Ukraine of 13 January 2011. It was stated that under Article 1 of the Convention, the state is obliged to guarantee to everyone under its jurisdiction rights and freedoms defined in the Convention, which also indirectly requires the existence of any form of effective investigation. However, it is important to understand that human rights and freedoms should not only be declarative in nature, but at the legislative level there should be clear, high-quality and truly effective legal mechanisms for their implementation by each person. Otherwise, all human rights tools guaranteed by the state are lost.

II. Methodological basis of the study

To answer the question arising from the notion of judicial order, it was important for the author to analyse and establish how practice of the ECTHR is carried out using an empirical basis. The legal basis of the work are the provisions of international legal acts and criminal procedure legislation of Ukraine. The theoretical basis of the work are the scientific works of Ukrainian and foreign scientists.

The methodological support of the research is carried out with the use of general scientific and special methods of cognition, which are used in legal science. In particular, the epistemological method was used to study the general preconditions, means and regularities of development of mechanisms for the protection of the human rights to privacy and family life during judicial control, including the ECTHR. The dialectical method was used in the search for the right approaches to solve theoretical and legal problems that arise in the legal regulation of the right of a person to private and family life. Using the method of legal analysis, the scope of judicial control as a guarantee of the right to non-interference in private and family life during the pre-trial investigation is determined. The statistical method was used to study the dynamics of processes related to the implementation of this right, and the comparative legal method allowed to compare the provisions of national legislation of Ukraine and other countries with the practice of the ECTHR during judicial control, in order to ensure the right to privacy and family life at the pre-trial investigation.

III. Results and discussion

From the established findings and results, it is of great emphasis that the investigating judge at the pre-trial investigation considers issues related to the personal and family life of the person and reflect his/her relations in the family, with friends, neighbors, relatives, etc. Relatively, it is important to consider the relevant request of the investigator, agreed with the prosecutor, and to provide permission to the investigating judge:

1. To carry out criminal proceedings;
2. To conduct investigative (search) and covert investigative (search) actions;
3. Consideration of complaints against decisions, actions or inaction of the investigator and prosecutor during the pre-trial investigation.

Addressing the issues of application of measures to ensure criminal proceedings belongs to the powers of the investigating judge, as such actions may be accompanied by significant restrictions of personal, property and other rights and freedoms of participants in criminal proceedings, including the respect for the right to private and family life. Thus, the legislator, aware of the possibility of potential restriction of the constitutional rights and freedoms of a person during the application of measures to ensure criminal proceedings, imposes certain additional responsibilities on the investigating judge. When considering a request for such measures, the investigating judge must apply the principle of proportionality: To compare the need and importance of the tasks of a particular criminal proceeding with the nature and degree of restriction of human rights and freedoms. In addition, the investigating judge is obliged to take into account and assess the possibility of achieving the tasks of criminal proceedings without interfering with the personal and family life of the person: On a voluntary basis, from other alternative sources, and so on.

Personal and family life may also be subject to some interference during temporary access to property and documents, temporary seizure of property and arrest of property, as certain items or documents may contain such information about these areas of a person's life. In the judgment in case of Roemen and Schmit v. Luxembourg of 25 February 2003, the ECTHR unanimously found that the confiscation of the letter addressed to the applicant office is the interference with the respect for the right to private life.[2] In addition, such information may relate not only to a person who is a participant in criminal proceedings, but also to the personal and family life of other persons who are not such participants. In such situations, there is a certain conflict

2 Case of Roemen and Schmit v. Luxembourg (Application No. 51772/99): Judgment; Strasbourg, 25 February 2003. Available at: http://hudoc.echr.coe.int/eng?i=001-60958

between the implementation of an effective pre-trial investigation and compliance with this principle. Additional guarantees of compliance with this principle are special rules of the CPC of Ukraine, which regulate the implementation of certain types of measures to ensure criminal proceedings. For example, the CPC of Ukraine establishes a list of things and documents that are prohibited from providing temporary access (Part 1 of Article 161 of the CPC), including:

1. Correspondence or other forms of information exchange between a lawyer and his client or any person who represents his client in connection with the provision of legal assistance;
2. Objects that are attached to such correspondence or other forms of information exchange.

