

GUARANTEES OF LEGALITY IN THE IMPLEMENTATION OF ACTIVITIES OF A COVERT NATURE BY CRIMINAL POLICE UNITS

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ABSTRACT

Description: The article is devoted to determining the state of scientific research of the guarantees of legality during the implementation of covert investigative measures by criminal police units of Ukraine. Research methodology. During the research general scientific and special methods were used, in particular: logical method, analysis and synthesis method, monographic method is used in studying the researches of a number of scholars dedicated to this issue, normative and dogmatic method, system and structural method, method of summarization. Results of the Study. Scientific works of the scholars devoted to some problematic aspects of conducting covert investigative measures by criminal police units are studied. Normative and legal acts of Ukraine regulating the issue under consideration are examined. Practical implication. It is determined that there are a number of constitutional guarantees for ensuring the rights and freedoms of individuals in conducting covert investigative measures, which prevent abuses by law enforcement agencies. Besides, national legislation contains a set of provisions aimed at protecting privacy and respecting the rights and freedoms of citizens in this area. Value /originality. Some particular aspects of the principle of respect for legality in the course of conducting covert investigative measures by criminal police units, which need further development, are determined.

Keywords: Legality, Investigative Measures, Criminal Police Units, Covert Actions, Constitutional Guarantees.

INTRODUCTION

At the present stage of Ukraine's formation as a European state, a set of strategic measures aimed at economic development in the context of European integration (Yunin et al., 2018), overcoming poverty and combating crime is being implemented. Today, Ukraine prioritizes the work of the National Police in combating latent, organized, interregional and ethnic crime (Sevruk, 2016). The practice shows that crime is becoming more complex every year, and the mechanism of committing crimes and the ways to counteract law enforcement agencies become more sophisticated and developed.

At the same time, law enforcement officials interviewed indicate that the mechanism of recording criminal activity is also complicated, in particular in the context of the need to use the complex of both operational and covert investigative (search) measures, which will later acquire the status of full material evidence. For example, drug and corruption offenses cannot be fully recorded without the use of such a variety of operational and covert investigative (search) measures as audio and video surveillance, because it is the results of these measures that will provide an objective picture of the preparation or conduct of an offense. At the same time, the practice demonstrates frequent violations of legal rights and freedoms of the person and third parties during audio and video surveillance, i.e. there is a violation of legality of these measures in the context of tactical principles.

The activities of the units of the National Police of Ukraine are based primarily on ensuring guarantees of the legality of such activities. Thus, the Constitution of Ukraine and the Laws of Ukraine define the basis of the legal status of all participants of law enforcement activities, determine their powers and responsibilities. That is, the functioning of law enforcement, in particular the criminal police units of the National Police of Ukraine are unthinkable without clear legislative definition of the rights and responsibilities of all persons involved in criminal investigations and criminal proceedings, which are based on the principles of freedom, equality and are of universal nature. However, the analysis of the practical activities of the units of the National Police, in particular criminal police units, indicates the presence of certain violations of current legislation in the implementation of operational and investigative activities (Odarchenko, 2017). Accordingly, the aim of the Article is to investigate the guarantees of legality during the implementation of covert measures by criminal police units.

MATERIALS AND METHODS

During the research general scientific and special methods were used. Thus, logical method helped to study the institution of legality in the course of conducting investigative measures by criminal police units. The analysis and synthesis method makes it possible to define particular aspects of the principle of respect for legality in the course of conducting covert investigative measures by criminal police, which need further development. Monographic method is used in studying the researches of a number of scholars dedicated to this issue. Normative and dogmatic method is applied when analyzing legal acts regulating the issue under consideration. System and structural method is helpful in identifying the constitutional guarantees in ensuring the rights and freedoms of individuals in conducting covert investigative measures, which prevent abuses by law enforcement agencies of Ukraine. The method of summarization is used for making the relevant conclusions.

The studied materials are the legislation of Ukraine, as well as the works of Ukrainian and foreign scientists, who have studied the investigated issue.

RESULTS AND DISCUSSION

The importance of ensuring human rights and freedoms is due to the requirements of the Constitution of Ukraine, which are manifested in the fact that life and health, honor and dignity, inviolability and security of the person are recognized as the highest social value. Human rights

and freedoms, their guarantees are the content and objectives of State activity. Ukraine is accountable to the people for the activities of its public authorities. The promotion and protection of human rights and freedoms is the main responsibility of the State. In this context, Bandurka (1996) examines the issues of legal regulation, analyzes the legal basis of operational and investigative activities in detail.

The National Strategy for Human Rights and the Action Plan for its implementation have given rise to some summaries of the inclusion of clearly essential strategic documents in the public policy agenda. After all, the priority of human rights and freedoms in decision-making by public authorities and local governments determine the purpose of their activities. To ensure the effective implementation of the National Strategy in the area of human rights and the actual implementation of the Action Plan for its implementation, the Ukrainian Helsinki Human Rights Union with the support of the Parliamentary Commissioner for Human Rights established a Public Monitoring Platform, which includes about 70 NGOs and independent experts (Bushchenko & Kryklyvenko, 2016).

