

# Guarantees of the legality of evidence collection by investigative units of the security agencies of Ukraine when conducting covert investigative (search) actions in criminal proceedings

Rusinov Yevgen,

Postgraduate degree seeker at the Research Institute of Public Law

ORCID: <https://orcid.org/0009-0006-1280-5537>

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**Abstract.** The article formulates the concept of legality of evidence collection by the investigative units of the security agencies of Ukraine during covert investigative (detective) actions in criminal proceedings as one of the principles of this activity, which consists in strict compliance with the provisions of criminal procedure legislation when conducting covert investigative (detective) actions. The author notes that there is an extensive system of guarantees of legality of evidence collection by the investigative units of the security agencies of Ukraine during covert investigative (detective) actions, which are both legal and organisational in nature.

The study used a range of both general scientific and special methods of cognition, in particular, methods of dialectical and formal logic: analysis, synthesis, deduction, induction, comparative, and systemic and structural methods.

The research findings are the following: The legal guarantees include: 1) general legal: an appropriate level of legal awareness of investigators of the security agencies of Ukraine; 2) procedural guarantees: prosecutorial supervision, judicial and departmental control over the observance of the law. As for the organisational guarantees of such activities, the author emphasises the need to further improve the organisational and staffing structure of investigative units, to fill them with qualified personnel, to systematically conduct advanced training of investigators, to further improve the uniform distribution of the workload of each investigator, to ensure their proper logistical support, and to introduce electronic systems for recording criminal proceedings and document flow.

**Key words:** legality, criminal proceedings, evidence, evidence collection, standards of proof, legal guarantees, covert investigative (search) actions.

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**Problem statement.** All participants in criminal proceedings are obliged to comply with the requirements of the criminal procedure legislation. This is especially important for officials and state bodies that conduct criminal proceedings. They must be responsible for applying the provisions of this legislation and exercising their authority, which sometimes involves the possibility of restricting human rights, such as liberty, security of person, inviolability of the home, or interference with private life. The public authorities and their representatives involved in criminal proceedings should make decisions and perform actions exclusively within their competence and in accordance with the grounds and procedures established by law [1, p. 41]. Such a vision of legality is common since legality is a general legal principle. According to Part 2 of Article 19 of the Constitution of Ukraine: "State authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of their powers and in the manner provided for by the Constitution and laws of Ukraine" [2]. This necessitates a deeper study of the problem of legality and its guarantees in the implementation of covert investigative (detective) actions by investigators of the security agencies of Ukraine.

**State of the study.** Having done a comprehensive literature review, it is worth pointing out prominent Ukrainian scientists who have contributed to the research on the relevant topic. Those scientists are H. M. Onishchenko, V. V. Moldovan, R. S. Katsavets, O.M. Kornilova, I.M. Koropatnik, I.O. Kravchenko, T.M. Kravtsova, A.M. Kulish, O.M. Muzychuk, V.O. Nevyadovsky, P.M. Rabinovich, V.V. Kopeychikov, L.M. Loboyko, V.M. Tertyshnyk, V.V. Nazarov, O.Yu. Tatarov, T.K. Zavgorodnya, L.G. Kaydalova, T.A. Kobzeva, and O. V. Zaichuk. However, the issue of the guarantees of the legality of evidence collection by

investigative units of the security agencies of Ukraine when conducting covert investigative (search) actions in criminal proceedings hasn't been researched as comprehensively as it should be. Thus, this article tries to address the following gap in the literature.

**Purpose and objectives of the study.** The purpose of this study is to examine and define the system of guarantees that ensure the legality of evidence collection by investigative units of the security agencies of Ukraine during covert investigative (search) actions in criminal proceedings. The study aims to formulate a comprehensive understanding of legality as a principle that underpins such activities and to identify the legal and organisational measures required to uphold it. To achieve this, the research sets out several key objectives: first, to conceptualize the principle of legality in the context of covert investigative actions and its grounding in Ukrainian constitutional and criminal procedural law; second, to classify and analyze the components of legal guarantees, namely, general legal awareness and procedural oversight mechanisms such as prosecutorial and judicial control; third, to evaluate the organizational guarantees necessary for effective implementation, including structural reforms, human resource development, and the modernization of investigative processes through digital technologies; and finally, to identify gaps in current scholarly and practical approaches, thereby contributing to the ongoing improvement of Ukraine's security and law enforcement practices within the bounds of democratic legality.

