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Comparative Legal Analysis of Judicial Oversight over Operational-Search Activities

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Abstract: This article presents a comparative legal analysis of judicial oversight over operational-search activities (OSA) in various legal systems, with a focus on continental Europe, the Commonwealth of Independent States (CIS), and selected Asian jurisdictions. It highlights the central role of judicial authorization in protecting fundamental rights, particularly the right to privacy, when law enforcement agencies engage in covert surveillance and other special investigative measures. The study examines relevant legislative frameworks, judicial practices, and the influence of the European Court of Human Rights in shaping standards of oversight. It explores practices in countries such as France, Germany, Ukraine, Russia, Kazakhstan, Vietnam, Moldova, and Azerbaijan, assessing both the strengths and shortcomings of their respective models. The analysis reveals a global trend toward embedding OSA within the criminal process and ensuring judicial supervision, yet also uncovers persistent legal gaps, lack of transparency, and systemic approval of surveillance measures with minimal judicial scrutiny. The article concludes by emphasizing the need for clear procedural rules, effective remedies, and constitutional safeguards to ensure that operational-search measures do not infringe upon fundamental rights.

Key words: Judicial oversight, operational-search activities, covert surveillance, criminal procedure, right to privacy, constitutional safeguards, legal comparativism, special investigative measures, due process.

In the continental legal system, the role of operational-search activities (OSA) has directly influenced the nature of judicial oversight over such activities. That is, due to the unification of OSA within the criminal process, there is no issue regarding the necessity or scope of judicial oversight.

The European model of judicial oversight is based on the European Convention on Human Rights and the rulings of the European Court of Human Rights. According to these standards, any interference by the state in an individual's private life must:

Be established by law;

Pursue a legitimate aim (including combating crime and ensuring public safety);

Be necessary in a democratic society.

To comply with these requirements, the grounds for authorizing OSAs must be clearly defined, authorization must be granted by an independent oversight body (i.e., a court), and — if it does not compromise the investigation — the individual subjected to such activities must be informed afterwards.

For example, in France, pre-investigation checks are considered part of operational-search activities, administrative procedures, and elements of the criminal process, and are generally viewed as police activities. The initiation of a criminal case is regarded as the boundary that separates police activity from procedural activity.

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In Ukraine, operational-search activities conducted within the scope of a criminal case are regulated as covert investigative (search) actions under Chapter 21 of the Criminal Procedure Code (CPC).

According to Article 247 of the Ukrainian CPC, requests for authorization to conduct covert investigative (search) actions are reviewed by an investigating judge of the appellate court.

Importantly, under Article 248 of the CPC, the request must substantiate — along with other information — that it is impossible to obtain the necessary information about the crime and the perpetrator by other means, and that the covert investigative (search) actions are likely to yield significant information about the crime and the individual who committed it.

In general, the Ukrainian experience of judicial oversight over operational-search activities can be evaluated positively, with the following key features highlighted:

The grounds for granting a request to conduct covert investigative (search) actions are clearly defined (such as the seriousness of the crime and the potential to obtain evidence of significant importance to the case);

The investigating judge's decision must specify the duration of validity, which may not exceed two months;

There is an obligation to inform the person subjected to covert investigative (search) actions about such measures[1].

According to Paragraphs 99 and 100 of the Criminal Procedure Code of the Federal Republic of Germany, the monitoring and seizure of telegraphic and postal communications may only be carried out with judicial authorization, or — in urgent cases — with the approval of the public prosecutor.

A notable aspect is that the categories of crimes for which telephone conversations may be monitored are clearly defined. Entry into a private residence by law enforcement officers is permitted only with a court decision, or in exceptional cases, with the prosecutor's authorization. Covert surveillance is allowed only against a suspect, and only when there is no other way to obtain evidence or determine their whereabouts[2].

In its judgment in the case of Akhlyustin v. the Russian Federation, the European Court of Human Rights stated that[3]:

- The term **"domicile"** under Article 8 of the European Convention on Human Rights encompasses not only a person's residence but also their **workplace**;
- Phone calls made from office premises — including those from a government official's office — fall under the scope of **"private life"** and **"correspondence"**;
- The Court concluded that the subject of the application had not been provided with sufficient safeguards against potential abuse of power during covert surveillance measures. Therefore, in such cases, **judicial authorization** is required for the use of special technical devices to conduct electronic surveillance in office spaces by OSA (Operational-Search Activity) entities.

