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THE UNDERCOVER AGENT IN THE CRIMINAL PROCEDURE LAW OF SERBIA AND MONTENEGRO

Introduction

There is no doubt that covert police activity is an unavoidable element in any modern arsenal of resources for combating crime. Some of these activities can represent a potential threat to human rights. However, in order to successfully combat modern crime, it is necessary to apply adequate methods, even those which may limit certain basic rights and freedoms of citizens. There exists a perceived trend in contemporary society to renounce or limit some of these rights so that the remaining, that is the majority of them, can be protected.

The most debatable of covert police methods is the *agent provocateur*,[1] that is when an agent is persuading, provoking or supporting the decision of a

[1] Among these methods we can also include the so-called "decoy" or "lure" operations, in which an agent presents himself as a potential victim (ex. purchaser of drugs); "manna from heaven" operations in which police places desirable objects in the vicinity of the target individual, which may prompt him to commit a crime; "honey-pot" operations – the police supposedly undertakes certain activities in order to become a victim of a crime (ex. racket) or attempts to establish links with criminals in order to obtain important information; "sting" operations in which covert

future perpetrator to carry out a criminal act. However, in the fight against particularly dangerous forms of modern crime it is necessary to use even "refined" means. As one American author stated, "Fair play must not entail the releasing of serious criminals to freely walk our city streets." In other words, this method should not be rejected outright simply because of certain problems that may arise in its implementation. The legislature needs to find a balance so that this method is made available, along with the appropriate measures to prevent its misuse.

The undercover agent does exist in the legal system of both Serbia and Montenegro and its member republics. In the State Union of Serbia and Montenegro, the enacting of criminal procedure regulations is within the exclusive competence of the member republics. The republics have their own codes of civil procedure, which, among other things, regulate the issue of undercover agents. On the federal state level, there exists a certain form of undercover agents in laws dealing with the military.

I. The Undercover Agent and the Federal State

Legislative power regarding the military remains within the competence of the federal state. According to the Law on Security Services of the Republic of Yugoslavia,[2] the Military Security Services have the right to investigate and document, from within the jurisdiction of the military courts, crimes against the constitutional order and security of SRJ (*Savezna Republika Jugoslavija* – Federal Republic of Yugoslavia), mankind and international law and the most grave acts with elements of *organized crime* (Article 8). In carrying out this task the Military Services may infiltrate groups and organizations. They are also authorized to use certain methods and means to *conceal the identities of their members* (Article 28).

investigators enter criminal organizations and become more than just passive observers of illegal activity, but actually to a certain extent actively participate in these. The key task in these operations is not to strengthen or support the decision of the perpetrator to carry out the crime.

[2] *Službeni list SRJ* (Official Journal of SRJ) 37/2002

II. The Undercover Agent in the Criminal Procedure Law of the Republic of Serbia

The concept of the undercover agent first entered into the criminal procedure legislation with an amendment to the new ZKP (*Zakon o krivičnom postupku* - Law on Criminal Proceedings) towards the end of 2002. The ZKP was given a new Chapter XXIX entitled "*Special Provisions on Proceedings Regarding Criminal Acts of Organized Crime*."[3] Articles 504 Lj – 54 Nj regulate some important matters.

1. Requirements for the use of undercover agents

Several cumulative requirements have been provided (Article 504 Lj):[4]

- There needs to *reasonable suspicion* against a person that he alone or together with other persons *is planning* to undertake criminal acts of organized crime
- If the activity of organized crime cannot be uncovered, proven, or prevented in any other manner or
- If this could be done, but with serious difficulties
- A court order is issued by the investigative judge (of the special department of the District Court in Belgrade).
- A request from the Attorney General is necessary

Requirements set in this manner naturally bring certain question to mind:

- One of the most important issues in theory, related to covert police methods, is to define what factual minimum is necessary for the implementation of such methods.