**Scientific novelty of the study.** The scientific novelty of the lies in the fact that the author has employed a range of both general scientific and special methods of cognition, in particular, methods of dialectical and formal logic: analysis, synthesis, deduction, induction, comparative,

and systemic and structural methods to study the issue comprehensively.

**Presentation of the main material.** When considering the issue of legality, the literature describes it as a socio-political regime based on the principles of democracy and social justice. At the same time, it is important to ensure the real and unconditional implementation of legal norms by all participants in social relations [3, p. 331]. According to P.M. Rabinovich, legality is a regime in which social relations are consistent with the laws and bylaws of the state, being formed through their precise and unconditional observance by all subjects of law [4, p. 104]. V.V. Kopeychikov describes the principle of legality as the implementation of all legal forms of state activity, as well as the functioning of civil society and individuals on the basis of and in accordance with legal norms and the natural rights and duties of a person [5, p. 135].

The principle of legality covers several important aspects. Firstly, it is its generality, which requires mandatory compliance with laws and other regulations by all participants in social relations without exception. This also includes strict adherence to the law by each subject of legal relations. It also includes the actual implementation of the law by all parties to legal relations, which underlines its practical significance. It is also important that the activities of public authorities should be aimed at a single goal that reflects the expediency of legality: choosing the most optimal legal ways to exercise powers to achieve the goals of legal regulation. Finally, establishing an effective mechanism for implementing this principle in all spheres of public life and creating a system of guarantees ensures its full compliance [6, p. 13 - 14].

In criminal procedure, there are works on the structure of the principle of legality, which allow revealing its content and facilitate its effective application in criminal proceedings. The elements of the structure of this principle are the system of applicable law, which includes criminal procedure legislation. This means that the participants in the proceedings must not only comply with the requirements of the law but also properly implement, use and apply it. This also includes the beginning and conditions for the implementation of the principle of legality, the subjects that ensure this legality, and the principle of inadmissibility of violation of the law in the activities of investigative bodies, prosecutors, and courts, as well as legal entities and individuals. Ensuring the rule of law is associated with preventive measures and the existence of a system of effective guarantees [7, p. 104].

Thus, one of the structural elements of the principle of legality is the guarantee of its ensuring. Consequently, the guarantees of legality of evidence collection by the investigative units of the security agencies of Ukraine during covert investigative (detective) measures in criminal proceedings should be considered as a component or reflection of the principle of legality in criminal proceedings in general.

With regard to the concept of guarantees of legality, in the legal literature, the system of guarantees is usually understood as both objective conditions of existence of society and specially developed by the state and the public

means. Their purpose is to ensure the accurate implementation of legal norms by all participants and to maintain the rule of law and stable law and order in society [8, p. 108]. Guarantees of legality cover a wide range of social relations, so in the legal literature, they are usually classified into two main groups: general and special. General guarantees include economic, political, moral and social components, while special guarantees are represented by legal mechanisms [9, p. 35]. O. V. Zaichuk and H. M. Onishchenko note that most authors distinguish legal and organisational means among the special guarantees of legality [10, p. 537-541].

Legal guarantees are a system of means, determined by the level of development of a society, which are enshrined in the current legislation, have a legal nature and are aimed directly at ensuring the rule of law. They include, for example, the constitutional enshrining of the principle of legality and the means to ensure it; improvement of current legislation; means of detecting violations of legality; means of preventing offences; effective means of legal liability and protection of rights and freedoms of subjects; quality work of law enforcement agencies, etc. The peculiarity of these guarantees is that they are specially created to ensure and protect the rule of law and always receive legal recognition. They are developed, protected and guaranteed by the state.

Organisational guarantees are based on the creation of an effective structure of the state apparatus, the introduction of the principle of separation of powers and the establishment of specialised bodies. Normative anchoring also relates to the system of organisational guarantees, but its uniqueness lies in the fact that it covers the activities of special state structures. Such guarantees include clearly defined and normatively enshrined powers of state bodies, functional separation of work of governmental structures, constitutional provision of the principles of organisation of the state apparatus, independence of judicial bodies and their subordination to the law, creation of necessary conditions for the activities of law enforcement agencies, careful selection and placement of state personnel, existence of control and supervision bodies for compliance with the law, etc. [9, p. 35].

