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CONDITIONS FOR CONDUCTING OPERATIVE-INVESTIGATIONAL ARRANGEMENTS

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The relevance of the article is connected with the need for an optimal solution to the problems of protecting constitutional guarantees of personal human and civil rights in the field of law and order, in the process of carrying out operational-investigative actions.
Key words: operational investigative activities; operational investigative measures; constitutional rights; a person and a citizen.

The most important prerequisites for assuring constitutional guarantees of human and citizen's rights and freedoms are the basis and conditions for carrying out operative-investigational arrangements. In particular, clear legal grounds and conditions need to be, established for the application of operative-investigational arrangements. In Law of Republic of Kazakhstan dated 15th of September 1994, No. 154-XIII «On operative-investigational activities» (as amended on 19.12.2020) are established a separate legal basis for conducting operative-investigational arrangements (art.10) and conditions for handling them (art. 12). However, there are no definitions of indicated concepts (terms) in the Law. Under legislation of Kazakhstan, such actions realize only under the conditions and grounds stipulated by law. In our view, juridical grounds need be, seen in two aspects: legal grounds as a legal institution and legal grounds as a socio-legal reality. The first aspect means that the legislation of Kazakhstan foresee a legal basis, juridical norms regulating operative-investigational activity, compliance with which is aimed at the legitimate implementation of these activities. The socio-legal aspect implies the implementation of investigative measures in the presence of certain documented criminal information of operational interest (about a crime that is being prepared, committed, committed, a criminal who is hiding from law enforcement agencies) and also the discretion of the operative official about the expediency of its implementation. In that regard, we think that expedient to consider the views of some academics on the definition of operative-investigational arrangements. According to A.Y. Ginzburg, «operative-investigational arrangements – is a tactically and psychologically subtle and sharp weapon with which the subject of operative-investigational activities penetrates into the intent of a criminal and makes the secret revealing in a timely manner to either prevent or solve a crime in a timely manner» [1, p. 41]. An operative-investigational action, as considers M.P. Sysalov, is a targeted set of actions of the agencies carrying out investigative activities within their competence aimed at solving the problems of investigative activities [2, p. 93]. «Operative-investigational arrangements – S.V. Patashkov, J.M. Chokin and E.E. Kaimuldinov note – are the actions of bodies carrying out operative-investigational activity within their competence in order to protect life, health, rights, freedoms, legitimate interests of citizens and property from illegal encroachments and to solve tasks provided for by the Law» [3, p. 93]. Specifying the positions of the above authors, we formulate a slightly different definition of «operative-investigational arrangements»: it is a set of measures (general and special) carried out (openly and/or tacitly) in compliance with certain conditions that ensure legality in achieving the goals and objectives of the subjects of operative-investigational activity.

In harmony to the Law of Republic of Kazakhstan dated 15th of September 1994, the legal grounds and conditions for carrying out an operative-investigational activities are: firstly, the existence of opened criminal proceedings (part 1 clause «a» art. 10); secondly, the presence of information, including confidential information on the offence being prepared, committing or committed; persons hiding from agencies of inquiry, investigation or court or evading criminal punishment, confidential information about an offence being prepared, committed or committed, persons absconding from bodies of enquiry, investigation or court or evading criminal punishment, the unknown absence of citizens and the discovery of unidentified corpses, intelligence and subversive activities of special services of foreign states and international organisations (part 1 clause «b» art. 10); thirdly, written instructions from an investigator in criminal cases pending before these bodies (part 1 clause «c» art. 10); fourthly, requests from international law enforcement organisations and foreign authorities in accordance with treaties (agreements) on legal assistance (part 1 clause «d» art. 10); fifthly, the need to obtain intelligence information in the interest of public, state and strengthen its economic and defence potential (part 1 clause «e» art. 10); sixth, availability the sanction of the prosecutor to handle that operative-investigational arrangement (part 2 art. 12); seventh, presence the statement or written consent (where there is a threat to the life of individuals) (part 6 art. 12); the existence of a documented operational unit assignment (in the form of a reasoned resolution approved by the relevant manager). And eighth, the use of only operational and technical forces and means of the Interior Ministry, National security committee, Ministry of Internal Affairs, the NSC, military intelligence bodies of the Ministry of Defence and the Presidential Protection Service, the financial police, the penal system of the Ministry of Justice and the customs authorities (part 2 art. 12).