Additional protection of these things and documents is due to the fact that communication between the defense counsel and his client is not only an element of personal life, but also an integral part of the person's right to protection provided for by the criminal procedure law. According to our study, for the period from January 2019 to August 2020, the courts received 1,178,758 requests for measures to ensure criminal proceedings, including about a quarter — 282,585 requests (23.97%) for temporary access to things and documents.[3]

The opportunity to receive an access to information available from telecommunications operators and providers should be considered separately. This measure to ensure criminal proceedings, provided for in Paragraph 7 of Part 1 of Article 162 of the CPC of Ukraine, in its content intersects with the covert investigative (search) action provided for in Article 263 of the CPC of Ukraine — withdrawal of information from transport telecommunications networks. The delineation of the above procedural actions is contained in the information letter of the High Specialized Court of Ukraine, "On some issues of the investigating judge of a court of first instance charged with carrying out court supervision over the observance of rights, freedoms and interests of persons involved in criminal proceedings", dated 5 April 2013. According to Paragraph 17 of this document, temporary access is provided to documents that contain information about the connection, subscriber, provision of telecommunications services, including receipt of services, their duration, content (outgoing or incoming connections, SMS, MMS, etc.), transmission routes, etc. Such information does not allow to interfere in private communication, i.e. to gain access to the content of the transmitted information. At the same time, the withdrawal of information from transport telecommunications

3 Unified State Register of Court Decisions. Available at: http://reyestr.court.gov.ua/.

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networks (Article 263 of the CPC of Ukraine) is a kind of interference in private communication, as it is access to the content of messages of any kind transmitted by a person during communication.[4]

Another measure to ensure criminal proceedings, the application of which may encroach on the interference with a person's personal and family life, is the temporary seizure of property. It is necessary to dwell in more details on the issue of possible seizure of electronic information systems during the search, including mobile phones or personal computers. These items can be seized to study their contents if they are in the list of items to be searched or other procedural action (inspection or detention). At the same time, even the lawful seizure of such electronic systems does not give the prosecution the right to freely access the information contained on these devices. During the temporary seizure of electronic information systems, the person to whom they belong is encroached upon the inviolability of his/her property rights. Instead, when trying to get acquainted with specific information, the secrecy of private communication is encroached upon. Such actions of the prosecution are a separate type of interference in private and family life, so obtaining information in these cases requires a separate legal basis. In our opinion, in such situations, the investigator, in consultation with the prosecutor, must apply for temporary access to things and documents. Only in case the investigating judge satisfies such a request, the prosecution will have the right to get acquainted with the information available in electronic information systems in the manner prescribed by law.

What is new in judicial control over the respect for human rights is that, in accordance with Part 1 of Article 206 of the CPC of Ukraine, every investigating judge within whose territorial jurisdiction a person is detained has the right to issue a decision which will oblige any public authority or official to ensure the respect for the rights of such a person. Judicial control over the detention, as noted in the judgements of the ECTHR, must be automatic and cannot depend on a detainee's prior statement (McKay v. the United Kingdom, § 34[5]; Varga v. Romania, § 52[6]; Viorel Burzo v. Romania, § 107[7]).

4 On some issues of the investigating judge of a court of first instance charged with carrying out court supervision over the observance of rights, freedoms and interests of persons involved in criminal proceedings: Letter of the High Specialized Court of Ukraine No. 223-558/0/4-13 dated April 5, 2013. Available at: https://zakon.rada.gov.ua/laws/show/v0558740-13

5 Case of McKay v. the United Kingdom (Application No. 543/03): Judgment; Strasbourg, 3 October 2006. Available at: http://hudoc.echr.coe.int/eng?i=001-77177

6 Case of Varga v. Romania (Application No. 73957/01): Judgment; Strasbourg, 1 April 2008. Available at: http://hudoc.echr.coe.int/eng?i=001-123847