In standard proceedings, the investigative judge has the ability to order measures of surveillance and recording of phone conversations or other forms of communication, if there is *reasonable suspicion* that certain persons are *engaged in criminal activity* with elements of organized crime. This right to authorize such measures is already present in the initial phase where a person is merely *planning* to carry out activities of organized crime. This requirement is not precisely defined. The term "planning" can be interpreted in a number of different ways. Hence, this allows for a very broad interpretation and the use of an undercover agent even in cases where there is no solid factual basis. In fact,

[3] *Službeni list SRJ* (Official Journal of SRJ) 68/2002

[4] Articles not designated otherwise represent articles of the Law on Criminal Proceedings.

it leaves the investigative judge with a sort of *carte blanche*. The question which arises, therefore, is to what extent such a requirement is in line with the case law of the European Court of Human Rights.

This type of question has been addressed by the Court. In the case of *Texeira da Castro v. Portugal* (1998), the Court ruled that the accused was illegitimately deprived of his rights when undercover agents lead him to commit a crime without there being reasonable suspicion of him being the perpetrator.

On the other hand, the positive aspect of such an order is its emphasis on prevention. Prompt implementation of this measure can prevent a crime from being committed.

- By giving the investigative judge this authority, there is a serious deviation from the idea of the investigative judge being someone who undertakes *investigative action during criminal proceedings* and only exceptionally before the investigation (art. 239 and 240), while in most cases *after* the crime has been committed. This order can be justified by the danger posed by the crime and the overall need for its prevention. Such a measure is, by its very nature, a purely criminalistic tactic. However, since its implementation can result in the violation of certain constitutional rights of citizens, it is safest to have the final decision in the hands of a judicial body[5]. The most unfavorable aspect of the order is the expansion of the investigative judge's competence in pre-criminal proceedings. This does not fit into the existing theoretical concept of the investigative judge. In this way, the boundary between pre-criminal and criminal proceedings has become highly flexible, while the investigative judge has become an even more important organ in pre-criminal proceedings.

The measure is supposed to be based on *subsidiarity*: if the activity of organized crime cannot be uncovered, proven, or prevented in any other manner, or if it could be done but with serious difficulties. However, these are highly flexible notions and the law does not offer any sort of guideline in this regard. In practice, it is probably relatively easy to "meet" these conditions, if the need to use an undercover agent should arise.

[5] There are various solutions concerning which body is competent to authorize such a measure in comparative legislation. In Europe, this is usually within the competence of the judiciary, although certain countries have more precisely named the investigative judge as being authorized (ex. France, Croatia, Serbia and Montenegro). In certain countries, in case of a risk of the measure being stalled, it can be authorized by the public prosecutor with the condition that he must immediately inform the investigative judge (Italy) or inform him within a period of three days in order to get a confirmation of his order (Germany).

2. Content of the order

The order must be in written form and must contain the following:
- Information about the person against whom this order is being implemented
- A description of the crime
- The manner
- The scope
- The location
- Duration of the measure

The set requirements are in all likelihood to be proven overly strict, and when necessary, circumvented in practice. Difficulties may arise in giving information about the person against whom this measure is being implemented. The point of such a measure is usually to uncover an organizer whose identity remains unknown. Therefore, this measure can only be ordered against persons whose identity has been established to a certain extent. The work of the undercover agent has to be channeled or restricted in a certain manner. The question is whether this seems to be the best way to do it. Furthermore, it is very difficult to predict, and therefore describe in an order, exactly *where* and in what *way* the undercover agent will carry out his task. Additionally, it is unclear as to what the "*scope*" of the measure entails.

These requirements are, in fact, common requirements prescribed for a number of covert methods. It is safe to say, however, that concerning undercover agents, some of these requirements have no justification.

With an order of the investigative judge, the undercover agent may use technical equipment to *record conversations* and *enter someone's home* or other such premises (Article 504 Nj, para. 5). Why is it then that the law does not authorize the use of photographs and video recording as in the case of Article 232? Perhaps it was deemed to be unnecessary. In all likelihood, however, this has more to do with neglect. Another question is, what does this provision have to do with Article 232? The difference lies in the requirements for ordering the measure. For measures provided in Article 232, it is necessary to have reasonable suspicion that the crime has been *committed*. For this measure, however, it is necessary only to have reasonable suspicion that there has been *planning* to commit a crime with elements of organized crime. Furthermore, the action of entering a home is left unclear, i.e. it is not regulated as to what can or cannot be done within the home itself.

