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INSTRUMENTS OF OPERATIVE-SEARCH ACTIVITIES AS MEANS OF COGNITION IN CRIMINAL PROCEEDINGS

Abstract. Purpose. The purpose of the article is to identify direct and indirect means of cognition of the investigator in criminal proceedings, as well as to determine the place of instruments of operative-search activities among them. **Results.** The article underlines that the solution of the tasks of criminal procedure is directly dependent on the means of cognitive activities of the investigator. Means of criminal procedural cognition are used exclusively for detection, investigation and prevention of crimes and establishment of the truth in criminal proceedings. Means of operational and search activities are aimed only at detecting and recording signs (traces) of crimes, so their cognition is important for the results of the pre-trial investigation but can be considered a cognitive activity of the investigator only indirectly. **Conclusions.** Means of cognition of the investigator in criminal proceedings are investigative (search) actions, certain covert investigative (search) actions, certain measures to ensure criminal proceedings, by which the investigator performs cognitive activities regarding the circumstances of a criminal offence in a particular criminal proceeding, and then this is considered to be “direct cognition”. Operative-search actions and search measures cannot be means of direct cognition of the investigator in criminal proceedings, since they are carried out by special actors (operational units) before the criminal proceedings are initiated. Partially (in case of necessity to search for a person, establish the location of property, funds, etc.), when this competence of operational units is exercised on behalf of the investigator (including through covert investigative (search) actions), the investigator has the opportunity to use the information obtained in the process of cognition – in this case, it is considered to be “indirect cognition”. The results of operative-search activities carried out with the use of legal means of the investigator’s cognitive activities may be used as evidence in criminal proceedings, provided that operative-search activities are carried out in accordance with the rules set out in the CPC of Ukraine and the Law of Ukraine “On Operative-Search Activities”.

Key words: criminal proceedings, operative-search activities, cognition, means, instruments.

1. Introduction

In view of the procedural provisions of the CPC of Ukraine, investigative (search) actions, covert investigative (search) actions and other procedural actions are considered to be means of obtaining evidence by an investigator. In the theory of criminal proceedings, some scholars also distinguish other means that formally belong to the theory of OSA and unreasonably consider them to be search means of cognition of the investigator. For example, O.V. Kovalova argues that the search activities of the investigator begin with the study of phenomena that are external manifestations of the offence through the establishment of specific material objects – carriers, sources of infor-

mation, their recording and procedural introduction into the process of proving. The author believes that the search activities of the investigator (as a means of cognition of the investigator) is ensured by the use of criminal procedure and operative-search activities, and in support of her opinion, she notes that the current CPC of Ukraine repeatedly mentions a form of cognitive activities such as search actions that, according to Article 281 of the CPC of Ukraine, the search for a suspect is conducted if his/her whereabouts are unknown (Kovalova, 2012). However, neither the CPC of Ukraine nor by-laws provide the list of search instruments for investigators. Moreover, these regulations, the theory of OSA and criminal procedure do

not even use the term “search actions” (the term covert investigative (search) actions or operative-search actions, search measures are used). Wanted list is a separate institution of operative-search activities and it does not coincide with the concept of “search activity” (although both are traditionally attributed to the competence of operational units). Wanted list is normalised by closed regulations, which do not provide for any other entities to directly search for a suspect than operational units (the investigator only gives them instructions in accordance with Article 281 of the CPC of Ukraine). It is possible to consider the investigator's activities so that he/she identifies persons, subjects, documents, but in this case such activities should be considered as search activities. Therefore, the investigator's search activities are nonsense, and even more so, the search cannot be a means of cognition of the investigator. Similarly, it is impossible to equate the means of operative-search activities with the means of cognition in criminal proceedings. This situation has arisen as a result of the interpretation of certain processes and law enforcement instruments by different legal institutions (criminal procedure and operative-search activities), the theory of each of which uses “own” terminology, which is reflected in regulations. This necessitates determining the instruments of OSA in the cognitive activities of the investigator in criminal proceedings.

