

ПРОТИДІЯ ЗЛОЧИННОСТІ: ПРОБЛЕМИ ТЕОРІЇ ТА ПРАКТИКИ

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Covert Questioning as an Instrument of Pre-Trial Investigation of Crimes

The purpose of this study is to identify and resolve legal issues relating to the use of covert questioning of individuals within the framework of pre-trial investigation of crimes. To achieve this goal, both empirical and theoretical methods of research were used. Methodology. The empirical basis of this paper is the results of questioning of 312 cover police operatives of the National Police of Ukraine (active and retired) who have considerable experience in using covert questioning during pre-trial investigation of crimes; materials of 249 criminal proceedings (Ukraine, 2014–2019), where according to unofficial data covert questioning was used; own experience of the authors of conducting covert questioning within the framework of pre-trial investigation of crimes; a survey of 4000 people of different ages (from 18 to 67 years old) with different social status regarding their attitude towards the use of covert questioning within the framework of pre-trial investigation of crimes. Theoretical basis for the study was the following: the results of research on the content of covert questioning; a possibility of using certain methods and means of criminal intelligence and covert investigation of crimes; the results of the analysis of the legislation of post-Soviet countries. Scientific novelty. In this study, it has been shown that in many post-Soviet countries, without legislative consolidation, covert questioning is used actively and with much effect. It is substantiated that if such a questioning is not legalized (or even forbidden), law enforcement officers will still use it due to high efficiency for obtaining the necessary information. In this case, the use of covert questioning will be impossible to control, which creates conditions for abuse. Legitimation of covert questioning with the criminal procedural law enables to put this activity under control and minimize social harm from it. Conclusions. 1. Covert questioning is an action which is carried out by the staff of the police (and other law enforcement bodies) with concealment of personal data and (or) professional membership, and consists of obtaining the information necessary for prevention of crimes, by making a dialogue with persons questioned (oral or written; direct or indirect, with the use of technical communications devices or without it). 2. The use of covert questioning in pre-trial investigation of crimes is possible and expedient. Inevitable social harm from its application in the form of humiliation of dignity of the questioned (because of deceit) is insignificant in comparison with its social benefit which becomes possible from its application (execution of tasks of criminal legal proceedings, establishing of location of the wanted persons, providing compensation of harm caused by a criminal offence, prevention of crimes which could be committed and their heavy consequences, etc.). Causing possible (probable) harm from the use of covert questioning (damage to the reputation of the interrogated person in case of disclosure of the fact and content of questioning, danger to his life and health, damage to the reputation of the organizations from which the documents of operative covering are applied) can be minimized and, in general, liquidated at all in case of introduction of precise procedure and an effective control behind realization of covert questioning. 3. Covert questioning is subject to legislative normalization not as separate covert questioning action, but as one of the measures of operative (intelligence) support of criminal proceeding. It needs to be established in criminal-procedural codes on such a model sample: covert questioning is interviewing carried out with concealment of its purpose, and also with concealment of a professional membership and personal data of persons who perform it. It is carried out only for obtaining information necessary for taking procedural, organizational and tactical decisions in criminal proceeding. The information received by the results of covert questioning cannot be used in criminal procedural proving.

Keywords: covert questioning; police; pre-trial investigation; crime; criminal procedure.

Introduction

In many countries of the post-Soviet space the reform of criminal justice authorities is going on. At the same time fundamental changes to the criminal procedural legislation are made or new criminal procedural laws are adopted. In these changes and laws, European standards for protecting the rights, freedoms and interests of individuals in criminal proceedings are implemented. A competitive system

of criminal justice is introduced. During the last decade such criminal law reforms in Georgia, Kazakhstan, Lithuania, Latvia, Moldova, Estonia, Ukraine and other countries have undergone such reforms. A common trend of these reforms is a widespread adoption of the norms of criminal procedural legislation of the USA and EU countries. At the same time, all unspoken investigative actions are subject to strict regulation. The law defines their numerous clauses, grounds and procedural order of

application. This actually makes it impossible to apply traditional means (for the post-Soviet countries) in pre-trial investigation.

Thus, in order to carry out the tasks of preliminary investigation, covert questioning of persons by operatives (detectives) of law enforcement bodies is widely used in the countries that appeared on the territory of the former USSR. Such questioning suggests that the policeman, hiding his affiliation with law enforcement agencies and the true goals, communicates with individuals and receives the information necessary to perform the tasks of pre-trial investigation from them. At the same time, he can use specially produced documents, which contain false information about his personality and (or) the place of work.

Such a method of obtaining information has shown its effectiveness for the detection, termination and pre-trial investigation of crimes. Until now, it continues to be successfully (but illegally) used by law enforcement, intelligence and counter-intelligence agencies in many post-Soviet countries that have embarked on the path of democratic development and introduced the appropriate models in the criminal process.