3. Duration of the measure

The law regulates the duration of the measure (Article 504 M). The measure can last up to six months. Based on a reasoned proposal of the public prosecutor, the measure can be extended twice more for up to three months. Therefore, the total duration can be up to twelve months.

The law specially provides that it is up to the investigative judge to decide whether the measure is necessary or whether the same results could be achieved in a manner which poses less of a threat to the rights of citizens.

The measure can be suspended in the following ways:
- When the set deadline expires or
- When reasons for the implementation of the measure cease to exist

The first condition is purely objective. The measure is simply suspended without any formalities once the set deadline has expired.

This second condition, however, relies upon someone's judgment. The question is whose? The law does not address this issue. There are various choices: based on the judgment of the body implementing the measure or the body which prescribed it. It seems that the latter solution is the most acceptable, i.e. that the measure should be suspended in the same manner in which it was prescribed.

4. Deadline for the use of information

Article 504 N provides for a deadline for the use of information obtained through the implementation of the measure. If a public prosecutor does not, within six months, initiate criminal proceedings, all gathered information must be destroyed. Persons whose identity is uncovered in the course of gathering information are to be informed about the measure. This applies only to third parties and not the person against whom the measure is being implemented, since his identity must be given already in the order. From the aspect of the protection of citizen's rights, it is important that unused information will not be kept indefinitely. However, it seems that the six-month deadline is too short. Pre-criminal proceedings do not develop continuously**.** There should either be a permanent extension of the deadline or a new possibility for a series or repeated extensions.

5. Accidental findings

The ZKP contains significant restrictions regarding the use of obtained information. If during the implementation of this measure *information* is obtained *which does not have to do with activity of organized crime*, it cannot be used in future proceedings which will be initiated *for that crime* (Article 504 N, para. 3). This therefore limits the use of information obtained with this measure to solely proceedings in matters of organized crime. When dealing with organized crime, however, there are no such restrictions. Information can be used in any proceeding in matters of organized crime, because Article 504, para. 3 does not contain any restrictions in this regard. This provision, therefore, offers a different stance regarding "accidental findings" than Article 80, which provides that an item uncovered in the course of a raid that may point to a different crime may be (temporarily) seized with necessary notification to the public prosecutor. Justification for this sort of order can be found in the need for the protection of privacy and the prevention of abuse, i.e. in cases where the undercover agent is supposedly engaged in the prevention of organized crime, but whose real task is solving a totally different crime. However, it is completely irrational not have a *legally* permissive possibility to obtain material in this manner, which can later be used to prosecute other serious crimes. Under certain circumstances, it should be possible to use this information to prosecute other crimes such as murder or robbery, etc.

There is absolutely no mention of situations where, in the course of the implementation of this measure a perpetrator, whose name is not mentioned in the order itself, is uncovered. What exactly should be done in these situations is not addressed neither by the ZKP of Serbia nor the ZKP of Montenegro. There seems to be no answer to this question in literature either.

6. The organ competent for appointing the undercover agent

The undercover agent is appointed by the Minister of Internal Affairs or any other person authorized by him.

7. Executing organs

According to Article 504 M, the measure is executed by organs of the Ministry of Internal Affairs. However, Article 504 Nj, para. 2 ,clearly provides

that an undercover agent can be any person employed within a state body. It is unclear which provision is valid.

According to Article 16, para. 1 of the Law on the Security Information Agency[6], when necessary, out of reasons of security in the Republic, the Agency itself can undertake and directly carry out tasks which are within the competence of the Ministry of Internal Affairs. Therefore, a member of the Agency can act as an undercover agent.

8. Reporting on the execution of the measure

The relevant organs of the Ministry of Internal Affairs report on the execution of the measure to the investigative judge and the public prosecutor (Article 504 M). They compile daily reports which they, along with gathered information, deliver upon request to the investigative judge and public prosecutor.

