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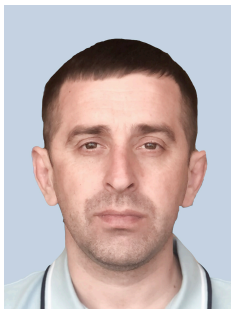

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WAR ON CRIME: FROM PASSIVE BEHAVIOUR OF AN UNDERCOVER AGENT TO ACTIVE FORMS OF COVERT INFLUENCE ON ACCOMPLICES OF CRIMINAL ACTIVITIES

Abstract. The research is dedicated to the operative work of law enforcement agencies in terms of the use of undercover agents for conducting operative-search operations in the criminal environment for searching for the criminal activity of previously unknown persons (unknown

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accomplices). A comprehensive analysis of the main provisions of the Ukrainian legislation and fundamental international acts that regulate the use of undercover activities in Ukraine was conducted chronologically. It has been established that the European standards defining the limits of legal behaviour of undercover agents in the criminal environment are mainly based on the provisions of fundamental international acts on the protection of human rights and freedoms adopted in the 1948−1980s; the Ukrainian legislation regarding the issue under research began to be formed in 1990s; only since 2006, the Ukrainian justice system began to actively recognise the European judicial practice when passing verdicts in the field under study. It has been emphasised that the effectiveness of legal regulation of the use of undercover activities by law enforcement agencies depends on the ability to combine and direct positive factors accompanying the legal norm and block those that hinder it. The disparity of legal acts that fragmentarily regulate legal foundations of undercover activities negatively affects the efficiency of using the obtained results for combating crime. It is suggested to solve this issue through the unification of the provisions of the legal acts in order to achieve uniformity in the use of undercover methods by law enforcement agencies for combating crime according to the European legal standards. Taking into account a high crime rate in modern Ukraine, it is quite challenging to comply with or implement the latter in order to avoid incitement or entrapment to the extent of the regulation of lawful behaviour of undercover agents in the criminal environment, since solely passive behaviour of undercover agents not only fails to contribute to detecting criminal activities and documenting criminal intents of accomplices but rather exposes the undercover agents to the criminal world, which poses a threat to the life and health of both undercover agents and their relatives. In order to improve the effectiveness of crime-fighting activities in Ukraine, this research justifies the legal regulation of the general principles of permissible lawful behaviour of undercover agents as regards empowering them to use active forms of denunciating the criminal activities of people in the criminal environment.

Keywords: *entrapment, incitement, undercover agent, lawful behaviour, passive waiting*

Introduction. The conducted analysis of the fundamental international legal acts on the protection of basic human rights and freedoms from unjustified intervention and imposing restrictions by law enforcement agencies, relevant national legislation in the mentioned field, criminal case-laws of the European Court of Human Rights, where the evidence is based on the result of the undercover activities of law enforcement agencies, as well as national practical realities of covert operations in the criminal environment demonstrated a sufficient imbalance in the implementation of the state policy, particularly in the field of respect for human rights and freedoms during the operative-search operations in Ukraine (as based on the work of police units). The current legislative framework for undercover activities of law enforcement agencies as regards the use of undercover agents is versatile, but in general, it does not correspond to the actual crime rate in Ukraine, since it does not offer a comprehensive approach to ensuring and regulating the sufficiently effective lawful behaviour of undercover agents in the criminal environment to actively detect the criminal intents of the subjects, which have not yet been identified by the law enforcement agency as perpetrators of the crime being prepared or committed.