So a dilemma arises: either to recognize the use of covert questioning in pre-trial investigation of crimes as illegal and to establish responsibility for its use, or to legitimize it. That is, the problem of expediency and the possibility of legislative regulation of covert questioning as a means of investigating crimes should be resolved.

The above concerns not only the countries of the post-Soviet space, but also developed European countries. After all, the problems of countering criminality have become much more actual today. In particular, these are the issues of anti-terrorism protection, drug trafficking, cyber crimes and other criminal activities where various means of conspiracy are widely used.

In addition, covert questioning is a traditional practice for the countries of Europe. So, back in 1987, George I. Miller, while reviewing covert police work, noted, «When citizens do not willingly communicate information to the police or cannot be induced to do so, police officers themselves adopt fictitious identities of various types» (Miller, 1987). The statement, pointing to covert questioning as an ordinary means of police activity, further was constantly met in the writings of Western scholars (Maguire, & John, 1996; Miller, 2006, etc.)

The purpose and objectives of the study

The purpose of this study is to identify and solve legal problems of applying covert questioning of persons to investigate crimes.

In order to achieve this goal, the following tasks must be accomplished.

1. To disclose the content of covert questioning.

The fulfillment of this task was based:

– on the general conclusion of the results of scientific research on the contents of questioning, as means of obtaining information necessary for combating crime;

– on the results of questioning of 312 police operatives of the National Police of Ukraine (acting and retired) who have considerable experience in applying covert questioning during pre-trial investigation of crimes;

– on the study of the materials of 249 criminal proceedings (Ukraine, 2014–2019), where according to unofficial data covert questioning was used;

– on the analyses of the authors' personal experience in conducting covert questioning within the framework of pre-trial investigation of crimes.

2. To determine the correlation of social benefit and social damage from the use of covert questioning within the framework of pre-trial investigation of crimes.

To perform this task we used:

– the analysis of materials of the above mentioned 249 criminal proceedings;

– the poll of 4000 people of different ages (from 18 to 67 years old) with different social status (2500 Ukrainians, 500 citizens of Belarus, 500 residents of the Republic of Kazakhstan, 500 residents of the Republic of Lithuania) about their attitude to using covert questioning within pre-trial investigation of crimes;

– the general conclusion of the results of scientific research on the possibility of using certain methods and means of covert investigating of crimes.

3. To determine the appropriateness of rationing covert questioning within the framework of criminal process models of post-Soviet countries that have embarked on the path of democratic transformation; to find out in what forms such rationing is possible.

To perform this task we used:

– the analysis of the norms of legal acts on which the law enforcement officers of the post-Soviet countries relied, using covert questionin within the framework of pre-trial investigation (before the introduction of new models of the criminal process and the reform of the criminal justice authorities)

– the analysis of the norms of legal acts, which regulate the criminal process in these countries today;

– modelling the foundations of optimal patterns for the legal legitimation of the application of an covert questionin within the framework of a pre-trial investigation.

Presentation of the main material

1. Contents of covert questioning

It is generally accepted that questioning (interviewing, survey) is one of the methods of scientific knowledge. Many scientific works are devoted to its use for scientific purposes (Gubrium, & Holstein, 2002; Berg, 2009). The survey, as a method of scientific cognition, is also used in this study.

At the same time, questioning (interviewing, survey) also acts as a method of cognizing the event of a crime. It is explored as a means of obtaining the information needed for combating crime in Western countries (Baldwin, 1993; Kassin et al., 2007; Dixon, 2010; Fisher, & Geiselman, 2010; Oxburgh, Grant, & Myklebust, 2010), and in the countries of the former USSR.

The basis of the questioning (both as a means of scientific cognition and as a means of cognizing the event of a crime) is to receive information on the «question – answer» principle in the process of communication (oral or written, direct or indirect, with or without the use of technical means of communication).

Questioning (as a measure used by law enforcement agencies) in scientific literature of the countries of the post-Soviet space is defined in different ways. (Each scientist does it with insignificant differences). These differences are included in the definition of the essential features of questioning of individual elements: the circle of subjects; the circle of objects; compliance with laws and by-laws.

However, the vision of the main content of such question remains unchanged: this is an activity that consists of obtaining information necessary for combating crime in the process of communicating with individuals on their voluntary consent.

Depending on the application (or nonuse) of the means of concealing the data of the subject of the survey, two main types are identified: open and covert (intelligence).

An open survey can be conducted both publicly and privately. After all, both in scientific research and in police activity, it often happens that the interviewees want to remain anonymous, so that the content of their answers (and sometimes the fact of questioning) remains unknown. Both scientists and police officers in matters of confidentiality of the fact of questioning of a particular person and the content of the information received mainly take the position of their respondents. After all, unlike interrogation, questioning is conducted only on the basis of voluntary consent of the people questioned.

