

*Artem Samodin*, Doctor of Philosophy, associate professor,  
Head of Criminalistics and Forensic Medicine Department  
National Academy of Internal Affairs;  
*Anna Nechval*, Adjunct of Criminalistics and Forensic  
Medicine Department National Academy of Internal Affairs

## **LEGAL REGULATION OF SEARCH IN EU CRIMINAL PROCEDURE LEGISLATION**

Any activity of pre-trial investigation agencies, prosecution and judiciary in the course of criminal process may not be considered as full-fledged if it does not stipulate use of various means and tools to influence the proceeding subjects' behavior along with authority to limit the basic constitutional rights.

Commission of crime distorts the existing balance between state authority and human rights and freedoms in favor of the state – to be more precise in favor of pre-trial investigation agencies and judiciary as under these circumstances they are given extended authority to restrict the behavior of certain individuals, put the realization of constitutional rights and freedoms under actual ban. It can be only justified by one purpose – protection of countervailing rights and freedoms [5, p. 153].

Search is classified as an urgent investigative action which provides certain psychological impact on individual subjected to this procedure who tends to resist the law enforcement in any conflict environment and obstructs the detection and extraction of any required objects. During the search citizens are often inflicted moral and material damage caused by intervention of law enforcement staff into their personal space. Encroachment into citizen's residential property is carried out without any prior consent provided and usually without any due consideration of time and life tenor [5, p. 156].

In order to ensure that all commitments under Convention for the Protection of Human Rights and Fundamental Freedoms are met related to search conducting, pre-trial investigation agencies, prosecution and judiciary must take in to accounts the decisions made by ECHR concerning the following cases: «Holovan vs Ukraine», «Bielousov vs Ukraine», «Aleksanian vs Russia», «Buck vs Germany», «Peiev vs Bulgaria», «X.M. vs Turkey», «Ratushna vs Ukraine» etc.

It is worth mentioning that Criminal Procedure Code of Ukraine does not contain the legal definition of «search», only the purpose of its conducting. This definition is hard to find in analogous codes adopted in post-Soviet (Russian Federation, Armenia, Kazakhstan, Belarus etc) and some EU states (France, Poland. At the same time analysis of foreign legislation leads us to the required definitions found in Criminal Procedure Code of Austria and Switzerland – Article 139 of the Criminal Procedure Code of Austria defines the search as «investigative action taken to examine the residential property where the wanted person or any items and documents related to case may be potentially located»; bodily search is identified as «investigative action taken to examine the body or clothes (personal belongings) of a suspect to detect any items and documents related to case». According to Article 250 of the Criminal Procedure Code of Switzerland bodily search is identified as «physical and psychological examination of a person» [7].

British police authority in terms of search and seizure conducting is regulated by the Law «On Police and Evidence in Criminal Cases» with clear procedure of search conducting in public places with right to enter these places without any obstructions; it is stressed that search is conducted only with properly justified suspicion of the wanted object detection [2].

Analysis of criminal procedure legislation of Germany has revealed that purpose of search conducting, just like any other investigative action, is formulated under the dominant principle of criminality control which essentially results in limitation of certain rights and freedoms realization, imposing new prohibitions and restrictions etc. Each state takes numerous factors in to account to formulate the purpose of enforcement measures taken in the course of criminal proceeding – traditions of national criminal legislation development, its uniqueness and current aspects (both national and global) [8].

According to the Criminal Procedure Code of Ukraine authorization to conduct search and ensure immediate examination of all extracted items (Part 5 of Article 236 of CPC of Ukraine) is given to investigator and prosecutor (Part 6 of Article 236 of CPC of Ukraine). But Paragraph 110 of the Criminal Procedure Code of Germany states that prosecution is authorized to examine the documents extracted during the search – officials from other bodies and agencies are entitled to perform the examination only upon prior consent of the document owner.

Certain differences in search conducting procedure were revealed after comparing the criminal procedure legislation of Ukraine and EU states. According to Part 2 of Article 234 of the Criminal Procedure Code of Ukraine, search conducting is authorized by the judge's ruling. In emergency cases this ruling is provided post factum in order to legitimize the intervention to residential property.

In Great Britain search is conducted upon the issuance of court order except of search conducted during the arrest, search conducted in the residential property of suspect and bodily search with due justification of suspicion (possession of stolen or forbidden items) [4, p. 166].

According to Paragraph 106 of the Criminal Procedure Code of Germany judge is granted the exclusive right to authorize the search conducting (in emergency cases – the prosecution). We consider the implementation of this provision in Ukrainian legislation to result in both negative and positive consequences. Lack of definition for «search» in Ukrainian legislation leads to multiple violations of citizens' constitutional rights and freedoms. At the same time this inconsistency is present in criminal legislation of EU states as well. We consider it necessary to amend Article 3 of the Criminal Procedure Code of Ukraine with this definition and continue the comparative analysis in the scope of criminalistic tactics solutions.

### *References*

1. Criminal Procedure Code of Ukraine : Law of Ukraine from April 13, 2012, No. 4651-VI (amended dd. January 5, 2017 ) [Electronic source]. – Access mode: <http://zakon2.rada.gov.ua/laws/show/4651-17>.
2. **B. Bulatov. Criminal Process (textbook)** / edited by **B. Bulatov, A. Baranov**. – 5th edition, revised and amended. – Moscow, Yurait, 2015. – 555 p.
3. D. Mc Bride. European Convention on Human Rights and Criminal Process // Kyiv, KIS, 2010. – 576 p.
4. A. Moldovan. Criminal Procedure Code of Germany and Ukraine: Key Differences // Scientific Works of National Aviation University: Legal Journal «Aircraft and Space Law». – 2007. – Vol. 2. – №. 3. – P. 48–52.
5. V. Nazarov. Limitation of Constitutional Rights during the Search Conducting in Criminal Procedure Code of Ukraine, USA and Germany: Comparative Analysis. – Nashe Pravo, 2011, №. 1. – P. 153–159.
6. M. Pohoretskyi. Criminal Procedural Guarantees of Lawyer's Secrecy (German and French legislative acts) // Forum Prava, 2015. – № 1. – P. 255–260.
7. H. Rybikova, L. Hrekova. Legal Regulation of Search Procedure in Ukraine. – Yurydychnyi Visnyk, № 2 (39), 2016. – P. 184.

8. <http://radnuk.info/pidrychnuku/protses/512-moldovan/11460-12121.html>.

9. [http://pidruchniki.com/1270101259197/pravo/kriminalniy\\_protsesnimechchin](http://pidruchniki.com/1270101259197/pravo/kriminalniy_protsesnimechchin)  
i.