According to Art. 3 of the Constitution of Ukraine (Law of Ukraine, 1996) the human being, his or her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. It is the prevention and cessation of unlawful encroachments on the basic inalienable human rights and freedoms aimed at operational and investigative activities, which is a kind of guarantee from the State for their inviolability.

There is a number of constitutional guarantees and legitimacy in ensuring the rights and freedoms of individuals, which prevent abuses by law enforcement agencies of Ukraine: 1. Prohibition of torture, cruel, inhuman or degrading treatment or punishment. 2. Ensuring the right to liberty and security of person. 3. Ensuring the right to a fair trial. 4. Ensuring the right to privacy. 5. Ensuring freedom of thought and speech, expression of views and beliefs, access to information and free development of personality. 6. Ensuring freedom of peaceful assembly and association. 7. Ensuring the right to participate in the management of public affairs and elections. 8. Ensuring the right to work and social protection. 9. Creating conditions for freedom of entrepreneurial activity. 10. Ensuring the right to health care. 11. Ensuring the rights of the child. 12. Ensuring the right to education. 13. Raising awareness in the area of human rights. 14. Combating gender-based violence, human trafficking and slavery. 15. Combating domestic violence. 16. Ensuring equal rights and opportunities for women and men. 17. Prevention and counteraction of discrimination. 18. Ensuring the rights of indigenous peoples and national minorities. 19. Ensuring the rights of participants in the anti-terrorist operation. 20. Ensuring the rights of internally displaced persons. 21. Release of hostages and restoration of their rights. 22. Taking the necessary measures to protect the rights of persons residing in the temporarily occupied territory of Ukraine. 23. Ensuring the rights of citizens of Ukraine living in Donetsk and Luhansk regions, on whose territory the public authorities temporarily do not exercise or do not fully exercise their powers. 24. Ensuring the rights of refugees and persons in need of additional protection, as well as foreigners and stateless persons, who are legally in Ukraine.

This is not an exhaustive one. National legislation contains a set of provisions aimed at protecting privacy and respecting the rights and freedoms of citizens in this area. The Criminal Code of Ukraine (Law of Ukraine, 2001) occupies the main place among the legislative provisions that ensure the protection of the privacy of citizens and their inviolability. It establishes criminal liability for unlawful entry into residence or any other property of a person,

or unlawful examination or search thereof, and also unlawful eviction or any other actions that violate the security of a citizen's residence (Article 162), Violation of privacy of mail, telephone conversations, telegraph and other correspondence conveyed by means of communication or via computers (Article 163), Illegal collection, storage, use or dissemination of confidential information about a person without his/her consent, or dissemination of such information in a public speech, publicly demonstrated work, or mass media (Article 182), Illegal use of special technology for secret obtaining of information (Article 359), as well as for illegal actions under Section XVI of the Criminal Code of Ukraine “Criminal offenses related to the use of electronic computing machines (computers), systems and computer networks and telecommunication networks”. In addition to the guarantees of substantive content, national legislation also contains a number of procedural guarantees that provide effective protection of privacy from unauthorized interference (Abroskin 2020).

Ukraine has positioned itself and established itself as a country with a high level of tolerance and interethnic mutual respect. It strictly adheres to its obligations under both national and international law. As a multi-ethnic State and proud of the cultural, linguistic and religious diversity of its citizens, Ukraine always cares about the inviolability of the foundation of the ancient tradition of tolerant and peaceful coexistence of different nationalities and the creation of appropriate conditions to protect their rights. Having chosen the path of building an open democratic legal society, Ukraine, as a European country, has studied and applied the international experience of protecting the rights of national minorities in its legislation. Ukraine occupies one of the leading positions in Europe according to the level of legal provision of fundamental rights and freedoms of national minorities (Council of Europe, 2018).

Ukraine had formed strong legal framework for the harmonious combination of the interests of all ethnic components of Ukrainian society in the first years of independence and ensured equal conditions for their national development. The legal basis in the area of interethnic relations and protection of the rights of national minorities was laid by the Declaration of State Sovereignty of Ukraine and the Declaration of the Rights of Nationalities of Ukraine. These fundamental documents formulated the principles, on which ethno-national policy is built: respect and equality of the rights of Ukrainian citizens of different nationalities, and the prohibition of discrimination on the basis of nationality. Subsequently, the guarantees for the rights of national minorities are enshrined in the Constitution of Ukraine and found their development in a number of other legislative and regulatory acts (Sevruk 2018).

First of all, it should be noted that the legality of law enforcement activities has been under the attention of scholars for many years. For example, Kravchuk (2002) defines that legality is a regime, such a state of society, which is characterized by strict implementation, compliance by all participants in public relations with the requirements of legal and regulatory instruments.

According to experts in the field of operational and investigative activities, legality in this area is a normative requirement that obliges the actors of investigative activities, as well as all persons involved in the relevant tasks, to strictly and accurately comply with all provisions of the Constitution of Ukraine, current operational and investigative, criminal and criminal procedural legislation. For example, when discovering information on the persons of operational interest, it is important not to violate or limit the scope of confidentiality of personal information, secrecy of family and personal life, respect for human honor and dignity. That is, given the above, we can

conclude that compliance with the law when conducting investigative or procedural activities is not only the duty of law enforcement, but also a mandatory element of such activities in general.