The main means of obtaining the necessary information in the process of covert questioning (as well as any other kind of questioning) is the communication of the police officer with persons who have (or may possess) the required information.

But such a dialogue is carried out with the application of invented, false data («legend»), therefore it has received the name an «imaginary dialogue».

Covert questioning is used when people, who may own the information on the circumstances of commission a crime and the persons involved in it, do not wish to give this information to police officers. This phenomenon is widespread enough on the territory of the countries of the former USSR. The public mentality of the population of these countries leads to those people, who possess important (for criminal proceeding) information, are not inclined to inform the representatives of law enforcement bodies even informally and, all the more, during the official interrogation.

The reasons of it are fear of the criminals' or their accomplices' revenge; mistrust to police officers, judges, public prosecutors, absence of reliable mechanism of protection of witnesses and unwillingness to be considered as an environment «informer» (a person who privately cooperates with the bodies of protection of the law and order and state security). The essence of such attitude of the population to informing the state bodies is reflected even in Ukrainian national proverb: «It's not my business – I know nothing».

Covert questioning is a means to bypass specified factors and to receive the data necessary for disclosing of crimes. It is natural, that these data cannot be used as proofs, however they have always had (and will have further) a great value for the acceptance of important decisions in criminal trial. In particular, during covert questioning the places of storage of property weapon, drugs, received in a criminal way can be found out, certain data on participation in committing crimes by these or those people can be revealed, unknown circumstances of committing a criminal offence can be elicited. This information cannot be directly used as the demonstrative one in the criminal trial for the infringement of the principle «unity of proofs and their sources».

However, obtaining such information can be the basis for: 1) decision-making on carrying out other investigative (search) actions such as public (searches, surveys, interrogations, evidences, etc.) and covert (latent visual supervision, taking information from transport telecommunication networks, covert penetration in habitation or other possession of the person); 2) definition of the time, the place of carrying out these actions, arrangements of forces and means of police divisions. Only definite investigative actions should become direct means of getting proofs in criminal manufacture.

So the purpose of covert questioning is obtaining the information necessary for the acceptance of important remedial, organizational and tactical decisions during pre-trial investigation of crimes

(without its use as proofs in criminal proceeding). Covert questioning is a version of police interrogation. Its specific attribute is the form in which it is carried out – an imaginary dialogue (a legend).

2. A parity of social benefit and social damage of covert questioning within the framework of pre-trial investigation of crimes

From 4000 persons questioned by us 3567 (89,2 %) have expressed that they do not wish to be covertly questioned with the purpose of performing the task of pre-trial investigation, even if it would lead to exposure of the guilty and their bringing to liability prosecution. But only 335 persons (8,4 %) would have addressed the Office of Public Prosecutor or other bodies with corresponding messages in case of revealing the fact of their covert questioning by policemen. 95 persons (2,3 %) have specified, that they are indifferent for to it.

Thus, only 1257 (31,4 %) have expressed that they would give any information necessary to the inspector for pre-trial investigation during open questioning or interrogation.

Negative attitude of people to covert questioning is caused by quite objective factors. In fact, social harm from covert questioning of persons within the limits of pre-trial investigation of crimes takes place in any case as for the achievement of the purpose of such questioning, lie is used. In questioning a person is misled concerning the professional membership of the subject of questioning and its true purposes. Thus, the advantage of questioning a person is reduced. Such humiliation, as a rule, is realized neither by the person who is questioned nor by other people (except the subject of covert questioning). In fact, the received information is used only for the acceptance of certain procedural, organizational and tactical decisions in pre-trial investigation. The sources of its obtaining are not open. But the fact of application of lie and humiliation of human dignity cannot be justified by it.

Social harm considerably increases, if the fact of covert questioning of a concrete person is disclosed (exposed), and, all the more, when the contents of the information received, becomes known. It can do harm to his reputation. Besides, theoretically life, health and property of such a person can be put under threat (on motives of revenge the person, concerning whom the information was given, can do harm to the person questioned). The last thesis is only theoretical as neither from personal experience of the authors, nor from questioning covert operative workers such cases are known. The disclosure (decoding) of the facts of covert questioning takes place seldom enough, and the facts of reference to court with claim for compensation of harm, caused by covert questioning, in general, are not present.

The analysis of practice shows that sometimes during covert questioning subjects resort to actions which can do other kinds of damage. Among such actions the following ones have been fixed: 1) use of such methods of communication that oppress mentality of a person; 2) combination of covert questioning with covert inspection of habitation or other possession of a person, installation of technical means of control; 3) carrying out covert questioning with disguising as a lawyer, the clergyman, a doctor.

