

Application of the Covert Measures with the Focus on Kosovo Legislation

Kadri ARIFI

AAB University, Kosovo

kadri.arifi@gmail.com

Abstract

The sophisticated forms of the organized crime, the high level of risk, complexity and threatening potential of the terrorism, impose the need (among other measures) for the application of covert investigative measures, among other the interception of telecommunications in order to prevent and combat these threats. Measures and traditional methods used by security institutions and law enforcement agencies do not provide adequate results and this raises the need and necessity for application of covert measures. In particular, the application of covert investigative measures for the security services as a measure, is necessary and essential for early detection and prevention of activities that affect the national security, while for the law enforcement agencies, the covert measures are used as a prevention and investigation measure of serious criminal acts and terrorism, but also as a measure to provide evidence for investigative processes. There is no doubt about the high sensitivity that the application of covert measures has in relation to human rights and freedom, respect and protection of which is the duty of the state and represents not an easy challenge for several reasons. In this regard, the application of covert measures should be limited by the law and their application in accordance with the law is a precondition for respecting human rights and freedom.

Keywords; Covert measures, Kosovo, law enforcement, legislation, human rights.

INTRODUCTION

Contemporary security challenges such as terrorism, organized crime, cybercrime, trafficking with narcotics, trafficking with human being, economic crimes and corruption challenges each country regardless their economic, political and military power or geographic position. Combating, investigation and prevention of these threats is becoming more and more complex because of a simple fact that the criminal and terrorist groups are using as an advantage the possibilities offered by development of science and technology, development of transport and communication tools, process of globalization and integration, free movement of goods, services and people as well. At the same time it is very clear that individuals, terrorist or criminal groups, or combination of both (narcoterrorism i.e.) perform their activities in total secrecy and it is very difficult for national security services and for law enforcement bodies to detect and prevent such dangerous activities.

Conventional policing methods which are mainly of a reacting nature are not sufficient to face these challenges, therefore applying covert measures necessary in the field of combating organized crime, terrorism, corruption and law enforcement in general as well as in the aspect of national security. At the same time, in order to use these measures only for legitimate purposes and prevention of any abuse, establishing a legal infrastructure and supervision mechanisms and democratic control is required. Because "to secret agencies for security and information are often given extraordinary competencies, such as approval of surveillance and security, that if used incorrectly or improperly, carry the risk of serious injustice against individuals"¹

LEGAL FRAMEWORK

The creation of legal framework has been and remains one of the main priorities of Kosovo's Institutions during the transition period and process of integration in euro atlantic structures. The very first step towards this direction is the approval of

¹ Born, Hans. & Leigh, Ian. Standardet ligjore dhe praktika më e mirë për mbikëqyrjen e agjencive të fshehta të informacionit, TOENA, Tiranë, 2005 pg. 111

constitution by the Kosovo Parliament which meets all international requirements and standards for the functioning of a democratic state. "The Constitution of Kosovo is in line with European standards, which require stability of institutions, guaranteeing democracy, the rule of law, human rights and respect and protection of minorities"¹

The Kosovo constitution on Chapter XI Security Sector, Article 125 General Policy, defines priorities in the field of security, the role of state security institutions, international cooperation, international conventions and democratic oversight. However "The parliament approval for establishing, mandating and competencies for security agencies is necessary but not a sufficient condition for providing a state of rule of law. The legal bases increases the legitimacy of the existence of these agencies as well as the competencies (frequently special ones) they have."²

The Kosovo constitution, on Chapter Chapter II Fundamental Rights and Freedoms, Article 22 Direct Applicability of International Agreements and Instruments, defines that human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions:

- (1) Universal Declaration of Human Rights;
- (2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (3) International Covenant on Civil and Political Rights and its Protocols;
- (4) Council of Europe Framework Convention for the Protection of National Minorities;
- (5) Convention on the Elimination of All Forms of Racial Discrimination;
- (6) Convention on the Elimination of All Forms of Discrimination Against Women;
- (7) Convention on the Rights of the Child;
- (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

The direct application of the above mentioned international conventions is in the benefit of respect of human rights and freedoms, among those, the European Convention for human rights which in article 8 Right to respect for private and family life, defines;

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In addition in the Constitution of Kosovo in article 36 Right to Privacy, also guarantees that;
 1. Everyone enjoys the right to have her/his private and family life respected, the inviolability of residence, and the confidentiality of correspondence, telecommunication and other communication.
 3. Secrecy of correspondence, telephony and other communication is an inviolable right. This right may only be limited temporarily by court decision if it is necessary for criminal proceedings or defense of the country as defined by law.

