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ANALYTICAL SURVEY

ANALYSIS OF THE LEGISLATION OF THE KYRGYZ REPUBLIC ON SPECIAL INVESTIGATIVE MEASURES

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United Nations Office on Drugs and Crime

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CONTENT

ANALYSIS OF THE LEGISLATION OF THE KYRGYZ REPUBLIC ON SPECIAL INVESTIGATIVE MEASURES[1]

Introduction

The institution of special investigative measures or, as it sometimes called, operational investigative activity (hereinafter SIMs) in the Kyrgyz Republic in its present form has been inherited by the Kyrgyz law enforcement agencies from the Soviet police. The current law regulation special investigative measures in Kyrgyzstan is the Law On Special Investigative Measures adopted in 1998, which has been amended numerous times.[2] As of July 16, 2014 the Parliament of the Kyrgyz Republic has passed 15 laws that ammended the Law on SIM. In this analysis, we examine the existing SIMs legislation in terms of its compliance with constitutional and criminal law legislation of the Kyrgyz Republic, the provisions of international law, as well as best practices in a number of democratic countries.

Soviet legal theory and practice have traditionally distinguished the SIMs and criminal proceedings during the preliminary investigation. While the course of the preliminary investigation was governed by the Criminal Procedure Code, SIMs were not regulated by either Criminal Procedure Code, or any other statute.

In the Soviet period, the SIMs were not regulated at the legislative level. Instead, the law authorities acted on the basis of classified departmental instructions and orders issued by the same bodies exercising SIMs.

1 *The analysis has been prepared by Dr. Nikolai Kovalev, Associate Professor of Criminology at Wilfrid Laurier University, Brantford, Canada. The views expressed in this expert evaluation are those of the author(s) and do not necessarily represent those of United Nations Office on Drugs and Crime (UNODC), including United Nations' family organizations, and/or, its projects/programs, donors or beneficiary governments.*

2 *Law of the Kyrgyz Republic of 16 October 1998 No. 131 On Special Investigative Measures (as of July 16, 2014).*

Moreover, during the Soviet period, law faculties of the civilian universities did not even mention the subject of SIM in any of their courses, and the study of SIMs was carried out in police academies under security classification.[3] Only after gaining independence, the Kyrgyz Republic has adopted a legislative act stipulating for principles and provisions of the SIM.

Current legislation of the Kyrgyz Republic on special investigative measures

Article 1 of the Law on SIMs provides the following definition of the SIMs:

> *Special investigative measures – activity undertaken, publicly or privately, by public authorities authorized by this Act within their jurisdiction by carrying operations in order to protect life, health, rights and freedoms of individuals, security of the society and the state from criminal transgressions.*

This provision does not clearly define the SIMs, but merely indicates that the authorized bodies carry out this activity by conducting search operations. This provision also indicates that the authorities empowered to conduct SIMs not by the criminal procedural legislation, but by virtue of the law on the SIMs.

The Law on SIMs in Art. 7 gives a more detailed explanation of the SIMs by listing various actions or methods of gathering and verifying information by agencies authorized to perform SIMs:

1. interview with citizens;
2. inquiries;
3. collection of samples for comparative studies;
4. screening procurement;

3 *Poliakov M.P. Ugolovno-protsessual'naia interpretatsiia rezul'tatov operativno-rozysknoi deiatel'nosti / Tomin V.T. (ed.). Nizhnii Novgorod: Nizhegorodskaia pravovaia akademiia, 2001.*

5. study of objects and documents;
6. controlled delivery (validation set);
7. identification of individual;
8. examination of the premises, buildings, structures, terrain and vehicles;
9. monitoring of postal, telegraph and other communications;
10. interception and recording of conversations, producing on the phone and other communication devices;
11. collection of information from technical communication channels;
12. establishment of secret enterprises and organizations;
13. investigative infiltration;
14. investigative surveilance;
15. investigative experiment;
16. investigative setting;
17. use of technical devices to obtain information that do not affect legally protected privacy, home, personal and family information, as well as confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other communications;
18. search for illegal use of technical means for collecting information;
19. surveillance in networks and communication channels;
20. wiretapping of conversations (with the use of video, audio and (or) special technical equipment);
21. receiving information about the connections between subscribers.

From the text of Art. 7 it is obvious that methods of gathering information through SIMs by law enforcement agencies are often coupled with the direct intrusion into private lives of citizens, control and violation of their rights and freedoms. Art. 5 of the Law on SIMs lists sources of law governing the SIMs in the Kyrgyz Republic:

The legal basis for SIMs are the Constitution of the Kyrgyz Republic, this Act, international treaties ratified by the Kyrgyz Republic, as well as other legal acts of the Kyrgyz Republic.

According to this article, SIMs shall comply with the Kyrgyz Constitution and international law. This provision does not explicitly refers to the Criminal Procedure Code of the Kyrgyz Republic (hereinafter CPC) as a basis for the legal regulation of the SIMs. However, it should be noted that the phrase "other legal acts" can be interpreted as the norm including CPC as "other legal acts." Although the legislation does not explicitely divide SIMs into different categories, nevertheless, on the basis of the provisions of Art. 9, SIMs can be divided into three main categories:

- SIMs, which affect the legally protected privacy of correspondence, telephone and other conversations, telegraph and other messages transmitted over networks telecommunications and postal services, and the right to inviolability of home;
- SIMs, which affect the rights and interests referred to in the first paragraph, in cases that are urgent and can lead to the commission of an act of terrorism or sabotage;
- SIMs, which affect the rights and freedoms defined in the first paragraph, in the case of a threat to life, health or property of individuals on their request or with their written consent allowing wiretapping of communication from their phones or other communication devices;
- SIMs, which do not affect the rights and interests referred to in the first paragraph.

Under current law, the first category of SIMs requires prior court authorization, and for SIMs from the second and third categories the preliminary decision of the court is not required. In order to apply SIMs from the second and third categories the police is required to obtain authorization from the head of the agency, engaged in the SIMs, with obligatory notification of the appropriate court (judge) and the supervising prosecutor and the subsequent grant of the court's decision within 24 hours. With regard to the

fourth category of SIMs, their application does not require a court decision and their application is within the exclusive competence of the law enforcement agencies.

The law does not specify which of twenty-one SIMs listed above (Article 7 of the Law on SIMs) affect legally protected privacy of correspondence, telephone and other conversations, telegraph and other messages transmitted over networks telecommunications and postal services, as well as the right to inviolability of home. Thus, there is an ambiguity as to how to solve the question of whether a particular SIM affects legally protected confidential information, as well as the inviolability of someone's home. In some cases, the answer to this question is obvious. For example, a survey of premises certainly affects the right to inviolability of home, and wiretapping of telephone conversations certainly affect the right to confidentiality of telephone and other conversations. However, the question arises whether some other SIMs, such as investigative infiltration, affect one of these rights. According to the definition in Art. 2 of the Law on SIMS, investigative infiltration involves penetration of an undercover police officer or an informer in the environment of the investigative target or creating a conspiratorial organization (legal entity) to perform the SIMs tasks. During the investigative infiltration undercover officers and informers use false documents to conceal their identity, as well as departmental affiliation.[4] On the one hand, the law does not require court's decision for conducting investigative infiltration. On the other hand, infiltration of the agent into the environment of the investigative target can lead to a situation whenthe undercover agent participates in telephone conversations with persons who are targets of the SIMs, and at the invitation of these persons undercover agent may visit and inspect accommodations without a court decision. In order to avoid ambiguous interpretation of the law it is necessary to clearly indicate in which cases a judicial authorisation is required for specific SIMs. There is a fine line between SIMs, which do not affect the legally protected right to privacy of correspondence and right to

4 *Smirnov M.P., Kommentarii operativno-rozysknogo zakonodatel'stva RF i zarubezhnykh stran. Moskva: Ekzamen, 2002, p. 149.*

inviolability of the home, and SIMs, that may violate these rights. By giving agencies performing SIMs, the authority to determine which SIMs affect constitutional rights and which do not affect such rights, there is a huge risk that the police will abuse these powers in the interests of combating criminality and against the rights of citizens who are SIMs' objects.