Thus, social harm from carrying out covert questioning for the performance of the tasks of pre-trial investigation can be divided into obligatory and facultative. The obligatory one is inevitable and connected with the fact of existence of the given way of obtaining information. The facultative one is caused purely by subjective factors of activity of subjects of covert questioning and can be reduced to a minimum or liquidated in general.

Social benefit of covert questioning in contrast to social harm does not always take place. All 312 police officers questioned by us have declared that rather frequently there are cases when by the results of carrying out covert questioning it is not possible to receive the information necessary for pre-trial investigation. Among the reasons of it the questioned have named mistakes in the choice of sources of information (the questioned did not own the necessary information); mistakes in the choice of time, place and legend for the dialogue (questioning was carried out in an adverse situation); mistakes in defining of a line of conduct and psychological methods (it was not possible to come into psychological contact with the interrogated).

Besides, 287 (92 %) the questioned workers of police have declared that, the use of the information received during covert questioning does not always lead to the increase of efficiency of investigation. Among the reasons of it they also have named: mistakes in the use of information (untimely acceptance of procedural, organizational and tactical decisions in pre-trial investigation) ignoring the received information; mistakes in the work of investigation that are not connected with questioning, but have led to a failure of pre-trial investigation.

The analysis of material of 249 criminal proceedings where (according to the informal data) covert questioning was applied also confirms all the stated above. Only 187 (75,1 %) from them have been directed to court with the indictment. And only in 121 (48,6 %) there have been brought verdicts on the guilty by the court.

At the same time the content and volume of social advantage on specified criminal proceedings are considerable. So, the use of covert questioning within the framework of one of them has allowed to establish the accomplice of preparation of the act of terrorism. Consequently, the decision of installing

technical means of latent visual monitoring on him and listening to his telephone was accepted. As a result the place of storage of explosive and weapon was established (mortars, automatic device, a grenade cup discharge) which the terrorists planned to use. During the search all of these things have been exempted. There is no verdict of court on it yet. But it is possible to assert, that the results of covert questioning became key-noted to prevent deaths and mutilation of hundreds or, perhaps, and it is also possible, thousands of people, significant losses of property which could have taken place due to the act of terrorism.

Other examples of essential social advantage of covert questioning are: exposure of activity of clandestine laboratory on manufacturing heavy synthetic drugs which function in conditions of strict conspiracy (with removal of the equipment and a lot of available preparations ready for the use); exposure of a network of selling heroin; revealing and destructions of a plantation of marihuana located in the middle of a large forest. Not in all the cases all the people involved in the drug industry have been determined. Not in all the cases the full volume of the faults of the persons, who according to the data of juridical scrutiny were directly tied with the criminal activity, was proved. But the termination of this criminal activity has allowed to prevent harmful consequences for the health of the population, to protect its genetic pool.

Naturally, social advantage of carrying out covert questioning is shown when the received information is effectively used in pre-trial investigation. Social justice is restored when persons, guilty of crimes, are called to criminal responsibility; the victims are compensated the harm caused by the commission of the crime. So by the results of covert questioning in the criminal proceedings investigated by us the decisions which further have allowed to collect proofs and prove the fault in court were taken: two saboteurs; two falsifiers of money; three terrorists; five human traffickers; two hirers of a contract killer and two sponsors of planned murders; seven persons, who already committed deliberate murders; 12 persons who made armed assaults and robberies; 15 swindlers; 22 persons who committed crimes in the sphere of drugs trafficking; 45 persons that committed thefts, etc.

In nine criminal proceedings the suspected and accused disappeared from the bodies of preliminary investigation and court. The locations of five of them have been established with the use of covert questioning.

Due to the application of covert questioning in 27 criminal proceedings the place of storage of property (cars, jewels, cultural values, etc.) was discovered. In 35 criminal proceedings it become possible to find out the information concerning the

suspected that allowed to provide compensation of harm caused by criminal offences.

In our opinion, social benefit of application of covert questioning in pre-trial investigation of crimes considerably outweighs inevitable (obligatory) damage of its conducting. However, facultative (possible) harm should be completely excluded.

Indicative is that fact, that from 4000 persons questioned by us 3211 (80,3 %) have declared, that they would support application of covert questioning by police if it assisted prevention committing a heavy lucrative-violent crimes concerning them or their relatives.

3. Legitimation of covert questioning as a private investigative action

In the countries, that were part of the Soviet Union, legal differentiation of criminal trial and operative and searching activity is usual practice. Pre-trial investigation of crimes is made within the criminal trial (according to the criminal procedural law).

Prevention of criminal offences and detection of latent crimes are committed within operative and searching activities (in accordance with the performed investigative law). The subjects of pre-trial investigation and operative and searching activity are also various. Pre-trial investigation is carried out by investigators, and operative and searching activities – by operational units of law enforcement agencies.