Kosovo Criminal Procedure Code, defines covert measures that can be authorized based on this law, defined in Article 87 Definition of Covert and Technical Measures of Surveillance and Investigation, During Preliminary Investigation

1. A covert or technical measure of surveillance or investigation ("a measure under the present Chapter") means any of the following measures:

¹ European Commission, Kosovo Progress Report 2009

² Born, Hans. & Leigh, Ian. Standardet ligjore dhe praktika më e mirë për mbikëqyrjen e agjencive të fshehta të informacionit, TOENA, Tiranë, 2005, pg 18

- 1.1. covert photographic or video surveillance;
- 1.2. covert monitoring of conversations;
- 1.3. search of postal items;
- 1.4. interception of telecommunications and use of an International Mobile Service Identification "IMSI" Catcher;
- 1.5. interception of communications by a computer network;
- 1.6. controlled delivery of postal items;
- 1.7. use of tracking or positioning devices;
- 1.8. a simulated purchase of an item;
- 1.9. a simulation of a corruption offence;
- 1.10. an undercover investigation;
- 1.11. metering of telephone-calls; and
- 1.12. disclosure of financial data. As regards competencies for authorization of covert measures in a criminal procedure article 84 Criminal Procedure Code defines "If the state prosecutor has grounded suspicion that a criminal offence listed in Article 90 of this Code has been committed, is being committed or will soon be committed, the state prosecutor may authorize or request the pretrial judge to authorize covert or technical investigative measures in accordance with Articles 86-100 of this Code."¹

Except the Criminal Procedure Code, Kosovo Institutions have approved other laws as well related to applications of the covert measures, such as; Law on the Kosovo Intelligence Agency, Law on Police, Law on Classification of Information and Security Clearances, , Law on Police Inspectorate, Data Protection Law, Law no. 03/I-196 on the Prevention of Money Laundering and Terrorist Financing, etc.

Also, for the purpose of international cooperation in criminal issues, according to the article 99 Covert investigations, Law No. 04/L-213 on international legal cooperation in criminal matters, "the authorities of the Republic of Kosovo, upon request, can offer assistance to another state in order to conduct investigations by officers acting under covert or false identity, in accordance with national law."²

Generally, Kosovo institutions have approved a modern legal framework the application of which provides sufficient legal bases to security institutions but it also guarantees the respect of human rights in the procedures of covert measures.

CHALLENGES AND RESPONSIBILITIES

Among the importance and necessity for applying covert measures, undoubtedly, there are challenges and responsibilities that arise for responsible bodies as a result of the sensitivity that the application of these covert measures has in relation with human rights and freedoms, respect and protection of which is a state's obligation and as it seems not an easy challenge for several reasons. "Certain aspects of covert operations may raise ethical questions and therefore they must respect these conditions: proportionality and approval by the competent judiciary authority."³ Initially, a completed legal infrastructure is required, it doesn't mean only the approval of one law but the importance lies on the quality and implementation of that law and adapting it to the political, economic and cultural features of the country, also drafting other acts and procedures for specific matters regarding the justification and necessity of use of covert measures as well as procedures of implementation and use of data and their storage. "Undercover techniques include long term infiltration, body microphones, surveillance (audio and video), wiretaps, all kinds of telecommunication interception (e.g. internet and e-mail) and disguised situations. These very intrusive means should be deployed only if there is a proper legal basis (generally contained in a criminal procedure act). If this legal foundation is lacking (e.g. a warrant issued by a judge), the results of

¹ Kosovo Criminal Procedure Code, no. 04/I-123

² Law No. 04/L-213 on international legal cooperation in criminal matters

³ The Geneva Centre for the Democratic Control of Armed Forces (DCAF), Toolkit on Police Integrity, DCAF, Geneva, 2012, pg 236.

the undercover techniques, which often infringe upon human rights and privacy regulations, might not (and should not) be considered by the court and could lead to acquittal or discharge from further prosecution..”¹

Second issue is about the integrity of authorized personnel for approving and implementing covert measures and access in information, documentation or even interception of communications. Procedures and criteria for personnel recruitment and selection is a first step in providing qualified personnel, with high moral and ethical values in order to properly implement legal norms and guarantee protection of human rights and freedoms. At the same time, personnel abilities and skills in use of contemporary technology utilized by law enforcement and national security institutions should be considered as well. In countries where selection of personnel is done based on corrupted criteria such as nepotism, political belief or other forms of discrimination, the risk or chances of abusing covert measures disturbs citizens.