According to the **"reasonable expectation of privacy"** doctrine, national laws must be sufficiently clear to give citizens a proper understanding of the **circumstances and conditions** under which government authorities are permitted to conduct communications surveillance.

[1] Уголовный процессуальный кодекс Украины от 13 апреля 2012 года № 4651-VI (с изменениями и дополнениями по состоянию на 26 февраля 2025 года). (n.d.). Континент: Интернет-портал правовой информации. https://continent-online.com/Document/?doc_id=31197178#pos=2910;-60

[2] Уголовно-процессуальный кодекс ФРГ [Электронный ресурс]. http://www.juristlib.ni/book

[3] Постановление ЕСПЧ от 07.11.2017 "Дело Ахлюстин (Akhlyustin) против Российской Федерации" (жалоба N 21200/05)

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The Court further emphasized that covert surveillance must not be beyond **public or individual accountability**. Any unlimited legal discretion vested in the executive or judiciary contradicts the principle of **rule of law.**

Therefore, the law must define — with sufficient clarity to protect individuals against arbitrary interference — the scope of discretion granted to the competent authorities and the manner in which such discretion is exercised[4].

In its judgment in the case of Bykov v. Russia, the European Court of Human Rights held that the use of a radio-transmitting device during an operational experiment to record a conversation between the applicant and "V." was essentially equivalent to telephone tapping. The Court emphasized that:

The interception of the conversation was not subject to any conditions;

The scope and method of conducting the surveillance were not defined;

No safeguards were in place to prevent abuse.

As a result, the Court concluded in favor of the applicant.

In its judgment in the case of Iordachi and Others v. Moldova, the Court noted that between 2005 and 2007, Moldovan courts approved 98% of the investigative authorities' requests for communication surveillance. The Court found that:

Judges granted the vast majority of such requests;

Judicial decisions authorizing covert wiretapping were not sufficiently reasoned;

This systemic practice allowed for abuse, and thus constituted a violation of Article 8 of the European Convention on Human Rights[5].

In the Socialist Republic of Vietnam, operational search activities have been partially integrated into the Criminal Procedure Code (CPC). Articles 223 to 228 of the 2015 CPC classify the following actions as special investigative measures:

- Covert video and audio recording;
- Covert surveillance of telephone communications;
- Covert collection of electronic data.

In Vietnam, these special investigative measures are permitted only in cases involving:

- Crimes against national security;
- Illegal drug trafficking;
- Corruption;
- Terrorism;
- Money laundering;
- Other especially serious crimes committed by organized criminal groups.

[4] The Court's decisions in "Malone v. the United Kingdom", "Leander v. Sweden", "Yvigue v. France", and "Weber and Saravia v. Germany".
[5] Иордаки и другие против Молдавии [Iordachi and Others v. Moldova] (№ 25198/02) Постановление от 10 февраля 2009 г. [вынесено IV Секцией]

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An analysis of the legal regulation of operational search activities (OSA) in CIS countries shows that establishing judicial oversight and integrating OSA into the criminal procedure system remain some of the main challenges.

Among the CIS countries — including Russia, Kazakhstan, Tajikistan, Kyrgyzstan, Ukraine, Moldova, Azerbaijan, and Armenia — we can observe that judicial oversight over operational search activities is generally in place, although in varying forms, and is fully functioning in all of these states.

In particular, Article 5[6] of the Federal Law of the Russian Federation "On Operational-Search Activities", Article 34[7] of the Law of the Republic of Armenia "On Operational-Search Activities", and Article 10[8] of the Law of the Republic of Azerbaijan "On Operational-Search Activities" set forth the relevant provisions.

A positive aspect of judicial oversight of operational-search activities in the Republic of Azerbaijan is that Article 19[1] of the Law "On Operational-Search Activities" directly stipulates that judicial oversight shall be carried out in accordance with the procedure established by the Criminal Procedure Code.

In particular, actions such as wiretapping of telephone conversations, inspection of postal, telegraph, and other correspondence; obtaining information through technical communication channels and other technical means, entering and searching residential and other premises, inspecting buildings including dwellings, and conducting surveillance of individuals are carried out only with court authorization[9].