The operative and searching activity has some features similar to the activity which the countries of EU define as criminal investigation (Brown, 2007; Carter, 2009; Carter, D., & Carter, J., 2009; Den Hengst, M., & Ter Mors, 2012; Damjan, Potparič, 2014). In particular, they are preventive orientation and use of covert methods of obtaining information.

Covert methods of obtaining the necessary information are stipulated by both criminal procedure laws of the countries formed on the territory of the former USSR (criminal-procedure codes of: the Republic of Moldova, 2003; the Estonian Republic, 2003; Ukraine, 2012; the Republic of Kazakhstan, 2014, etc.), and laws on operative and searching activity of such countries (Laws «On operative and searching activity»: the Ukraine, 1992; the Republic of Kazakhstan, 1994; the Kirghiz Republic, 1998; the Republic of Uzbekistan, 2012; the Republic of Belarus, 2015). However, as a rule, a range of covert methods of work in operative and searching activity is wider.

So, Ukrainian legislators, having introduced the institute of covert investigative actions into the Criminal Procedure Code of Ukraine, have disregarded a number of effective means of data acquisition, necessary for the exposure of the persons who are guilty of committing crimes. In particular, within the framework of criminal trial on the lawful basis it is impossible to use separate

means of gathering necessary information, that in theory are considered as operative and searching actions, and in article 8 of Law of Ukraine «On operative and searching activity» are determined as the right of operative divisions:

– to question persons with their consent, to use their voluntary help;

– to visit accommodation and other premises with the consent of their proprietors or inhabitants for finding out the circumstances of the crime which is being prepared, and also to collect the data on illegal activity of persons, concerning whom the check is carried out;

– to reveal covertly and to note the traces of grave or especially grave crimes, documents and other things which can be proofs for preparation or committing such crimes;

– to receive from legal or physical persons on free-of-charge or on compensation basis the information on the crimes, being prepared or accomplished, and on the threat of safety to the a society and the state;

– to create and apply the automated information systems (the Law of Ukraine «On operative and searching activity», 1992).

As the Ukrainian legislator has defined operative and searching activity as the system of public and covert actions (the Law of Ukraine «On operative and searching activity», 1992: article 2). The rights which are listed above hypothetically can be used both publicly and privately. But the given conclusion is debatable and is put under doubt by many practioners and theorists. In particular, it is not told directly in the law that it is possible to question a person covertly – with concealment of the true purpose of questioning and the membership of the questioning subject to law enforcement bodies. In general, it is told nothing there about a possibility to use lies, disinformation.

A long time use of disinformation in operative and searching activity was based on item 16 of article 8 of Law of Ukraine «On operative and searching activity» (in edition before coming into force of the Criminal Procedure Code of Ukraine in 2012) which gave to operative divisions the right «to create (with a view of conspiracy of an enterprise, organization) and to use documents, which encode the person or departmental assignments employees, premises and vehicles of operative divisions». With coming into force the Criminal Procedure Code of Ukraine in 2012 this position has been cancelled, and in the Law of Ukraine «On operative and searching activity» the right of operative divisions «to create and use beforehand identified (marked) or false (imitating) means according to provisions of article 273 of Criminal Procedure Code of Ukraine» (the Criminal Procedure Code of Ukraine, 2012) have been brought.

However, article 273 «Means used in carrying out covert investigative actions» of Criminal Procedure

Code of Ukraine has only separate attributes of a legislative possibility to use disinformation in carrying out covert questioning actions. In the article mentioned above, without definition of corresponding concepts, the legislator uses essentially new to Ukrainian theory and practice of criminal trial terms: «beforehand identified (marked) means» and «false (imitating) means (marked)». The analysis of this article bears evidence that the use of disinformation is connected only to creation and usage of certain material objects (generally, which play the role of a subject or a means of committing a crime). It is impossible to lean on the norms of this clause for carrying out covert questioning.

The similar situation is observed in the Republic of Kazakhstan. However, the use of covert questioning there within pre-trial investigation definitely can be substantiated from the point of view of the law. So, part 2 of article 232 Criminal-Procedure Code of this republic «Terms and grounds of carrying out covert questioning actions» provides that covert questioning actions are carried out with the use of forms and methods of operative and searching activity (The Criminal-Procedure Code of the Republic of Kazakhstan, 2014). Covert questioning in the theory of operative and searching activity comes under the heading of its methods. However, the Law of the Republic of Kazakhstan «On operative and searching activity» does not have a definition or a list of methods of operative and searching activity. There is only a definition and a list of operative and searching actions, interrogation is attributed to them among others. Such terminological discrepancy leads to a conclusion about the impossibility of application of questioning by law enforcement bodies (especially covert) in pre-trial investigation of crimes in the Republic of Kazakhstan.

