USE VS. ABUSE OF SPECIAL INVESTIGATIVE MEASURES IN DETECTING SEVERE FORMS OF CRIME IN REPUBLIC OF MACEDONIA

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Abstract

The reformed Macedonian penal judiciary system is as concept a result of adjusting the development of the social system, which originated more than a century ago. Throughout the long history the penal system was, more or less successfully, adjusted to significant historical, political and social changes. The point of reference for the penal and legal reform is harmonization with the international standards on human rights and constitutionalism on one hand, and the increase of crime and corruption on the other. The development of the international law on human rights also had influence on the increase of the penal and legal protection, which resulted in harmonization of our legislation by embedding the international norms on human rights. The European Convention on Human Rights, which is considered to be the main instigator of the reforms of the penal procedure in the last ten years, also had significant influence on the law and the legal practice. With reference to a clearly defined and consistent reform concept, corroborated by solid comparative and empirical examinations, and comparisons with foreign experience, successful reforms of the penal judiciary have been initiated in the Republic of Macedonia. Comprehensive reform of the penal system must be planned and carried out exclusively based on rational and confirmed means and methods of detection, and elimination of all dysfunctional elements of the organization and the operation of the public prosecution, police and judiciary.

Keywords: Reform, incriminations, special investigative measures, crime

Introduction

Inclusion of special methods, that is, investigative activities in the penal and criminal legislation, for efficient legal and state control over the organized crime and sophisticated forms of terrorism and espionage is a relatively new aspect in the comparative and the international law. On one hand, it is recognized that the methods of secret surveillance, recording and wire-tapping are real threat for democracy and the human rights although performed in the name of their protection. On the other hand, there is strong awareness that democratic societies today are threatened by sophisticated forms of crime, espionage and terrorism. Therefore, states must provide means for efficient resistance to such threats. There should be a reasonable compromise between the requirements for protection of a democratic society and the individual rights. The main idea is to legally regulate certain actions of the state bodies, which may vitally interfere with the civil rights and freedoms, for the purpose of protecting the latter from abuse and using the results as evidence during the procedure.[200]

[200] Given the level of classification of data according to the Law on Classified Data, in the course of creation of this work it was impossible to use statistical method or present any statistical data. In the course of creation of

The penal and criminal procedure reform, characterized by introducing new procedure and evidential rules and special investigative measures for detection and prosecution, is by all means the sole possible response to the increased danger from organized crime and its paralyzing influence over the penal justice system. The first Macedonian Law on Criminal Procedure was adopted on the session of the Assembly of the Republic of Macedonia on 26 March 1997.

The first phase[201] of the reform of the Macedonian penal criminal law aimed to harmonization with the most relevant international documents concerning human rights. The necessity of severe reforms of the penal criminal law area was identified in the Strategy for Reform of the Judicial System of the Republic of Macedonia of November 2004.[202] The general goal is to build a functional and efficient justice system based on the European legal standards[203]. The two key objectives to be achieved by such judiciary reform are to enhance its independence and increase its efficiency. Benchmarks (courses) of the reform are the following: increase the application of the principle of expedience of criminal prosecution; promote extra-judicial settlement[204] and simplified procedures; abandon the court paternalism by transferring the burden of proving to the clients; provide proactive and leading role of the public prosecution in the pre-criminal procedure along with efficient control over the police forces; abolish the court investigation and take over the pre-criminal procedure from the public prosecution[205]; introduce a system of preclusions for certain criminal procedure actions and measures against abuse of criminal procedure authorities of clients; strict deadlines for rendering and writing the verdict; rationalize the system of legal remedies; implement the penal procedure recommendations of the EU and the Council of Europe; create efficient public prosecution and introduce a new operational and managerial structure as well as management and cooperation with the police and the other law enforcement organs.[206]

The Law on Criminal Procedure has endured significant amendments in 2004 when the Law on Modification of the Law on Criminal Procedure was adopted by the Assembly of the Republic of Macedonia on the session held on 14 October 2004.[207] This novelty was of great significance both from the aspect of its volume and from the aspect of the new institutes that were regulated and further development of the existing penal criminal institutes. By the novelty to the Law on Criminal Procedure of 2004 a number of innovations have been introduced regarding the following: legalization of "special investigative measures" in detecting and prosecuting organized crime and other severe forms of crime; higher powers to the public prosecutor in the course of the pre-investigative procedure and extension of the principle of expedience; introduction of temporary measures of freezing and temporary confiscation of property, and other temporary measures; measures for acceleration of the

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this work the following methods were used: method of contents analysis, induction and deduction, comparative method, and synthesis and generalization.