Scholars who considered different variants of cognitive activities mostly distinguished between procedural actions, forensic means as instruments of cognitive activity and means of operative-search activities. Only since the interpenetration of the theories of criminal procedure and operative-search activities in the form of regulating covert investigative (search) actions, other assumptions have emerged. For example, I.V. Hora and V.A. Kolesnyk argue that cognition of the actual circumstances of a case begins even before it is initiated and often within operative-search activities. However, proving as an element of cognition cannot objectively arise before the implementation of procedures, since it requires procedural mediation and, accordingly, the assessment of the results of operational cognition can be an impetus for the development of criminal procedural cognition (Hora, Kolesnyk, 2012). M.A. Pohoretskyi argues that the specificity of cognition in OSA is that, unlike cognition in criminal proceedings, which is only retrospective in nature (since the activities of the inquiry body and investigator, prosecutor and court are always based on cognition of facts that took place in the past), an operational officer as an actor of cognition can be an eyewitness to

a crime when it is directly documented and can learn its circumstances both indirectly, including retrospectively, and directly at the time of its preparation and execution (Pohoretskyi, 2007). D.B. Serhieieva and O.S. Starenkyi emphasise that investigative (search) actions are distinguished from other procedural actions precisely by their inherent cognitive nature, search and detective focus, the essence thereof is the attempt of a procedural person to identify (find, search for) and properly record in the relevant procedural sources the factual data relevant to criminal proceedings (Serhieieva, Starenkyi, 2017). O.V. Kovalova believes that by their nature and cognitive capabilities, investigative (search) actions are aimed at finding objects of interest to the investigator, contribute to the establishment of the truth in the case and can be attributed to organisational measures of a detective nature (Kovalova, 2012). O.S. Tarasenko, A.V. Shevchysheh, Y.O. Yermakov, D.M. Mirkovets, Y.O. Diakin conclude that operative-search activities may be carried out both before and simultaneously with the pre-trial investigation; operative-search actions may be initiated before the pre-trial investigation and completed during its conduct; operative-search actions do not end with the commencement of criminal proceedings, but continue further in a different status; operative-search actions are aimed not only at recording the facts of criminal offences being prepared or recording the criminal actions of persons preparing to commit them, but also solves a number of tasks during the pre-trial investigation; the list of operative-search actions includes those that have no analogues with CISA and therefore operative-search measures do not duplicate CISA, but perform the task of ensuring the possibility of fulfilling the investigator's order to conduct CISA (Tarasenko, Shevchishen, Yermakov, Mirkovets, Diakin, 2021).

It can be stated that a number of perspectives are controversial and contradictory and these issues are constantly being intensified and remain relevant.

The purpose of the article is to identify direct and indirect means of cognition of the investigator in criminal proceedings, as well as to determine the place of instruments of operative-search activities among them.

2. Particularities of the process of cognition in criminal proceedings

The commencement of criminal proceedings transfers the process of cognition to the procedural level and commences proving. However, this does not deprive the process of cognition of its multilevel nature. Operative-search activities also contribute to such cognition and may

have a certain impact on both procedural cognition and the process of proving. Cognition of the circumstances of a criminal offence within the scope of operative-search (search) actions enables to obtain information promptly that is necessary for the investigator or prosecutor to make procedural decisions on the implementation of certain investigative (search) actions and the choice of tactical methods for their conduct. Operative-search actions can collect information that characterises the suspect's identity, lifestyle, intentions to hide from criminal prosecution, connections, etc. Furthermore, it is a way to learn about the circumstances of the crime and may be relevant for making a number of procedural decisions, in particular, on the choice or change of a preventive measure. On behalf of the investigator, employees of operational units may conduct investigative (search) actions, covert investigative (search) actions and operative-search actions aimed at finding fugitives from pre-trial investigation bodies and court, searching for (locating) stolen property, money and valuables, property obtained by criminal means, as well as property that may be seized. All of these actions are also carried out for the purpose of cognition in the case, and some of them are aimed at proving it. This gives grounds to assert that operative-search activities and the cognition carried out in the course of their conduct can be considered an important element of criminal procedural cognition in criminal proceedings (Hora, Kolesnyk, 2012).

Employees of operative units may receive information about a criminal offence committed or being prepared as a result of operative-search actions both within the scope of search activities before the pre-trial investigation is commenced and within the scope of present criminal proceedings when fulfilling the investigator's order to conduct CISA (during their preparation and conduct). In this regard, operational units are entitled by the Law of Ukraine "On Operative-search activities" and departmental regulations of the MIA to conduct operative-search actions within the scope of the OSA (Tatarov, 2012).

Operative-search cognition (search activities) is characterised by specific features that distinguish it from cognition in general and from other types of cognition in particular, since it is carried out by actors defined by the legislation on OSA, by means, methods and techniques specified in this legislation, it has its own object and scope (Pohoretskyi 2007, p. 173). Due to its specificity, search activities are of importance in cognition of the circumstances of a criminal offence, since cognition in the course of search activities precedes and ensures criminal proce-

dural cognition that takes place within the scope of a pre-trial investigation.

