

Comparative Legal Analysis of the Legal Regulation Concerning Correspondence and Telephone Conversation Privacy Problem at the Seizure of Mobile Communication Devices According to the Legislation of Foreign Countries (Belgium, USA, Canada)

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Abstract: The study deals with the rights of correspondence and telephone conversations privacy during the seizure of electronic mobile devices. The right to privacy of correspondence, telephone conversations, postal, telegraph and other communications, stated in Part 2 of the Article 23 of RF Constitution, belongs to the category of basic constitutional rights and freedoms of a man and a citizen. The relevance and practical significance of the study is based on the uncertainty of legislation interpretation, an ambiguous position of courts at the determination of mobile device seizure legality. The development of society and information technologies requires new approaches to the assessment of protected values, aimed at criminal defense increase concerning the protection of correspondence, telephone conversations and other postal and telegraph message privacy. The researchers analyzed the norms of domestic and Foreign legislation (Belgium, USA, Canada), studied court practice in order to develop a common approach to solve the identified problem. The study is aimed at: the identification of problems concerning any constitutional rights to privacy of correspondence and telephone conversations during the seizure of electronic mobile devices through the analysis of legislation standards and court practice, the development of solutions based on our research.

Key words: Seizure, electronic sources of evidence, correspondence and telephone conversation privacy, court practice, Belgium

INTRODUCTION

The Article 23 of the RF Constitution states the right of every person to privacy, personal and family secrets; everyone has the right to the privacy of correspondence, telephone conversations, postal, telegraph and other messages. This right may be restricted only on the basis of a court decision. In accordance with Article 25 of the Constitution a living space is inviolable, no one has the right to enter a living space against the will of those living there, except in cases established by Federal Law or by court decision.

According to the Chapter 1, 3 of the Article 63 of the Federal Law No. 126-FL “Telecommunications” issued on 07.07.2003 the privacy of correspondence, telephone conversations, postal, telegraph and other messages transmitted via telecommunication networks and postal communication networks is guaranteed on the territory of Russian Federation.

MATERIALS AND METHODS

The relevance and practical significance of the study is based on the uncertainty of the legislation norms

interpretation, an ambiguous position of a court at the determination of mobile device seizure legality. The position of Foreign legislators and the courts, the opportunity to use the acquired experience as well as the views of processualists, lawyers make some interest.

The Federal Law no. 143 FL issued on July 1, 2010 introduced the Article 186.1 of Criminal Procedure Code “Getting information about the connections between subscribers and (or) subscriber units”. The legislator considered all the needs of investigative bodies in the legal regulation of the procedure for obtaining factually and legally relevant and probative information on the use of mobile phones during the preparation, committing and covering up a crime. The information about the connections between subscribers includes not only the detailing of incoming and outgoing calls and the data about subscribers and their telephones but also the information on the numbers and the location of receiving and transmitting base stations.

Considering the right of citizens to privacy as the pool of secrets guaranteed by the state Petruhin (1998) determines personal secrets, “trusted to no one” and professional secrets “trusted to the members of a specific profession in order to protect the rights and legitimate

interests of citizens". The privacy to correspondence and telephone conversations is referred by Petruhin to the category of "personal secrets", noting that a client trusts to the mail and telegraph not the content of telephone conversations or correspondence but only mail forwarding or the provision of communication.

However, the legitimate ways of getting acquainted with the content of correspondence and telephone conversations are provided. In accordance with the Article 13 of RF Criminal Procedure Code the restriction of a citizen right to privacy of correspondence, telephone and other conversations, postal, telegraph and other communications shall be permitted only on the basis of a court decision.

RESULTS AND DISCUSSION

The opinions of processualists concerning the judicial control are different, it is a form of the judiciary power (Azarov and Tarichko, 2004; Volodina *et al.*, 2002; Zinatullin and Zinatullin, 2002); it is justice or its special form (Lazareva, 1999; Lebedev, 1967; Solodilov, 2000; Suleymanova, 2013; Yakimovich, 1997). This is the principle of the criminal proceedings (Muratova, 2004); This is a judicial function (Kolokolov, 2004). There were the opinions of its ineffectiveness (Kalnitsky, 2004) and that it is an interdisciplinary institute. Anyway, judicial control is implemented from the outset, as soon as there are reasons to believe that someone's constitutional rights and freedoms may be limited in the course of criminal proceedings and serve as the guarantor of their observance.