Once the measure has ended, organs of the Ministry of Internal Affairs deliver a *special detailed* report which contains the following:

- Start and end time of the measure
- Information on the official who executed the measure
- Number and identity of persons encompassed by the measure
- An evaluation of the usefulness and results of the measure

The last point seems questionable. It is highly unorthodox for an organ which implements a measure to carry out some sort of *evaluation of usefulness* of such a measure. Such an organ can only rate the legality of a certain measure and its own competence, but never the usefulness of it.

Along with the report, the internal affairs organ gives the prosecutor the complete documentation originating from photographs, video, audio, or electronic recordings and any other *evidence* obtained during the implementation of the measure.

Another question which comes up, is how is it possible for the undercover agent to legally come up with photographs or video material when Article 504 Nj clearly states that the investigative judge can authorize the undercover agent to use only technical equipment for the recording of *conversations*?

[6] *Službeni list Republike Srbije* (Official Journal of the Republic of Serbia) 42/2002

It is obvious that articles 504 Nj and 504 M are not in concord.

The Law mentions "*evidence*" which leads one to think that the measure entails an investigative activity for the gathering of evidence. However, it is clear that this is a rather imprecise formulation, because already in the next article it states that "*all gathered evidence*" must be destroyed.

9. The possibility of hearing the undercover agent as a witness

An undercover agent can be heard in criminal proceedings as a witness. The hearing must be done in such a way so as not to uncover his or her identity. Information on the identity of the agent is to remain classified.

10. Accountability of the undercover agent

This very sensitive issue, which opens up a number of questions and which is being hotly and continually debated, is regulated by Article 504 Nj, para. 3 which states that, "It is forbidden and punishable for an undercover agent to incite the committing of a crime."

No further requirements are defined, rendering the borderline of accountability of an undercover agent for crimes committed by persons under his influence highly flexible. Does this mean that the undercover agent does not answer for crimes in which he participated as a member of a criminal circle, if he did not incite others to commit the crime? (For more insight on this *see Conclusion*).

III The Undercover Agent in the Criminal Procedure of the Republic of Montenegro

The Republic of Montenegro enacted its Code of Criminal Procedure on 29 December 2003.[7] Regarding undercover agents, the main difference in comparison with Serbia, is that the agent constitutes a general measure of surveillance which can be applied, not only for organized crime, but to all other crimes which warrant a prison sentence of ten years or more.

[7] *Službeni list Republike Crne Gore* (Official Journal of the Republic of Montenegro) 71/2003

1. Requirements for the use of undercover agents are the same as for other measures of secret surveillance

- If there are no other available means to gather evidence or if other means would require taking of a disproportionate amount of risk and thereby endangering human lives
- It is necessary to obtain a written explanation/proposal of the public prosecutor which must be delivered in a sealed envelope marked MNT (*mere tajnog nadzora* – measures of secret surveillance) (Article 237)
- The measure can be ordered:
  a) For crimes which warrant a prison sentence of 10 years or more
  b) For crimes with elements of organized crime (Article 238)
- The measure is prescribed by the investigative judge with a written order

2. Content of the order

The order must contain all available information about the person against whom the measure is being implemented, the crime for which the measure is being implemented, the facts related to the need for implementation, duration, methods, scope, and location.

3. Duration of the measure

The duration of the measure must be pertinent to achieving the set goal and must not be more than six months in length, with the option of extending the measure for another six months out of important reasons (Article 239, para. 1).

The measure ends once all deadlines have passed or if the investigative judge, with an order, decides that there is no longer a need to implement the measure (Article 240, para. 2).

4. Accidental findings

Accidental findings are mentioned only in relation to secret surveillance and recordings. According to Article 239, para. 4, information and notices which relate to other crimes, from the list of crimes of Article 238, must be delivered to the public prosecutor. However, there is no mention as to what should be done if the crime is not on this list, i.e. a crime which does not warrant measures of secret surveillance. There is no clear answer to this question in literature either. As is the case with the Serbia, the Montegrin ZKP does not offer any solutions for situations where in addition to the person whose name is mentioned in the order for measures of secret surveillance, through the implementation of the measure, other persons are uncovered as perpetrators.