7 Case of Viorel Burzo v. Romania (Application No. 75109/01, 12639/02): Judgment; Strasbourg, 30 June 2009. Available at: http://hudoc.echr.coe.int/eng?i=001-123471

Such a requirement would not only change the essence of the guarantee provided for in Article 5 § 3 and which differs from the guarantee under Article 5 § 4 of the Convention, which provides for the right to apply to the court to verify the lawfulness of detention. In addition, according to the Article 5 § 3 Convention, which is to protect the individual from arbitrary detention by ensuring an independent and thorough judicial review of the act of imprisonment, the guarantee itself would be meaningless (Aquilina v. Malta, § 49[8]; Niedbala v. Poland, § 50[9]).

The law does not specify which official is responsible for informing the investigating judge regarding the location of a person deprived of liberty within the territorial jurisdiction of the court, in the absence of a court decision that has entered into force. It seems doubtful that the investigator or prosecutor has such powers. After all, if such circumstances are found, the prosecutor, for example, must defend the rights and interests of an illegally deprived person. However, the provisions of Article 206 of the CPC of Ukraine allow the detainee or his defense counsel to apply to the investigating judge to verify the legality of detention and, if necessary, use violence during detention or detention in an authorized public authority, state institution.[10]

According to Article 5 § 3 of the Convention, after a certain period of time even a reasonable suspicion of a crime cannot be the sole justification for the detention of a suspect or accused person, and therefore the investigating judge, the court, if the request for election or extension of the term of applying preventive measure in the form of detention is granted, must clearly indicate in the court decision the existence of other grounds or risks provided for in Part 1 of Article 177 of the CPC of Ukraine. The same position is set out in Paragraph 60 of the judgment of the ECTHR in the case of Eloev v. Ukraine of 6 November 2008. In addition, the courts must take into account all the evidence for and against the existence of a real public interest which, in view of the presumption of innocence, justifies a derogation from the principle of respect for personal liberty (Paragraph 35 of the ECTHR judgment in Letellier v. France, 26 June 1991[11]).

According to Parts 2-7 of Article 206 of the CPC of Ukraine, if the investigating judge receives information from any sources whatsoever (which gives ground for a

8 Case of Aquilina v. Malta (Application No. 25642/94): Judgment; Strasbourg, 29 April 1999. Available at: http://hudoc.echr.coe.int/eng?i=001-58239

9 Case of Niedbała v. Poland (Application No. 27915/95): Judgment; Strasbourg, 4 July 2000. Available at: http://hudoc.echr.coe.int/eng?i=001-58739

10 O. G. Yanovska. *Application of the Case Law of the European Court of Human Rights in the Performance of Judicial Control in Criminal Proceedings*. BULLETIN OF THE ACADEMY OF ADVOCACY OF UKRAINE 2. 2013. Pg. 15.

11 Case of Letellier v. France (Application No. 12369/86): Judgment; Strasbourg, 26 June 1991. Available at: http://hudoc.echr.coe.int/eng?i=001-57678

reasonable suspicion that within the court's territorial jurisdiction there is a person who has been deprived of his/her liberty without valid court's decision, or has not been released from custody after the payment of bail in accordance with the procedure laid down in the CPC of Ukraine), such judge is required to issue a ruling to order any public authority or official in whose custody the person is kept, to immediately bring this person to the investigating judge in view of verifying grounds for deprivation of liberty. The investigating judge shall have the duty to release the person deprived of liberty from custody, unless the public authority or official that keeps such person in custody presents a valid court's decision or proves the existence of any other legal grounds for deprivation of liberty.

If public prosecutor, investigator files a motion to apply a measure of restraint before such person has been brought to the investigating judge, the latter is required to ensure consideration of such motion as soon as possible. In the case of McKay v. The United Kingdom, § 33[12] of the ECTHR stated that judicial control at the first detention of an arrested person must, above all, be immediate in order to ensure that any ill-treatment is detected and to minimize any unjustified interference with individual freedom. Time limitations set out in this requirement do not provide for free interpretation in order to prevent a serious weakening of a person's procedural guarantees and the risk to violate the right protected by this provision.