With regard to the concept of guarantees in criminal procedure, in the professional literature one can often find the concept of 'criminal procedural guarantees', which is a broader concept than guarantees of legality. Let us consider their content. Thus, procedural scientists V. V. Moldovan and R. S. Katsavets understand procedural guarantees as 'the rules established by law that ensure the implementation of the tasks of justice by providing all participants with procedural rights and imposing on state bodies the obligation to ensure the exercise of these rights' [11, p. 146].

L.M. Loboyko believes that criminal procedural guarantees are legally defined instruments that ensure the effectiveness of the criminal process. He identifies a system of such guarantees, which includes: an appropriate level of regulation of criminal procedural activities; criminal procedural form; principles of criminal process; legal status of participants in criminal process; possibility of applying coercive measures, including preventive and other measures; judicial control; prosecutorial supervision; control by departments; justification of procedural decisions and the

complex procedure for making some of them, in particular regarding a search of a person's home or arrest; the right to appeal the actions and decisions of bodies and officials conducting the process; as well as legal liability [12, p. 19].

V.M. Tertyshnyk offers a different approach to the system of criminal procedural guarantees, dividing it into three groups, which he includes "guarantees of justice", "guarantees of establishing objective truth" and "guarantees of protecting human rights and freedoms" [13, p. 25]. The system of guarantees of justice, as noted by V.M. Tertyshnyk, is an optimal combination of mechanisms that ensure the establishment of the truth and the protection of human rights and freedoms [14, p. 26].

The scientist believes that guarantees of establishing objective truth are provided by both the procedural form as a whole and specific institutions of the criminal process. Among them: the principles of criminal procedure, evidentiary law, institutions of investigative actions, judicial investigation and judicial debates. He includes the following elements in the procedural guarantees of rights and legitimate interests in criminal proceedings: legal definition of rights and freedoms; prohibition of narrowing existing rights and freedoms; determination of procedures for their implementation; ensuring a real opportunity for the implementation of these rights; prevention of violations of rights and freedoms by other participants in the process; assistance from investigators, the inquiry body, the prosecutor, the defense attorney and the court in the exercise of rights; the obligation of persons conducting criminal proceedings or controlling the process to take measures to prevent violations; protection of rights and freedoms by establishing barriers against their violation; restoration of violated rights and full rehabilitation and compensation for the damage caused [13, pp. 328-329].

Despite the existence of differences in scientific approaches, in our opinion, all criminal procedural guarantees are interconnected and form a single, inseparable system.

Based on the analysis of the above approaches both in legal theory and in the field of criminal procedure, we consider it possible to formulate our own understanding of the guarantees of the legality of collecting evidence by investigative units of the security agencies of Ukraine when conducting covert investigative (detective) actions in criminal proceedings. First, it is important to recognise the justified division of the guarantees of the legality of carrying out covert investigative (detective) actions into two types. The first concerns ensuring the fulfilment of the tasks of criminal proceedings, including obtaining admissible, legal and reliable evidence. The second focuses on the protection of the rights, freedoms and legitimate interests of participants in the criminal process.

The legality of collecting evidence by investigative units of the security agencies of Ukraine when conducting covert investigative (detective) actions in criminal proceedings should be understood as one of the principles of their criminal procedural activity and a requirement that consists in strictly observing the provisions of criminal procedural legislation when conducting covert investigative

(detective) actions. In other words, this is a requirement to comply with the established criminal procedural form of conducting covert investigative (search) actions or the criminal procedural procedure for conducting them, which, in our opinion, are equivalent concepts. Since the requirement of legality in the activities of any subject of criminal proceedings is expressed in their conscious attitude to the implementation of the procedure for conducting covert investigative (detective) actions determined by criminal procedural norms, the first guarantee of its provision (legality) is the necessary level of legal awareness of the investigator. It is the legal awareness that determines the attitude of a certain person to the need to comply or not to comply with legal norms during their social activity. This thesis applies to absolutely all areas of the manifestation of law and therefore also takes place in criminal proceedings. This guarantee, in our opinion, is of fundamental importance for ensuring legality both in criminal proceedings in general and in the conduct of covert investigative (search) actions. After all, a positive sense of justice always encourages the subject to properly comply with the norms of the law.