5. Protecting the identity of undercover agents

The public prosecutor and the investigative judge will by suitable means (removing personal information from transcripts, records, etc.) prevent unauthorized persons, suspects, or their defenders from establishing the identity of the persons implementing the measures of secret surveillance.

However, if these persons are to be heard as witnesses, the general rules of Article 101 (Article 239) regarding the hearing of witnesses are to be applied. There is no application of provisions for the special participation and hearing of protected witnesses. Hence, it is highly unlikely that persons who implement these measures are to be heard as witnesses.

6. Execution of the measure

The measure itself is executed by the police, while attempting not to violate the privacy of persons not encompassed by the measure (Article 240).

7. Reporting on the execution of the measure

The police officer authorized to execute the measure keeps records of every activity undertaken relating to measures of secret surveillance. This rule does not apply to undercover agents, as the keeping of such records on activities would be rather complicated and highly dangerous if these records should fall in

the hands of criminal group members. These activities are reported to the Attorney General and the investigative judge on a periodic basis, while the police delivers the Attorney General a final report and all materials obtained through the measure, once the measure has been executed.

8. Procedure with unnecessary material

If the state prosecutor decides that he will not initiate an investigation against a suspect he shall deliver all obtained material in a sealed package marked MTN to the investigative judge who will give the order to have the material destroyed under his presence and the presence of the Attorney General. A record is made for this procedure. The investigative judge will do the same thing if the received material, or a part of it, is deemed unnecessary for conducting criminal proceedings against the suspect (Article 240, para. 4 and 5).

9. Lawful and unlawful evidence

Contrary to the Serbian ZKP, the Montegrin ZKP does attend to the question of whether information obtained through measures of secret surveillance, which includes the use of secret agents, can be used as evidence. According to Article 241, para. 1, a court ruling can only be based on this information if this it is obtained in accordance with provisions of the ZKP or upon an order of the investigative judge. In other words, this can be used as evidence in criminal proceedings. On the other hand, if in the implementation of the measure actions were taken contrary to the provisions of the ZKP or the order of the investigative judge, this information cannot be used in proceedings. For this reason, theoretical discussions have concluded that we are dealing with a special investigative activity in this matter.[8]

10. Accountability of the undercover agent

This is addressed in the same manner as in Serbia. The execution of the measure must not entail the inciting of others to commit a crime (Article 237 para. 3).

[8] *See* D. Radulović, *„Specijalne istražne radnje i valjanost dokaza pribavljenih preduzimanjem tih radnji u krivičnom procesnom zakonodavstvu Srbije i Crne Gore i opšteprihvaćeni standardi", Zbornik radova XLI Savetovanja za krivično pravo i kriminologiju SCG,* pg. 461.

IV Commentary

It is a fact that certain covert police measures have been legalized, since they are highly efficient in combating dangerous forms of crime. However, the statutory provisions in Chapter XIX of the ZKP regarding undercover agents have a number of defects. One can easily conclude that they were not thoroughly thought through and brought into according with each other, while in certain places they remain unclear and confusing. These deficiencies can significantly impede the practical implementation of the special provisions on proceedings for organized crime. We have already mentioned some of the problems. Here we shall focus on three major problems:

- Constitutional basis
- Accountability of undercover agents for committing crimes during the execution of a task
- The legal nature of material obtained by undercover agents

1. Constitutional basis

These activities encroach upon one of the basic rights: the right to respect of privacy and family life, the home and secrecy of communication. These rights are guaranteed by a number of international acts, as well as the provisions of domestic law.[9] The same acts also allow for a restricting of these rights under certain conditions. Article 8, para. 2 of the European Convention of Human Rights provides that the right to private life, family life, home, and communication can be restricted for the purpose of combatting disorder and crime.