3. Implementation of the mechanism of cognition by the investigator directly

During the investigative (search), covert investigative (search) action, tactical (cognitive) techniques as means of achieving its goal are combined into a corresponding system that forms the stages of the investigator's performance and essentially forms the tactics of the investigative action. In view of this system, from a forensic perspective, an investigative action should be considered as a form of implementation of special methods used by an investigator in his/her practical activities to learn the actual circumstances of a crime and establish the truth in criminal proceedings. In investigative (search) actions, as in the activities of the investigation body regulated by the criminal procedure law, cognitive techniques and operations are put into practice, facilitating collection and transmission of the necessary information to the addressees of proving (Vatral, 2017, p. 51). From this perspective, investigative actions are characterised by: the source (carrier) of information (object of knowledge), the type of information that this method is to obtain; the essence of techniques and their systems (tactical combinations) for collecting, examining, verifying and evaluating evidence; the place, time and sequence of application of these techniques and combinations (i.e. procedure or methodology), etc. (Stratonov, 2010, p. 141).

Therefore, the cognitive essence of investigative (search) actions is direct observation, measurement, description and comparison of the object's features, which result in solving the general task of finding, recording and examining material carriers of evidence. Here, the relationship of the investigator with material objects (things) is one-sided and is carried out in the form of deliberate sensory (organoleptic), direct or indirect cognition (influence) by technical means (Stratonov, 2010, p. 148). That is, it can be argued that the investigator's cognition can be either independent or as a result of obtaining information as a result of the direct use of technical means.

4. Implementation of the mechanism of cognition by the investigator indirectly

The situation is somewhat different when the investigator implements the mechanism of cognition not personally, but indirectly, which may occur when he/she gives instructions to other entities to carry out certain procedural actions. Moreover, this indirectness can be incorporated a priori into the procedure of delegation of powers.

In fact, covert investigative (search) actions are another type of investigator's means of cognition. CISA are practically a prototype of operative-search actions, which previously, without being available to the public, were aimed at meeting the social need for security (which is reflected in the rights and legitimate interests violated (or possibly violated) as a result of a criminal offence). Moreover, the subject matter of regulatory framework for operative-search activities did not fully cover the social need for freedom, as rights and legitimate interests may also be violated in the course of operative-search activities. This imbalance allowed for arbitrariness on the part of operational units' employees during any covert actions (Loskutov, 2016, pp. 129–130), as by carrying out “secret” operative-search actions on rather abstract grounds, in relation to an indefinite number of persons, without periodic judicial control, operational units' employees were able to restrict the rights and legitimate interests of citizens (Loskutov, 2016, p. 130). The institution of CISA has partially resolved this issue, as well as ensured the possibility of using data obtained practically during the course of the OSA in criminal proceedings (Loboiko, 2012, p. 156).

However, the institution of CISA in criminal proceedings alone cannot ensure absolute effectiveness in the fight against crime. The use of CISA as a means of criminal procedural proving requires constant improvement of the effectiveness of their organisation and tactics, as well as procedural guarantees of the legality of their conduct (Serhieieva, 2017, p. 57).

In practice, several blocks of CISA can be distinguished in terms of their possible usage by the investigator in the process of cognition:

- CISA, which the investigator can conduct independently without instructing operational units and independently perceive the information received (direct cognition) (for example, when collecting information from telecommunication networks);

- CISA, which the investigator can conduct by instructing operational units, but according to the mechanism of conducting, can independently perceive the information received (direct cognition) (for example, audio, video control of a person, place);

- CISA that an investigator can conduct by instructing operational units, but cannot independently perceive the information received (indirect cognition), as the information is received by operational units and then, through their subjective perception, provide to the investigator (e.g., surveillance of a person, city, thing; covert inspection of publicly inaccessible places, housing or other property of a person).

The departmental regulations (of the MIA and the SSU) do not consider the possibility

of conducting CISA independently by the investigator, while the investigator is considered only as an “initiator”, that is, the gaps in the law were filled by the developers of departmental regulations of the MIA and the SSU, who referred to the actors of cognition only as operational officers, depriving the investigator of the opportunity to personally implement the possibilities of cognition, the basis of which is laid down in the CPC of Ukraine.

In addition, there are a number of CISA (e.g., establishing the location of a radio electronic device), procedural actions, various types of measures to ensure criminal proceedings (in particular, temporary access to things and documents), provisional seizure of property, property attachment are those aimed at collecting and preserving evidence (Shylo, 2013, p. 357), which essentially means that they are cognitive means of the investigator, which do not have direct cognitive content. The list of means that may be used in the course of conducting CISA also includes pre-identified (marked) and fake (imitation) means. According to Article 273 of the CPC of Ukraine, such means may be used exclusively for solving the tasks of criminal proceedings by the decision of the head of the pre-trial investigation body, the prosecutor. For this purpose, it is allowed to produce and use specially made things and documents, and to create specially formed enterprises, institutions, and organisations (Vatral, 2017, p. 53). These instruments cannot be recognised as means of cognition of the investigator, because by using them, the investigator does not directly learn anything in the criminal proceedings, but they are used to ensure the conduct of CISA (and the actual effective cognition of the crime event in this way) by operational units.