Regardless of the request of the investigator, the prosecutor, the investigating judge must release the person if the public authority or official in whose custody the person was detained does not prove the following: The existence of statutory grounds for detention without the decision of the investigating judge, court; not exceeding the maximum period of detention; no delay in bringing a person to court. This circumstance is emphasized in Paragraph 48 of the judgment of the ECTHR Cebotari v. Moldova[13] of 13 November 2007 — in the absence of reasonable suspicion, a person may not be arrested or detained under any circumstances to force him/her to confess the crime, testify against others or in order to obtain from him/her facts or information that may serve as a basis for reasonable suspicion.

If during any court hearing a person alleges violence during arrest or detention in an authorized public authority, state institution (public authority, state institution, which has the right to detain persons), the investigating judge must record such a statement or accept a written statement from a person to: Ensure an immediate forensic examination of the person; instruct the relevant body of pre-trial investigation

12 Case of McKay v. the United Kingdom (Application No. 543/03): Judgment; Strasbourg, 3 October 2006. Available at: http://hudoc.echr.coe.int/eng?i=001-77177

13 Case of Cebotari v. Moldova (Application No. 543/03): Judgment; Strasbourg, 13 November 2007. Available at: http://hudoc.echr.coe.int/eng?i=001-83247

to conduct an investigation of the facts set forth in the person's statement; take the necessary measures to ensure the safety of the person in accordance with the law. The application from the detainee is not necessary, as the investigating judge must organize an inspection if the detainee's appearance, condition or other circumstances known to the investigating judge give grounds for reasonable suspicion of violation of the law during arrest or detention in an authorized state body, institution.

An unequal treatment to the issue of medical care for detainees should be emphasized. The CPC of the Republics of Kazakhstan, Belarus, Azerbaijan, Uzbekistan and the Kyrgyz Republic defines only general provisions that do not in fact determine the right of arrested persons or detainees to medical care. This principle of non-deprivation of medical care in the CPC of the Russian Federation, the Republic of Armenia and Turkmenistan is partially defined, which indicates a fragmentary mention of the right to medical care in the criminal procedure legislation of these post-Soviet states.[14]

The situation with defending the right of the person who was illegally detained and then released by the same body or authorized official who detained him/her is also currently unresolved. In this case, it is impossible to apply Article 206 of the CPC of Ukraine, because at the time of the application to the court such a person is no longer in custody, so he/she is not a party to the appeal and protection in accordance with this article of the Code. In such a case, there is a violation of the right to an effective remedy guaranteed by Article 13 of the Convention, according to which everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity. In the case of the ECTHR concerning Kats and Others v. Ukraine[15] of 18 December 2008, it is stated that the existence of remedies must be sufficiently clear both in practice and in theory, as without this they will lack adequate accessibility and effectiveness.

Judicial control is exercised not only when measures ensuring criminal proceedings are applied, but also during investigative (search) and covert investigative (search) actions. In particular, for the period from January 2019 to August 2020, the courts received 310,192 requests for a search of housing or other property of a person, 266,675 of which (85.9%) were satisfied.[16] However, this issue is so complex, volu-

14 V. Teremetskyi, V. Chmelyuk, V. Matsiuk, V. Galagan & Zh. Udovenko. *Problem of Ensuring the Right to Medical Care of a Detainee (Detained in Custody) within Criminal Proceedings: Experience of Ukraine and Foreign Countries*. GEORGIAN MEDICAL NEWS 11. 2019. Pg. 155-156.

15 Case of Kats and Others v. Ukraine (Application No. 29971/04): Judgment; Strasbourg, 18 December 2008. Available at: http://hudoc.echr.coe.int/eng?i=001-90362

16 Unified State Register of Court Decisions. Available at: http://reyestr.court.gov.ua/

minous and multifaceted that it needs its own separate in-depth and detailed study, taking into account the specifics of the procedural actions provided for in Chapters 20-21 of the CPC of Ukraine (primarily in view of their purpose, composition, procedural coercion, in particular those that restrict the constitutional rights of participants in criminal proceedings).