Analysis of recent research and publications. The issue of permissible behaviour of undercover agents in the criminal environment has been studied by a range of scholars, such as S. Albul, L. Arkusha, O. Bandurka, I. Basetsky, V. Bobrov, L. Brusnitsin, V. Vasilinchuk, A. Venediktov, A. Voznyi, V. Volobuyev, Zh. Bygu, M. Boguslavsky, O. Gida, V. Glazkov, V. Glushkov, O. Granin, M. Gribov, D. Grebelskyi, L. Gula, O. Dolzhenkov, O. Dulsky, V. Zakharov, L. Katsan, A. Kyslyi, V. Klimchuk, I. Kozachenko, M. Kornienko, O. Kopan, V. Kroshko, V. Krugly, Yu. Mantulyak, D. Nikiforchuk, S. Nikolayuk, V. Omelchuk, Yu. Orlov, S. Pichkurenko, M. Pogoretsky, S. Popov, S. Prikhodko, I. Servetsky, V. Silyukov, O. Skakun, E. Skulysh, S. Slynko, V. Stolbovoy, A. Subbot, O. Tsvetkov, V. Tsymbalyuk, Yu. Cherkasov, S. Chernykh, V. Shendryk, I. Shynkarenko.

Of course, the above list of the researchers, who directly or indirectly touched upon the discussed issue in their research, is not complete. Following the analysis of the existing significant scholarly research in the context of ambiguous

and often controversial issues regarding undercover activities of law enforcement agencies and in the absence of the up-to-date comprehensive monography on the topic under study, we can conclude that the studied problem is topical especially in the light of modern methods of countering organised criminal activity and the need to incorporate the international judicial decisions in the national law enforcement practice.

The purpose of this work is to justify the need to revise the legal regulations of the limits of the permissible undercover influence exercised by an undercover agent on a subject of the non-obvious (latent) criminal activity.

The achievement of the goal presupposes the consistent implementation of the following tasks: to analyse international and national legislative framework for the legal regulation of the use of covert methods of combating crime applied by the Ukrainian law enforcement agencies as regards using undercover agents to detect the wrongful intents in latent subjects of criminal activities; to review the European case-law in terms of interpretation of lawfulness of the use of undercover agents by law enforcement agencies; to outline the national tendencies in the use of undercover agents for detecting criminal intents in the latent subjects of the criminal offence; to draw the conclusions concerning the limits of permissible use of undercover agents by law enforcement agencies to detect the criminal intents in the latent subjects of the criminal offence (crime).

Taking into account the topic, goal and tasks of the research, the latter is done with the help of the following methods: the method of systemic and structural analysis (1) allowed us to study the theoretical aspects of the use of undercover agents in accordance with the international legislative acts, and (2) was applied during processing and generalisation of the empirical material concerning the legal regulation of undercover activities; comparative, logical legal, logical normative and comparative legal methods were used (1) to analyse the legislative acts and their equivalents that regulate the legal basis of using undercover agents and (2) to draw the conclusions regarding the limits of the permissibility of law enforcement agencies' using undercover activities to detect the criminal intents in the latent subjects of the criminal offence (crime); the dogmatic approach was used to determine the reason for the use of undercover agents; structural and functional method (analysis) is used to study the legal basis for the use of undercover agents; sociological methods (questionnaire and interview) were used to get primary information from the initiators of agent operational activities concerning the limits of lawful behaviour of undercover agents in the criminal environment; Aristotelian method contributed to drawing the conclusion of the conducted research.

Materials of the presented study include scientific and theoretical framework based on the research of famous experts in the field of Criminal Procedural Law, Criminal Law, operative-search operations and other branches of Law; legal framework based on the provisions of international legislative acts, the Constitution of Ukraine, the Criminal Code of Ukraine, Criminal Procedure Code of Ukraine, current normative legislative acts and their equivalents that define the fundamental constitutional, criminal-procedural, criminal-intelligence principles of using undercover agents by law enforcement agencies for detecting the legal intents of latent subjects of the criminal offence; an empirical basis based on the provisions of international and national normative legislative acts, regulations, court judgments; theoretical basis comprising the references to certain scientific research papers available to the public.