Apparently, arrangements of operative-investigational nature, affecting legally protected privacy, the secrecy of correspondence, telephone conversations, telegraphic communications, postal communications and the right to inviolability of the home may, in exceptional cases, can be carried out by way agreed with the Prosecutor General of Kazakhstan to ensure national security and detect, prevent and suppress intelligence and subversive incursions by intelligence services of foreign states and foreign organisations. In cases, when the implementation of operative-investigational tasks cannot be delayed (threat to the life, health or property of citizens or the commission of a terrorist act, sabotage and other serious crimes), indicated activities are carried out on the basis of a resolution, approved by the head of the unit conducting the activity, with mandatory notification to the prosecutor and subsequent authorization within 24 hours. In view of this, the organisation and tactics conducting of covert measures constitute official (military, state) secrecy, therefore the prosecutor is presented only ones materials, which served as the basis for their measures, without specifying and excluding the possibility of deciphering confidential information. In the clause 2 art. 10 of the Law dated 15th of September 1994, marked that agencies carrying out the operative-investigational activity, within the limits of their competence, on their own initiative or on the initiative of other state bodies, have the right to collect personal data, necessary for taking decisions: on employment in the services and bodies listed in art. 6 of the Law of September 15 1994; on ensuring the security of operative-investigational agencies; on admission to information constituting a state secret or to work connected with the operation of facilities and constructions posing an increased emergency or economic danger, a list of which is determined by the Government of Kazakhstan; on admission to participation in operative-investigational activities or access to materials obtained as a result of such activities; on issue authorizations to engage in private detective work. No other, than those listed above can serve as the grounds and conditions for conducting an operative-investigational activity, except cases, when made a supplements or amendments in the Law dated 15th of September 1994. When making decision on the implementation of operative-investigational arrangements, as well as during their realization, the right choice of means is necessary, because it may happen that a crime will be, prevented or solved, but at such a cost, that the negative consequences clearly prevail over the positive re-

sults achieved [4].

In our point of view, the conditions for holding operative-investigational arrangements are methods, techniques and other forms based on the law that guarantee the observance of legality and constitutional human rights during the implementation of operational and investigative arrangements.

In the clause 9 of art. 77 of the country's Constitution fortifies, that evidences obtained by unlawful way have no legal force. That is why the legislator has introduced special norms, which create a legal and moral-ethical side to the implementation of operative-investigational functions; also norms obliging subjects of operative-investigational units to handle operative-investigational arrangements and use information only for their intended purpose. In the Law dated 15th of September 1994 very clearly and precisely are set aims and objectives of this activity. Categorically forbidden: to use obtained operative information for blackmail or provocation; to commit acts that infringe the legality; to infringe the rights and freedoms of law-abiding persons; to use means and methods of operative work to verify family and friendship ties; to keep obtained information for persons who do not involved in unlawful acts. At last, that negligible, is that information obtained by subjects of operational and detective bodies, may be introduced into criminal proceedings in cases, when it does not contrary the Constitution and complies with criminal procedural legislation of the RK, regulates collection (art. 125), state (art. 126), investigation (art. 127) and evaluation (art. 128) of evidences. The guarantee of respect for the rights and freedoms of the individual in the performance of operative-investigational functions provided for by the legislator is that any person may appeal unlawful acts of officers of law enforcement agencies carrying out investigative tasks on him in a higher authorities, a prosecutor's office or court. Of course, all branches of government should guarantee compliance with the provisions of the Constitution and other normative legal acts, but only the court have special competence to protect and enforce the legality in the territory of the Republic of Kazakhstan. In connection with the above, we consider it necessary to formulate the author's concept of «violation of individual rights and freedoms», which means the actions of an official (usually a field officer) committed with non-compliance with the prescriptions of operational and investigative legislation, which led to unwarranted prosecution and other violations of constitutional rights.