However, an ambiguous practice concerning the seizure of mobile devices was developed in domestic criminal proceedings. Due to the absence of detailed instructions concerning the seizure of this type of evidence source the problems of enforcement occur.

For example, the Soviet District Court of Omsk considered the complaint concerning the actions of the investigator during the seizure and the inspection of the mobile phone (Anonymous, 2012).

A similar complaint was satisfied by the Saratov Regional Court but the basis for the recognition of the investigator's actions as illegal one concerning the seizure of the phone was the violation recognition concerning the constitutional rights of ownership of the property (Anonymous, 2013).

Another resolution was made by the Stavropol Regional Court. In order to develop a uniform judicial practice and enforcement one should determine the need for court approval during the acts with mobile devices containing confidential information, correspondence, etc. There are two ways to solve this problem.

The need for judicial review at the seizure of all mobile devices, regardless of the purposes of their seizure.

- To conduct only the survey of a mobile device, the information contained herein according to a court resolution and the seizure may be performed without a court decision
- In order to develop the proposals on the improvement of the legal regulation for this sector an international experience shall be taken into account, particularly the experience of the United States, Belgium and Canada
- Considering the legal regulation of mobile devices seizure in the US, it should be noted that the Criminal Law in the United States consists of federal and state laws. Besides, there is the system of judicial precedents which also serves as the source of Criminal Law. The US constitution is a direct source of Criminal Law
- The Fourth Amendment to the US Constitution prohibits arbitrary searches and arrests, regulates the need for court approval to conduct such investigations

On June 25, 2014 the US Supreme Court in its resolution concerning Riley California case decided that a mobile communication device may be seized only by a court decision (Anonymous, 2014a-d).

Electronic mobile device as an evidence in a criminal case, may be considered as a source of information as a means of committing a crime or as a "traditional material evidence". In the first two cases, the probative value has the information contained in an electronic device, a court's permission is necessary to obtain the access to it. As a "conventional physical evidence" a mobile device may be considered, for example, in the case of using it to store narcotics. This case doesn't require a court permission to withdraw this type of evidence. In other words, the object of research in this case is not the information about one's private life. A similar resolution was taken by the US Court at the District of New Hampshire concerning the case of the United States against Adekoya (2014).

Considering the experience of legal regulation concerning the seizure of mobile devices in Belgium, we should note the sources of Criminal Law (Delmas-Marty and Spencer, 2002).

In accordance with the Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the right of respect for private and family life is stated. Everyone has the right on respect for his private and family life, his home and his correspondence.

The Article 15 of the Belgian Constitution states the right to inviolability of a premise. No one has the right to conduct a search of a dwelling, except as expressly provided by law in strict compliance with the norms of law. The Article 22 of the Belgian Constitution (the right of an individuals to privacy must be respected in accordance with statutory restrictions). The Article 12 of the Belgian Constitution declares that no one may be prosecuted except in cases provided by law (Anonymous, 1831).

On February 11, 2015 the Belgian cassation Court decision resolved the appeal to recognize the actions of the investigator as illegal ones. In particular, the violation in the course of the Article 8 proceedings of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Article 15 and 22 of the Belgian Constitution (Anonymous, 1831), the Article 28, bis 3 of the Belgian Code of Criminal Procedure, p. 39, bis 3 of the Code of Criminal Procedure (Anonymous, 2014a-d), p. 88, ter 1 of the Belgian Code of Criminal Procedure, p. 88, ter 3 was declared.

The representative of the victim declared the violation of Article 8 of the convention for the Protection of Human Rights and Fundamental Freedoms by the investigator during the inspection of the mobile device contents belonging to the applicant without a court order. However, on 11 February 2015, the Court recognized the investigator's actions as legitimate ones. According to Article 88, ter 1 of the Belgian Code of Criminal Procedure an investigator may perform an information system of inspection without a court order if there is a threat of evidence loss or the investigator has reasonable grounds to believe that the information system provides the necessary evidence (Anonymous, 2015).

