

Світлана Леонідівна Шаренко

Кафедра кримінального процесу
Національний юридичний університет імені Ярослава Мудрого,
Київський районний суд м. Харкова
Харків, Україна

ЗАГАЛЬНІ ПІДХОДИ ДО ХАРАКТЕРИСТИКИ СТРУКТУРНИХ ЕЛЕМЕНТІВ КОМПЕТЕНЦІЇ СЛІДЧОГО СУДДІ В КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

Анотація. В статті розглянуті питання компетенції слідчого судді як державно-владного суб'єкта, її структурні елементи. Зазначено, що досягнення цілей кримінального провадження має здійснюватися слідчим суддею суто через реалізацію його процесуальної функції – судового контролю. Запропонований розподіл цілей кримінального провадження. Проаналізовані зовнішні та внутрішні межі предмету відання слідчого судді. Загальною теорією компетенції та кримінальною процесуальною наукою доведено, що компетенція державно-владного суб'єкта включає в себе низку структурних елементів: нормативно-встановлені цілі; предмет відання як юридично визначені сфери і об'єкти впливу; владні повноваження як гарантована законом міра прийняття рішень і вчинення дій; відповідальність за невиконання рішень суб'єкта, наділеного відповідною компетенцією. Вказана структура компетенції, будучи екстрапольованою на тематику компетенції слідчого судді, не лише забезпечує спадковість як принцип розвитку наукового знання, а й надає можливість комплексно поглянути на дане питання, виявивши як особливості правової природи компетенції слідчого судді, так і теоретичні й прикладні аспекти, що потребують наукового осмислення. Актуальність дослідження визначається відсутністю комплексного наукового дослідження структурних елементів компетенції слідчого судді в кримінальному провадженні. Поява нових процедур, постійне розширення меж повноважень слідчого судді сформувавши запит на розробку і доповнення постулатів сучасного праворозуміння його компетенції. Для досягнення поставленої мети використані загальнонаукові методи та прийоми, зокрема такі як: діалектичний; системний; системно-структурний; моделювання та абстрагування; узагальнення; статистичний; аргументування; контент-аналіз та практичний досвід. Проведене дослідження є теоретичним підґрунтям для вирішення наукових і практичних питань, пов'язаних із пошуком оптимальної нормативної моделі компетенції слідчого судді у кримінальному провадженні.

Ключові слова: структурні елементи компетенції, слідчий суддя, нормативно-встановлені цілі діяльності, зовнішні і внутрішні межі предмету відання, судовий контроль.

Svitlana L. Sharenko

Department of Criminal Procedure
Yaroslav Mudryi National Law University
Kyiv District Court of Kharkiv
Kharkiv, Ukraine

GENERAL APPROACHES TO CHARACTERIZING THE STRUCTURAL ELEMENTS OF THE JURISDICTION OF AN INVESTIGATING JUDGE IN CRIMINAL PROCEEDINGS

Abstract. *The paper investigates the jurisdiction of the investigating judge as a governmental entity, its structural elements. It was stated that the achievement of the objectives of criminal proceedings should be performed by the investigating judge purely through the exercise of procedural function – judicial control. The distribution of the purposes of criminal proceedings is proposed. The external and internal boundaries of the jurisdiction of the investigating judge are analysed. The general theory of jurisdiction and criminal procedural science proves that the competence of the governmental subject includes a number of structural elements: statutorily established goals; jurisdiction as the legally defined spheres and objects of influence; power as a measure guaranteed by law for decision-making and taking action; responsibility for failure to comply with the decisions of an entity with the relevant competence. This structure of competence, being extrapolated to the jurisdiction of the investigating judge, not only provides heredity as a principle of scientific knowledge development, but also offers a comprehensive look at this issue, revealing both the specificity of the legal nature of the investigative judge's jurisdiction, and theoretical and applied aspects that require scientific comprehension. The relevance of the study is determined by the lack of a comprehensive scientific study of the structural elements of the investigative judge's jurisdiction in criminal proceedings. The emergence of new procedures, the constant extension of the powers of the investigating judge formed a request for the development and supplementation of the tenets of modern legal understanding of their jurisdiction. To achieve this purpose, common scientific methods and techniques, such as dialectical, systemic, structured system, modelling and abstraction, generalization, statistical, argumentation, content analysis and practical experience. The conducted research constitutes a theoretical basis for solving scientific and practical questions related to finding the optimal statutory model of investigative judge's jurisdiction in criminal proceedings.*

Keywords: structural elements of jurisdiction, investigating judge, statutory goals of activity, external and internal boundaries of jurisdiction, judicial control.