The ability of the investigator to use information obtained through confidential cooperation (Article 275 of the CPC of Ukraine) is sceptically perceived as a means of cognition in criminal proceedings, since this means was provided to the investigator by law without specifying, who is an actor of confidential cooperation, who directly receives information relevant to criminal proceedings, how it is documented, etc. (Pohoretskyi, Serhieieva, 2014, pp. 188–196), while all work with confidants is the responsibility of operational units. Therefore, their use as a means of cognition in criminal proceedings is also indirect.

The solution of the tasks of criminal procedure is directly dependent on the means of cognitive activities of the investigator. Means of criminal procedural cognition are used exclusively for detection, investigation and prevention of crimes and establishment of the truth in criminal proceedings. Means of operational and search activities are aimed only at detecting and recording signs (traces) of crimes, so their cognition is important for the results of the pre-trial investigation but can

be considered a cognitive activity of the investigator only indirectly.

5. Conclusions

Means of cognition of the investigator in criminal proceedings are investigative (search) actions, certain covert investigative (search) actions, certain measures to ensure criminal proceedings, by which the investigator performs cognitive activities regarding the circumstances of a criminal offence in a particular criminal proceeding, and then this is considered to be “direct cognition”. Operative-search actions and search measures cannot be means of direct cognition of the investigator in criminal proceedings, since they are carried out by special actors (operational units) before the criminal proceedings are initiated. Partially (in case of necessity to search for a person, establish the location of property, funds, etc.), when this competence of operational units is exercised on behalf of the investigator (including through CISA), the investigator has the opportunity to use the information obtained in the process of cognition – in this case, it is considered to be “indirect cognition”. The results of operative-search activities carried out with the use of legal means of the investigator’s cognitive activities may be used as evidence in criminal proceedings, provided that operative-search activities are carried out in accordance with the rules set out in the CPC of Ukraine and the Law of Ukraine “On Operative-Search Activities”.

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ІНСТРУМЕНТИ ОПЕРАТИВНО-РОЗШУКОВОЇ ДІЯЛЬНОСТІ ЯК ЗАСОБИ ПІЗНАННЯ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Анотація. Мета. Мета статті – виокремити безпосередні й опосередковані засоби пізнання слідчого в кримінальному провадженні, а також визначити серед них місце інструментів оперативно-розшукової діяльності. **Результати.** У статті зазначено, що вирішення завдань кримінального процесу перебуває в прямій залежності від засобів пізнавальної діяльності слідчого. Засоби кримінально-процесуального пізнання використовуються винятково для розкриття, розслідування й попередження злочинів і встановлення істини в кримінальному судочинстві. Засоби оперативно-розшукової, пошукової діяльності мають на меті тільки виявлення та фіксацію ознак (слідів) злочинів, тому їх пізнання має значення для результатів досудового розслідування, але може вважатися пізнавальною діяльністю слідчого тільки опосередковано. **Висновки.** Засобами пізнання слідчого в кримінальному провадженні є слідчі (розшукові) дії, окремі негласні слідчі (розшукові) дії, окремі заходи забезпечення кримінального провадження, шляхом проведення яких слідчий виконує пізнавальну діяльність стосовно обставин вчиненого кримінального правопорушення під час конкретного кримінального провадження, і тоді це позиціонується як «безпосереднє пізнання». Що стосується оперативно-розшукових, пошукових заходів, то вони не можуть виступати засобами безпосереднього пізнання слідчого в кримінальному провадженні, оскільки здійснюються спеціальними суб'єктами (оперативним підрозділами) до початку кримінального провадження. Частково (у разі потреби в проведенні розшуку особи, встановленні місцезнаходження майна, коштів тощо), у випадку, коли ця компетенція оперативних підрозділів реалізується за дорученням слідчого (у тому числі шляхом проведення негласних слідчих (розшукових) дій), слідчий має можливість використати отриману інформацію у процесі пізнання – у такому випадку це позиціонується як «опосередковане пізнання». Результати оперативно-розшукової діяльності, здійсненої з використанням правових засобів пізнавальної діяльності слідчого, можуть бути використані в кримінальному провадженні як докази за умови здійснення оперативно-розшукової діяльності за правилами, визначеними в КПК України та Законі України «Про оперативно-розшукову діяльність».

Ключові слова: кримінальне провадження, оперативно-розшукова діяльність, пізнання, засоби, інструментарій.

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