Thus, we may conclude about the imperfection of the legislation of Belgium which does not allow to protect human rights fully, including the right to the privacy of correspondence and an investigator on the contrary is endowed with broad powers during the investigation of crimes. A similar opinion was expressed by a jurist of the University of Leuven (Belgium) Conings (2015). Canada Constitution makes the system of Canada Criminal Law; Criminal Law (criminal code and supplementary criminal laws), case (common) law.

The hierarchy of Canadian criminal law sources reflects the rule of law (legislative supremacy) and the limited role of judicial precedent which are the distinctive features of the Canadian Criminal Legal Model that show the approximation of the Anglo-American and Roman-Germanic criminal law systems (Suleymanova, 2013).

The Article 8 of the Canadian Charter of Rights and freedoms stated that everyone has the right to protection against unreasonable search or seizure (Anonymous, 1982).

According to the Article 24 (2) of the Canadian Charter of Rights and Freedoms, if a court found that the evidence was obtained in a manner infringing or violating the rights and freedoms guaranteed by the charter, the evidence shall be excluded from the estimate (Anonymous, 1982).

The Article 487 (1)(b) of the Criminal Code of Canada provides that a judge grants the request to researcherize the search or seizure of evidence, if there are reasonable grounds to believe that these evidence contain the necessary data about a committed crime or the whereabouts of a person committed the crime (RSC, 1985).

The Supreme Court of Canada considered the case of *R. versus Feron*. According to the materials of the case, it was established that two armed men committed the robbery of the jewelry store at the time of goods unloading, put the jewelry in bags and fled the crime scene by car. On the same evening police discovered the vehicle and the suspects were arrested, but the jewels and weapons were not found. During the search and arrest of the suspect F., a mobile phone was found in his pocket. On-site inspection of device contents was carried out. The device contained the message confirming that the suspect committed the offense as well as the pictures of weapons. A day later the police obtained a search warrant for the vehicle where weapons were found, similar to the weapons on the pictures. A month later, a warrant was obtained to examine the mobile device, but new evidence were not found.

About 7 opinions of judges concerning the legality of the seizure were split (4-3). However, according to the majority opinion of judges, the application was rejected and the police actions were recognized as legitimate.

Thus, due to this court resolution law enforcement received unlimited powers during the search and seizure of mobile devices. It is only necessary to argue the urgency of investigation performance due to the threat of other evidence loss.

The investigator at the absence of court approval was withdrew the phone belonging to a suspect of a criminal case and further examination of the evidence was performed, particularly SMS messages and contact list were studied. The Soviet District Court in Omsk considered the actions of the investigator performing the evidence seizure as legitimate ones because the investigator had statutory grounds for its withdrawal. However, the survey of the information contained by

phone was declared illegal. The decision is motivated by the fact that the duty of the investigator to obtain a judicial decision on the inspection of SMS correspondence follows from international rules, stated in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which everyone has the right of respect for his private and family life, his home and his correspondence as well as the provisions of the RF constitution. Besides, the Court explained that the judicial control is applied to all stages of the information transmission via communication channels, including its storage on a subscriber's phone.

The applicant appealed against the action of the senior investigator Sh. at the Stavropol inter-district investigation department SU ID of Russia in the Stavropol region, who during the pre-investigation check of an attempted rape report committed according to the Article 144-145 of the Criminal Procedure Code withdrew the mobile device and laptop from the suspect. The Stavropol regional court resolved that the actions of the investigator concerning the phone seizure without a court approval were legitimized.

All 9 judges resolved that "smart phones and other electronic devices are different as the evidence from such evidence as purses, briefcases and vehicles. The fact that personal information is stored in one small device placed in a hand is not the circumstance precluding the application of fundamental human rights protection mechanism. Accordingly, in order to withdraw all such types of evidence a permission of a court shall be obtained".

At the time of arrest, the suspect Adekoy had a mobile phone in his hands that was seized without a proper court researcherization. But, police officers did not produce the study of the mobile device data, but only described the characteristics of the device, including the IMEI4, specified on the body of the phone. In the future, due to the established IMEI it was revealed that the suspect communicated with other participants of the criminal case via this phone. This fact was the basis for the charge of committing an organized theft of money from bank cards.