CONSTITUTIONAL PROVISIONS AND THE LAW ON SIMS

As mentioned above, SIMs often focus on limiting the rights and freedoms of citizens, including their constitutional rights and freedoms. In particular, SIMs may restrict or violate the following rights and freedoms guaranteed by the Constitution of the Kyrgyz Republic:

- The right to privacy, including the right to confidentiality of correspondence, telephone and other conversations, postal, telegraph, and other electronic communications (Article 29 paras. 1, 2);
- The prohibition on the collection, storage, use and dissemination of confidential information and information about the private life of a person without his consent (Article 29 para. 3);
- The right to judicial protection against unauthorized collection, storage, disclosure of confidential information and information about the private life (Article 29 para. 4);
- The right to inviolability of person's home and other objects for which he has property rights (Article 30).

THE RIGHT TO PRIVACY AND THE RIGHT TO INVIOLABILITY OF THE HOME

The modern theory of civil rights defines a concept of privacy as 'freedom from unwarranted and unreasonable intrusions into activities that society recognises as belonging to the realm of individual autonomy'.[5]

5 *Sarah Joseph, Jenny Schultz and Melissa Castan, The International Covenant on Civil and Political Rights, Oxford University Press, 2005, p. 476.*

The term privacy is contained in the English version of Art. 17 of the ICCPR.[6] In common law countries, where the concept of privacy got its start, there are three different aspects or zones of privacy:

- territorial zone refers to places such as one's home;
- personal or corporeal privacy is concerned with the human body (body, image as photographs, voice or name);
- informational privacy,which shelters intimate details concerning matters such as health, sexual orientation, employment, social views, friendship and associations.[7]

Although the Constitution of the Kyrgyz Republic does not contain the term of privacy in its text, it is obvious that all three zones of the concept enshrined in the text of the Constitution as the right to privacy, the right to confidentiality of correspondence, telephone and other conversations, postal, telegraph, and other electronic communications, and the right to inviolability of one's home and other objects to which he has property rights. In this regard, in this analysis, we use the term "privacy" as a concept, covering all constitutional rights which affect the interests or the private life of individuals.

SIMs by their nature aim to limit the privacy of individuals who serve as targets of surveillance, wiretapping, monitoring of mail. Thus, SIMs *a priori* restrict and violate the constitutional right to privacy. However, on the basis of constitutional provisions, the right to privacy and the right to inviolability of one's home are not absolute and can be limited. At the same time, the Constitution allows to restrict the right to privacy and the right to inviolability of one's home, subject to two mandatory conditions: (1) only in accordance with the law; and (2) solely on the basis of a judicial act. SIMs can be considered as constitutional if they satisfy both these conditions. The first condition means that grounds and procedure for authorizing SIMs should be

6 *The UN Human Rights Committee in its decisions in Russian language uses the term private life (chatsnaia zhizn').*

7 *Michael Power, The Law of Privacy, LexisNexis, 2013, p. 231.*

stipulated in the law. The second condition means that the decision to apply SIMs aiming to limit the right to privacy and the right to inviolability of one's home, can be made only by a judge in the course of due process.

On the one hand, the current Law on SIMs contains provisions designed to comply with both constitutional conditions. For example, according to Art. 9 of the Law:

> *Application of SIMs affecting the legally protected confidentiality of correspondence, telephone and other conversations, telegraph and other messages transmitted over networks telecommunications and postal services, and the right to inviolability of the home, is only permitted to collect information about individuals who prepare or attempt to commit grave and especially grave crimes or had committed grave and especially grave crimes, on a reasoned resolution of one of the heads of the relevant authority, engaged in SIMs, solely on the basis of a judicial act.*

Moreover Art. 12 of the Act states:

> *Consideration of materials regarding the limitation of constitutional rights to confidentiality of correspondence, telephone conversations, postal, telephone and other communications transmitted over telecommunications networks and postal services, and to inviolability of one's home during SIMs by a judge usually takes place at the court where SIMs are undertaking or at the location of the agency, applying for authorization to conduct SIMs. A single judge should promptly review these materials. The judge may not refuse to consider materials upon their submission.*

On the other hand, however, it appears that the provisions of the Law on SIMs do not comply with the Constitution of the Kyrgyz Republic for the following reasons.

Firstly, the law contains a provision under which the application of SIMs, 'affecting the legally protected confidentiality of correspondence,

telephone and other conversations, telegraph and other messages transmitted over networks telecommunications and postal services, is permitted on a reasoned decision of one of the heads of the relevant body exercising SIMs solely on the basis of a judicial act.' The phrase 'on a reasoned resolution' of the agency exercising SIMs and not on the 'request' of the agency exercising SIMs, suggests that the decision on the application is made by the law enforcement agency, authorized to conduct SIMs, and the court only formally approves that decision. In the criminal procedure legislation of the Kyrgyz Republic 'resolution' (*postanovlenie*) is defined as a 'decision' of the body, and the 'application' (*khodataistvo*) is defined as the request of the party or the applicant addressed to the decisionmaker, in this case to court. Constitutional provision enshrined in Article 29 para 2, according to which the restriction of the right to privacy is permitted only on the basis of a judicial act, means that a decision must be made by the judge independently of the bodies exercising SIMs. In this regard, it appears that the position of the current law on 'reasoned resolution' of the official contradicts the meaning of the constitutional provision that the decision is made by the judge.

Secondly, under the current law there is no clear grounds under which SIMs can be applied against citizens. The law only states that "the conduct of SIMs involving legally protected confidentiality of correspondence, telephone and other conversations, telegraph and other messages transmitted over networks telecommunications and postal services, <...> is only permitted to collect information about individuals who are preparing or attempting to commit grave and especially grave crimes or have committed grave and especially grave crimes." The law is silent, however, as to whether the person in respect of whom SIMs are held should be suspected or accused of preparation, attempt to commit or commission of a grave or especially grave crime, or the collection of information is allowed in respect of any person without sufficient grounds to suspect him in the preparation, attempt to commit or commission of a crime. Moreover, the law says nothing about what evidence linking a person to the commission of a crime for which can be

applied SIMs can be regarded as sufficient to address the application of SIMs. For example, it is not clear whether the SIMs authorities should submit to the court testimony of eyewitnesses who can say that the person in respect of whom SIMs can be held, is planning, attempting to commit or has committed a grave or especially grave crime.

The law should clearly describe the grounds for the permissible interference in the private life of a person through the use of SIMs. In particular, the law should specify what evidence linking a person to criminal activity can be sufficient in order to apply SIMs against him. The law does not contain any clear criterion or standard of proof that the applicant must satisfy before the court on the application to apply SIMs. Otherwise, the authorities may use SIMs against any person without reasonable grounds. This, in our view, reduces constitutional guarantees prohibiting interference with the private lives of citizens without legal grounds to a simple declaration. The notion of legal grounds include, in our opinion, the objective evidence indicating the involvement of a person in the commission of a crime.