Formulation of the main material. The crime that comes to the police's notice is just the tip of the "crime" iceberg that "actually took place". From the viewpoint of criminal science, the non-detected delinquency (or hidden crime) is a set of actions that were committed but not noticed by the criminal investigation agencies and, consequently, not included in the official criminal statistics (H. Shnaider, 1994). As far as combating crime is concerned, the law enforcement agencies are intended

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to detect yet unknown criminal offences (crimes) and, henceforth, those who have committed them. In addition, they are supposed to identify problems before they arise in order to prevent dangerous consequences, i.e. to take investigative measures in the criminal environment in order to detect a criminal offence (crime) that is being prepared, as well as persons who have criminal intents and are preparing for or involved in the unlawful activities that can develop into crime. Therefore, the law enforcement agencies are to work in the conditions of non-obviousness, i.e. when criminal acts and their subjects are not specified (identified), and the gathered information is not enough to start a pre-trial investigation. One of the most effective methods of operative-search operations used to solve and prevent (stop) grave and particularly grave crimes, disclose and eliminate criminal groups is the infiltration of the undercover staff and non-staff agents of the criminal intelligence unit into the criminal association, whose testimony as witnesses in criminal proceedings would be very important for both solving and investigating the circumstances relevant to the case (V. Klymchuk, 2018). Therefore, the main instrument used by the state to combat non-obvious crime includes undercover activities conducted by law enforcement agencies, i.e. the use of people who are consciously hiding their relation to the law enforcement agency to conduct search activities in the criminal environment for the detection of unlawful activities and persons involved herein (subjects, accomplices, etc.). A concomitant goal of such activities is to prevent unlawful activities by means of preventive investigation into the criminal environment. European judicial practice allows law enforcement agencies to use secret methods of investigating criminal offences (crimes) provided that there is no incitement by law enforcement agencies. International legislative acts on human rights and freedoms do not prohibit law enforcement agencies to use covert influence and means at the pre-trial stage if it is justified by the nature of the criminal offence. However, the court will consider the further use of the evidence obtained in such a way legally valid only if the relevant procedures for granting permission to use covert measures against a person, their implementation and control will be enshrined in the national law. Notwithstanding, in most cases, the legal restraints that predispose the undercover agent to act passively in order to detect the person's criminal intent do not contribute to the decisive manner of combating crime and, therefore, need to be revised, since modern criminal trends have revolutionised if compared to those that existed at the time of the adoption of the fundamental international act on human rights and freedoms. The infiltration of crime into every sphere of public life and governance in Ukraine requires the active transition from crime prevention to combating crime, as far as combating crime must result in the defeat of the crime, while the crime prevention, judging from its definition and semantics, leads only to neutralising the consequences and localising the activity. National criminal trends tend to be flexible and quickly diversify following all political, economical and social changes in the state, as criminal activities enable quick enrichment of corrupt government officials, unlike law enforcement agencies that are obliged to act in strict adherence to the law, which is extremely difficult to change, let alone the time required to develop a new practice of combating crime. Therefore, it is high time to rethink the boundaries of legal and moral tolerance of the state, society and citizens for criminal activity, which leads to the necessity to revise the limits of the permissibility of the covert influence on the non-obvious subject of latent criminal activity.

In the following lines, we will generalise and analyse in chronological order the provisions of the fundamental international legislative acts that authorise law enforcement agencies to lawfully apply covert methods of combating crime.

The Universal Declaration of Human Rights (adopted in 1948) establishes that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation (Article 12); in the exercise of his rights and freedoms, everyone shall be subject

only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society (Article 29, part 2, 1948).

The Convention for the Protection of Human Rights and Fundamental Freedoms (adopted in 1950) proclaims that everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no intervention by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8). The convention defines the legal interference by the state to person's exercise of rights as justified (particularly, the use of means of operational (special) equipment in investigative and/or undercover criminal proceedings), in particular when the interference is carried out in accordance with the law (the interference must be carried out in accordance with the current law, that is, the admissibility, grounds (conditions)) and procedure for conducting such a measure must be provided for by applicable regulations, which are available to the public, interference measures cannot be stipulated in certain secret instructions, and the person whose rights have been violated should have an opportunity to challenge the measures taken against him or her by the competent state authorities; the law must be necessary in a democratic society. That is, the law must contain a provision that a measure involving a restriction of citizens rights can only be carried out to the extent necessary for the security of democratic institutions; can be carried out under exceptional conditions necessary in a democratic society; in the interests of national and public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others (Article 8, part 2, 1950).

