

THE USAGE OF TECHNICAL SURVEILLANCE MEASURES IN COUNTERING THREATS REGARDING NATIONAL SECURITY

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Abstract:

National security is one of the most important objectives of a state that assures its independence, sovereignty and protection of human and civil rights of its citizens. This duty is fulfilled by intelligence services in accordance with the legal provisions.

In the current international context threats to national security are diversified. Terrorism represents one of the greatest threats of the 21st century to national security for any state. Its forms of manifestation are unpredictable and hard to anticipate. The question is whether Romania's intelligence services are capable of countering threats to national security.

The existing conflicts outside Romania's borders can pose a threat to national security. The current technological progress along with the use of internet has determined the authorities to redefine the strategies and techniques used to counter cybernetic threats. The strategies used must be in accordance with the legal provisions regarding human rights.

The article is focused on analyzing the legal provisions regarding national security and the infringements of human rights that may occur in countering national security threats alongside with a comparison of technical surveillance measures used in criminal proceedings and national security affairs.

Keywords: *national security, intelligence activities, human rights, countering threats to national security, cybernetic security, technical surveillance*

Legal provisions regarding use of technical surveillance in matters of national security

National security is defined by Law no.51/1991 in art. 1 and it consists in the condition of legality, social, economic and political stability necessary

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for the existence of an independent, sovereign and indivisible state. National security is the premise for maintaining the rule of law and unhampered exercise of human rights, in accordance with the Constitution (Law no. 51/1991).

National security is preserved by countering all domestic and foreign threats (Law no.51/1991). The threats to national security are defined in art. 3 as any plans or actions aimed against the state's sovereignty and independence or any other actions aimed at starting or supporting a war/civil war, military occupation, supporting a foreign power or organization, armed actions against the state, espionage, sabotage, actions aimed against human rights, threats to life of officials. Also actions that have a fascist, extremist or terrorist character, theft of munitions, explosives, toxic or biological substances, forming and supporting a terrorist group are considered a threat to national security (Law no.51/1991).

In combating threats to national security intelligence services can use specific methods that require certain violations of human rights. The legislature mentioned certain methods as intercepting and recording of electronic communications, access to certain documents and information, interception of personal correspondence, the interception of any kind of remote communications, access to a computer system, audio and video surveillance in public or private spaces, tracing or localization by use of technical measures, obtaining the financial records of a person (Law no. 51/1991).

Such methods can only be used only in specific situations, as stipulated in Law no. 51/1991 art. 3 and only if 3 conditions are met:

- threats to national security cannot be investigated otherwise
- the above mentioned methods are absolutely necessary in a democratic society
- a legal authorization is issued

In the literature a ranking of these methods was suggested along with a gradual use, given the specific context of each investigation and the interference in the matter of an individual's human rights (Grădinau, 2014, p. 8). Such ranking is achievable, but it cannot generate difficulties in successfully finalizing an investigation.

In intelligence service's practice information is usable if it can be exploited in a timely manner. If threats to national security are being investigated, the intelligence services inform the attorney general. The request

is analyzed and in 24 hours the attorney general requests the authorization of a warrant by the Supreme Court.

Furthermore Law no. 51/1991 art. 15 par. 6 stipulates that if necessary, the judge can request further investigations. This possibility is not stipulated in judicial proceedings. The use of such methods is approved by the judge who issues an authorization that must contain the following data: place, date and time of the issuing of the authorization, the name of the court that issued the authorization, the specific facts and circumstances that pose a threat to national security, the specific methods whose use is authorized, the person whose rights are violated by use of this method, the agents that will carry out the authorization, places where the authorization will be used, the duration for which the authorization can be used (Law no.51/1991).

When the facts and information presented to the judge do not justify the issuing of an authorization, a new solicitation can be made only if new facts and information are obtained, as stipulated in Law no. 51/1991 art.18par.2.

In certain emergency situations, when time is of the essence, the authorization can be issued by the attorney general for a period no longer than 48 h. The authorization can be issued by the general attorney only if any delay in use of specific methods can jeopardize the investigation. In such cases, after the 48h have expired the attorney general presents the evidence obtained to a judge, who can either confirm or infirm the authorization. In case the authorization is infirmed all specific activities are terminated and all the data obtained is destroyed, as stipulated in Law no.51/1991art.18par.2.

These specific methods can be authorized for a maximum period of 3 months at a time; total duration is limited to 2 years. The authorization procedure and the effective use of the specific methods is classified top secret. In the literature it is considered that the government must have legal provisions that allow the performing of state politics, without the interference of the citizens. This is one of the main reasons why methods used by intelligence services are classified top secret. The results obtained by the use of specific methods are communicated to the attorney general. Also the provisions in Law no. 51/1991 art.21 stipulate that intelligence services are required to retain all data and information regarding the commission of a criminal act. Art. 61 of Criminal Procedure Code stipulate that all intercepted communications and video recordings are rendered in writing and are sent to

the competent criminal investigations body in order to start the judicial proceedings.

When the data and information obtained are not relevant in a judicial proceeding and the use of specific methods is no longer required, the director of the intelligence service will notify the person about the investigation performed by use of specific methods (Grădinaru, 2014, p. 89).

In specific cases the investigated person will not be notified about the investigation if future investigations can be jeopardized or if an infringement of another individual's human rights can occur.

Law no. 51/1991 in art.21 doesn't stipulate which state institution must inform the prosecutor when data regarding the commission of a criminal act is obtained. Article 21 only mentions that the provisions in art. 61 of the Criminal procedure code must be followed concomitant with informing the attorney general. By extent, the data regarding the commission of a criminal act is analyzed only by the intelligence services without a prior consultation with the prosecutor. The law should enforce a procedure that should be followed when analyzing if such data is sufficient to start a judicial proceeding and justify the continuation of the investigation.