[201] Nikola Matoski, *"First phase of the Macedonian penal criminal legislation"*. Macedonian review on penal law and criminology, year 2, no. 1-3, (2004); 151-167

[202]Gordan Kalajdziev,*"Human rights and the penal procedure model,"* Macedonian review on penal law and criminology, year 1, no. 1, (1994); 139-141

[203] Nikola Matoski, *"Necessity of reform of the Macedonian criminal legislation*", Macedonian review on penal law and criminology, year 1, no. 1, (1994); 50-67

[204]Gordana Buzarovska, *"Concepts of settlement and admission of guilt of the reform of the penal criminal legislation"*. Skopje: Faculty of Law "Justinian Primus, Symposium, 2008, 139-165.

[205]Gordan Kalajdziev, *"Pitfalls and misbeliefs of the investigation reform*", Skopje: Faculty of Law "Justinian Primus, Symposium, 2008, 65-171.

[206]About the necessity of a new strategy: Vlado Kambovski, "Organized Crime". Skopje: 2-August, 2005, 349-390.

[207]Law on Amendment of the Law on Criminal Procedure, Official Gazette of RM 74/04, Refined text of the Law on Criminal Procedure, Official Gazette of RM 15/2005

penal procedure; resolution of property claims in the penal procedure, and modifications of the special procedures for application of confiscation measure as well as the provisions for international cooperation and cooperation with the international court instances.

Modifications are in the spirit of the goals of the Strategy for reform of the penal law of 2007. Objectives of the reform are: modernization of the criminal procedure and its compatibility with the European legislations; acceleration of the criminal procedure, and organizational and functional improvement of the public prosecution.

The Law on Criminal Procedure was modified again in 2008.[208] Important modifications were made of the provisions regulating the special investigative measures. Namely, the possibility increased those measures to be used by the court in cases when there is reasonable suspicion that a crime is being prepared or perpetrated or has been perpetrated. Regarding the severity of crimes a dual approach was accepted: the first category includes crimes which hold a sentence of up to four years imprisonment, and crimes perpetrated by an organized group, gang or another form of criminal organization; the second category includes criminal acts classified by name.

In order to make the national penal law compatible with the European law and able to respond successfully to the challenge of the combat against the organized crime, the criminal procedure structure must be modified completely. This not only calls for modification of the structure of the procedure, but also of the powers and the organization of the main actors. Accordingly, the pre-criminal procedure will adapt to the modern European trends, where the police, public prosecution and courts will play significantly different role compared with the current. The institution "investigative judge" is abolished and replaced by "pre-criminal procedure judge" with significantly different function - instead of being an active investigator the judge will be only a controller of legality of the measures interfering with freedoms and rights as well as the legality of the collected evidence. Beside the extensive modifications in the legislation and the organization this calls for modification of the habits and the mentality of the national judges and prosecutors.

Special investigative measures on human rights in the European law – The Strasbourg Court of Human Rights recognizes that the special investigative measures are necessary instruments of the criminal prosecution organs in a modern democratic society and adequate means for crime prevention; however, if their application is not legally regulated a danger may occur of undermining or even devastation of democracy, with justification that it has been done to defend it. Therefore, the states are required to provide clear evidence about the necessity of application of such measures, and to create a legal frame that will provide appropriate and efficient protection against abuse. In this regard, the Court points out that various investigative techniques, such as surveillance of telephone calls and mail; telephone call processing (ingoing or outgoing calls made from a telephone); pager monitoring; use of secret wire-tapping devices and video surveillance are *prima facie* violations of the right to justness and require justification in compliance with article 8 (paragraph 2) of the European Convention of Human Rights. The same treatment applies to all other investigative techniques used for surveillance in police stations, working premises and, of course, homes.