The International Covenant on Civil and Political Rights (adopted in 1966) sets forth that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation (Article 17 §1, 1966).

Code of Conduct for r Law Enforcement Officials (adopted in 1979) enshrines that in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons (Article 2); matters of a confidential nature in the possession of law enforcement officials shall be kept confidential unless the performance of duty or the needs of justice strictly require otherwise (Article 4, 1979).

Naples Political Declaration and Global Action Plan against Organized Transnational Crime (adopted in 1994) recommends that measures be taken to encourage members of criminal organizations to cooperate and give testimony, and within the limits established by the national law their sentence will be commuted if they cooperate in criminal proceedings.

The UN Convention against Transnational Crime (adopted in 2000) defines that "if permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime" (Article 20 §1).

Of course, this list of fundamental international acts is to be supplemented. This is enough though to understand the European legal position on the issue under study.

In the case law concerning bribery of a government official (deputy

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governor), discovered and documented by the undercover agent, the European Court of Human Rights has found that the line between legitimate infiltration by an undercover agent and the instigation of a crime is more likely to be crossed if no clear and foreseeable procedure was set up under the domestic law for authorising and implementing undercover operations (Tchokhonelidze, 2018). Hence, we will turn to the provisions of the Ukrainian Law that regulate temporary restrictions of human rights and freedoms by law enforcement agencies during covert recourse to force, means and measures to counter crime. It should be taken into account that in accordance with the provisions of the Constitution of Ukraine, existing international treaties ratified by the parliament are considered as a part of national legislation (Article 9). In addition, it is generally accepted that in the event of a dispute between international acts and national legislation (in the context of our research with the norms of the Criminal Procedure Code − author's note), the provisions of the relevant international treaty shall prevail (S. Solotkyi, 2018). According to the Constitution of Ukraine (adopted in 1996), the latter is considered the highest law, and its provisions are directly applicable (Article 8). Ukraine recognises and is governed by the rule of law. Everyone shall have the right to freely collect, store, use, and disseminate information by oral, written, or other means at his discretion (Article 34, Part 2). However, the exercise of this right may be restricted by law in the interests of national security, territorial integrity or public order as to prevent turmoil or crime, to protect public health, the reputation or rights of others, to prevent the disclosure of information obtained confidentially, or to maintain the authority and impartiality of Justice. The highest national law shall guarantee the inadmissibility of accusation based on illegally obtained evidence, and this guarantee cannot be restricted. The Constitution of Ukraine shall guarantee human rights and freedoms and require a person to adhere to a certain code of conduct in relation to other people and the state, as well as establish respective requirements and restrictions. Everyone shall be guaranteed the right to appeal to the court against the judgments, actions, or inactivity of State power, local self-government bodies, officials, or officers while exercising their powers. Everyone shall have the right to appeal for the protection of his rights to the Authorised Human Rights Representative (Ombudsman) to the Verkhovna Rada of Ukraine (Articles 55, 56, Constitution of Ukraine, 1996). Public prosecutor's supervision of undercover operations conducted by law enforcement agencies to combat crime shall guarantee respect for human rights and freedoms during their organisation and implementation. The public prosecution shall be entrusted with supervision over the observance of laws by bodies that conduct operative-search operations, inquiry, and pre-trial investigations (Part 1 of Article 121 §4 of the Constitution of Ukraine). General jurisdiction courts shall have absolute authority to ensure and protect human rights in Ukraine. Justice in Ukraine shall be administered exclusively by the courts (Article 124 of the Constitution of Ukraine). At the same time, courts shall not only ensure the right to judicial protection but also decide on the use of the operative-search operations (Article 8 of the Law of Ukraine "On Operative-Search Operations"), measures to ensure criminal proceedings (Article 131 of the Criminal Procedure Code of Ukraine) and covert investigative actions (Article 246 of the Criminal Procedure Code of Ukraine, 2012).