Such procedure is needed given the thin line between acts that can pose a threat to national security as stipulated in Law no.51/1991 art.3 or represent a criminal act incriminated as crimes against the state in the Penal Code art. 394-412. Crimes as treason – art.394, treason by divulging top secret information – art.395, espionage – art.400, crimes against communities – art.402 can be given as such examples (Lupașcu, 2014).

In the absence of an effective control mechanism for the specific methods used by the intelligence services abuses can be committed that can affect both national security and an individual's human rights. Another weakness is the possibility given to the intelligence services by law no.51/1991 in art.21par.3 to work with authorizations issued by the attorney general in urgent cases and not to notify the investigated person about these methods.

Any individual that has suffered an infringement of its human rights by an intelligence service can notify the competent Parliament committee or judicial bodies, in accordance with the provisions of law No.51/1911 art.22 and law. No.677/2001 protecting personal data.

Comparison between technical surveillance in criminal investigations and national security investigations

Technical surveillance is used both by intelligence services in investigations concerning national security and by judicial bodies in discovering and investigating criminal acts.

The Criminal Procedure Code contains general provisions for the authorization and use of technical surveillance, while Law no.51/1991 and law no.535/2004 contain provisions that apply only for matters of national security and terrorism.

Authorization of technical surveillance in both fields is given by issuing a technical surveillance warrant by a judge. In judicial proceedings the warrant is issued by a freedoms and rights judge from the competent court, but in matters that concern national security the warrant is issued by the president of the Supreme Court. Law no.51/1991 states a preliminary control (Zamfir, 2007, p. 160), in terms that the attorney general can analyze a technical surveillance request made by intelligence services and based on the data and information provided it can decide whether the request will be presented or not to the president of the Supreme Court. Also the president of the Supreme Court can request further data or investigations to be made prior to authorizing technical surveillance, which is not the case in judicial proceedings.

Regarding the notes resulted by use of technical surveillance, the literature argues that notes created by intelligence services cannot be used as evidence in judicial proceedings but can initiate a criminal investigation (Grădinaru, 2014, p. 89). In such cases based on the provisions of Criminal Procedure Code art. 61 par. 3 these notes can be used as leads in obtaining a provisional ordinance for use of technical surveillance.

In matters of national security the warrant issued by the president of the Supreme Court is classified as top secret, whilst the warrant issued by a freedoms and rights judge is not classified.

Regarding notification of the person investigated by technical surveillance means, in matters of national security this notification can be eliminated if it poses a threat to national security.

In judicial proceedings the warrant authorizing technical surveillance is implemented by the prosecutor or by specialized police officers, whilst in

national security affairs the warrant is implemented by the intelligence services. Also, in judicial proceedings, the use of technical surveillance can be authorized for a period of 6 six months, but for national security this period is increased to 2 years.

Therefore, by use of technical surveillance, in both judicial proceedings and national security investigations interference occurs regarding an individual's human rights, in contrast with the minimum standard of protection stipulated in art. 8 of the European Convention for Human Rights.

In the literature, the use of technical surveillance in investigations concerning national security was considered to have a distinct legal nature, as prior acts for a judicial proceeding. We consider this to be the most accurate opinion.

Analyzing legal provisions stipulated in art. 13 – Law no. 51/1991 regarding national security and art. 20 – Law no. 535/2004 art. 20 regarding counter-terrorism it is clear that technical surveillance is used for gathering intelligence and can be used in future judicial proceedings, but it also generates interference in the private and family life of an individual. The difference consists in that use of such means in national security generates intelligence information, where in judicial proceedings it generates means of evidence.

Another difference in the use of technical surveillance is that in national security matters it is used to counter threats to national security, where in judicial proceeding it is used to discover and punish those responsible for criminal acts and crime prevention.

Protecting the civil rights and freedoms, protecting the stability and well-functioning of the state according to the constitution is the most important task of all law enforcement institutions. Threats to national security require the use of technical surveillance, but the discretionary use of such methods can generate abuses. This is why procedures and control mechanisms must be created to ensure the legal and correct use of technical surveillance for protecting both the state and its citizens.

Conclusions

The rise of criminal acts committed along with the use of the latest technological means combined with the new emerging terrorist threats to national security forces a democratic state to take measures for preventing

and fighting these threats. Such measures consist in use of technical surveillance. Very important data and information can be obtained through these means helping law enforcement agencies in preventing and discovering criminal acts in a reasonable time and in such way that no innocent person be held accountable for committing of criminal acts.

Gathering the necessary evidence in a judicial proceeding must be done in accordance with the civil and human rights instated by the Universal Declaration of Human Rights, The European Convention for Human Rights and the Constitution of Romania.

This requires that the authorities respect and protect the civil rights, right to private life and the inviolability of home and any violation of these rights must be done based only on legal provisions.

Ensuring national security must be done by all citizens. Intelligence services must have access to all legal means, including technical surveillance in order to successfully counter all threats to national security. In some cases this means that an individual's civil rights and rights to private life can be violated. On the other hand a control mechanism must be created to assure that all individual's civil and human rights are protected.

The practice of law enforcement agencies has shown that use of technical surveillance can lead to successful investigations regarding both criminal investigations and national security investigations.

Technical surveillance is used based on the gravity and complexity of the crime or national security threat investigated. This goal can only be accomplished by creating law enforcement agencies endowed with both professional staff and latest technological resources.

As a solution, the national security must be analyzed and updated thus new legal provisions should include corruption, smuggling, corruption in public procurement of goods and services as threats to national security.

Also, new provisions must clearly stipulate if information obtained by use of technical surveillance by intelligence services can be used both in judicial proceedings and proceedings regarding national security.

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