Third challenging issue has to do with the importance that the information carries today, in political, economic as well as in the security sphere, “who has the information, has the power”. This is why individuals or groups will constantly attempt, in various forms including corruption, blackmail, subversion, sabotage etc. to get close to this type of information. Therefore, use and storage of collected information as a result of applying covert measures should be accompanied with rigorous security measures in order to prevent any leak or unauthorized disclosure. The entire process should be conducted only by legal procedures, it should be properly administrated and documented and only for legal purposes. This is the only way to keep the public trust towards the system of justice, otherwise “the public’s trust and respect are precious commodities and can be quickly lost with improper behavior by criminal justice employees”²

The fourth one is the issue of security. This implies the physical safety and safety of personnel, security of information, documents and communications. There are series of measures and procedures to be undertaken in order to provide physical security for working environments on implementation of covert measures and protection of sensitive materials. It starts from the installation of technological tools, surveillance and alarming equipment up to the strict rules for implementation of instructions for storing and protection of information, access and presence in working environment etc.

Personnel recruitment and selection procedures, training, education, verification and background investigation, monitoring and implementation of principles and procedures as well as the skills to investigate irregularities are just some of the necessary actions in the field of personnel security. The classification of sensitive materials be it electronic or hard copy, authorizations for access in information, procedures for safe protection from unauthorized hacking in to the system, inventorying and regular maintenance of technical equipment, empowered audit procedures as well as the implementation of best practices for the right and responsibility of the safety of information and communication is very important as well. Law on classification of information and security clearances , Article 19 Physical Security and Information Security, stipulates that “all public authorities shall ensure physical security and information security related to classified information in accordance with standards and procedures established by secondary legislation, which shall be in compliance with relevant standards established by the North Atlantic Treaty Organization and European Union security regulations..”³

No less important remains the issue of budget. Except other organizational expenses such as infrastructure and physical assets, personnel, goods and services, contemporary technology necessary to implement covert measures, technical maintenance of equipment and its technology has quite a great cost. Considering the rapid development and advance of technology, it is imposed a need for permanent investment in technology, equipment maintenance and upgrade.

For the same reason, responsibility and obligations of public or private operators which provide telecommunication services should be precisely defined by law for the legally responsible part they play in the investment on installation and technical maintenance of necessary equipment.

CONCLUSIONS AND RECOMENDATIONS

Contemporary security threats, cybercrime, terrorism as well as the challenges in prevention and combating complex forms of organized crime and corruption impose the necessity that except conventional policing measures and methods, covert

¹ The Geneva Centre for the Democratic Control of Armed Forces (DCAF), Toolkit on Police Integrity, DCAF, Geneva, 2012, pg 226.

² Peak, Kenneth J. JUSTICE ADMINISTRATION, Police, Courts and Corrections Management, 4th ed, Pearson Prentice Hall, New Jersey, 2004, pg. 358.

³Law nr. 03/I-178 on Classification of Information and Security Clearances

measures in investigation procedures be applied as well. The application of covert measures as necessary ones and determined by law in which circumstances their application is necessary, are important and proven techniques for the efficacy of state bodies in protection of order and safety. However, the application of covert measures should be limited by law and legal procedures for protecting privacy, human rights and freedom in general. In this regard Kosovo established a legal infrastructure harmonized with European Union and International Conventions on protecting human rights and freedoms.

We are witnessing that despite the endeavors for supervision and controlling the institutions authorized for applying covert measures, there are several cases and affairs published in media that prove the chances and potential for abuse and exceed the authorizations. Reactive investigations of cases or scandals of abuse of information cannot undo damages created to individuals or institutions done by publishing of these communications or private behavior.

Therefore, it is a responsibility of competent state institutions to undertake all necessary measures for completing legal infrastructure, recruiting and employing personnel with high integrity, verified, with professional moral, to provide equipment and modern technology, approve and implement standard action procedure and democratic supervision of institution mandated in implementing these covert measures. Protection of citizens and institutions from blackmail, coercion, insult or compulsion that may come as a consequence of abuse of various information and documents provided by the application of covert investigative measures is a state's responsibility.

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