BCTYII

The issue of the procedural status of the investigating judge and the subject of judicial control in criminal proceedings was investigated by well-known Ukrainian and foreign scholars, whose works thoroughly investigate the issues of the concept, subject, boundaries of judicial control in criminal proceedings, including the theoretical foundations of the procedural status of the investigating judge, historical and comparative aspects of the legal institution of an investigating judge. Thus, I. V. Hlovyuk believes that judicial activity in pre-trial proceedings is a specific, heterogeneous in

its legal nature activity, which finds its manifestation in several directions, which are the criminal procedural functions of the court, namely: permitting functions, functions of applying measures of criminal procedure compulsion, judicial control. The scientist presents the need to isolate precisely the three procedural functions of the court (judge) in the different nature of the areas of judicial activity in pre-trial proceedings [1].

V. O. Popelyushko provides a classification of the powers of an investigating judge according to the criterion of the subject of legal regulation, which largely corresponds to the structural composition of the current Criminal Procedure Code of Ukraine, namely: powers in the field of procedural relations associated with the application of measures to ensure criminal proceedings; powers related to the consideration and decision on motions for permission to conduct investigative (search), covert investigative (search) and other procedural actions specified in the law aimed at collecting evidence; powers to consider and resolve complaints about decisions, actions or inaction of the investigator or prosecutor; powers to collect evidence in the event of refusal by the investigator, prosecutor to the defence party to satisfy the motion; powers related to the establishment of procedural terms; powers to consider and resolve disqualification issues during the pre-trial investigation of the prosecutor, investigator, defence counsel, representatives, expert, translator; powers to decide the fate of material evidence at the preliminary investigation stage; powers to decide on the use of information obtained as a result of covert investigative (search) activities, on signs of a criminal offense that is not investigated in this criminal proceeding; powers to protect human rights enshrined in Article 206 Criminal Procedure Code of Ukraine¹.

O. G. Shilo notes that the statutory model of the investigating judge's jurisdiction in criminal proceedings is undergoing constant changes in the direction of expanding the subject matter of this subject of criminal procedural activity [2]. The scientist points out the need to establish objective criteria that should determine the subject matter of the investigating judge and their procedural powers, the implementation of which ensures the execution of the proceedings. Such criteria should be factored in by the legislator when further improving the statutory model of judicial control activity, determining the criminal procedural jurisdiction of an investigating judge as an entity that ensures the implementation of the basis of adversarial procedures during pre-trial investigations, respect for the rights and freedoms of participants in criminal proceedings upon performing procedural actions that limit them, solutions of legal conflicts arising between participants in criminal proceedings during pre-trial investigation of criminal offenses [3]. The powers of the investigating judge to exercise judicial control were also investigated by V. A. Zavtur [4], N. P. Siza [5], B. A. Skibitsky [6], S. V. Nagachevsky [7], V. Rudenko [8], V. A. Seleznyov [9].

¹ The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

The relevance of the paper is determined by the lack of a comprehensive scientific study of the structural elements of the investigative judge's jurisdiction in criminal proceedings. The emergence of new procedures, the constant extension of the powers of the investigating judge formed a request for the development and supplementation of the tenets of modern legal understanding of their jurisdiction. The purpose of the paper is to establish objective criteria that should determine the subject matter and limits of the investigative judge's jurisdiction in criminal proceedings, their procedural powers. To achieve this purpose, the author has performed scientific research to determine the jurisdiction of the investigating judge, its structural elements, and their correlation relationships.

1. MATERIALS AND METHODS

The methodological basis of the study is the general scientific dialectic method, using which the general approaches to the description of the structural elements of the investigative judge's jurisdiction in criminal proceedings are analysed in the relationship and interdependence, integrity, comprehensiveness and dynamics. The nature of the subject matter also determined the use of the systemic method to examine the structure and content of the investigative judge's jurisdiction; the structured system method is the basis for extrapolating the structure of the investigative judge's jurisdiction; modelling and abstraction methods were useful in the development of scientific and theoretical applied models with aim to improve the legal regulation of the investigative judge's jurisdiction. The generalization method provided an opportunity to consistently bring single facts into a single whole and formulate reasonable conclusions aimed at improving the legislative regulation of the issues under study, overcoming its conflicts and gaps. The statistical method was used to generalize the materials of practice so as to establish the spread of various kinds of controversial situations in law enforcement. The method of argumentation was used to prove the truth of their own judgments using other judgments, arguments, and proofs. Content analysis and practical experience contributed to the study of existing judicial practice within the jurisdiction of an investigating judge in criminal proceedings.