Despite this, in the criminal process at the legislative level, a number of preventive mechanisms for violating the principle of legality have been introduced, which, among other things, concern the procedure for conducting covert investigative (search) actions – prosecutorial supervision, judicial and departmental control over compliance with the law. As V.V. Nazarov rightly notes, judicial control consists in verifying the legality and validity of actions and decisions by the prosecution, which has state-authority powers (prosecutors, pre-trial investigation bodies, heads of these bodies, operational units). In this context, the role of the investigating judge, who exercises judicial control to protect the individual, society and the state from criminal offences and also protects the rights, freedoms and legitimate interests of participants in criminal proceedings, acquires particular importance [15, p. 90]. The function of judicial control over compliance with the rights, freedoms and interests of a person in the criminal process during covert investigative (search) actions is performed by the investigating judge. Its human rights nature imposes on it general obligations to protect human rights and ensure the legality and validity of procedural decisions and actions taken and committed during criminal proceedings.

In our opinion, the function of judicial control over compliance with the law when conducting covert investigative (search) actions in criminal proceedings is performed not only by the investigating judge but also by the court during the court proceedings and can be expressed in the following forms: 1) granting prior permission to conduct covert investigative (search) actions; 2) confirmation or refutation of the lawfulness of conducting covert investigative (search) actions after their actual conduct (legalisation); 3) verification of legality within the framework of the procedure for appealing the decision of the investigator or prosecutor to refuse to grant a petition to conduct covert investigative (search) actions; 4) recognition by the court of evidence obtained during covert investigative



(search) actions as inadmissible due to a violation of the procedural order for its conduct. The next guarantee of the lawfulness of collecting evidence when conducting covert investigative (search) actions that have been identified is the prosecutor's supervision over compliance with the law in the form of procedural guidance. Scientific sources indicate that prosecutorial supervision in pre-trial proceedings is the work of the prosecutor, which consists of ensuring compliance with the laws by the bodies conducting pre-trial investigations of criminal offences, in accordance with the current criminal procedural legislation [16, p. 9]. It is worth agreeing with the opinion that the exercise by the prosecutor, as the procedural head of the pre-trial investigation, of his legal powers should guarantee the admissibility of all evidence collected by the prosecution at the stage of the pre-trial investigation, including that obtained during covert investigative (search) actions [17, p. 12].

The main means of supervision by the prosecutor over the conduct of covert investigative (search) actions and the use of their results during the evidence are their relevant powers provided for by the current Code of Criminal Procedure of Ukraine. O.Yu. Tatarov notes that the prosecutor in the role of procedural leader during the conduct of covert investigative (search) actions is given extended powers in matters of organisation and control over the legality of these actions. This is aimed at the operational collection of evidence at the pre-trial stage of criminal proceedings. According to the Criminal Procedure Code of Ukraine, the prosecutor has the right to verify the legality of such actions, assign their implementation to operational units, make decisions on the use of the results obtained in criminal proceedings and ensure compliance with the rights of persons to whom they relate [18, p. 70].

Thus, in the author's opinion, in order to perform the function of procedural management, the prosecutor in criminal proceedings is vested with the following powers: 1) to approve the investigator's request to the investigating judge to conduct covert investigative (search) actions; 2) to prohibit or terminate further covert investigative (search) actions; 3) to make a decision to monitor the commission of a crime and to carry out a special task to uncover the criminal activities of an organised group or criminal organisation; 4) to cancel the investigator's decision to conduct covert investigative (search) actions; 5) to have full access to materials, documents and other information related to the conduct of covert investigative (search) actions; 6) to extend the term for covert investigative (search) actions; 7) to initiate questions before the head of the pre-trial investigation body about replacing the investigator; 8) making a decision to use previously identified (noticed) or fake (imitation) means during covert investigative (search) actions.

In the doctrine of criminal procedure, departmental control in pre-trial investigation is characterised as an additional internal function specific to a particular pre-trial investigation body. Departmental control over the activities of investigators is considered part of the organisational work of the head of the pre-trial investigation body. That is, control process that guarantees

the achievement of the organisation's goals. It includes establishing criteria, assessing the actually achieved results and making adjustments if the results significantly deviate from the specified criteria [19, p. 293].