Article 5 of the Federal Law of the Russian Federation "On Operational-Search Activities" stipulates that if a person has not been proven guilty of committing a crime in the manner prescribed by law—i.e., if a criminal case has been denied initiation or has been terminated due to the absence of corpus delicti in their actions—and operational-search measures were conducted in relation to that person, then, if they believe their rights have been violated, they have the right to request information about these measures from the body conducting operational-search activities, to the extent that the requirements of secrecy and the risk of disclosing state secrets allow.

If the provision of the requested information is denied or if the person considers the information provided to be incomplete, they have the right to appeal the matter in court.

In judicial proceedings, the burden of proving the legality of the refusal to provide information — including in full — lies with the competent authority that conducted the operational-search activities. Upon the judge's request, the relevant authority is obliged to submit the denied information.

If the court finds that the refusal to provide the necessary information was unfounded, the judge may order the respective authority to provide the applicant with the requested information[10].

In 2024, courts of the Russian Federation reviewed 537,364 requests for the conduct of operational-search measures, of which 537,080 were granted — meaning that only 272 requests were denied[11].

The above-mentioned situation raises questions regarding the effectiveness of judicial oversight over operational-search activities in the Russian Federation. At the same time, it is important to emphasize

[6]The Federal Law of the Russian Federation "On Operational-Search Activities" https://www.consultant.ru/document/cons_doc_LAW_7519/
[7]The Law of the Republic of Armenia "On Operational-Search Activities" https://www.arlis.am/documentview.aspx?docid=81018
[8] The Law of the Republic of Armenia "On Operational-Search Activities". https://mia.gov.az/ru/legislation/1/view/2/
[9]The Law of the Republic of Azerbaijan "On Operational-Search Activities". https://mia.gov.az/ru/legislation/1/view/2/
[10] https://www.consultant.ru/document/cons_doc_LAW_34481/
[11] https://cdep.ru/

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the special role of constitutional review over the legislative acts regulating operational-search activities.

Several rulings of the Constitutional Court of the Russian Federation have had a significant impact on the application of the law in key issues related to operational-search activities. These include the right to judicial protection during operational-search procedures[12], the justiciability of complaints against decisions made by operational-search bodies[13], the violation of the right to personal inviolability during such activities[14], and the right to legal assistance from a lawyer during the conduct of operational-search measures[15].

A study of the legislation of the Russian Federation reveals that there are certain gaps in the legal regulation of judicial oversight over operational-search activities (OSA), including:

The procedural procedure for the exercise of judicial control over OSA is not clearly defined;

There is no provision for appealing judicial rulings granting permission for operational-search measures.

In the Republic of Kazakhstan, operational-search measures conducted within the framework of a criminal case are regulated by the Criminal Procedure Code (CPC) as covert investigative actions.

Specifically, according to Article 232 of the CPC, covert investigative actions are carried out when it is necessary to obtain information about facts to clarify circumstances subject to proof in a criminal case, without notifying the persons whose interests may be affected.

Except for the monitoring of postal and other communications, covert investigative actions are carried out by authorized divisions of law enforcement or special state bodies using forms and methods of operational-search activity, based on the instructions of the pre-trial investigation body.

Such actions as audio and/or video surveillance of a location or person, covert control, interception and collection of information transmitted through electric (telecommunication) networks, covert collection of information, access to and retrieval from computers, servers and other equipment used for processing and storing data, covert monitoring of postal and other items, and covert entry into and inspection of premises, are conducted based on the sanction of an investigative judge.

According to Article 232 of the CPC of Kazakhstan, covert investigative actions may be conducted in cases punishable by imprisonment for more than one year, as well as for crimes being prepared or committed by a group.

Importantly, in Kazakhstan, the law clearly defines who may be subject to covert investigative actions:

A person indicated in a complaint or report as preparing, committing, or having committed a crime;

A suspect;

A victim, with his or her written consent;

A third party, if there is information indicating that he or she is receiving or providing information relevant to the case;

Places that are significant for the investigation.

