**Karolina Kremens, LL.M., Ph.D. Faculty of Law, Administration and Economics University of Wroclaw (Poland) email: karolina.kremens@uwr.edu.pl website: https://prawo.uni.wroc.pl/user/15630**

**Prosecutorial or Judicial Powers to Issue Search Warrants**

**During Criminal Investigation in Comparative Perspective**

Significant importance must be attached to search as an example of investigative action aimed at discovery of evidence. Failures in conducting lawful and reasonable searches have direct impact on admissibility of evidence during trial. Nonetheless, search in its nature significantly interferes with rights of individual such as right to privacy, personal inviolability and inviolability of home. For that reason, legal provisions concerning search must be shaped in a way that will reconcile effectiveness of investigation and adequate protection against unreasonable searches and unlawful interference with individual’s rights and freedoms to that matter. One of such regulations is a question of legal authority empowered to order searches that will successfully safeguard rights of individual.

It is almost unquestionable rule in common law countries that issuing search warrants remains exclusively in hands of the judge (magistrate). Despite the quite common practice of conducting searches without a warrant by police, if the search warrant must be issued it has to be done by the proper judicial official. This is based on a premise that only the detached scrutiny of a neutral magistrate is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in criminal investigation (see *United States v. Chadwick*).

However, what may seem as an undisputable imperative in one system, can be frequently questioned in another. Continental criminal procedure seems less coherent when it comes to this issue. Some Continental countries (Italy and Poland) accept the idea of prosecutor being exclusively responsible for issuing search warrants during criminal investigation. This is justified by a strong involvement of the prosecutor during that stage of criminal process in these countries. Surprisingly, it does not raise too many eyebrows, even though the neutrality of the prosecutor, supervising law enforcement officers while undertaking the decision to search, may be easily questioned. In Italy – the state that position prosecutors as equal to judges making them a part of judicial branch – this is overcome by the myth of an inherent independence of such authority, which allows prosecutors to make as neutral decision as judges would undertake. In Poland – country that rather leans toward associating prosecutor with executive branch – the law provides for judicial review upon individual’s request in accordance with ECHR case law (for lack of compliance with which Italy has been criticized by the ECHR – see *Brazzi v. Italy*). At the same time Germany – state that appears as the most traditional Continental country and that has prosecutor similarly positioned in charge of criminal investigation – provides for different resolution by which search warrants are exclusively issued by judges (*Ermittlungsdurchsuchung*). This shows the lack of coherence and calls for identification of reasons standing behind such diversity.

In practice however, majority of searches happen without a warrant upon immediate decision of the competent police officer (in case of Germany also prosecutor). For such case, the Continental system provides some additional safeguards that are unknown to common law system. In every case the prosecutor must subsequently confirm conduct of such warrantless searches (Italy, Poland) or such search may be controlled by the power of judicial review upon individual’s request (Germany) while the common law system (US) does not provide similar protection, unless the evidence seized during a search is to be used in a trial. This means that in every case in Continental system, at least in theory, a person that questions legality and proportionality of warrantless search conducted at the early stage of criminal process has a right to a second look at the reasons that provoked the search.

The goal of this study is to provide the descriptive analysis of distinct resolutions to the problem of authority responsible for issuing search warrants during criminal investigation as they appear in the law of selected Continental and common law countries (Part I).

Accordingly, the summary of the major similarities and differences of these systems will be made with an aim to identify these resolutions that provide the best protection for a person against unreasonable and disproportionate searches (Part II).