We believe that judicial control should extend to any procedural activity or inaction of the prosecution. The possibility of filing a complaint provided by law leads to the emergence of legal relationships between the person who has the right to do so and who filed it, and between the subject of acceptance and resolution of the complaint. The right of a person to file a complaint corresponds to the obligation of the person or body concerned to accept, verify and resolve it in the prescribed manner. Thus, the complaint acts as a legal way to protect the violated right and arises only on the basis of existing legal relations within the pre-trial investigation.[17] This right is actively exercised by participants in criminal proceedings. In particular, during this period, the courts received 276,415 complaints about the actions or inaction of the investigator, prosecutor and other persons during the pre-trial investigation. Most complaints were received about the inaction of the investigator, the prosecutor — 194,302 (70.29%) and the decision of the investigator to close the criminal proceedings — 47,866 (17.31%). The share of other contested actions or decisions of the investigator, prosecutor is much less than these ones.[18]

At the same time, Part 2 of Article 303 of the CPC of Ukraine stipulates that complaints against other decisions, acts or omissions of the investigator or public prosecutor are not considered during pre-trial proceedings and may be subject to consideration during preparatory proceedings in court, in accordance with Articles 314-316 of the CPC of Ukraine. In terms of the analysis of the right to non-interference in private and family life, such a view of the legislator, in our opinion, is unjustified. The CPC of Ukraine does not provide for appeals against decisions of the investigating judge on granting permission to conduct investigative (search) and covert investigative (search) actions, as well as the actions of the investigator during their conduct. However, some of them cause significant interference in the personal and family life of participants in criminal proceedings, and sometimes persons who do not yet have a certain procedural status. For example, during a search, property belonging to persons living in the dwelling may be damaged, but these persons were not present

17 V. V. Nazarov & R. I. Trakalo. *The Role of Judicial Control over the Observance of the Right to Respect for Private Life in Appealing Decisions, Actions or Inaction during the Pre-Trial Investigation*. INTERNATIONAL LAW BULLETIN 2. 2015. Pg. 36.

18 Unified State Register of Court Decisions. Available at: http://reyestr.court.gov.ua/

during the search, or valuables disappeared or personal items were found, and so on. Part 8 of Article 236 of the CPC of Ukraine states that persons who are present during the search have the right to make statements in the course of investigative (search) action, such statements being entered in the record of search. However, persons who are not present during the search cannot physically make such statements. It should be noted that the decisions of the investigating judge may be appealed by the participants in the criminal proceedings in the part in which the procedural actions carried out and the adopted procedural decisions affect their interests.

In our opinion, during the consideration of the complaint the investigating judge should identify the existence of a violated right to non-interference in the personal and family life of the person, the possibility of its restoration, the legality and validity of the decision. We think that in order to protect personal interests, the court may consider the complaint in closed hearing in the cases provided for in Parts 2-3 of Article 27 of the CPC of Ukraine (for example, it is necessary to prevent disclosure of personal and family life or circumstances that degrade the dignity of the persons).

3.1 An appraisal of the international experience on judicial control

Despite the diversity of judicial systems, there is a clear global trend towards the creation of special courts or judicial positions with judicial control powers. For example, in the Anglo-American legal system, the British model of judicial enforcement in criminal cases is characterized by the fact that there is the effective judicial control at all stages of the investigation, without prosecutorial supervision. The police may perform only those procedural actions that do not restrict the constitutional rights and freedoms of citizens. To apply any procedural measures (except for short-term detention) it is necessary to apply to the court.[19] In England and Wales, there is the Crown Prosecution Service (CPS), an independent public body responsible for prosecuting persons charged by the police and deciding whether there is sufficient evidence to apply to court.[20]

The basis of the pre-trial stage in criminal proceedings in this legal system is the collection of evidence of a crime, and the task of the suspect or his/her defense counsel is to collect contrary evidence. Police convey the evidence to the Attorney

19 B. Levenets. *Models of Judicial Enforcement of Great Britain and the United States*. ENTREPRENEURSHIP, ECONOMY AND LAW 1. 2020. Pg. 172.