[12] Определение КС РФ от 14 июля 1998 г. № 86-О
[13] Определение КС РФ от 1 апреля 2008 г. № 386-О-О
[14]Определение КС РФ от 15 апреля 2008 г. № 312-О-О.
[15] Определение КС РФ от 1 декабря 1999 г. № 211-О., Определение КС РФ от 21 апреля 2011 г. № 580-О-О.

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Kazakhstan provides for both preventive and subsequent judicial control over covert investigative actions. In urgent cases, covert investigative actions must be submitted to an investigative judge within 24 hours along with documents justifying the necessity of such actions.

If there are doubts about the authenticity of the information presented when requesting a sanction, the investigative judge may issue the sanction and forward the decision to the prosecutor within 24 hours to verify its legality.

A covert investigative action requiring judicial authorization may not last more than 30 days, and its extension for another 30 days must be authorized by the investigative judge.

The results of covert investigative actions may be used only after being assessed in accordance with the requirements of the Criminal Procedure Code, more precisely, after a verification report of the results of the covert investigative actions has been drawn up.

Regardless of their form, both overt and covert investigative actions have retained their function as the main means of collecting evidentiary information by authorized state bodies during the pre-trial investigation stage of criminal proceedings. In our opinion, this situation has enabled the legislator to unify both forms of evidence collection under the general conceptual category of "investigative actions"[16].

Based on the above, the following distinctive features of Kazakhstan's experience with judicial oversight of operational-search activities (OSA) can be identified:

Some OSA measures are regulated directly in the Criminal Procedure Code (CPC) as covert investigative actions;

Most covert investigative actions are subject to judicial control; when they are carried out in urgent circumstances, their legality must be reviewed by an investigative judge;

The CPC precisely defines, for each category of case, who may be subjected to covert investigative actions;

A person who has been the object of a covert investigative action must be notified of this no later than six months after the pre-trial body issues a final decision in the criminal case;

Covert extraction of information from computers, servers and other devices for processing, collecting or storing data is expressly classified as a covert investigative action;

A person whose involvement in preparing or committing a crime has not been proven may demand from the OSA body the grounds for the check conducted in respect of him or her and acquaint himself or herself with any related information (Article 5 of the Law on Operational-Search Activities).

At the same time, Article 120 of the CPC shows that the results of covert investigative actions differ procedurally from those of other investigative actions: factual data on unlawful acts, obtained in accordance with legal requirements, are deemed documents and may be used as evidence in criminal proceedings.

In the Kyrgyz Republic, OSA conducted within a criminal case are regulated in Chapter 31 of the CPC as "special investigative actions." The specific features of judicial oversight there include:

Special investigative actions may be carried out only within an instituted criminal case;

Judicial oversight is mandatory and exercised by an investigative judge;

These actions may also target third parties;

[16] Ахпанов А.Н., Хан А.Л. О соотношении гласных и негласных следственных действий в уголовном процессе Республики Казахстан**.** Вестник Института законодательства РК// №4 (45) 2016 – 132-б

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To protect the object's identity, a pseudonym may be used in the application instead of personal data;

Special investigative actions may be conducted for no longer than two months within the investigation period of the case;

In exceptional circumstances, their duration may be extended up to one year on the investigator's request;

The person concerned must be informed that a special investigative action has been carried out;

Records of special investigative actions and the other evidence obtained do not require separate verification and may be used directly as evidence.

Legislation on OSA in the United Kingdom and the United States differs in that its provisions are oriented toward combatting crime or serving intelligence / counter-intelligence purposes. Nevertheless, regardless of the subjects or purposes of operational-search activities, the principle "ubi jus, ibi remedium" ("where there is a right, there is a remedy") is strictly observed: each statute provides a detailed procedure for considering complaints by persons who claim to have been harmed by such measures.

In the United States, judicial oversight of measures that restrict citizens' constitutional rights is carried out based on the Foreign Intelligence Surveillance Act (FISA). These measures may only be implemented with the authorization of a special court, known as the FISA Court.

Key features of judicial oversight of operational-search activities (OSA) under U.S. practice include:

Permission for conducting operational-search measures is granted only on the basis of a petition by an authorized agency;

Court proceedings are closed to the public;

The legality of the information obtained is assessed during the substantive review of the criminal case.

This approach balances national security interests with constitutional safeguards by ensuring that any intrusion into personal rights is subject to prior judicial approval and later review.

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