Such guarantees are reflected in a number of provisions of the Law of Ukraine "On investigative activities" (Law of Ukraine, 1992). For example, Art. 9 of this Law directly enshrines the guarantees of legality during the implementation of investigative activities; Art. 5 clearly defines the units authorized to carry out investigative activities; Art. 6 specifies the grounds for investigative activities; Art. 8 regulates the rights of units carrying out investigative activities, etc. Besides, this Law describes the mechanisms of investigative activities in general and, accordingly, the conditions and procedural aspects of certain investigative measures that temporarily restrict constitutional human rights. State guarantees of compliance with the law when conducting operational and investigative activities are implemented through judicial and departmental surveillance, prosecutorial oversight of their conduct, bringing officials of operational units to various types of legal liability in case of violation of legal norms, etc. All this contributes to the effectiveness of the principle of legality in investigative activities, which is a fundamental one. The other principles to some extent serve as a manifestation of the principle of legality and, accordingly, violation of any of them will mean violation of this principle in general (Abroskin 2020).

Holdberg (2017) explored theoretical and organizational and tactical principles of ensuring the constitutional rights and freedoms of citizens in conducting covert investigative actions. In particular, he studied the criminal procedure legislation of Germany, England, South Africa, USA, Japan on the application of covert measures restricting the constitutional rights of citizens by the relevant bodies of investigation of these countries and came to the conclusion that international standards to ensure the rights and freedoms of citizens in conducting covert activities have served and continue serving as a general standard in the development of State policy in the area of criminal proceedings.

The scientist proves that the developed countries of the world community, in general, adhere to common principles, standards and approaches when conducting covert actions (despite the differences in the legal systems), which allows to speak about the legality of when conducting such activities, namely: 1) covert actions are carried out on the basis of legislative acts that are publicly available. Thus, the persons in respect of whom these actions are performed, are able to verify the legality and legitimacy of their conduct; 2) the legislation of the countries provides for an exhaustive list of crimes, in the presence of which it is possible to perform covert actions; 3) the actual basis for performing these actions is the grounds to suspect a person in committing serious offense; 4) the restriction of the rights of citizens through covert actions is possible at the request of a certain official, who is determined by the legislation; 5) covert actions are carried out only with the permission of the judge; 6) there are certain restrictions on conducting such covert action as wiretapping, namely: the court's permission shall indicate the period during which it is valid; 7) the legislation provides for the circumstances under which the information received should be destroyed; 8) prohibition of the competent authorities to disseminate information which has been collected.

Matsak (2018) notes that compliance with the law during the audio and video surveillance of a person is provided by a large number of regulations. The determination of a binding judicial authorization for the conduct of these types of investigative measures is common to them. Analyzing and systematizing the results of criminal police officers survey, it can be

concluded that nowadays the main legally unregulated issues of guarantees of legality during audio and video surveillance of a person are: 1) the order of extracting of information on the third parties from materials collected in the course of on audio and video surveillance is not enshrined in any legal act of Ukraine ; 2) rather fragmentary legislative enshrinement of the procedure for involving of confidants or persons who confidentially cooperate with the police in audio and video surveillance of a person's; 3) the lack of legislative consolidation of the possibility of using in exceptional cases not only specialized equipment, which is on the balance of the National Police or the Ministry of Internal Affairs of Ukraine, but also other technical devices.

That is, given the radical changes in criminal procedure and investigative legislation, it can be stated that the issue of legality when conducting covert investigative activities by criminal police units is not sufficiently studied nowadays; especially, it concerns the following aspects:

1. International experience of ensuring legality in the implementation of covert investigative activities;
2. Modern ways to improve legal regulation of the guarantees of legality during the implementation of operational and investigative activities by criminal police units;
3. Organization of observance of guarantees of legality in the conduct of covert investigative activities by criminal police units (Odarchenko, 2017).

CONCLUSION

According to statistics, most serious and especially serious crimes are committed in conditions of invisibility with signs of latency, and therefore, the focus of law enforcement is on increasing the effectiveness in identifying not only the perpetrators of such crimes, but also the circumstances of their commission. In particular, respondents indicate the difficulties in establishing information about witnesses, the discovery of physical evidence, evidence of guilt of the person, the ways to disguise criminal activity, etc.

Given the above, it is not surprising that most often law enforcement officers use covert, operational and investigative measures and opportunities to perform these tasks, in particular, the types of measures of operational search of primary operational and investigative information permitted by current legislation. However, quite often police officers violate the basic principles of operational and investigative activities, in particular the principle of legality when performing covert measures. Therefore, it should be noted that the implementation of the principle of legality in the course of investigative activities lies not only in preventing violations of applicable law in the enforcement process, but also covers surveillance and management activities aimed at ensuring the rights and freedoms of individuals, the rule of law and other principles of the constitutional State.

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