Thirdly, Art. 9 of the Law on SIMs allow the authorities can conduct SIMs without prior judicial authorization. Instead, 'in cases that are urgent and can lead to the commission of terrorist act or sabotage,' SIMs can authorized by a reasoned decision of one of the heads of the relevant law enforcement agencies, engaged in SIMs activity. The law requires the police to promptly notify the appropriate court (judge) and obtain its authroization within 24 hours. This provision is in direct contradiction to the provision of the Constitution, which clearly stipulates that the restriction of rights to privacy is permissible only on the basis of the judgment and not by order of the executive body. It can be suggested that in such exceptional and clearly defined cases, the legislator should provide for a procedure whereby the court may decide to authorize urgently, for example, by telephone (see para 9 (h) of this analysis below).

Fourth, it appears that the law provides for too long a maximum validity of the judgment on the application of SIMs - up to six months. In our opinion, in

order to limit the ability of law enforcement to invade the privacy of citizens, the law should provide for a shorter period of validity of the judgment, with the possible extension of the SIMs in the application for the extension of the SIMs and when submitting evidence supporting the petition in court. This will contribute to a more reliable control of the court.

International legal standards and legislation of the Kyrgyz Republic on SIMs

The Kyrgyz Republic is part ofseveral international agreements that guarantee rights and freedoms of citizens, which can be restricted by the legislation on SIMs. In particular, in 1994, the Kyrgyz Republic ratified the International Covenant on Civil and Political Rights (ICCPR), the provisions of which take precedence over the legal rules on SIMs.

It apears that some of the provisions of existing law on SIMs are not only in conflict with the Constitution of the Kyrgyz Republic, but are also inconsistent with the provisions of the ICCPR.

In our opinion, the provisions of current law on SIMs does not meet the requirements of Art. 17 of the ICCPR, which prohibits arbitrary or unlawful interference with one's privacy, family, home or correspondence. Thus, in paragraph 8 of General Comment No. 16, the UN Committee on Human Rights notes that 'relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted.'[8]

The UN Committee on Human Rights in its reports has repeatedly criticized the governments of several states for inconsistency of their legislation to the requirements of Art. 17 of the ICCPR. For example, in its concluding observations on the Russian Federation in 1995, the UN Committee on Human Rights expressed concern 'that the mechanisms to intrude into private telephone communication continue to exist, without a

8 *UN Human Rights Committee, General Comment No. 16, available at* http://ccprcentre.org/doc/ICCPR/General%20Comments/HRI.GEN.1.Rev.9%28Vol.I%29_%28GC16%29_en.pdf.

clear legislation setting out the conditions of legilimate interferences with privacy and providing for safeguards against unlawful interferences.'[9]

As mentioned above, the rules of the current law does not clearly describe the legal grounds for the possible use of SIMs. In this regard, the current law on SIMS, does not provide protection against arbitrary or unlawful interference with private and family life of citizens, as well as protection against unlawful interferences with the integrity of their homes or correspondence.

Jurisprudence of the European Court on Human Rights regarding SIMs

The European Convention on Human Rights contains a provision similar to the provision of Art. 17 of the ICCPR. In particular, Art. 8(2) of the ECHR states:

> *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Although the Kyrgyz Republic is not a member state of the Council of Europe and is not bound by the precedents of the European Court of Human Rights, it appears, however, that the legal standards developed by the Strasbourg Court, may be considered by the legislator of the Kyrgyz Republic as a model law, given the fact that about a half of the former Soviet Republics are members ofthe Council of Europe. In the past six years, the European Court of Human Rights issued several decisions against numerous member states for their SIMs legislation's failure to satisfy the provisions of Article 8 of the ECHR.

9 *(1995) UN doc. CCPR/C/79/Add.54, para 19.*

Thus, in its decision in *Bykov v. Russia*, the European Court of Human Rights stated:

> *78. The Court has consistently held that when it comes to the interception of communications for the purpose of a police investigation, "the law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence".*[10]

In another decision *Sefilyan against Armenia* the ECHR criticized the Armenian legislation on SIMs:

> *129. […] the Court cannot overlook a number of serious shortcomings in Armenian law at the material time.*
>
> *130. In particular, the law did not set out either the types of offences or the categories of persons in whose respect secret surveillance could be authorised. Nor did it specify the circumstances in which, or the grounds on which, such a measure could be ordered. It must be noted in this respect that the lack of such details was capable of leading to particularly serious consequences, given that this measure could be authorised in the absence of any criminal proceedings.*
>
> *131. The law further failed to prescribe a clear maximum time-limit for secret surveillance. Thus, while the effect of a judicial warrant authorising surveillance was normally limited to six months, the judge was nevertheless free to decide otherwise.*
>
> *132. Furthermore, the law did not prescribe any periodic review of the measure or judicial or other similarly independent control over its implementation […].*

10 Bykov v. Russia, application No. 4378/02, 10 March 2009.

133. The foregoing is sufficient for the Court to conclude that the interference was not "in accordance with the law" since Armenian law at the material time did not contain sufficiently clear and detailed rules and did not provide sufficient safeguards against abuse.[11]

These examples of judicial decisions indicate that the European human rights standards require that the legislation on SIMs, should be clear in terms of its contents, and secondly, it should provide detailed guidance in which cases and circumstances SIMs affecting privacy rights can be used. Thirdly, the case law of the European Court of Human Rights requires a periodic inspection of SIMs, including judicial control over the conduct of SIMs.

Court (judge) making decision on the application to use SIMs

As mentioned above, the Constitution and the legislation on SIMs provide that decisions regarding the use of SIMs affecting the constitutional rights of citizens, shall be taken by the court (judge). However, this legislation does not clearly define what level of court or judge shall have the power to make this decision. Article 12 of the Law on SIMs only says that it is the court that is «as a rule, at the place of conducting such measures [SIMs] or location of the applicant [law enforcement agency or unit applying for SIMs].» Judging by the text of the article, it can be concluded that the decision regarding which court considers the application is made solely at the discretion of the body applying for SIMs.

In our opinion, the legislator should clearly indicate which court (judge) has jurisdiction to authorize the use of SIMs.

In many countries, the functions to authorize SIMs and other investigative proceedings are executed by judges who do not participate in the first instance proceedings on the merits. In addition, in some countries of Western Europe, there are specialized judges who oversee law enforcement

11 *Sefilyan v. Armenia, Application no. 22491/08, final decision of 02/01/2013.*

agencies engaged in the investigation and search operations. As a rule, these judges do not consider the merits of the case, and are engaged in verifying the validity and legitimacy of the investigative and prosecutorial agencies and ensuring the rights and freedoms of citizens in the exercise of investigative measures and proceedings.

In Germany, the judicial supervision over the observance of the rights and freedoms of the individual in the course of the preliminary investigation is conducted by a specialized judge - *Ermittlungsrichter* (judge of pre-trial investigation). The judge has broad powers. He or she, in particular, decides on detention or temporary placement in a psychiatric hospital; suspension of driving licenses; authorizes the search and seizure; authorizes telephone tapping of suspects; performs deposition of evidence; and takes other decisions that the prosecutor may decide on their own. This judge is not involved in deciding cases of first instance or on the merits. The judge checks the legality and validity of acts of the police and the prosecutor's office, while not leading the preliminary investigation.[12] Usually, the police cannot apply to a judge of pre-trial investigation themselves, unless it is urgent. The police should contact the appropriate prosecutor to file an application in court.[13]

Italy also has an institution of specialized judge - *giudice per le indagini preliminary* (GIP) or a pre-trial investigation judge. The judge oversees the investigating authorities (prosecutors and police) to ensure the rights of persons under investigation: the authorization of arrest, wiretapping, etc .; monitoring compliance with the terms of the preliminary investigation; in some cases, deposition of evidence. The judge is appointed in each tribunal (*tribunale*) or a court of administrative or municipal district, covering the territory of several municipalities (*circondario*).