The specified methods were used in conjunction, which contributed to the comprehensiveness, completeness and objectivity of scientific research, specificity, validity and consistency of the conclusions drawn, and the reliability of the results. The study is the theoretical basis for solving scientific and practical issues related to the search for the optimal regulatory model of the investigative judge's jurisdiction in criminal proceedings; ensuring the successful solution of a specific cognitive and practical problem of the investigative judge's jurisdiction in criminal proceedings. The legal and informational basis of the study includes: The Criminal Procedure Code of Ukraine¹,

¹ The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

subordinate legislation, interpretative acts of the highest judicial instances of Ukraine. The theoretical basis of the study is the work of domestic and foreign lawyers in criminal proceedings and other branches of legal science. The empirical basis of the research is the case law available in the Unified Register of Judgments, including the author's own 30 years' experience as a judge, including almost 8 years as an investigating judge.

2. RESULTS AND DISCUSSION

Jurisdiction, being the cornerstone in determining the place and role of public authorities in public relations, today is already a fairly deeply studied socio-legal phenomenon [10–13]. The presence of deep conceptual scientific works both on the theory of jurisdiction and on the issues of criminal procedural jurisdiction allows, in the words of Isaac Newton, “to see further by standing on the shoulders of giants” [14]. In other words, relying on the achievements recognized by the scientific community in this matter, and therefore, having a reliable scientific foundation, we can attempt to create our own “scientific superstructure” in the form of identifying the specific jurisdiction of an investigating judge as a governmental subject of criminal procedural legal relations.

Currently, the most famous scientific developments in the field of jurisdiction theory, in general terms, define jurisdiction as the scope of public affairs laid upon authorized entities by law [11]. In turn, specialists-processualists, absolutely correctly emphasizing that “the concept of criminal procedural jurisdiction is a derivative of the general concept of jurisdiction”, suggest defining criminal procedural jurisdiction as “the scope of public affairs in the field of settling of criminal law conflicts arising in society, laid upon the preliminary investigation bodies, prosecutors and courts by law” [12]. We shall, however, caveat that upon considering issues of criminal procedure jurisdiction, as L. Lobjko noted, the proposed definition does not claim to be ideal and comprehensive, but merely a starting point to further deepen the understanding of criminal procedural jurisdiction as a socio-legal phenomenon. By and large, the activity of legal thought should be focused not on the formation of ideal definitions of a concept, but on the disclosure of its deep essence [12].

At the same time, being a complex phenomenon, jurisdiction, as the researchers indicate, includes a number of structural elements: 1) statutorily defined goals; 2) the jurisdiction as legally defined spheres and objects of influence; 3) power as a legally guaranteed measure of decision-making and taking actions; 4) responsibility for failure to comply with decisions of an entity endowed with relevant jurisdiction [11]. It appears that the extrapolation of the specified structure of jurisdiction to the consideration of the investigating judge's jurisdiction will not only provide a comprehensive look at this issue, but also ensure continuity as a principle for the development of scientific knowledge.

Upon considering the statutorily established goals of the investigating judge's activities in the criminal process, we will not delve into the dictionary meaning of the concept of "purpose", but will rely on the relevant conclusions made by experts in the study of jurisdiction as a criminal procedural phenomenon at large. As L. Lobjko notes, the purposes established by law for the activities of state bodies determine the way in which they are statutorily oriented towards achieving a specific procedural result. In a broad sense, this refers to public functions performed by each of the bodies that have the right to perform criminal proceedings. Departure from the performance of their functions by these bodies, or the performance of others' functions entails significant damage to the rights and legitimate interests of the subjects of the criminal process, and therefore cannot lead to the achievement of the process purposes [12].

An attempt to transfer the indicated concept of the relationship between purposes as a structural element of the jurisdiction of a governmental subject of criminal proceedings and the functions of such a subject to matters of determining the investigating judge's jurisdiction, necessitates addressing the following. The current criminal procedural legislation of Ukraine statutorily defines the objectives (purposes) of the criminal process, but does not detail them for the activities of separately defined subjects of criminal proceedings. Thus, in accordance with Article 2 of the Criminal Procedure Code of Ukraine¹, the objectives (purposes) of criminal proceedings are to protect the individual, society and the state from criminal offenses, protect the rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensure a quick, complete and impartial investigation and judicial review so that everyone who committed the criminal offense was brought to justice to the extent of their guilt, that no innocent person be accused or convicted, that no person be subjected to unreasonable procedural compulsion and that due process be applied to each participant in criminal proceedings.

Thus, the question arises as to the possibility of equating the list of final results specified in Article 2 of the Criminal Procedure Code of Ukraine², the achievement of which the criminal proceedings are aimed at, to purposes as a structural element of the investigating judge's jurisdiction. In our opinion, the answer should be in the affirmative, but with the caveat that the achievement of these purposes should be performed exclusively by the investigating judge through the implementation of procedural function – judicial control. This caveat engages the statement that, due to the specificity of the legal nature of the procedural status of the investigating judge, the purposes of the criminal proceedings referred to in Article 2 of the Criminal Procedure Code of Ukraine³ should be divided into: (a) those whose achievement is directly ensured by the activities

¹ The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

² *Ibidem*, 2012.