The provision of article 8 paragraph 2 of the Convention permits a state to violate the general right to privacy, proclaimed in paragraph 1 of the same article, to prevent a crime or in interest of the national security. Jurisprudence of the Court in Strasbourg leads to a conclusion that the state "is for the most part capable of showing and justifying the goal" of the application of special investigative measures; however, it is more difficult to prove that interfering with a private life "was necessary in a democratic society", and that it "was in

[208]Law on Criminal Procedure, Official Gazette of RM 83/08

compliance with the law". The state has to cumulatively satisfy both requirements in order to make its intervention compliant with the Convention.

Special investigative measures in the national law - Special investigative measures may be ordered for crimes which hold a sentence of up to four years imprisonment, and crimes which hold a sentence of up to five years imprisonment, when there is reasonable suspicion that a crime is being prepared or perpetrated or has been perpetrated by an organized group, gang or other form of criminal organization as well as crimes against the state, crimes against humanity and international law stipulated in the Criminal Act.

The Law on Penal Procedure determines the types of special investigative measures and their goal. According to the Law, they are taken when it is likely that their application will provide data and evidence, which are necessary for successful course of the criminal procedure, and could not be provided otherwise. The following investigative measures may be taken:

1. Surveillance and recording telephone and other electronic communications in a procedure determined by a special law
2. Surveillance and recording in a home, closed or fenced area belonging to said home or business premises marked as private, or a private vehicle and entrance into the same premises, for the purpose of creating conditions for surveillance of communications
3. Secret surveillance and recording persons and items by technical means outside a home or business premises marked as private
4. Secret insight and search in a computer system
5. Automatic, or other, search and comparison of personal data
6. Insight into realized telephone and other electronic communication
7. Simulated purchase of items
8. Simulated offering and receiving bribe
9. Controlled delivery and transportation of persons and items
10. Use of undercover persons for surveillance and collection of information or data
11. Simulated opening a bank account
12. Simulation of registration of legal entities or use of existing legal entities for collection of data

Duration of application of special investigative measure is determined by law and may last no longer than four months. Continuation of the measures and recording telephone and other electronic communication, surveillance and recording in a private home, closed or fenced area or in a vehicle and entrance into those premises for creating conditions for surveillance of communication, secret surveillance and recording persons and items by technical means, secret insight and search in a computer system, may be authorized by the judge of the pre-criminal procedure for no longer than another four months upon prior written request of the public prosecutor. A public prosecutor or a judicial police under control of a public prosecutor is by law the authorized organ for implementing special investigative measures. The special investigative measures terminate when the goals are achieved. Data, notifications, documents and items obtained by application of special investigative measures may be used as evidence in a criminal procedure.

Use/abuse of special investigative measures in practice - According to the aforementioned application of special investigative measures may be analyzed from the aspect of their use, but also from the aspect of their abuse, including the element of insufficient knowledge about the essence, basics and the manner of application of such measures, for the purpose of detection, clarification and proving criminal acts.

Key theses derive from this. First, **higher efficiency in defeating severe forms of crime is achieved and abuse of the special investigative measures is eliminated by their**

precise legal regulation as well as qualification, training and effective coordination among authorized organs for their implementation (public prosecution, court and police). On the other hand, the following theses extend the main thesis:

- beside legal regulation, in order to facilitate the work and to eliminate any possibility of abuse there should be a list of sub laws to further specify the contents, methodology and the manner of application of special investigative measure and

- precise legal frame to facilitate communication and coordination between the executive, judicial and legislative power, and the democratic control, especially in regard to observation of civil freedoms and human rights at application of the special investigative measures

We assert the following arguments in favor of the aforementioned placed theses:

Argument 1: **Legal determination to application of the measures**. According to the Law on Criminal Procedure the evidence obtained by application of special investigative measures will be acceptable solely if they have been used in a manner and by procedure stipulated in the Law. According to the Law on Criminal Procedure this evidence must be made available to the defendant and his defense counsel to build the defense, as basic segment of the principle of fair trial and equality of means in a criminal procedure. Namely, if there is reasonable suspicion that a crime is being prepared or being perpetrated or has been perpetrated, which holds a sentence of up to four years imprisonment or a crime is being prepared or has been perpetrated by an organized group, gang or other form of criminal organization, taking special investigative measures may be ordered to provide information and evidence. In this manner severe crimes may be intercepted and prevented, which could have severe consequences both for the state and the citizens of the Republic of Macedonia.[209]