12 *Nikolai Kovalev, Zakliuchenie pod strazhu po resheniiu suda v riade evropeiskikh stran // Jurist, No 7, 2007, pp. 89-94.*

13 *Ed Cape, Jacqueline Hodgson, Ties Prakken and Taru Spronken (eds.), Suspects in Europe, 2007, p. 82.*

Every Italian province has at least one tribunal. Unlike the investigative judge (*giudice instruttore*), equivalent to the French investigating judge (*juge d'instruction*), which existed in Italy until the reform of 1989, the institution of GIP has no prosecutorial or investigative functions, which under the new law are the functions of the Prosecutor's Office. Originally GIP was presiding at the preliminary hearing, however, the 1998 law changed the Code of Criminal Procedure and passed this function to another special judge, *giudice dell'udienza preliminare* (GUP - judge for the preliminary hearing).[14]

In our opinion, Kyrgyz lawmakers need to consider introduction of a specialized institution of the judge who would be engaged in the disposition of matters related to the authorization of SIMs and pre-trial investigative proceedings. Based on the models in some European countries like Germany and Italy, the judge could have functions to authorize all SIMs and pre-trial proceedings affecting the rights and freedoms of citizens. The main advantages of creating a separate specialized judicial position are as follows. Firstly, these judges would undergo training on the basis of international standards in making decisions relating to the rights and freedoms of citizens at the stage of pre-trial investigation of crimes and would be more skilled at making such decisions than the other judges. Secondly, specialized judges for pre-trial investigation would not participate in the proceedings on the merits and would not be in direct subordination and communicating with the judges of the court of first instance. It would contribute to their greater independence and impartiality, as well as the impartiality of the judges of the first instance.

LEGAL REGULATION OF SIMS

Undoubtedly, the model of legal regulation of SIMs under a separate law on SIMs has been borrowed by the Kyrgyz government and legislator from the Russian Federation, where the law was adopted

14 *Kovalev, supra note 8 at p. 90.*

in 1992,15 and subsequently replaced by the new Law on SIMs in 1995.16 According to some Russian authors, the enactment of the Law on SIMs aimed to achieve the following two main objectives: (1) the establishment of a unified legal framework for SIMs activity, and (2) the formalization of SIMs activity as a public-legal form of combatting crimes.17 These arguments are also valid with respect to Kyrgyz legislation on SIMs. Indeed, the law on SIMs introduced a uniform legal basis for the Kyrgyz law enforcement agencies, which until then had carried out SIMs in accordance with the SIMs regulations issued by the same law enforcement agencies. In other words, law enforcement agencies were not regulated by the law passed by the legislative branch of power. In addition, after the official recognition of the SIMs at the legislative level, it became in part a subject of judicial control. Neither Russian nor Kyrgyzstani legislators incorporated legal provisons regulating SIMs into the Criminal Procedure Code (CPC). Although the Criminal Procedure Code referes to SIMs, in particular in articles that define the powers of the prosecutor and the investigative bodies, the CPC does not define either SIMs or indicate any legal grounds for implementation of SIMs, or provide any criteria for determining the legality of SIMs. CPC also is silent on the powers of the court to control the bodies engaged in SIMs.

It appears that the main reason for which the legislator has not subdued SIMs legal regulation in the framework of the criminal procedural law is the approach of the Russian and other former Soviet legal scholars and practitioners, according to which SIMs and the pre-trial investigation

15 *Law of the Russian Federation On Special Investigative Measures Activity in the Russian Federation of March 13, 1992 (Закон РФ «Об оперативно-розыскной деятельности в Российской Федерации» от 13 марта 1992 г.).*

16 *The Federal Law of the Russian Federation On Special Investigative Measures Activity of August 12, 1995 (Федеральный Закон РФ «Об оперативно-розыскной деятельности» от 12 августа 1995 г.).*

17 *Smirnov, supra note 4.*

are conducted under «different legal regimes.»[18] This division can be seen in the teaching of two separate disciplines or courses in the faculties of law in the post-Soviet countries: criminal procedure and SIMs activity. For example, Professor M.P. Smirnov highlights the following differences: (1) «different legal basis for their undertaking, as an investigator acting on the basis of the criminal procedure law, but SIMs activity is based on the corresponding [...] law» on SIMs; (2) «different limits of investigative actions, there must be a criminal case opened in order to conduct pre-trial proceedings, the SIMs activities can be carried out prior to the opening of the criminal case; (3) «different results, the outcome of pre-trial investigative proceedings is evidence; the result of SIMs, as a rule, only unspoken information about the sources of the facts, which may become evidence only after its validation through criminal procedings.»[19]

On the one hand, the division of the legal regulation of the pre-trial investigation and the SIMs activity into two different regimes has certain logic. On the other hand, however, the creation of a special legal regime, which is different from the legal regime governing pre-trial investigations can lead to excessive restriction of the rights and freedoms of citizens, who are the targets of SIMs, including persons who allegedly have chosen the criminal lifestyle.

Firstly, the fact that law enforcement agencies can apply SIMs against persons without initiating criminal proceedings against them may significantly extend the range of individuals whose rights and freedoms, including the right to privacy and the right to inviolability of their home, can be restricted and violated. As mentioned above, the current legislation of the Kyrgyz Republic on the SIMs does contain a clear legal criterion under which a violation of constitutional rights can be recognized as a valid and legitimate.

18 *Id. at 23.*

19 *Id.*

Secondly, although according to Professor Smirnov's argument that the results of SIMs may become prosecution evidence only after its validation trough criminal proceedings, criminal procedure legislation of the Kyrgyz Republic expressly acknowledges the results of the SIMs as evidence in criminal proceedings.[20] In other words, in order to recognize the results of SIMs as evidence the investigator does not need to hold a separate pre-trial criminal proceeding. Thus, there is a contradiction between the principles of the admissibility of evidence in a single legal regime - the criminal procedural law and methods of gathering this evidence, which is governed by a different legal regime.

It is obvious that this discrepancy is beneficial primarily for law enforcment agencies exercising SIMs, as their search activity is not limited to the scope of the criminal procedural law, while the results of this activity are admissible as evidence. One way to solve this problem would be the exclusion of SIMs results from the list of admissible evidence. However, this measure is not preferable for several reasons. Firstly, it would significantly restrict the ability of law enforcement agencies to collect evidence in criminal cases. Secondly, if the law enforcement agencies still gather evidence within SIMs activity, and then validate it through pre-trial proceedings - it would be a mere formality. In fact, law enforcement agencies would also be able to collect evidence in circumvention of criminal procedural rules, and then validate it by conducting formal pre-trial proceedings.

The preferred option is to regulate SIMs in a single criminal procedure law - the Criminal Procedure Code. It would have helped to repeal the contradictions between the rules of the existing legislation on SIMs and the rules of the criminal procedure law. The single criminal procedure law would contain powers of SIMs agencies, investigators who give orders to SIMs agencies to execute SIMs, prosecutors and the courts.

20 Article 81(2)(4) CPC KR.

In our opinion, the rules which are now contained in various regulations of the Government,[21] ministries and agencies with respect to the SIMs should be brought in line with the new Code of Criminal Procedure and to be included in the text of the Code of Criminal Procedure, in order to avoid different interpretations of regulation standards.

SPECIAL INVESTIGATIVE MEASURES

The specific character of SIMs suggests that the organization and tactics of SIMs activity are secret, behind closed doors and discussed in detail in classified literature. In addition, the current law on SIMs directly states that the organization and tactics of carrying out search operations are state secrets. However, this should not mean that the closeness of the organization and tactics may extend to the grounds for use SIMs. Legislation should effectively protect the constitutional rights of citizens against arbitrariness of law enforcement conduct.