20 S. Rab. LEGAL SYSTEMS IN UK (ENGLAND AND WALES): OVERVIEW. (2019). Available at: https://uk.practicallaw.thomsonreuters.com/5-636-2498?transitionType=Default&contextData=(sc.Default)

Service. Attorneys are not only prosecutors in criminal proceedings, but also are government legal advisers.[21] They check the legality of the police's actions, thus ensuring the admissibility of the evidence gathered in court.

In the United States, judicial control in criminal proceedings belongs to the general system of judicial supervision. Arrest and search are the main measures of criminal proceedings and investigative actions applied by a court. They are carried out on the basis of a special court permit — warrant, and on which, according to Anglo-Saxon procedural tradition, the successful completion of criminal prosecution largely depends. The Constitution of the United States is of great importance in the criminal process, because it guarantees the rights of citizens accused of committing a crime. Such rights are guaranteed by the Bill of Rights more broadly. For example, the fourth annex protects American citizens from unjustified searches and detentions, i.e. the right to the inviolability of the person, home, documents and property from unjustified searches and arrests. No search and detention order shall be issued without sufficient grounds, supported by oath or affirmation. In addition, the warrant must contain a detailed description of the place of search, persons or things to be seized. The legal conditions for a search are set out in Amendment IV to the United States Constitution, which provides for the right of citizens to protection of persons, housing, documents and property from unjustified searches or arrests. This right is aimed to protect the person and property of a citizen, his/her private life from unjustified searches and seizures, and the issuance of warrants allows the judiciary to control the coercive activity of the police. When issuing a warrant, the judge must take into account the importance of private interests that will be limited during the search, the validity of the facts that give the police a "reasonable basis" for the search, the conclusions reached by the police, based on the analysis of the facts, and the probative value of these conclusions. Thus, the search warrant formally confirms and authorizes the need for the state to restrict the sphere of private life of citizens in order to investigate the crime. A significant restriction on the constitutional rights of citizens to privacy is the telephone tapping. In the United States, compared to any other country in the world, a lot of efforts have been made to limit privacy and increase the ability of police and special services to eavesdrop on personal communication.[22]

21 P. P. Pidiukov, Ya. Yu. Koniushenko & M. O. Amons. *System and Competence of the US Law Enforcement Agencies Authorized to Initiate Criminal Surveillance (Prosecution) and Conduct Pre-Trial Criminal Proceedings*. EUROPEAN PERSPECTIVES 2. 2012. Pg. 120-121.

22 R. I. Trakalo. *International Legal Standards of Judicial Control over the Observance of the Right to Respect for Private Life*. BULLETIN OF THE ACADEMY OF ADVOCACY OF UKRAINE 1. 2014. Pg. 89.

In France, on the other hand, as a representative of the Romano-Germanic legal system, in addition to the investigating judge who conducts the preliminary investigation and performs judicial control over the police investigation, judicial control is also conducted by the Trial Chamber and the Preliminary Investigations Chamber. In addition, the post of judge on liberties and imprisonment was introduced. It took some powers of the investigating judge and became another judicial body that ensures the legality of the preliminary investigation. This structure of authorized bodies has created a clear system of judicial control, including the respect for the right to private life.[23]

According to the CPC of France, the Trial Chambers have the following procedural powers: 1) Consideration during the investigation of complaints against the decisions of the investigating judge, which are subject to appeal; 2) consideration of the issue regarding the invalidation of investigative acts and their removal from the criminal case; 3) as appropriate, independently conduct investigative actions, collect evidence and even withdraw the case from the investigating judge to complete the investigation of the first instance; 4) disciplinary supervision of some officials, including judicial police officers, issues regarding extradition, rehabilitation, etc. In addition to the Trial Chamber, judicial control over the preliminary investigation is conducted by the Preliminary Investigations Chamber. It has the right to control the preliminary investigation both on incoming complaints and on its own initiative. There are no significant differences between the proceedings on the appeals of the participants in the process in the Trial Chamber and the Preliminary Investigations Chamber.[24]