³ The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

of the investigating judge; (b) those whose achievement is indirectly ensured by the activities of the investigating judge.

This thesis can be confirmed by examples of specific functional capabilities of an investigating judge, the implementation of which is aimed at the direct or indirect achievement of individual elements of the general purpose of criminal proceedings, as defined in Article 2 of the Criminal Procedure Code of Ukraine¹. For example, (a) protecting the rights, freedoms and legitimate interests of participants in criminal proceedings, including (b) ensuring that no person be subjected to unreasonable procedural compulsion and that due process of law is applied to each participant in criminal proceedings, are the purpose of the investigating judge. The said purpose is achieved through the exercise of powers by the investigating judge to provide permits for investigative (search) and covert investigative (search) activities; its exclusive jurisdiction in applying criminal procedural compulsion measures to a person; the general duties of the investigating judge for the protection of human rights provided for in Article 206 Criminal Procedure Code of Ukraine².

At the same time, (c) protecting the individual, society and the state from criminal offenses, and (d) ensuring a quick, complete and impartial investigation and judicial review so that everyone who commits a criminal offense is held accountable to the extent of their guilt, that no innocent person be accused or convicted, are not the direct functional areas of the investigating judge.

Thus, the protection of individuals, society and the state from criminal offenses as the purpose of criminal proceedings is directly achieved primarily due to the active initiative of law enforcement agencies aimed at identifying criminal offenses and prosecuting those who committed them. In turn, the modern paradigm of the domestic criminal process assigns a more passive role to the investigating judge in this activity and involves the “inclusion” of the judicial control mechanism only if one of the parties appeals with the corresponding initiative. At the same time, it is rather difficult to deny the indirect participation of the investigating judge in achieving this purpose. Firstly, by issuing permits for various kinds of procedural actions aimed at solving criminal offenses and bringing the perpetrators to criminal responsibility, the investigating judge becomes part of the general criminal procedural mechanism, the activity of which is aimed at achieving this purpose. Secondly, by monitoring the legality of the decisions of pre-trial investigation bodies regarding various kinds of procedural actions aimed at restricting the rights and freedoms of a person and a citizen, the investigating judge indirectly (preventively) protects the individual, society and the state from those criminal offenses that include unlawful restriction human rights and freedoms by pre-trial investigation bodies. Thirdly, by selecting a preventive measure for a person, which, among other things, is aimed at preventing the suspect from continuing the criminal

¹ *Ibidem*, 2012.

² *Ibidem*, 2012.

activity, the investigating judge again indirectly protects the individual, society and the state from possible criminal offenses.

Ensuring a prompt, complete and impartial investigation and judicial review so that everyone who committed a criminal offense be held accountable to the extent of their guilt, that not a single innocent person be accused or convicted is also an indirect purpose of the investigative judge, since the investigating judge does not directly affect the speed, completeness, impartiality of the investigation and judicial review, and the resolution of the issue of guilt or innocence. At the same time, the mediated activity of the investigating judge in achieving this purpose is clearly evident. Thus, for example, it is the investigating judge who considers all the challenges during the pre-trial investigation, which ensures the achievement of the objective of impartiality of the pre-trial investigation. In addition, today it is the investigating judge who is obliged to verify the legality and validity of the suspicion report on a complaint by the defence, which in turn is aimed at achieving the purpose of preventing the unjustified criminal prosecution of an innocent person.

Under the jurisdiction as a separate element of competence of a governmental subject of criminal procedural relations, it is customary for the science of criminal process to understand it as the objects on which such a subject can exert a procedural influence. With that, the researchers point out that “objects of such influence are traditionally associated with the powers of state bodies regarding the possibility of proceedings in certain criminal cases” [12]. Fully agreeing with the definition of the jurisdiction as an object to which the influence of the state subject of criminal procedural relations extends, we will provide some clarifications, which, in our opinion, are appropriate to implement regarding the above statement on the powers of state bodies. Undoubtedly, the connection between the jurisdiction (as an object of influence) and the powers of the governmental subject is obvious, because, as noted above, both phenomena are structural (and therefore interconnected) elements of competence of such a subject. At the same time, this kind of connection nevertheless obliges to clearly distinguish between the jurisdiction (the range of criminal procedural relations that can be influenced by the subject of criminal proceedings) and powers (procedural possibilities to exercise such influence).

Being a structural element of the competence of a governmental subject, the jurisdiction, in turn, as scientists point out, shall also be subject to structuring. In particular, scientific works propose to distinguish between the “criminal law element (type of crime) and the criminal procedure element (personality characteristics, connection of criminal cases; alternative possibilities of proceedings in the case; territorial effect of powers of the authority)” in the structure of jurisdiction of competent bodies in the field of criminal procedure [12]. In turn, it follows that a direct extrapolation of this approach to the matter of determining the investigating judge’s jurisdiction is impossible, given the specifics of the procedural status of this participant in criminal proceedings.