As mentioned above, the legislator should clearly define what SIMs require a court decision on their application, as well as how to enjoy rights and freedoms of citizens in the course of activities that do not require judicial approval. The law should not be limited to a brief definition of some of the SIMs, but must describe the procedure for obtaining authorzation for their use, as well as the powers of law enforcement agencies in their execution. This analysis further discusses importantissues related to individual SIMs.

21 *See, for example, Regulation of the Government of the Kyrgyz Republic of February 18, 2013 No. 80 On Approval of the Rules regarding submitting the results of SIMs to the investigating agency, investigator, prosecutor and the court (Постановление Правительства Кыргызской Республики от 18 февраля 2013 года № 80 «Об утверждении Порядка представления результатов оперативно-розыскной деятельности органу дознания, следователю, прокурору или в суд»).*

Interview

The currrent law defines this SIM as 'personal communication between undercover officer with a citizen, who may be aware of the information of an investigated event or the people involved in it.'[22] At the same time the law is silent on a number of very important aspects of this SIM. Firstly, whether the participation of citizens in the SIM is voluntary and whether the undercover officer has to inform the person being interviewed about it. Secondly, whether the person refused to appear for interviews upon the invitation, can be subjected to detention. Thirdly, whether the undercover officer can hide the true purpose of the interview or their professional identity. Fourthly, whether the facts obtained during the intreview can be used as evidence. The the degree of protection of citizens against unlawful influence by the officers and permission to extractract confessions from suspects by fraud depends on answers to these questions.

The legislation should specify that interviews with citizens shall be allowed only if they voluntarily consent to such interviews, and they cannot be detained in case of failure to appear for interviews by invitation. In other words, the undercover officers may not use their official position in order to force a person who is not called as a suspect or a witness to talk to them. In this case, the undercover officer must a person to be interviewed on the rights to refuse to participate in the interview before the officer asks any questions. Legislation may provide undercover officers engaged in SIMs, the right to conceal their identity, but at the same time, law enforcement officers should not have the right to use coercive methods and techniques. The data obtained during such interviews should not be used as evidence because persons participating in the interview, unlike witnesses are not warned about criminal liability for refusal or failure to testify and for perjury.[23]

22 *Article 2 of the Law on SIMs KR.*

23 *Article 191 para 2 CPC KR.*

INQUIRIES

The current legislation provides a very vague definition of this SIM - official acquisition by undercover police officer of factual information relevant to the solution of tasks of SIMs activity from forensic and other databases. In particular, it is not clear what is meant by factual information. For example, whether the information relating to medical, banking and other confidential information can be obtained in the course of the SIM. In addition, it is not clear whether the authority conducting SIMs, can make inquiries from public databases or databases belonging to non-governmental organizations that have the obligations not to disclose confidential information. Lawmakers need to describe in more detail what is factual information to perform the SIM and what are the powers of law enforcement agencies to obtain this information from non-governmental organizations which have special legal relationship with the citizens.

It appears that data, which is stored in the databases of non-governmental organizations, and which contains financial, medical and other secrets should be provided to SIMs authorities only by the court order. The information contained in the databases of some organizations, such as banks and other commercial entities is related to the constitutionaly protected right to privacy. Citizens of the Kyrgyz Republic expect that the interference with their privacy will not be performed in arbitrary manner.

Legislation of some Western countries provide for certain conditions for granting the police the right to obtain financial or commercial data. For example, Art. 487.013(4) of the Criminal Code of Canada provides that before making an order to a financial institution to produce in writing financial or commercial information (account number of a person, the status and type of the account etc.), the judge must be satisfied that there are reasonable grounds to suspect that:

- an offence has been or will be committed;
- the information will assist in the investigation of the offence; and

- the institution, person or entity that is subject to the order has possession or control of the information.

It is suggested that the Kyrgyz legislator should consider the need for adopting similar rules in relation to the information that contains banking, medical and commercial secrets.

Collection of samples for comparative analysis and the identification of the person

These two SIMs in content resemble pre-trial investigative proceeding, which is stipulated in Art. 207 of the Kyrgyz CPC - Collection of samples for comparative analysis. The main difference of the SIM from the pre-trial investigative proceeding consists only in the fact that during the pre-trial proceeding there is an obligation of the suspect or the accused to provide samples, and in the case of SIMs, these samples should be collected with the voluntary consent of individuals possessing the necessary specimens, or if the fact of sampling is necessary to keep confidential from the sampling sources, the undercover methods are used to obtain them.[24]

In our view, the collection of samples from the human body affects the personal or physical aspect of privacy of citizens. Obviously, the collection of samples on a voluntary basis may be made by law enforcement agencies without special legislative regulation, except for the issues related to storage and subsequent destruction of the samples if the comparative analysis does not give a positive result of identification of the person who committed the crime.

However, in cases of collecting samples for comparative analysis by undercover techniques, legislation and practice should provide assurance that these techniques do not violate the constitutional rights of citizens. When collecting samples containing genetic information about the person who used

24 *Smirnov, supra note 4 at pp. 125-126.*

an item (a cigarette butt, drink container such as bottle or can) and left traces of DNA on it, it is important to take into account the circumstances under which the item has been seized by the law enforcement agents. For example, if operating officer picked up this item after it has been discarded by a person it can be argued that there is no violation of the constitutional rights of the individual. However, if the undercover officer has seized this item from the premises of the person then there is an argument in favour of the violation of the right to inviolability of the person's home. Therefore, this SIM must be carried out exclusively with the authorization of the court. The Criminal Procedure Code should also require the juducial authorization for collection of samples for comparative analysis against the suspect and the accused as a pre-trial proceeding.

The test purchase, controlled delivery (delivery screening) and investigative experiment

Although the test purchase, the controlled delivery and investigative experiment are three different SIMs arguments regarding their legality and validity can be combined into one group.

Firstly, all three of these SIMs may be conducted 'in order to uncover, prevent, deter and solve crimes' against 'objects, substances and products, free sale of which is prohibited or whose circulation is restricted, as well as other items, which are instruments or means of crime, or items obtained through criminal activity or objects wrongful acts with which are contraband.'[25] Often, these SIMs are held in respect of persons suspected of committing crimes related to drug trafficking.

Second, when performing these SIMs law enforcement agencies use deception tricks and techniques in relation to targets of SIMs. Undercover police offciers often do things that have characteristics of an illegal activity. Conducting these SIMs can be compared with two closely linked criminal law

25 Id. at 150.

concepts: (1) the use of agents provocateurs by law enforcement agencies and (2) the use of entrapment.

In the early 20th century professor Tagantsev wrote about the use of agents provocateurs in various countries of Europe inciting to commit crimes in order to attract the perpetrator to commit a crime.[26] In some Western countries, the use of agents provocateurs and entrapment is either prohibited altogether, or very restricted in application. International human rights law also condemns the use of provocation and entrapment as methods of investigation.

In its decisions, the European Court of Human Rights identified a number of factors, the presence of which indicate the presence of provocation and, therefore, a violation of the right to fair trial:

- the absence of reasonable grounds to suspect that the person, including the absence of any previous record;
- the absence of the object of the crime (e.g., drugs) in the possession of the person or getting it from a third party;
- the absence of evidence that the person was predisposed to commit a crime;
- the active role of the police in influencing the person to commit the offense.[27]

In some judgments, the European Court of Human Rights considered the same criteria only through the prism of positive conditions for the use of SIMs by law enforcement agencies:

- Law enforcement agencies must have specific and objective evidence that the person made the initial steps for the offense.