Operative-investigational units and their officials when carrying out operative-investigational arrangements must ensure the legal safety of the individual and the citizen on inviolability to privacy and home, personal, family mystery and the secrecy of correspondence, since this is the main purpose of the operative-investigational activities and actions of the operative-investigational units must be, aimed specifically at achieving this goal. However, in art. 5 of the Law of September 15 1994 (observance of individual rights and freedoms during handle operative-investigational activities) does not reflect this regulation, therefore necessary to supplement this article with a paragraph concerning the prevention of violations of the constitutional rights of human and citizen. As a rule, operative-investigational activities are directed to achieve this or that result. The results of the operative-investigational arrangements have a great value and significance, since under part 1 art. 14 of the Law dated 15th of September 1994, materials which obtained during the operative-investigational activity may be used for the preparation and carrying out of investigative actions and holding operative-investigational actions for the prevention, suppression and detection of crimes and also as evidence in criminal cases after their verification in accordance with criminal procedural legislation.

With the various operative-investigational actions, used by subjects of operative-investigational bodies, appear an opportunity to penetrate the criminal environment, maintain contact for some time, and monitor and control the actions of suspects. In many respects, with this method may be to get information about the composition and structure of the criminal group, its links and its plans. And if not be able to prevent crime, there is an opportunity for collection of operative information, which will allow by the commencement of investigation optimal use of guidance data on possible sources of evidence and also some properly recorded information, which can later be introduced in accordance with the law as evidence. This is the meaning

and content of using the results of operative-investigational activities in criminal proceedings. The results of the operative-investigational activities, according to N.I. Krasheninnikov, are the factual data, obtained by operational units in the manner prescribed by the Law «On operative-investigational activities», about the signs of crime being prepared, being committed or accomplished; about persons preparing, committing or having committed a crime, have eloped from the bodies of enquiry, investigation and court, evading from punishment and missing persons; as well as events or actions posing a threat to state, military, economic or environmental security, which serve as a reason and basis for a criminal case; can be used for the preparation and implementation of investigative and judicial actions, as well as in proving the criminal case in accordance with the provisions of criminal procedural legislation governing the collection, verification and assessment of evidence. Evidences gathered during the preliminary stage of investigation, may be admissible and used in criminal proceeding, provided that the investigation was conducted legally and the rights and freedoms of the individual were not infringed during the gathering of evidences. The circumstances of any case must refer on evidences, which in turn must meet the requirements of admissibility. B.A. Abdrakhmanov in work «Correlation of proof and use of results of operative-investigative activity», points out the following requirements: evidence must be obtained by a proper subject, who has the right to conduct procedural actions in the given case (part 1 art. 111 of the CPC of the RK); evidences must be obtained only from sources listed in art. 111 of the CPC of the RK; observance of rules of conducting a procedural action in the result of which it was obtained; when obtaining evidence it is necessary to observance of all requirements of the CPC, relating the commit on course and results of investigative action [5].

Indicated list should, in our view, be supplemented by, another mandatory requirement. In particular, the collection, preservation, verification and assessment of evidence must respect the guarantees of citizens' rights and freedoms provided in the Constitution of the Republic of Kazakhstan. Violation or non-compliance with any of the listed requirements will result in the evidence being, declared unacceptable. When deciding on the admissibility of evidence, the relevant rules of law should be, applied to all evidence as well as to specific types of evidence. From the analysis we can mark, that using results of operative-investigational activities, which are executed in accordance with the current criminal procedural and operative-investigational legislation, at all stages of the criminal process will allow the most complete and in the shortest possible time to solve the main task of criminal proceeding – detection of the crime.

In the current criminal procedural legislation of the RK, indicated only necessity of handing over to the investigator phonogram in sealed form with a cover letter, but there are no clear regulations on the registration procedure of the results of the operative-investigational arrangements we are considering. It should be noted that while the operative-investigational body, which carried out the tapping and recording of telephone conversations, draws up got results in an act, the investigator in charge of the criminal case draws up the results in a protocol, which must comply with art. 203 of the CPC of the RK. The above-listed documents attach to the criminal case file as evidence. The audio cassette, if not in doubt by the court, may be used and kept in the criminal case file. In cases where the investigator has doubts about the audio recording or accused denies that the voice recorded on the tape belongs to him, on the basis of reasoned resolution of the investigator, conduct an expert examination of the authenticity and reliability of the accused's voice or to prevent a falsification appoint a criminal examination of voice identification – phonoscopic examination (examination of magnetic soundtracks) to determine whether the voice recorded on the tape belongs to the accused (for which purpose from accused must be obtained a sample of his voice, in accordance with the relevant procedures). Except above-examined forensic sound recordings, there are other forensic and technical examinations to verify the authenticity and reliability of audio, video and photographic recordings. The report on the above examinations is also, be attached to the above-mentioned materials. The cover letter for the material to be sent must contain information on the origin of the recording: date, time, place, conditions and cir-

cumstances of receipt, technical characteristics of the used equipment and other information. The example above shows that information (materials) obtained during of investigative activities may, after the relevant procedural actions, be used, as evidence in court.