Judicial control over the pre-trial investigation in general and the respect for the right to private and family life in particular, according to the CPC of Germany, is to obtain a court decision for seizure, seizure of mail (§ 99-100), search (§ 102), placement of the accused for surveillance in a psychiatric hospital, physical examination of the accused, other persons, blood sampling, establishment of checkpoints on the streets, seizure or arrest of property, arrest of a person (§ 112-126), control of telephone conversations (§ 111), and verification of the arrest (§ 105). The § 100a., § 100g., § 100h., § 100i, etc., of the CPC of Germany clearly regulate the grounds and procedure for control over the means of telecommunication, as well as obtaining control by the investigation (with the permission of a judge) from bodies providing telecommunication services and information about telecommunication connections (access codes, card numbers, location codes, as well as telephone numbers or recognition signals of the devices from

23 *Ibídem*. Pg. 87.

24 Yu. V. Skrypina. *The Investigative Judge in the System of Criminal-Procedural Activity (Comparative-Legal Research): Dissertation of the Candidate of Juridical Sciences*. (2008). Pg. 35-38.

or to which calls are made, or end device; start and end of connection with date and time determination; type of telecommunication service used by the client; locations of fixed connections, their beginning and end with the date and time; location of the activated mobile phone, etc.). In addition, the procedure for providing this information and about future telecommunication connections has been established.

According to § 99 of the CPC of Germany, the seizure of letters and postal items, as well as telegrams on the telegraph addressed to the accused or containing information about the accused or their content is relevant for the case. The right to seizure belongs only to the judge, and in case of urgent actions — to the Prosecutor's Office (§ 100 of the CPC of Germany). The seizure carried out by the Prosecutor's Office is not valid if the judge's confirmation is not received within three days. According to this Code, in certain cases provided by law the constitutional right of a person to inviolability of the home is subject to restriction by a court decision. For example, in accordance with § 102 of the CPC of Germany, persons suspected of committing a criminal offense, or an accomplice, abetter or a person who hides the offender, may be searched housing or other premises.[25] During the inspection of coercive actions, the judge has certain restrictions, namely he must check only the legality and admissibility of this coercive measure. The issues of necessity, proportionality or feasibility do not fall within his competence, as it is within the competence of the Prosecutor's Office.

According to Chapter 3 of the CPC of the Republic of Lithuania, a pre-trial judge has the right to conduct such procedural actions and decisions — appointment of a pre-trial investigation, arrest, temporary detention, search, seizure of postal items, temporary restriction of the owner's rights, control and recording of telephone conversations, interrogation of a witness by a court if a person, during interrogation by the investigator, refuses to testify and asks to be questioned by the judge (the right to be questioned by the judge).

According to Paragraph 10 Part 2 Article 26 of the Criminal Procedure Law of the Republic of Latvia, there is a position of investigating judge. Article 40 of this Law stipulates that an investigating judge shall be the judge whom the chairperson of the district (city) court has assigned, for a certain period, the control over the respect for human rights in criminal proceedings, as well as Article 41 — the rights and duties of an investigating judge to apply coercive measures; Paragraph 8 Part 1 Article 41 — joining to a criminal case at the request of protection of uninvolved materials; Paragraph 4 Part 1 Article 41 — conducting special investigative actions: Control of legal correspondence; control of means of communication; control of data in an automated data

25 V. V. Nazarov. *Restriction of Constitutional Rights of the Person in Criminal Procedure: Dissertation of Doctor Degree in Law on Speciality*. (2009). Pg. 316-317.

processing system; control of the content of transmitted data; audio-control of a site or a person; video control of a site; surveillance and tracking of a person; surveillance of an object; a special investigative experiment; the acquisition in a special manner of the samples necessary for a comparative study; control of a criminal activity (Part 1 of Article 215).