26 Tagantsev, N.S. Russkoe Ugolovnoe pravo, vol. I, 1902 p. 150.

27 Teixeira de Castro v. Portugal, 25829/94, 9 June 1998, para. 38; Ramanauskas v. Lithuania [GC], 74420/01, 5 February 2008; Miliniene v. Lithuania, 74355/01, 24 June 2008.

- The information, on which the law enforcement agencies based their decision to select SIMs, can and should be verified.
- It is necessary to distinguish the cases when the information about a committed crime or preparation for its commision is obtained from the private complainant, and when it comes from the agent or police informant. In the second case there is a great risk that informants may become provocateurs, if they are directly involved in the implementation of SIMs.
- The SIM must be carried out with the passive role of undercover police officers and their agents.
- The provocation is more likely in countries where there is no clear and obvious procedures for authorization of SIMs described in the legislation, as well as where there is no independent control over the law enforcement agencies. In particular, in its judgments in cases against the Russian Federation, the European Court of Human Rights emphasized that neither the law on SIMs, nor any other legislation provide sufficient guarantees in respect to such SIMs as test purchase and pointed to the need for judicial or other independent authorization and supervision.[28]

Despite the attempts of the post-Soviet legal academics to distinguish between provocation and the 'legitimate' SIM,[29] in practice the police often abuse their positions and provoke people to commit crimes. In order to prevent the use of provocation and entrapment by law enforcement engaged in SIMs activity, the legislator of the Kyrgyz Republic must made a number of specific changes in the legislation.

28 *Bannikova v. Russia, 18757/06, 4 November 2010, §§ 33-65; Khudobin v. Russia, 59696/00, 26 October 2006, § 135; Veselov v. Russia, 23200/10, 24009/07 and 556/10, 2 January 2013, §§ 88-94.*

29 *See, Radachinskii, S.N., Provokatsiia prestupleniia kak kompleksnyi institut ugolovnogo prava: problemy teorii i praktiki. Nizhnii Novgorod, 2011.*

Firstly, it is necessary to amend the criminal law by introducing a new circumstance eliminating criminal act - the act is committed as a result of provocation or other positive actions of law enforcement agents exercising the SIMs. In particular, the legislator should clearly define and point out the main elements of provocation. One possible definition of provocation is given by Professor Radachynskii as 'deliberate unilateral actions aimed at the involvement of a person in the commission of a crime with a view to further incrimination.'[30]

Secondly, although the current legislation of the Kyrgyz Republic criminalizes law enforcement for provocation bribes or commercial bribery (Article 237 of the Criminal Code),it does not imply responsibility for the provocation of other crimes. For example, in Russian literature, there have been proposals for the introduction of criminal liability for the provocation of any crime.[31] In this regard, the Kyrgyz legislator should consider the possibility of introducing criminal liability for the provocation of any crime.

Third, one of the main reasons of abuse by law enforcement authorities of their powers is the lack of independent monitoring of their activities during these SIMs. It appears that the conduct of test purchases, sales and operational validation experiments should be carried out only on the basis of the decision of the judge who has to make sure that against a particular person there is reason to suspect him or her of continuing criminal activity or preparing to commit a crime.

In some Western countries, such as Denmark, the police may use some form of entrapment only by court order. In particular, the Civil and Criminal Procedure Code of Denmark contains the following special rules. The police pursuing an investigation may not induce someone to commit a crime, unless there are three necessary conditions: (1) there is an especially corroborated suspicion that the crime is being or will be committed; (2) other

30 *Id.*

31 *Id.*

means of investigation are inadequate; and (3) the suspected crime involves punishment of more than six years or is a second drug offense. In addition, the law requires that the decision to hold the SIM must be authorized by the court.[32]

Inspection of premises, buildings, terrain and vehicles

Law enforcement intrusion in the territory of someone's home or other private facility affects the interests of the territorial aspect of privacy. There is an English expression 'A man's home is his castle'. It appears that this aspect of privacy also has strong roots in the Kyrgyz society. Citizens of the Kyrgyz Republic expect that no one, including the police, can intrude into their home, and other objects of property without their consent, and without the special permission of the court.

Inspection of premises of buildings, terrain and vehicles is an operational analogue of such pre-trial proceeding as inspection.[33] Both the inspection and the examination of premises affect the constitutional right to inviolability of someone's home and other facilities which are in ownership or in any other property right. In this regard, it is clear that both of these actions require the consent of any persons residing in it (including temporary tenants) [34] or the owners or by the court's decision except in emergency cases, such as the pursuit or investigation «102» call made from the number belonging to the resident.

The current legislation and practice of SIMs make a distinction between public and undercover inspection of premises.[35]

32 *Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation. Lexis-Nexis, 2012, p. 515.*

33 *Article 177 CPC KR.*

34 *See the definition of temporary residents in article 1 of the Housing Code KR of July 9, 2013 No 117.*

35 *Smirnov, supra note 4 at p. 136.*

When the public inspectiontakes place the owners or tenants know that the inspection is carried out by the police. Undercover inspection, however, is conducted in secret from tenants or owners.[36] It can be argued that the undercover inspection of premises and other facilities should be prohibited, as there is a high risk that in the course of this SIM the police can plant the evidence. Instead, the police must obtain a judicial warrant for the inspection or search and hold them in the presence of tenants or owners.

The requirement for judicial authorization of all SIMs related to entry into someone's home is supported by Art. 30 para. 2 of the Constitution of the Kyrgyz Republic, which states that 'the execution of search, seizure, inspection and other actions, as well as the intrusion of the authorities in someone's house and other facilities owned or is in other property right, shall be permitted only on the basis of a judicial act.'

It should be noted that the constitutional right to the inviolability of someone's premises covers not only dwellings, but also any other premises that are owned by citizens, as well as in any other property right, for example, land use. Current legislation on SIMs contains provisions on court authorization of the use of SIM only in relation to the right to inviolability of home. This is directly contrary to the provisions of the Constitution, which requires judicial authorization also for inspection and intrusion by the police in the housing and other facilities owned, which are in any other property right. In this regard, the law on the SIMs should be brought into conformity with the Constitution.

36 Id. at p. 137.

Monitoring of mail, telegraph and other communications, wiretaping of conversations on the phone and other communication devices and collection of information from technical communication channels

These three types of SIMs can be combined into one group, as they are all designed to restrict citizens' constitutional right to privacy of correspondence, telephone and other conversations, postal, telegraph, and other electronic communications. Based on the text of Article 29 para. 2 of the Constitution of the Kyrgyz Republic, these types of SIMs are produced exclusively with a prior judicial authorization.

The right to confidentiality of correspondence, telephone and other conversations, postal, telegraph, and other electronic messages is informational aspect of privacy.[37] One of the most widely used SIM affecting the informational aspect of privacy is wiretapping of telephone conversations. In some countries, there are fairly strict conditions for the use of such SIMs as wiretapping.

For example, in Italy wiretapping may be authorized by a judge of the preliminary investigation where there are serious grounds to believe that a crime has been or is being committed and only if this SIM is absolutely necessary to continue the investigation.[38] In other words, the police are required to demonstrate to the judge that the use of wiretapping is not just a desirable method of investigation, but it is absolutely necessary, i.e. without it is impossible to continue the investigation.