The defense of the accused declared about the violation of the mobile device withdrawal procedure without a court decision, which roughly violated the rights of the defendant's privacy. But the court resolved that police officers actions were legitimate, as IMEI is indicated on the mobile phone body and the information contained on the device was not studied and used as the evidence in the case. Accordingly the phone in this episode is considered as a "simple" material evidence the seizure of which does not require a court permission.

The Criminal and Criminal Procedural Law in Belgium are presented by the Belgian Constitution of 7th February 1831, the Belgian Penal Code of 8th June 1867, the Criminal Procedure Code of Belgium of April 17, 1878, the Judicial Code of October 10, 1967. Besides, the Criminal and Criminal Procedural Law of Belgium include international conventions. First of all this is the Convention on Human Rights of 4 November 1950, ratified by the Government of Belgium on May 13, 1955, the International Covenant on Civil and Political Rights of 19 December 1966, ratified on 15 May 1981 and the Convention about the Rights of a Child of 20 November 1989.

The seizure is performed in strict accordance with the law and shall not violate human rights. The control concerning the legality of the seizure is carried out by the prosecutor of Belgium. If the necessary information may be seized without the seizure of the data storage media, an investigator performs the transfer of data to another storage device.

If an investigating judge granted the permission to inspect a specific information system, the necessary procedural steps may also be committed in respect of other devices located elsewhere but related with this system.

If the necessary information is stored on the territory of another state, this information is subject only for copying. An investigating judge by the prosecutor's office shall inform the Ministry of Justice which in its turn reports about the performance of the necessary investigative actions by a representative body of a foreign state via a public prosecutor's office.

Investigative actions deemed urgent, since the obtaining of the necessary evidence was directed to the search for truth on the case, the search for other suspects and also prevented the loss of stolen property and other evidence on the case. Besides that police found no weapons that could serve as an instrument of a new offense, therefore, the actions of the police were aimed at public safety provision. The judges acknowledged that the actions of the investigator showed the signs of "privacy invasion" but they were minimal.

Three of the judges decided to acknowledge these actions as illegal, as the mobile device contains a lot of information about the private life of the owner and the inspection of the device contents without judicial authorization violates the constitutional rights of the smartphone owner provided by the Article 8 of the Canadian Charter of Rights and Freedoms. The investigator's actions could be considered as urgent ones.

if there was a risk of evidence loss only in the case of mobile phone use. According to the opinion among the minority of judges, the obtained evidence should be excluded due to the illegality of their collection.

CONCLUSION

The solution of this problem lies in the modernization of criminal justice. The system of electronic request for judicial resolution to conduct a search or seizure within the “electronic criminal case” looks promising. This will increase the efficiency of investigative actions and will also reduce the burden on judicial system. This idea was also proposed by Miller (2014) within the similar model creation in the USA criminal procedure system.

Moreover, the effectiveness and necessity of domestic judicial CONTROL in its current form should be taken into account. Courts satisfy 98% of requests concerning the conduction of investigations pursuant to Artical 165 of Criminal Procedure Code (Kovtun and Suslova, 2010). At its core, this is a formal procedure which does not guarantee the achievement of the objectives set for this institution. Of course, some reforms of this institution are necessary. Russian President V.V. Putin recommended to RF Supreme Court to study the proposal of the Council under RF President concerning the development of Civil Society and Human Rights to create an institute of investigative judges (Anonymous, 2014a-c). This proposal was supported by the chairman of the RF Constitutional Court V.D. Zorkin. According to him the introduction of a new institute will allow to move forward in the solution of systemic issues, including the restrictions of an accused one right to defense during pre-trial stages of a process, etc. The prominent lawyers, the Doctor of Law T.G. Morschakova, S.M. Shahray and M.Yu. Barshevsky also reacted positively to these innovations. Besides, evaluating the work of this institution in Belgium, Spain, Germany and also the domestic experience of its existence during the period from 1860-1929, we may conclude that there are more positive aspects in these reforms than the negative ones.

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