Argument 2: Institutional authority. The public prosecutor is authorized in a pre-investigative procedure to order the application of special investigative measures under conditions and in a manner stipulated by law. "In a pre-investigative procedure the public prosecutor shall decide by a written order in response to a written and well explained proposal of the Ministry of Interior regarding the application of special investigative measures, that is, in cases when the Ministry does not have any knowledge as to the identity of a perpetrator of a crime, for special investigative measures stipulated in article 142-b paragraph 1 items 3 to 8 of the Law on Criminal Procedure. When a written and explained proposal of the Ministry of Interior exists, it should be considered that it is not sufficient only to claim that the Ministry has information about a crime being prepared or perpetrated and it does not have any other way to provide evidence. The fact that application of special Investigative measures interferes with privacy must always be considered; therefore, these measures must be the very last resort for providing evidence. During an investigation, in compliance with article 142-g paragraph 1 of the Law on Criminal Procedure, only an investigative judge may issue an order. The order for application of special investigative measures shall be implemented by the Ministry of Interior, Customs Office and the Financial Police".[210] Having in mind the fact that these measures remain the sole legally approved derogation of the fundamental human rights and freedoms, since their application violates individual's privacy, they must be used with high caution in order to disable arbitrariness and abuse.[211]

[209] Available on www.sobranie.mk, (accessed on 14 May 2012). Shorthand report of session no. 146 of the Assembly of the Republic of Macedonia)

[210] Vilma Ruskovska and others. Handbook of special investigative measures-both domestic and international practice. Skopje: OBSE, 2010, 15.

[211] Available on http://www.mhc.org.mk/?Item ID=89F5D9C67BF512459C040C7FCE347736 (accessed on 14 May 2012)

Argument 3: The justification of application of special investigative measures stems from the characteristics of the organized crime. Characteristics of the organized crime such as high profitability, sophistication, organization, synchronization, coordination, internationalism, technical equipment and multi-specialization are very tightly connected with terrorism, money laundering, corruption, illegal trade, production and distribution of drugs, computer crimes, espionage and other crimes, which are grounds for application of special investigative measures.[212]

Argument 4: Efficient combat against severe forms of crime. Application of special investigative measures is necessary for efficient combat against severe forms of crime, especially in cases involving organized crime, although with strict adherence to some principles: necessity of high level of protection of the human rights and freedoms as stipulated in the Constitution of the Republic of Macedonia; restrictiveness of the use of special investigative measures; strict adherence to the legal form, and supervision of their application[213].

Argument 5: General prevention of the society. Application of special investigative measures increases the hope of deterrence of potential perpetrators. This hope increased even more with application of the total capacity for surveillance of communications, because adoption of the Law on Surveillance of Communications increased the probability of greater efficiency in detecting and prosecuting perpetrators of crimes.

On the other hand, counter arguments impose the fact that **in our country there is absence of standard, democratic and parliamentary control, and partial public surveillance over implementation of special investigative measures**. This allows certain political entities and parties to use the special investigative measures for their own goals, which continuously and totally impairs the general impression of possible control over these activities. Therefore, it is necessary to refer to comparative analysis of existing laws and regulations in order to find out who, when and by which procedure may be authorized to request and/or approve application of special investigative measures. A well-defined legal framework should provide efficient surveillance mechanism that would control the application of such measures and eliminate using them solely for political goals. In this manner, the application of special investigative measures will eliminate the abuse at achieving the goals such as timely detection, surveillance, observation and documentation of perpetrators of severe crimes or prevention and disabling various illegal activities of individuals, group and organizations.[214]

Therefore, the fact must be emphasized that insufficient knowledge of the organs applying the special investigative measures (lack of knowledge about the essence, the basics and the manner of application) as well as the weak democratic control of the state, caused their abuse for political and individual goals.

Conclusion

Worldwide experience is guidance for further legal specifying and correcting the application of special investigative measures, and developing the manners, methods and operational practice in application of the same by the authorized organs. Developing new experience and applying the existing positive experience of the states in establishing and operating the executive, judicial and legislative power will lead to appropriate use of special investigative measures through several phases. As we assert in the theses in favor of the use of special investigative measures, legal precision is achieved by adherence to the provisions

[212]Vlado Kambovski. Organized Crime. Skopje: 2-August, 2005, 396.
[213]Vilma Ruskovska and others. Handbook of special investigative measures-both domestic and international practice. Skopje: OBSE, 2010, 27.
[214]Milan Milosevic. National Security System. Belgrade: Police Academy, 2001, 195.