Swedish law permits wiretapping only with court approval and only in cases where there are 'substantial grounds to suspect a person of committing a crime or preparation to commit a crime, and at the same time, applying

37 *Michael Power, The Law of Privacy, LexisNexis, 2013, p. 236.*

38 *Craig Bradley (ed.), Criminal Procedure. A Worldwide Study, 2nd ed., Carolina Academic Press, 2007; Codice di procedura penale, at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.del.presidente.della.repubblica:1988-09-22;447.*

the principle of proportionality.' The principle of proportionality means that the 'secret wiretapping ... [may] be used only when the desired result can not be achieved by other reasonable means.' [39] Swedish law also allows only wiretapping of a particular phone number, which presumably belongs to the suspect, and not any other phone numbers that a suspect may use. [40]

Similar legal requirements for wiretaps can be found in the laws of other democratic countries. In Germany, wiretapping is permissible under the following conditions:

- There must be some suspicion, based on facts, that a person has committed or has attempted to commit one of several offences specifically listed in § 100a CCP. The list includes serious offences ranging from murder and high treason to extortion, arson, drug offences and money laundering;
- An investigation of the offence by means other than telecomunications surveillance would be impossible or significantly more difficult;
- Surveillance is ordered by the Judge of the investigation.[41]

The Criminal Code of Canada[42] also describes in detail the mandatory requirements for the interception of telephone communications. Except for the emergency cases, for example, in cases where the victim is in danger, the police are required to obtain special permission of the court. Application for such judicial authorization shall be signed by the Attorney General of the province of Canada or the Deputy Attorney General personally.

39 *Zashchita prav grazhdan pri vnedrenii sistemy operativno-rozysknykh meropriiatii v setiakh sviazi. Sankt-Peterburg: LIK, 2000 at p. 204.*

40 *The Swedish Code of Judicial Procedure (CJP), chapter 27 s. 20, available at http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf.*

41 *Cape, Hodgson, Prakken and Spronken, supra note 13 at p. 87; Criminal Procedure Code of Germany, Art. 100a, http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.*

42 *Criminal Codeof Canada, available at http://laws-lois.justice.gc.ca/eng/acts/C-46/FullText.html.*

The application should be accompanied by an affidavit, which be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

- the facts relied on to justify the belief that an authorization should be given together with particulars of the offence;
- the type of private communication proposed to be intercepted;
- the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used;
- the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (*e*) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made;
- the period for which the authorization is requested, and
- whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.[43]

Once the application and affidavit filed in court, a single judge decides whether to grant or refuse the application. Criminal procedure law in Canada clearly prescribes the conditions under which a judge may issue a warrant for interception. According to section 186(1) of the Criminal Code of Canada judge must be satisfied that the use of inception:

43 Ст. 185 УК Канады, Criminal Code of Canada, http://laws-lois.justice.gc.ca/eng/acts/C-46/.

- that it would be in the best interests of the administration of justice to do so;
- that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

The legislation of democratic states provides for various maximum periods for which the police are allowed to incercept telephone communications. They ranged from 15 days in Italy,[44] 30 days - in Sweden,[45] 60 days - in Canada,[46] and up to 90 days in Germany.[47]

Laws of foreign countries prohibit the interception of communications between the suspect and his lawyer. In this case, the law is based on the principle of strict confidentiality of the communications between the lawyer and the client. For example, the Swedish law states that telephone conversations between the suspect and his lawyer could not be the subject of wiretapped by law enforcement authorities, and if in the course of wiretapping it is found that the conversation takes place between the suspect and the lawyer interception should be stopped immediately, and the record of communication must be destroyed.[48]

The Criminal Code of Canada states that a judge cannot authorize the interception of communications in the office or place of residence of a lawyer, or in any other place, which is commonly used by counsel for the purpose of consultation with the clients, except in cases where the judge is satisfied that there are reasonable grounds to believe that the lawyer or any other lawyer

44 *Article 267(3) of CPC of Italy.*

45 *Chapter 27 s. 21of CJP of Sweden.*

46 *S. 196 of CC of Canada.*

47 *S. 100b u 100 of CPC of Germany.*

48 *Chapter 27 s. 22 of CJP of Sweden.*

who practices with him/her, was or about to become a party to the crime.[49] In this case, confidential information obtained in the course of such wiretapping cannot be admitted as evidence in court.[50]

Based on an analysis of the legislation of several democratic countries, we can conclude that the use of wiretapping as SIM is used only in cases of extreme necessity. It is obvious that the use of such SIMs is associated with the most serious interference with the privacy of citizens.

It is recommended to Kyrgyz legislator to consider the experience of democratic states and to provide clear and strict rules regarding the use of interception of telephone or other conversations. It appears that the legislation on the SIMs in the Kyrgyz Republic should be also based on the principles of proportionality and necessity in applying these SIMs. Also, it is advisable to provide for a ban on the interception of communications between the suspect and his lawyer.

UNDERCOVER INFILTRATION

This SIM is 'a way to get information through the establishment of a trusting relationship between the undercover agents of the law enforcement exercising SIMs or persons providing assistance to them on a confidential basis, and individuals suspected of crimes committed by organized criminal groups.' [51] The current legislation on the SIMs does not explicitly include the implementation of judicial control over this SIM. Instead, it is assumed that the ground for applying this SIM is the decision of the law enforcement agency approved by the head of that agency. Undercover infiltration, along with other SIMs that have been discussed above, suggests a direct interference with the private life of persons suspected of committing crimes. When establishing

49 S. 186(2) of CC of Canada.

50 S. 189(6) of CC of Canada.

51 Smirnov, supra note 4 at p. 148.

a trusting relationship with the suspects undercover agents gain access to information about the private lives of suspects, can have private telephone conversations with the suspects may be invited to the suspects' home. In order to ensure the right of individuals to privacy, undercover infiltration should be subject to the judicial control. In particular, only the court must give permission for the undercover video and audio recording during phone calls or when visiting the suspects' homes, even if the phone calls and visits are made with the consent of the suspect.

Obtaining a judicial authorization in urgent matters

It has already been pointed out that in the urgent cases the decision to use SIM should also be authorized by the court (see para. 4 above). Foreign legal literature identifies a number of benefits of the warrant obtained over the telephone or other communication channels: (1) the warrant may be issued remotely, the justice being at some distance from the applicant; (2) the applicant does not need to immediately seek out and attend personally before the justice; (3) the warrant may be issued with relative speed.[52]

In our view, it is necessary to consider how this issue is regulated in other democratic countries. In this regard, the provisions of the Criminal Code of Canada are of interest as they contain the procedure for obtaining an order by phone. Several articles of the Criminal Code of Canada allow police authorities to obtain a judgment for the search and other investigative and search activities over the phone.[53] In particular, Art. 487.1 of the Canadian Criminal Code allows for obtaining a search warrant by telephone in the following circumstances:

- The application must be made by a peace officer.
- The officer must believe that an indictable offence has been committed.

52 *James A. Fontana and David Keeshan, The Law of Search and Seizure in Canada, 8th ed., LexisNexis, 2010, p. 407.*

53 *Ss. 487.01(7); 487.05(3); 487.092(4); 529.5 of CC of Canada.*

- The officer must believe it would be impracticable to appear personally before a justice to apply for the warrant.
- The offcer may apply by telephone (or other means of telecommunications) to a designated justice or provincial court judge.
- It must be on oath which may be administered by telephone or other means.
- The receiving justice (or judge) must record the information verbatim, certify as to time, date and contents, and file it with the clerk of the court.[54]

The information submitted to the judge must meet several criteria:

- It must set out the circumstances making it impractibale for the officer to attend personally.
- It must include a description of the indictable offence, the place to be searched and the items to be seized.
- It must include a statement of the officer's grounds for believing the items will be found in that place.
- It must state whether there has been a prior application in respect of the same matter.[55]

If the judge is satisfied with the information submitted by the police he or she may issue a warrant to conduct investigative proceeding (searches, etc.). The judge may specify the time period within which must be carried out investigative proceeding. Once the judge has issued a telephone 'warrant', he or she has to fill out a form[56] - a written warrant for search, sign it and indicate the exact time, date and place the warrant has been issued. After that the written form must be forwarded to the police authorities by telefax or