The legislators of the Estonian Republic have chosen another way. Actually, they integrated all the norms regulating operative and searching activity in the Criminal Procedure Code. Chapter 3-1 of this document named «Operative and searching actions» includes the norms establishing the list and the content of operative and searching actions; the general conditions and the base for their performance, the order of obtaining sanction for their carrying out; the order of registration, storage and use of materials of these actions; supervision of their carrying out (the Criminal-Procedure code of the Estonian republic, 2003).

But covert questioning it is not included to these measures. Simultaneously with this, article 126-9 of Criminal Procedure Code of the Estonian Republic provides the use of a police agent which collects the information necessary for pre-trial investigation, «using the fictitious person» (Criminal Procedure Code of the Estonian Republic, 2003). The analysis of the contents of this clause allows to assert that a police agent in his

activity cannot avoid the use of covert questioning. However, the formal grounds determined by the law for this purpose are not present.

We managed to find a direct legislative establishing of covert questioning only regarding part 15 of article 2 of Law of the Kyrgyz Republic «On operative and searching activity», where the concept of definition of operative and searching action is stipulated under the name «operative setting». In particular, it is specified there, that operative setting is covert gathering of data on criminal activity of the checked person, revealing his communications and obtaining other information by carrying out encoded questioning of citizens, officials; making covert inquiries; getting acquainted with documents (the Law of the Kyrgyz Republic «On operative and searching activity», 1998). But it is told nothing in the criminal procedural legislation of the Kyrgyz Republic either about covert questioning, or about operative aim.

So, all the considered models of legitimation of covert activity do not enable to use covert questioning in pre-trial investigation on the lawful basis.

In western scientific literature, the questions of carrying out covert questioning by police have been the subject of discussions for many decades. These discussions are conducted in legal, ethical, psychological and economic aspects. Basically, it concerns application of covert methods of two types.

First, methods which do not provide the use of lie and communication as a whole (hidden visual observation, interception of telephone conversations, taking the information from computers, definition of the location by the radio-electronic means).

Second, methods based on deceit (participation of policemen under covering in organized criminal formations; imitating the crime committing conditions; controllable purchase of the goods forbidden for free circulation, etc.). The sharpest discussions have been held around the methods based on a deceit for a long time.

Specific features of these discussions were studied in detail more than a decade ago by Ross Jacqueline E. (Ross, 2008). We have conducted the analysis of his work, and also works devoted to covert activity of police, which were published later (Kruisbergen, Jong, & Kleemans, 2011; Loftus, & Goold, 2012; Ross, 2014; Kruisbergen, 2013; Loftus, & Goold, & Mac Giollabhui, 2015; Christopher, 2017; Kruisbergen, 2017; Maercker, & Guski-Leinwand, 2018; Schlembach, 2018; Loftus, 2019; Atkinson, 2019; Henry, Rajakaruna, Crous, & Buckley, 2019). As a result, we have grounds to assert the following: the point of scientific debates basically concerns complex special operations where policemen use covering not only for carrying out interrogation, but also for direct exposure of criminals.

In particular, the question is about the cases when policemen perform the roles of bribers, buyers

of narcotics (weapon, explosive, stolen property, false money, etc.), executors of contract murders, participants of gangs and terrorist formations. Such activity is connected not only with deceit, but also with participation of police in committing crimes, and also in situations created by them which can be considered as provocation for committing a crime.

The balance of social advantage and social harm from such activity in each case will be various. Frequently the use of covert methods based on a deceit leads to rough infringement of the basic rights and freedoms of a person who did not initially plan to commit crimes.

But today's threats to a society force to recognize the necessity of application of covert methods. The matter concerns terrorism, drug crimes, illegal migration, and growth of street criminality.

Recognizing an opportunity of application of covert methods based on deceit, almost all researchers emphasize the necessity of its legal regulation to reduce to a minimum the probability of infringement of the rights and freedoms of a person, to exclude an opportunity of provocation. Certainly, it is necessary to agree with it.

The application of such an approach to legitimation of special police operations gives the basis for a conclusion about the opportunity to apply it and to establish covert questioning as a means of obtaining information in pre-trial investigation of crimes. In fact, social harm (both inevitable and possible) from covert questioning is less than the one which can take place in carrying out a special operation. In case of covert questioning (in comparison with covert special operation) there is no threat of provocation of committing crimes, participation of a policeman in criminal activity, loss of items and means used for carrying out operations (money, drugs, weapon, etc.).

Also it is necessary to note that the analysis of the content of special covert police operations allows to assert that covert questioning (covered story communication) is an integral part of such operations. It is another argument for the benefit of that it is expedient to legitimize covert questioning in case of legislative regulation of special covert police operations.