of the Law on Criminal Procedure being the grounds for their use. Next, the Law on Surveillance of Communications stipulates adoption of sub laws to further regulate the application of the measures. The fact is that to this point such sub laws have not been adopted, although the Law foresees adoption of the same within three months of the date the Law has gone into effect. Therefore, the sub laws have to be adopted as soon as possible in order to prevent arbitrariness and abuse. In other words, the standard procedures for approval and implementing special investigative measures are insufficient and not precisely defined. Therefore, it is necessary to present a list of public state organs and institutions authorized to approve and/or apply special investigative measures. Also, it is necessary to further specify the information as to how long and according to which selection criteria may these measures apply, and which type of technical means and equipment may be used. If we refer to the aforementioned counter arguments, the Law clearly indicates to the necessary control mechanism in the form of a commission for supervision of the implementation of measures for surveillance of communications by the Ministry of interior and the Ministry of Defense. Such commission was established in the Assembly of the Republic of Macedonia; however, it has not issued a single report on its work.

All this complicates the establishing and functioning of a standard democratic and parliamentary control, and partial public supervision, over the entities implementing this measure. Therefore, necessary bodies should be defined as well as the manner in which they should be established; the bodies should work in the spirit of supervision and control over the implementation of the special investigative measures as well as the implementation of all control mechanisms related to observation of civil freedoms and human rights.

In addition to the aforementioned, the civil servants should adhere to a professional code of ethics in order to achieve high level of professionalism in applying the special investigative measures (precisely defined, standard procedures of approval and implementation) and eliminating abuse of the same. Part of this professional ethics should be observation of every individual's right to live, but also taking coercive measures only in cases when it is necessary to secure a legitimate goal, and the coercion must not be more intensive than the one absolutely necessary and approved by law.

It is our belief that the end should not justify the means at any cost, because a legitimate goal must stem from legal means used for its realization. There must be balance between the combat against the organized crime as the ultimate goal of the state and the obligation to observe the human rights.

References:

Budjakoski Stefan. Criminal Law, general part. Skopje: IMZ - Institute for Knowledge Management, 2008.

Buzarovska, Gordana. Concepts of settlement and admission of guilt of the reform of the penal criminal legislation. Skopje: Faculty of Law "Justinian Primus, 2008.

Matoski, Nikola. First phase of the Macedonian penal criminal legislation . Macedonian review on penal law and criminology, year 2, no. 1. Skopje: 2004.

Matoski, Nikola. Necessity of reform of the Macedonian criminal legislation, Macedonian review on penal law and criminology, year 1, no. 1. Skopje: 1994.

Kalajdziev, Gordan. Human rights and the penal procedure model. Macedonian review on penal law and criminology, year 1, no. 1. Skopje: 1994

Kalajdziev, Gordan. Pitfalls and misbeliefs of the investigation reform". Skopje: Faculty of Law "Justinian Primus, 2008.

Kambovski, Vlado. Organized Crime. Skopje: 2-August, 2005.

Ruskovska Vilma and others. Handbook of special investigative measures-both domestic and international practice. Skopje: OBSE, 2010.

Milosevic, Milan. National Security System. Belgrade: Police Academy, 2001.
Vodinelic Vlado. Criminology, detecting and proving Vol 1 and 2. Skopje: Faculty of Security, 1985.
Constitution of the Republic of Macedonia. Official Gazette of RM 52/91, 1/92, 31/98, 91/01, 84/03, 107/05, 3/09.
Law on Surveillance of Communications. Official Gazette of RM 121/06, 110/08, 04/09.
Law on Amendment of the Law on Criminal Procedure, Official Gazette of RM 74/04, Refined text of the Law on Criminal Procedure, Official Gazette of RM 15/2005
Law on Witness Protection. Official Gazette of RM 38/05 и 58/05.
Police Act. Official Gazette of RM 114/06, 06/09.
Law on Free Access to Public Information. Official Gazette of RM 13/06, 86/08, 06/10.
www.sobranie.mk (accessed on 14 May 2012). Shorthand report of session no. 146 of the Assembly of the Republic of Macedonia
http://www.mhc.org.mk/?Item ID=89F5D9C67BF512459C040C7FCE347736 (accessed on 14 May 2012)