54 *Ss. 487.01(7); 487.05(3) of the CC of Canada; see also Fontana and Keeshan, supra note 78 at p. 408.*

55 *Fontana and Keeshan, supra note 78 at p. 408.*

56 *Form 5.1 of the CC of Canada.*

other communication channels.[57] After receiving the written warrant from the court the police can use it as the basis for investigative proceedings, such as search and, if necessary, present it to interested parties, such as tenants of residential premises, where the search is conducted.[58]

A police officer to whom a warrant is issued by telephone or other means of telecommunication should file a written report with the court as soon as practicable but within a period not exceeding seven days after the warrant has been executed. The report should include:

- statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;
- a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and
- a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.[59]

After receiving this report, the judge who issued the warrant over the phone, decides on the admissibility of evidence obtained in the course of investigative proceedings. In Canadian law and practice there is a presumption that in the absence of report composed by a judge of the receipt of information from the police on the phone with the exact time and date, as well as a warrant signed by a judge, the evidence obtained during the investigative proceeding deemed to be received without the permission of court.[60]

57 *S. 487.1(6.1) of CC of Canada.*

58 *S. 487.1(7) of CC of Canada.*

59 *S. 487.1(9) of CC of Canada.*

60 *Cm 487.1(11) 1 487.1(7).*

Kyrgyz lawmakers are urged to consider the introduction of the institution of obtaining the court's decision to conduct investigative and SIMs over the phone and other communication channels. The legislator should describe in detail the procedure for the application request , as well as the procedure for issuing such a decision of the court. Cases of obtaining the judicial authorization over the phone should be limited to urgent cases and when the application by the police in person in court is impracticable. It should be kept in mind that the police and the courts, which issue telephone warrants to conduct SIMs, must be equipped with appropriate means of communication (telephone, fax, etc.) for rapid communication between the police and the court and sending a copy of the court decision.

NOTIFICATION OF THE PERSON REGARDING A SIM EXECUTED AGAINST HIM OR HER

Legislator of the Kyrgyz Republic should introduce a provision, according to which law enforcement agencies are required within a certain period after the execution of relevant SIM notify the person against whom the SIMs were carried out, that he or she was the target of the SIM.

Canadian law requires the provincial prosecutor to notify the person in respect of whom the interception has been executed, within 90 days after the completion of wiretapping. In this case, the prosecutor is also required to inform the court that issued the authorization of the SIM that the person in respect of whom held the wiretapping, has been notified. However, the Canadian law provides a number of cases where the court may issue a permit for the extension of the period within which the target of surveillance should be notified. In particular, the judge has to come to the following conclusions:

- the investigation of the offence to which the authorization relates is continuing, and

- that the interests of justice warrant the granting of the application for an extension.[61]

In this case, the judge may extend the period for notification of up to three years. Another exception is cases where the audition was carried out in respect of an organized criminal group or terrorist group. In this case, only the second condition must be met - the extension is necessary in the interests of justice. In this case, the term can also be extended to three years.

In this regard it is recommended to the legislator of the Kyrgyz Republic to provide a duty of law enforcement agencies to notify the persons who became objects of the SIMs, during a certain period. It is possible to provide for exceptional rules with regards to cases, which are still under investigation, as well as cases related to organized crime and terrorism.

RECOMMENDATIONS FOR CHANGES TO THE LEGISLATION ON SIMS

1. The legislative provisions on the SIMs should be incorporated into a new unified law on criminal procedure - the Criminal Procedure Code in order to avoid conflicts with the interpretation of the various pieces of legislation.
2. It is necessary to harmonize the provisions of the legislation on the SIMs with the requirements of the Constitution of the Kyrgyz Republic.
3. It is necessary to change the provision of the current law, according to which the conduct of SIMs, «affecting the legally protected confidentiality of correspondence, telephone and other conversations, allowed on 'a reasoned decision' of a law enforcement officer to the provision that the law enforcement agency apply to the court to conduct the appropriate SIM.
4. It is necessary to amend the law by adopting clear grounds permitting the use of specific SIMs. In particular, the legislation should require

61 *S. 196 of CC of Canada.*

that the application of SIMs can be only permitted if there are serious grounds for suspecting the particular person in the commission or preparation to commit a crime.

5. The law should clearly state which kind of evidence linking the person to criminal activity may be sufficient for the use of SIMs against him.
6. It is necessary to determine a shorter period of validity of the judicial authorization to conduct SIMs, for example, up to one month. At the same time, the extension of the period for conducting SIMs should be permitted by filing an application for extension of SIMs, backed by new evidence supporting the application in court.
7. The law should make it clear for which SIMs the judicial authorization is required.
8. It is necessary to consider the establishment of a specialized position of the judge who would be involved in the disposition of the issues related to the authorization of the SIMs and pre-trial investigative proceedings. This judge could have functions to authorize SIMs and all pre-trial investigative proceedings affecting the rights and freedoms of citizens.
9. The legislation should indicate that the interview with individuals as the SIM should be allowed only if they voluntarily consent to an interview. They cannot be subjected to detention in case if they do not appear for interviews by invitation.
10. Legislation needs to describe in more detail what factual information can be obtained by law enforcement agencies through inquiry and what are the powers of law enforcement agencies to obtain this information from non-governmental organizations which are in the special legal relationship with the citizens against whom SIMs are conducted.
11. In order to prevent the use of provocation and entrapment by law enforcement agencies engaged in the SIMs, the legislator of the Kyrgyz Republic must make a number of specific changes in legislation.

12. It is necessary to amend the criminal law by introducing a new circumstance eliminating criminal act - the act is committed as a result of provocation or other positive actions of law enforcement agents exercising SIMs.
13. It is necessary to introduce criminal liability for the provocation of any crime.
14. The test purchase, controlled delivery (delivery screening) and investigative experiment should be permitted only on the basis of the decision of the judge who has to be satisfied that against a particular person there is a reason to suspect him of continuing criminal activity or preparing to commit a crime.
15. The current legislation on the SIMs speaks only of the court authorizing the use of SIMs aiming to restrict the right to inviolability of one's home, which is directly contrary to the provisions of the Constitution, which requires judicial authorization for any inspection and intrusion by law enforcement in the housing or any other facilities owned by the person which are in any other property right. In this regard, the law on the SIMs should be brought into conformity with the Constitution.
16. It is recommended that lawmakers need to consider the experience of democratic states and to provide clear and strict rules regarding the use of interception of telephone or other conversations. It appears that the legislation on the SIMs in the Kyrgyz Republic should also be based on the principles of proportionality and necessity in applying these SIMs. Also, it is advisable to provide for a ban on the interception of communications between the suspects and their lawyers.
17. In order to ensure the right of individuals to privacy and inviolability of their home, undercover infiltration should always be under the judicial control. In particular, only the court must give permission for the undercover video and audio recording during phone calls or visiting the homes of suspects, even if the phone calls and home visits are made with the consent of the suspect.

18. The lawmakers of the Kyrgyz Republic should introduce a legal provision, according to which law enforcement agencies are required within a certain period after the relevant SIM is completed to notify the person against whom these SIMs were executed, who was the object of the SIMs.
19. It is necessary to consider the introduction of telephone warrants. Moreover, the legislation should describe in some detail the application procedure, as well as the procedure for issuing such decision by the court. Cases of telephone warrants should be restricted to cases that are urgent, and that the application by the police personally in court is virtually impossible. The police and the courts, which issue authorization to conduct SIMs must be equipped with appropriate means of communication (telephone, fax, etc.) for fast communication between the police and the court.

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