In particular, in our opinion, it can be argued that the criminal law element (type of crime) as a factor affecting the determination of the jurisdiction of the subject of criminal procedural relations is not relevant for solving this issue regarding the investigating judge's jurisdiction. According to the current criminal procedural legislation of Ukraine, the qualification of a criminal offense does not in any way affect the decision on the belonging of the proceedings to the investigating judge's jurisdiction. Of course, reflecting on this issue, we shall point out a certain, although not obvious, but nevertheless a connection between the severity of the crime and the delimitation of the jurisdiction of investigating judges of local and appeal courts, because it is the competence of the latter to consider issues related to the granting of permits for secret investigations (search) actions, the conduct of which is permitted only upon the investigation of grievous and extremely grievous crimes.

At the same time, in our opinion, the factor (reason) of this delimitation of jurisdiction is not the specifics of the criminal offense (in particular, its gravity), but the organizational and technical features connected with the state secret regime. In particular, it is difficult to disagree with O. I. Polukhovich is that "the main reason for legislative assignment of issues related to covert investigative (search) actions, specifically to investigative judges of the courts of appeal, is the purpose of minimizing the risk of disclosure of information on the fact of conducting covert investigative (search) actions, since the probability of disclosure of information in conditions of adopting decisions on covert investigative (search) actions in a regional level court is significantly reduced. In addition to the above, in the decision on securing the right to grant permissions for covert investigative (search) actions precisely to courts of appeal, factors of an organizational and technical nature played an important part. Considering the fact that information on the fact and methods of conducting covert investigative (search) actions is included in the list of information constituting a state secret¹, the work with all types of carriers of such information should be performed through a special information security department [15]. With that, the organization of these departments requires significant material costs connected with provision of technical, human resources, obtaining the appropriate licenses, etc.²

In the context of consideration of the issue of the investigating judge's jurisdiction and its boundaries, the above positions provide an opportunity not only to state the ir-

¹ Decree of the Security Service of Ukraine No. 440 "On Approval of the State Secret Information". (2005, August). Retrieved from <https://zakon.rada.gov.ua/laws/show/z0902-05>; Decree of the Cabinet of Ministers of Ukraine No. 939 "On approval of the procedure for organization and maintenance of the secrecy regime, in state bodies, local self-government bodies, enterprises, institutions and organizations". (2013, December) (for official use). Retrieved from http://search.ligazakon.ua/l_doc2.nsf/link1/KP130939.html.

² Resolution of the Cabinet of Ministers of Ukraine No. 1169 "On Approval of the Procedure for Obtaining a Court Permit to Take Measures Temporarily Restricting Human Rights and Use of the Extracted Information" (2007, September). (The decree has become invalid on the basis of the Decree of the Cabinet of Ministers of Ukraine No. 252 (252-2016-p) of 30.03.2016). Retrieved from <https://zakon.rada.gov.ua/laws/show/1169-2007-%D0%BF>.

relevance of such a factor as the type of criminal offense for determination of the investigating judge's jurisdiction, but also to indicate the existence of a different, by their legal nature, limits of the investigative judge's jurisdiction. In particular, in such a context, this refers to both the external limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of an investigating judge and the jurisdiction of other subjects of criminal proceedings) and the internal limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of investigating judges of local and appeal courts, the jurisdiction of investigative judges by territoriality, the jurisdiction of investigative judges of one court, factoring in the specifics of the person regarding whom criminal proceedings are carried out, etc.) [16].

Currently, the legislative tendency of the gradual expansion of the investigating judge's jurisdiction in criminal proceedings is evident: granting permission to conduct a special pre-trial investigation; appeal of the notice of suspicion; engaging an expert to produce expert evidence (currently – on the motion of the defence party, and in the period from March 2018 to October 2019 – on the motion of the parties to the criminal proceedings); appeal of the decision of the prosecutor to refuse to satisfy the complaint on non-conformity with reasonable time by the investigator, the prosecutor during the pre-trial proceedings, etc. At the same time, the Criminal Procedure Code of Ukraine¹ defines only a certain specific list of decisions, actions or inaction that can be appealed to certain judicial instances. Article 303 of the Criminal Procedure Code of Ukraine contains a list of decisions, actions or inaction that may be appealed to an investigating judge; Article 309 of the Criminal Procedure Code of Ukraine – a circle of decisions of an investigating judge, which may be appealed to the court of appeal; Part 2 of Article 33-1 of the Criminal Procedure Code defines the competence of an investigating judge of the High Anticorruption Court².