Chapter 39 "Judicial control over pre-trial proceedings" of the CPC of the Republic of Armenia i) regulates the scope of judicial control, and ii) defines the list of investigative actions (search of housing, investigative actions related to restricting the secrecy of correspondence, telephone conversations, postal, telegraphic and other communications), coercive measures (detention, placement in a medical institution for judiciary and psychiatric or forensic examination of suspects), and operational and investigative measures (related to the restriction of citizens' rights to secrecy of correspondence, telephone conversations, postal telegraph and other messages, as well as measures provided by the Law "On operational and investigative activities"), conducted by a court decision (Articles 279, 280, 281), the procedure for consideration of motions by the prosecution (Articles 284, 285, 286), as well as the procedure for consideration of protests against illegitimate and ungrounded decrees and actions of officials (Articles 289, 290).

In contrast, other judicial control is provided for in the CPC of the Republic of Belarus, where prosecutorial supervision of criminal investigations is preserved. Judicial control consists only in considering complaints against the actions and decisions of the criminal prosecution body (Articles 33, 144 of the CPC of the Republic of Belarus), i.e. the court is practically not involved in criminal proceedings at the pre-trial investigation stage and is not given exclusive powers to make decisions related to judicial control over the respect for the right to private and family life. According to Paragraph 14 Part 5 Article 34 of the CPC of the Republic of Belarus, the prosecutor has the power to: Authorize the application of a preventive measure in the form of detention, house arrest, bail; conduct a search, inspection of housing or other lawful possession; seize property in housing or other lawful possession, postal and telegraphic and other items and their seizure, seizure of documents containing state secrets or other secrets protected by law; listening to and recording negotiations conducted through technical communication channels and other negotiations; exhumation; placement of a suspect or accused who is not in custody in a psychiatric hospital; removal of a suspect or accused from office.

Having analyzed various forms of judicial control over the respect for the right to private and family life, we can conclude that there are specially established structures in the judicial system in different countries to exercise the function of judicial control

(France); judicial procedure for issuing a warrant (order) for search, seizure, control and recording of telephone conversations, etc., present in most civilized countries (England, Germany, United States, France, etc.). In some countries, judicial control is exercised only in the form of appeals to the court against illegal decisions and actions of investigative bodies, leaving to the Prosecutor's Office the authority to restrict the constitutional rights of citizens (Republic of Belarus).

IV. Conclusions and perspective for effective implementation of judicial control

In summary, it should be noted that human rights are the highest human value, and their respect and observance is the duty of the state. The court must protect the rights of participants in criminal proceedings by restoring them in case of violation, and improving the quality of law enforcement in criminal proceedings. The judgment of Shchokin v. Ukraine[26] of 14 October 2010 defines the concept of the quality of the law and the requirement that it be accessible to interested parties, clear and predictable in its application. The lack of the necessary clarity and precision in national law violates this requirement. If national law provides for an ambiguous or multiple interpretation of the rights and obligations of individuals, national authorities are obliged to take the most favorable approach for individuals in such a way that conflict resolution is always interpreted in favor of the individual. Respect for the right to privacy and family life is no exception.

Thus, judicial control as a guarantee of the right to non-interference in private and family life during the pre-trial investigation is guaranteed by the international community, but even in the legislation of European states there are gaps in the judicial protection of this right. The main purpose of the investigating judge is to exercise judicial protection of this right and the legitimate interests of persons involved in criminal proceedings, and to ensure the legality of proceeding at the pre-trial investigation. However, the judgement of the ECTHR and the Convention on various aspects of guaranteeing the right to privacy and family life of citizens, which is most limited at the pre-trial investigation during the collection, verification and evaluation of evidence, is a guideline for lawful and reasonable procedural decisions.

26 Case of Shchokin v. Ukraine (Application No. 23759/03 and 37943/06): Judgment; Strasbourg, 14 October 2010. Available at: http://hudoc.echr.coe.int/eng?i=001-100944

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