The results, which obtained during handle operational-investigative arrangements, may constitute evidence in a criminal case and include materials of the operational-investigative activities, material evidence, and documents. The most problematic, both in theoretical and practical aspects, is the comprehension of these concepts. In particular, documents are acknowledged, as evidence, if the information set out, or certified therein by organisations officials and citizens are central to criminal case (art. 123 of the CPC of the RK). Documents may be admissible as evidence in a criminal case with the observance of procedural conditions. First, if there are data in the documents, indicating how they were entered into the criminal case file (existence of a cover letter); second, if the documents contain information, whose carrier is known and they can be verified; third, if official documents data on the natural person from whom they come, hold prescribed requisites; fourth, if the statutory procedure for attaching documents to the criminal case is observed. In the presence of the characteristics set out by art. 120 of the CPC of the RK, written documents are recognised as material evidence in cases: a) if they served as instruments of crime (forged and used documents); b) if they served as a means of establishing the identity of the criminal, the victim, the location of objects of criminal encroachment.

On basis of our conducted analysis, we propose working definitions of these complex concepts. In particular, the documents of the operational-investigative activities are material objects, on which an authorized person in an appropriate way recorded information about the circumstances, relevant to the correct decision-making of an official. In turn, the materials of the of the operational-investigative activities are documents and items, obtained during operational-investigative arrangements, which contain information on the involvement (non-involvement) of the accomplice involved in the crime.

In the process of proving an important place is belong to physical evidence. In this matter, the theory and practice of the operational-investigative activities do not give an unambiguous interpretation of this complex concept. In our opinion, physical evidences in the operational-investigative activities are objects (instruments of crime or objects of criminal actions), as well as information recorded on paper and electronic carrier, relating to the circumstances of the case. Based on the above, to operative-investigational results need to attribute obtained, investigated and recognised, as admissible in accordance with the criminal procedural legislation of the Republic of Kazakhstan and are used later on as evidence the factual data (items, documents, information, data on persons in respect of whom conducted the operational-investigative arrangements), confirming (not confirming) involvement of the accomplice in illegal activity.

As conclusion, we can note that, if the grounds and conditions prescribed by legislation for carrying out operational-investigative arrangements are not complied, this in itself entails a juridical danger, i.e. it precludes the objectivity of the data obtained and the possibility of forming evidence on their basis. In this connection the legal regulation of situations on the use of the results of the operational-investigative activities acquires particular importance, which, in our opinion, will: a) increase the effectiveness of law enforcement agencies in the fight against crime; b) ensure the guarantees of human rights and freedoms provided by the Constitution of the RK; c) contribute to the quality investigation of criminal cases. There is no definition of the term «results of the operational-investigative activities» in the law. In our opinion, the results of the operational-investigative activities are collected in accordance with the law (factual data) about the persons in respect of whom the investigative measures were carried out, confirming or not confirming the involvement of the accomplice in an illegal activity.

In order to increase the effectiveness of using the results of the operational-investigative activities, the following rules should be afford to in the RK: firstly, avoid violations of constitutional rights and freedoms of human and citizen; secondly, strictly follow prescribed by the legislator grounds and conditions of holding operational-investigative arrangements; thirdly, the results of the operational-investigative activities must be executed in accordance with the current criminal

procedural and operational-investigative legislation; fourthly, maintain a constant interaction between subjects of operative-investigational units with concerned bodies. Compliance of all these rules at all stages of the law enforcement process will allow most thoroughly and in the shortest time points enable the main task of criminal proceedings – the detection of crime.

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УСЛОВИЯ ПРОВЕДЕНИЯ ОПЕРАТИВНО-РОЗЫСКНЫХ МЕРОПРИЯТИЙ

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Актуальность статьи связана с необходимостью оптимального решения проблем защиты конституционных гарантий личных прав человека и гражданина в сфере обеспечения законности и правопорядка, в процессе проведения действий оперативно-розыскного характера.

Ключевые слова: оперативно-розыскная деятельность; оперативно-розыскные мероприятия; конституционные права; человек и гражданин.