However, as evidenced by the existing judicial practice, there are procedural decisions of individual investigating judges, the resolution of which is not prescribed by law, when the investigating judge makes a decision that goes beyond their authority. The unified register of court decisions contains over 15,000 decisions of investigating judges on consideration of requests from investigators and prosecutors for permission to conduct unscheduled tax audits. The legal assessment of such decisions of investigating judges was provided by the Supreme Court on March 6, 2018 in the case of a cassation appeal by a representative of Sintop Research and Production Association LLC against a decision of the Donetsk Region Court of Appeal dated August 30, 2017 on refusal to open an appeal proceedings³. The panel of judges of the Supreme Court emphasized the fact that the powers of an investigating judge as a subject of criminal proceedings are determined only by the Criminal Procedure Code of Ukraine (part 3 of

¹ The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

² *Ibidem*, 2012.

³ Order of the Supreme Court. EDRSU. (2018). Retrieved from <http://reyestr.court.gov.ua>.

Article 26), and Article 9 of the Criminal Procedure Code of Ukraine excludes the influence of other laws on issues of determining the powers of subjects of criminal proceedings, since it contains a peremptory requirement that a law that contradicts the Criminal Procedure Code of Ukraine cannot be applied¹. The resolution states that the legislator clearly defined the role of the investigating judge in the criminal justice system: to ensure that law enforcement authorities do not violate the rights, freedoms and interests of a person upon exercising their powers. This task can justify the various powers of the investigating judge, aimed at ensuring the rights, freedoms and interests of individuals, even if they are not clearly stipulated by law. An example of such powers can be found in Article 206 of the Criminal Procedure Code of Ukraine², when the legislation obliges the investigating judge to “take the measures necessary” without defining a list of these measures.

However, even with the broadest understanding of the role of the investigating judge, it is impossible to harmonize it with the right of the investigating judge to expand – in comparison with the legislation – the powers of state bodies and officials. An investigating judge can only limit in a particular case, based on the circumstances of the case, the use of powers already granted to such entities by law. In the above case, the judge made a decision having the exact opposite effect: he gave the investigator powers that he was deprived of by law. This contradicts the very essence of judicial control over the actions and decisions of state bodies so as to protect the rights, freedoms and interests of individuals. It also contradicts the purpose of the court as an institution in a democratic society. Criminal procedural legislation in its essence constitutes a body of provisions that restrict the freedom of action of the state in the investigation of crimes. The meaning of criminal procedural legislation in a democratic country is to balance this legitimate interest in the investigation of crimes with other – equally important – values and interests of society: protection from excessive state interference in the private sphere, protection from arbitrariness, the value of personal freedom, and prevention of humiliation dignity, the value of family ties, freedom of entrepreneurial activity, etc. It is difficult to even list all the values and legitimate interests that the criminal procedural law protects from the desire to investigate crimes at all costs [17].

The configuration of this balance of conflicting values and interests is always the subject of fierce debate in society. This balance is too complex, too dependent on the current situation in the country, historical and legal traditions and many other factors to be the subject of discretion of a single person, in this case, an investigating judge. It is because of the complexity of determining this balance that it is determined by law. It is the Parliament, and not a single person, that constitutes the most appropriate means of finding a balance of various public interests in a democratic society. The practice of criminal investigations often raises painful questions regarding the balance between the

¹ The Criminal Procedure Code of Ukraine, op. cit.

² The Criminal Procedure Code of Ukraine. (2012). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17>.

needs of the investigation and the protection of the rights of individuals and other values of society. But, despite the urgent needs of the investigation, the prohibition of torture is unconditional, even if torture can help investigate and – sometimes – save lives [18; 19].

Forced self-disclosure is prohibited, although it can often contribute to an investigation. Intervention in the confessional privilege is impossible, although such interference could provide decisive evidence in the investigation. A full fingerprinting would be a very effective way to control crime and a great relief in the investigation of crimes, but at the cost of freedom and privacy. In all these cases, the needs of the investigation cannot justify the state moving beyond the limits defined by legislation. It is the judicial system that has the responsibility to ensure that the law-defined balance between the needs of the investigation and other public values is respected [20]. The provisions of the law, which exclude the powers of the investigator or prosecutor to appoint inspections, cannot be interpreted as a change in the procedure for exercising powers, for example, as a ban on exercising these powers without the permission of the investigating judge or court. The legislator completely and unconditionally excluded such actions from among actions allowed to be performed by an investigator or prosecutor. In the context of the given case, the objective of the investigating judge laid precisely in that the powers of the investigator and the prosecutor, which were excluded by law, were also excluded in practice. Consequently, in this case, the investigating judge, having granted the investigator permission to conduct an inspection, went beyond his powers and ruled a decision that is not stipulated by the criminal procedural legislation. The statutorily set goals, as a fundamental element of determining the jurisdiction of governmental participants in criminal proceedings, one of which is the investigating judge, are enshrined in Article 2 of the Criminal Procedure Code of Ukraine. With that, the achievement of the objectives of criminal proceedings should be pursued solely by the investigating judge through the exercise of their procedural function – judicial review. In its turn, the stated reservation obliges to state that due to the specifics of the legal nature of the judicial control, the aims of the criminal proceedings stated in Article 2 of the CPC of Ukraine should be divided into: (a) those whose achievements are directly ensured by the activities of the investigating judge (protection of the rights, freedoms and legitimate interests of participants in criminal proceedings; ensuring that no person is subjected to unjustified procedural compulsion and that due process of law be applied to each participant of criminal proceedings, being the direct purpose of the investigating judge); (b) those whose achievements are indirectly secured by the activities of the investigating judge (protection of the individual, society and the state from criminal offenses; ensuring a prompt, complete and impartial investigation and judicial review so that everyone who committed a criminal offense be held accountable to the extent of their guilt and no innocent person be accused or convicted).