Regarding the powers of the heads of pre-trial investigation bodies, who act as subjects of departmental control, it is worth noting that in the criminal procedural doctrine it is recommended to classify them into organisational and procedural aspects [20, p. 83]. They are legislatively defined in Articles 39 and 39-1 of the Code of Criminal Procedure of Ukraine and are also detailed in departmental regulatory documents. We believe that the powers of the head of the pre-trial investigation body regarding the implementation of departmental control over investigative (search) actions can also be divided into organisational and procedural.

As A.B. Stepanov rightly notes, procedural powers should be recognised as those that have a direct impact on the course of the pre-trial investigation in a specific criminal proceeding. The powers provided for in Part 2 of Article 39 of the Code of Criminal Procedure of Ukraine, which are aimed at ensuring the appropriate level of activity of the investigator, should be considered purely organisational [20, p. 85].

Also, the studied provisions of the Code of Criminal Procedure of Ukraine establish the authority of the head of the pre-trial investigation body (inquiry body) to take measures to eliminate violations of the requirements of the law in the event of their admission by the investigator. We believe that the specified authority can be attributed to both organisational and procedural reasons because, on the one hand, removing an investigator is more of an administrative function, but the reason for this is the establishment of circumstances that prevent the investigator from conducting a pre-trial investigation (inquiry), which is already a manifestation of procedural powers (for example, studying the materials of criminal proceedings, considering complaints of participants in the pre-trial investigation, etc.). In view of this, we propose to also define a third group of powers of the head of the pre-trial investigation body (inquiry body) – organisational and procedural – and attribute the specified authority to the proposed category.

Thus, the powers of the head of the pre-trial investigation body as guarantees of ensuring legality during the collection of evidence during covert investigative (search) actions by investigators of the security bodies of Ukraine include: 1) determining the investigator (investigative group) authorised to conduct a pre-trial investigation; 2) removing the investigator from conducting a pre-trial investigation and appointing another investigator in the event of an ineffective pre-trial investigation; 3) familiarising himself with the materials of covert investigative (search) actions; 4) providing the investigator with written instructions; 5) approving the investigator's resolution to conduct covert investigative (search) actions – performing a special task to uncover the criminal activities of an organised group or criminal organisation; 6) making a decision on the use of previously identified (noticed) or fake (imitation) means during covert investigative (search) actions; 7) extending the terms of conducting covert

investigative (search) actions; 8) conducting a pre-trial investigation (inquiry), using the powers of an investigator (investigator).

Regarding purely organizational guarantees of legality during the collection of evidence during covert investigative (search) actions by investigators of the security agencies of Ukraine, it should be emphasized that there is a need to further improve the organizational and staffing structure of investigative units, fill them with qualified personnel, systematically conduct advanced training of investigators, further improve the even distribution of the workload on each investigator, their proper material and technical support, implement electronic systems for recording criminal proceedings and document flow by analogy with the E-case system, which is currently in operation in the National Anti-Corruption Bureau of Ukraine, Specialized Anti-Corruption Prosecutor's Office and Supreme Anti-Corruption Court and implemented by the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine Regarding the Introduction of an Information and Telecommunications System for Pre-Trial Investigation" dated 01.06.2021 №. 1498-IX [21]. However, such organisational guarantees must also be established and recorded in relevant legal norms, which may be of both a criminal procedural and administrative-legal nature.

**Conclusions.** The study has highlighted the existence of a comprehensive system of guarantees ensuring the legality of evidence collection by investigative units of the Security Service of Ukraine during covert investigative (detective) actions in criminal proceedings. These guarantees are both legal and organizational in nature, with legal safeguards playing a foundational role by embedding the principles that organizational measures are designed to implement. The legal guarantees are twofold: first, general legal guarantees that require investigators to maintain a high level of legal awareness and competence; and second, procedural guarantees such as prosecutorial supervision and judicial or departmental oversight to uphold compliance with criminal procedure law. Complementing these are essential organizational guarantees aimed at reinforcing the effectiveness of investigative work. These include improving the organizational and staffing structures of investigative units, recruiting and retaining qualified personnel, conducting ongoing professional development, ensuring balanced workloads, securing adequate logistical support, and adopting electronic systems for case management and document flow. Together, these measures form a robust framework to ensure the integrity and legality of investigative actions, emphasizing the need for continual reform and modernization to meet contemporary security challenges.

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