Domestic law also allows for certain deviations from the rule, but only concerning the inviolability of secret letters and other means of communication. This can be done if deemed necessary for the conducting of criminal proceedings or out of reasons of defense (Article 24 Charter of Human and Minority Rights and Freedoms of Citizens, Article 19 of the Constitution of the Republic of Serbia, Article 30 of the Constitution of the Republic of Montenegro). These provisions are supposed to offer a sound basis for the introduction of new methods in the fight against modern crime, since classical methods have proved

[9] Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, Article 17 of the International Pact on Civil and Political Rights, Article 24 of the Charter of Human and Minority Rights and Civic Freedoms, Article 18 of the Constitution of the Republic of Serbia and Article 20 of the Constitution of the Republic of Montenegro.

to be inefficient.[10] For this reason, many states have been forced to revise their legislation and allow the introduction of much more efficient and modern methods. Classical methods are gradually being replaced or updated with new ones (usage of various technical equipment, camouflaged police activity, etc.). The question is, however, whether the mentioned provisions can be a basis for certain measures which might restrict the right to privacy, family life and the home, except of the restricting of rights of the inviolability of letters and other methods of communication. Moreover, restrictions in Article 24, para. 3 of the Charter and Article 19, para. 2 of the Serbian Constitution are explicitly referring to only the possibility of restricting rights regarding the inviolability of letters and methods of communication, and not to other possible restrictions. When dealing with the restrictions of basic rights, it is an absolute necessity to have the relevant restricting provisions. Therefore, it is rather clear that the abovementioned provisions of the Charter and Constitution of the Republic of Serbia cannot serve as a legal basis for the restriction of other basic rights and freedoms, that is for such methods which restrict rights and freedoms, which include covert police tasks.

2. Accountability of the undercover agent

The use of an undercover agent is an accepted police method in numerous countries with long democratic traditions. The method is highly efficient in uncovering certain particularly dangerous forms of crime, but also brings with it certain risks. This is particularly so in cases where the undercover agents incites a perpetrator to commit a crime. Such activities obviously must be restricted and a system must be formed whereby the active influence of the undercover agent in these matters can be curtailed. A complete ban on the active involvement of undercover agents would be uncalled for, as some forms of crime and their perpetrators cannot be uncovered otherwise. For example, it is difficult to imagine the uncovering of a drug dealer if the undercover agent would have to passively await the person to offer him the drugs. This would surely not be a contribution to the effective combating of illegal drug trafficking. Therefore, it is necessary to have a differentiation of various forms of active influence according to whether it is acceptable or unacceptable influence and thereafter develop an adequate system of regulations for the combating of *undesirable forms of police activity.*

[10] *See* D. Radulović, *„Specijalne istražne radnje i valjanost dokaza pribavljenih preduzimanjem tih radnji u krivičnom procesnom zakonodavstvu Srbije i Crne Gore i opšteprihvaćeni standardi", Zbornik radova XLI Savetovanja za krivično pravo i kriminologiju SCG,* pg. 462.

Various solutions have been applied in legislation. One of them is for the highest administrative organ to use administrative methods – giving instructions, guidelines, rules, etc. – to ban the implementation of this method. If the ban is violated, the perpetrators must be held accountable.

A second possibility is to prosecute police officers who utilize such methods as instigators of the relevant crime, or possibly even as perpetrators of a special crime. In certain countries, the public prosecutor is authorized to choose not to prosecute an undercover agent who has committed a crime in the course of fulfilling his task, if the interest to institute certain proceedings is greater than the interest of the state to prosecute and punish the undercover agent.[11] A further possibility is for the courts to, through the use of substantive or procedural legal means, prevent the punishing of perpetrators who acted under the influence of an undercover agent.[12]

The regulating of accountability of undercover agents is very important from the standpoint of police misconduct prevention. The first opportunity for misconduct is the choice of the person against whom a certain covert measure will be implemented. It should not be allowed for the police to target individuals without any tangible factual basis. This would cause substantial theoretical and practical problems.