In the context of consideration of the issue of the investigating judge's jurisdiction and its limits, it should be pointed out that there are limits of a different legal nature in

the investigating judge's jurisdiction. In particular, it is appropriate to refer to both the external limits of jurisdiction (which provide an opportunity to distinguish between the jurisdiction of an investigating judge and the jurisdiction of other entities involved in criminal proceedings), and the internal limits of the jurisdiction of courts, the jurisdiction of investigating judges by territoriality, and the jurisdiction of investigating judges of one court, factoring in possible specialization, etc.

The investigating judge's jurisdiction as a subject of criminal proceedings is determined only by the Criminal Procedure Code of Ukraine (part 3 of Article 26), and Article 9 of the Criminal Procedure Code of Ukraine excludes the influence of other laws on the determination of the powers of the subjects of the criminal process, since it contains a peremptory requirement that a law that is contrary to the Criminal Procedure Code of Ukraine cannot be applied. The legislator clearly outlined the role of an investigating judge in the criminal justice system: to ensure that law enforcement authorities do not violate the rights, freedoms and interests of a person upon exercising their powers. This task can justify various powers of the investigating judge, aimed at ensuring the rights, freedoms and interests of individuals, even if they are not clearly stipulated by law. An example of such powers can be found in Article 206 of the Criminal Procedure Code of Ukraine, when legislation requires an investigating judge to "take necessary measures" without defining a list of such measures. However, even with the broadest understanding of the role of the investigating judge, it is impossible to agree with it on the right of the investigating judge to expand – in comparison with the law – the powers of state bodies and officials. The investigating judge can only limit the use of powers already granted to them by law in a particular case, proceeding from the circumstances of the case.

CONCLUSIONS

The analysis of the current statutory model of judicial and criminal activity in criminal proceedings suggests the following conclusions. To date, the general theory of jurisdiction and criminal procedural science has proved that the jurisdiction of the governmental subject includes a number of structural elements: 1) statutorily set goals; 2) subject matter as the legally defined spheres and objects of influence; 3) authoritative powers as a law guaranteed measure of decision-making and taking action; 4) responsibility for non-implementation of the decisions of the subject with the respective competence. The specified structure of competence, being extrapolated to the investigating judge's jurisdiction, not only provides heredity as a principle of scientific knowledge development, but also offers a comprehensive look at this issue, revealing both the specificity of the legal nature of the competence of the investigating judge, and theoretical and applied aspects that require scientific comprehension. The meaning of criminal procedural legislation in a democratic country is to balance this legitimate interest in the investigation of crimes with other – equally important – values and interests of society: protection from excessive state inter-

ference in the private sphere, protection against arbitrariness, the value of personal freedom, and prevention of humiliation of dignity, values of family ties, freedom of entrepreneurial activity, etc. The scientific novelty of the study is determined by the fact that the author obtained new results in the form of a set of scientific conclusions about the structure of the investigating judge's jurisdiction.

The conclusions and proposals presented herein can be used for research purposes – for further processing of the subject of structure and limits of the investigating judge's jurisdiction; in legislative activity – upon improving the current Criminal Procedure Code of Ukraine; in law enforcement – to assist practitioners in the application of the law and the formation of law enforcement practice; in the educational process – in the preparation of textbooks, teaching guides and methodological materials on the criminal process, upon teaching the course of the criminal process and other educational disciplines.