The debatable moment on legislative establishing of covert questioning is that in competitive model of criminal trial the right of the party of charge and the party of protection on gathering proofs should be equal. On its base, it is possible to assume, that the right of carrying out covert questioning also should be given to the party of protection

But such questioning, as it was already noted, cannot be a means of gathering proofs. It is applied only for the acceptance of certain decisions on selection the most effective ways of getting proofs.

It is necessary to note, that the updated criminal procedure codes of the post-Soviet space countries envisage equal rights of the parties for the initiative of carrying out investigative actions (including covert) on gathering proofs. However, the mechanism of realization of initiating and carrying out covert investigative actions by the party of charge is not stipulated in any of these codes. However, it is the subject of a separate research.

Regarding the use of covert questioning in pre-trial investigation – psychological bases and concrete psychological methods of carrying it out are the subject to a separate research.

Scientific novelty

The analysis of the mentioned above empirical data and theoretical positions testifies that calculating certain quantity indicators, which would unequivocally illustrate a proportion of social harm and social advantage of using covert questioning, is impossible. Such parameters can be only qualitative. In fact, it is impossible to measure harm, dealt to questioned a persons by deceit, if such deceit has not been exposed. It is true in most cases (the fact of covert questioning and its content are kept covert). The disclosure of the fact of covert questioning of a concrete person and, all the more, the received information is an extraordinary incident; this is an exception, not a rule.

At the same time the amount of questioning, which has not brought advantage (the necessary information is not received or is not used properly) considerably outweighs the quantity of the one that has benefitted (the received information was successfully used in pre-trial investigation). It is connected to a number of objective and subjective factors. But it is possible to tell the same about other covert questioning actions (hidden visual observation; interception of telephone conversations; imitating of conditions of a crime, participation in the activity of criminal groups).

These actions do not always give the necessary results owing to awareness of malefactors on covert methods of police work and (or) nonprofessional actions of policemen. In comparison with other covert methods of police work, covert questioning costs less and is faster in use. The data is found out within 10–15 days with the help of the hidden visual observation, sometimes it is possible to learn during a half of an hour of covert questioning.

For these reasons law enforcement bodies of the post-Soviet space countries actively use covert questioning in pre-trial investigation of crimes (despite the lack of lawful basis). The absence of legislative normalization of covert questioning in pre-trial investigation of crimes leads not only to illegal use but also to uncontrolled one. It can lead to abusive practice including the application of the

results of covert questioning not for its purpose (beyond the limits of criminal proceeding and in general, not for the fulfillment of the task of struggle against criminality at all). Legalization (legislative normalization) of covert questioning as a means of pre-trial investigation of crimes will allow to supervise its use and to protect the received information.

All the models of legitimation of covert activity considered by us do not give an opportunity to use covert questioning in pre-trial investigation on the lawful basis. We believe that this basis should be created.

Legitimation of covert questioning as separate covert investigative action causes objections. In fact, investigative actions (including covert) should be directed to receiving proofs in criminal manufacture). Using the data, obtained by covert questioning in proving is impossible: such proofs cannot be taken as allowable in any case.

We believe that, it is expedient to establish the institute of operative (prospecting) support of criminal proceeding in criminal procedure laws of the countries formed on the territory of the former USSR. Within this institute it is necessary to allow the prosecution to carry out actions of the prospecting content which are inherent to operative and searching activity (criminal investigation). Among these measures it is also necessary to bring into accord fulfillment of covert questioning. Other measures of operative (prospecting) support of criminal prosecution, as well as covert questioning, should be used neither for the direct receiving of proofs, nor for the information on which it is possible to base the organization and tactics of pre-trial investigation. The question of legal legitimation of the institute of operative (prospecting) support of criminal prosecution is the subject of separate research.

Taking into account inevitable harm which covert questioning bears (and also from its application), the procedure of its carrying out needs to be regulated precisely.

Conclusions

Covert questioning is an action which is carried out by the staff of the police (and other law enforcement bodies) with concealment of personal data and (or) professional membership, and consists of obtaining the information necessary for prevention of crimes, by making a dialogue with persons questioned (oral or written; direct or indirect, with the use of technical communications devices or without it).

The use of covert questioning in pre-trial investigation of crimes is possible and expedient. Inevitable social harm from its application in the form of humiliation of dignity of the questioned (because of deceit) is insignificant in comparison with its social benefit which becomes possible from

its application (execution of tasks of criminal legal proceedings, establishing of location of the wanted persons, providing compensation of harm caused by a criminal offence, prevention of crimes which could be committed and their heavy consequences, etc.). Causing possible (probable) harm from the use of covert questioning (damage to the reputation of the interrogated person in case of disclosure of the fact and content of questioning, danger to his life and health, damage to the reputation of the organizations from which the documents of operative covering are applied) can be minimized and, in general, liquidated at all in case of introduction of precise procedure and an effective control behind realization of covert questioning.