The method of random choice is highly irrational, as it leads to unnecessary squandering of forces. On the other hand, it is rather susceptible to all sorts of misuse. It is both theoretically and morally inadmissible for the police to carry out moral profiling of citizens. It is generally accepted that utilization of covert methods requires a certain factual basis. However, there is no agreement, in neither theory or legislation, as to the quantity or quality of facts necessary to justify the application of these methods, as well as who and when is to authorize the execution. In common law systems, it is traditionally higher police officials who authorize the implementation of the measure, i.e. decide whether the

[11] Article 192, para. 2 Criminal Procedure Code of Hungary 1998

[12] In this regard, the case law of common law system countries is quite extensive. In England, the tendency has been to treat such activity of the *agent provocateur* as an abuse of process. This trend reached its pinnacle in the case of *Regina v. Looseley* (2001). The House of Lords, on the count of this case, determined that the English case law stands in conformity with the principles determined in the judgments of the European Court of Human Rights in Strasbourg. Moreover, it further determined that the accused, even before the main hearing, must request for the cancellation of proceedings based on the abuse of process. The accused may request the exclusion of evidence of the prosecution only if he has failed to submit the abovementioned request or if his request was denied.

existing available facts justify their implementation. The courts can only exercise control later on, once there has been an indictment. A further negative consequence of active involvement of police agents in the implementation of covert methods, is the possibility of inciting to commit a crime persons who would not otherwise do so. In this manner, the police is actually inciting (increasing) crime and not preventing it. The Serbian ZKP represents a correct approach to this matter by linking the involvement of an undercover agent to the authorization of the investigative judge.

A third important factor in deciding as to whether a certain covert police measure should be prevented or legalized is its reception among criminal elements. If the measure is so dishonest and unjust that even criminals find it unacceptable it should not be used.

3. The legal nature of obtained material

The issue here is whether material obtained by an undercover agent can be used as evidence in criminal proceedings. Chapter XIX of the ZKP does not address this very important question. According to Article 504A, para. 2, if something is not regulated by the provisions of Chapter XIX A, the other provisions of the ZKP are to be applied.

Another sort of solution to this question can possibly be found in the argumentation given in the provision of Article 504 J, according to which testimonies and notices gathered by the public prosecutor in pre-criminal proceedings can be used as evidence in criminal proceedings themselves. Therefore, we must ask ourselves: is the public prosecutor involved in the gathering of notices and testimonies with respect to the activity of the undercover agent? The answer, of course, is no. The use of an undercover agent is ordered by a investigative judge (albeit based on the proposal of the public prosecutor). The public prosecutor only uses material gathered based on the authorization of the investigative judge.

A second possible interpretation is given in Article 504 Lj, para. 1, where it says that the criminal investigator can, "in addition to the measure from articles 232 and 234 of this Code authorize the application of measures: (…) for the use of undercover agents." … From this stylization of the text, one could conclude that measures from Article 504 Lj, which encompass undercover agents, as well as wiretapping (Article 232) and inspecting business and personal records of the accused (Article 234), represents a totality. Pursuant to that, if

done so legally, material obtained in this manner can be used as evidence in criminal proceedings. Furthermore, according to Article 233, para. 4, information obtained by wiretapping cannot be used as a basis for a court ruling, only if the measure is implemented illegally.

However, this sort of argumentation cannot be enough of a basis for the deviation from the general rule that material obtained in pre-criminal proceedings cannot be used as evidence in criminal proceedings. Every break from this rule has to be explicitly provided in the ZKP (as are exceptions from Article 226, para. 9). Therefore, if nothing else is explicitly stated, material gathered by undercover agents can only be regarded as information upon which a court decision cannot be based. It is necessary for this issue to be addressed explicitly as was done in Article 241, para. 1 of the Montegrin ZKP.

V. Conclusion

Faced with an overall need for the effective prosecution of organized crime (in Montenegro other serious crimes as well), the Serbian legislature has legalized certain covert police methods, among which is the use of undercover agents. This is a very positive step. In combating highly dangerous forms of modern crime the police must have at their disposal the use of covert methods and modern technical equipment which have proven useful in practice in other countries. The possibility for misconduct and the restrictions on fundamental rights of citizens cannot be enough of a reason to *a priori* reject a certain method or measure. With due caution and the necessary statutory guarantees, new measures – carefully balanced between the need for criminal prosecution and the restricting of human rights (i.e. the protection of human rights and freedoms) should be allowed.