REFERENCES

- [1] Hlovyuk, I. V. (2009). Permissible function of the court in pre-trial proceedings: the order of implementation. *Journal of the Academy of Advocacy of Ukraine*, 2. Retrieved from <http://e-pub.aau.edu.ua/index.php/chasopys/article/view/612>.
- [2] Popelyushko, V. O. (2017). Investigating judge in criminal proceedings. *Journal of the Ostroh Academy National University. Law Series*, 9(1). Retrieved from http://www.irbis-nbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?I21DBN=LINK&P21DBN=UJRN&Z21ID=&S21REF=10&S21CNR=20&S21STN=1&S21FMT&C&S_21SOM_&S21Chasp_2014_1_15.
- [3] Shilo, O. (2018). Competence of Investigating Judge in Criminal Proceedings: Theory, Normative Model and Trends in Legislation. *Law of Ukraine*, 3, 79-91.
- [4] Zavtur, V. A. (2019). Consideration and resolution of investigating judge and court of appeals on establishment of procedural time limits in criminal proceedings: conceptual bases of the regulatory model. *Actual Problems of Domestic Jurisprudence*, 2, 153–159.
- [5] Siza, N. P. (2012). The powers of the investigating judge to exercise judicial control in criminal proceedings in Ukraine. *Journal of the Ostroh Academy National University. Law Series*, 2(6). Retrieved from <https://lj.oa.edu.ua/articles/2012/n2/12snpkpu.pdf>.
- [6] Skibitsky, B. A. (2016). Powers of the investigating judge in criminal proceedings. *Bulletin of the Lviv Trade and Economic University. Law*, 3, 209–216.
- [7] Nagachevsky, S. V. (2015). Functions of the investigating judge during the pre-trial investigation. *Scientific Bulletin of Lviv State University of Internal Affairs*, 3, 301–310.
- [8] Rudenko, V. (2013). Procedural Status of Investigating Judge. *Word of the National School of Judges of Ukraine*, 3(4), 71–78.
- [9] Seleznev, V. A., Kondrich, V. V., & Adabash, S. A. (2019). The powers of the investigating judge of the High Anticorruption Court. *Law and Public Administration*, 2(35), 105–108.
- [10] Bakyt, A. (2016). Authorization of the barring order by the investigating judge: Problems of legislative regulation. *Journal of Advanced Research in Law and Economics*, 7(5), 989–994.
- [11] Taipale, J. (2019). Predefined criteria and interpretative flexibility in legal courts' evaluation of expertise. *Public Understanding of Science*, 28(8), 883–896.

- [12] Lobjko, L. M. (2006). *Criminal procedural competence*. Dnipro: Dnipropetrovsk State University of Internal Affairs.
- [13] Lebedev, N. Y., & Lebedeva, Y. V. (2019). Managerial competencies of an investigator and the specifics of their implementation in crime investigation. *Russian Journal of Criminology*, 13(6), 1017–1024.
- [14] Letter from Isaac Newton to Robert Hook. (1676). Retrieved from <http://thuban.spruz.com/gfile/>.
- [15] Polukhovich, O. I. (2017). *Judicial control in conducting unspoken investigative (search) actions*. Kharkiv: Yaroslav Mudryi National Law University.
- [16] Pestsov, R. G., Ryabovolenko, I. V., Kitsan, Y. I., Melnyk, R. V., & Kravchuk, O. V. (2018). Magistrate's courts in the criminal justice system. *Journal of Advanced Research in Law and Economics*, 9(7), 2403–2407.
- [17] Vapniarchuk, V. V., Trofymenko, V. M., Shylo, O. G., & Maryniv, V. I. (2019). Standards of criminal procedure evidence. *Journal of Advanced Research in Law and Economics*, 9(7), 2462–2470.
- [18] Pohoretskyi, M. A., Serhieieva, D. B., & Starenkyi, O. S. (2019). Expert's findings in criminal proceedings on environmental crimes. *Naukovyi Visnyk Natsionalnoho Hirnychoho Universytetu*, 1, 155–163.
- [19] Tukhtasheva, U. (2019). Judicial system in the criminal proceedings in some CIS Countries. *International Journal of Innovative Technology and Exploring Engineering*, 9(1), 3193–3208.
- [20] Vapniarchuk, V. V., Puchkovska, I. I., Tavolzhanskyi, O. V., & Tashian, R. I. (2019). Protection of ownership right in the court: The essence and particularities. *Asia Life Sciences*, 2, 863–879.

Svitlana L. Sharenko

PhD (Law), Associate Professor

Associate Professor of the Department of Criminal Procedure

Yaroslav Mudryi National Law University

61024, 77 Pushkinska Str., Kharkiv, Ukraine

Chairman of the Kiev District Court of Kharkiv, judge

61168, 7-B Valentinovskaya Str., Kharkiv, Ukraine

Suggested Citation: Sharenko, S. L. (2019). General approaches to characterizing the structural elements of the jurisdiction of an investigating judge in criminal proceedings. *Journal of the National Academy of Legal Sciences of Ukraine*, 26(4), 194–208.

Submitted: 27/05/2019

Revised: 29/10/2019

Accepted: 26/11/2019