Covert questioning is subject to legislative normalization not as separate covert questioning action, but as one of the measures of operative (intelligence) support of criminal proceeding. It needs to be established in criminal-procedural

codes on such a model sample: covert questioning is interviewing carried out with concealment of its purpose, and also with concealment of a professional membership and personal data of persons who perform it. It is carried out only for obtaining information necessary for taking procedural, organizational and tactical decisions in criminal proceeding. The information received by the results of covert questioning cannot be used in criminal procedural proving.

In carrying out covert questioning it is forbidden: to use the methods of communication which depress a person's mind; combination of covert questioning with covert inspection of accommodation or other possession of the person, installation of means of technical control there (without the appropriate sanction of the investigative judge), carrying out covert questioning with disguise as a lawyer, a clergymen, a physician.

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Негласне опитування як один з інструментів досудового розслідування злочинів

Метою дослідження є визначення та розв'язання юридичних проблем застосування негласного опитування осіб у межах досудового розслідування злочинів. **Методологія.** Для досягнення окресленої мети було використано як емпіричні, так і теоретичні методи дослідження. Емпіричну базу роботи становлять результати інтерв'ювання 312 негласних оперативних працівників Національної поліції України (нинішніх і пенсіонерів), які мають значний досвід застосування негласного опитування під час досудового розслідування злочинів; матеріали 249 кримінальних проваджень (Україна, 2014–2019 роки), де за неофіційними даними застосовано негласне опитування; власний досвід авторів з проведення негласного опитування в межах досудового розслідування злочинів; опитування 4000 осіб (вікової категорії 18–67 років) з різним соціальним статусом для з'ясування їхнього ставлення до використання негласного опитування в межах досудового розслідування злочинів. Теоретичне підґрунтя статті становлять результати наукових досліджень стосовно змісту негласного опитування, можливості застосування окремих методів і засобів кримінальної розвідки та негласного розслідування злочинів, а також результати аналізу законодавства країн пострадянського простору. **Наукова новизна.** У публікації констатовано, що в низці пострадянських країн без законодавчого закріплення активно й ефективно використовують негласне опитування. Обґрунтовано, що таке опитування необхідно узаконити, оскільки правоохоронці в будь-якому разі будуть використовувати його для одержання потрібної інформації. За інших обставин застосування негласного опитування буде неможливо контролювати, що створить умови для зловживань. Унормування негласного опитування дає змогу кримінальному процесуальному законодавству контролювати зазначену діяльність і мінімізувати

соціальну шкоду від нього. **Висновки.** 1. Негласне опитування – це захід, що проводять працівники поліції (та інших правоохоронних органів) з приховуванням своїх персональних даних і (або) професійної приналежності, який також полягає в одержанні інформації, необхідної для запобігання злочинам, їх виявлення, припинення та розслідування, шляхом спілкування з опитуваними особами (усного або письмового; безпосереднього або опосередкованого; з використанням технічних засобів комунікації або без них). 2. Застосування негласного опитування в досудовому розслідуванні злочинів є можливим і доцільним. Неминуча соціальна шкода від його використання у формі пониження гідності опитуваних (через їх обман) є незначною проти соціальної користі (виконання завдань кримінального провадження; встановлення місцеперебування осіб, оголошених у розшук; забезпечення відшкодування шкоди, завданої кримінальним правопорушенням; запобігання злочинам, що могли б бути вчинені, та їхнім тяжким наслідкам тощо). Спричинення можливої (імовірної) соціальної шкоди від застосування негласного опитування (шкода репутації опитаної особи в разі розголошення факту й змісту опитування, загроза її життю та здоров'ю, шкода репутації організацій, від яких застосовують документи оперативного прикриття) можна мінімізувати й ліквідувати, якщо запровадити чітку процедуру та ефективний контроль за здійсненням негласного опитування. 3. Негласне опитування підлягає законодавчому унормуванню не як окрема негласна слідча дія, а як один із заходів оперативного (розвідувального) супроводження кримінального провадження. Його слід закріплювати в кримінальних процесуальних кодексах за таким зразком: негласне опитування – це опитування, що здійснюють з приховуванням його мети, професійної приналежності та персональних даних особи, яка його проводить. Його здійснюють з метою одержання інформації, необхідної для прийняття процесуальних, організаційних і тактичних рішень у кримінальному провадженні. Дані, отримані за результатами негласного опитування, не можуть бути використані в кримінальному процесуальному доказуванні.

Ключові слова: негласне опитування; поліція; досудове розслідування; злочин; кримінальний процес.