The Law of Ukraine "On Operative-Search Operations" (adopted in 1992) regulates the use of covert forces, means and measures by law enforcement agencies to combat crime; in particular, Article 6 defines the legal grounds for conducting operative-search operations, Article 8 determines the rights of the operational units to use covert forces, means and measures; Article 9 safeguards the rule of law in the course of operative-search operations (1992).

The Law of Ukraine "On Organisational and Legal Bases for Combating Organised Crime" (adopted in 1993) specifies the powers of the state agencies created established to combat organised crime. In the context of this research, we would like

to focus on the provisions of Article 13 of the above-mentioned law, which regulate public relations arising in the relation to the use of undercover agents.

The law of Ukraine "On the Procedure for the Compensation of Damage Caused to a Citizen by the Unlawful Actions of Bodies of Inquiry, Pre-trial Investigation, Prosecutors and Courts" (adopted in 1994) regulates the issue of compensation of damage caused to the citizen in the course of illegal use of covert forces, means and measures.

The Law of Ukraine "On Measures to Counter Illicit Trafficking of Narcotic Drugs, Psychotropic Substances, Precursors and their Abuse" determines the implementation of the covert operation through controlled delivery (a method of identifying sources and channels of illegal trafficking of narcotic drugs, psychotropic substances and precursors, as well as individuals involved herein) (Article 4); operational purchase (an operation to purchase narcotic drugs psychotropic substances or precursors to obtain evidence of criminal activity) (Article 5, 1995).

The Law of Ukraine "On Counter intelligence Activities" (adopted in 2002) authorises specially authorised state agencies to uncover, record, and document openly and secretly intelligence, terrorist, and other encroachments upon the state security of Ukraine; to conduct counterintelligence operations to forestall, uncover in good time, and put a stop to subversive intelligence, terrorist, or other illegal activity intended to harm the state security of Ukraine; to employ publicly known and covert staff and non-staff personnel (Article 5).

The Law of Ukraine "On the Public Prosecutor's Office" (adopted in 2014) determines that the public prosecutor shall supervise the observance of laws by the agencies conducting operative-search operations, inquiries and pre-trial investigation enjoying the rights and fulfilling the duties as stipulated in the Law of Ukraine "On Operative-Search Operations" and the Criminal Procedure Code of Ukraine (Article 25).

The Law of Ukraine "On Intelligence" (adopted in 2020) authorises intelligence agencies to organise and conduct intelligence activities, use undercover agents, maintain cooperation with individuals on a confidential basis (Article 12).

A significant number of law enforcement agencies have been established and operate in Ukraine, each of which is guided by its own regulatory legal acts. In order not to analyse the respective legal regulation provisions of each law enforcement agency related to the topic under study, we will analyse the regulations governing the activity of the most numerous law enforcement agency in Ukraine – the National Police. In accordance with the Law of Ukraine "On National Police", the rule of law and respect for human rights and freedoms shall be fundamental principles of police activities (Articles 6, 7). Restriction of human rights and freedoms is allowed only on the basis and according to the procedure defined by the Constitution and Laws of Ukraine, if needed and to the extent necessary for the accomplishment of police missions (Part 2 of Article 7); the implementation of measures restricting human rights and freedoms must be stopped immediately if the purpose of applying such measures is achieved or there is no need for their further application (Part 3 of Article 7, 2015).

In view of the above, it can be stated that the Ukrainian legislation stipulates both powers of law enforcement agencies to apply covert methods of combating crime and procedures for obtaining respective permissions to carry out such activities, forms of supervision and procedure for using the obtained factual information. The European Court reminds that the phrase "prescribed by law" not only requires compliance with national law but also refers to the quality of the law requiring it to comply with the rule of law.

In the context of covert control by public authorities, in our case – lawenforcement agencies, the country's legislation shall guarantee that there is no arbitrary interference with human rights guaranteed by Article 8 of the European Convention on Human Rights. In addition, the law must be formulated

in sufficiently clear terms to provide for an adequate notion of circumstances and conditions under which public authorities shall be authorised to resort to such covert operations (Khan, 2000).

According to the provisions of the Law of Ukraine "On Enforcement of Decisions and Application of Case-law of the European Court of Human Rights", the decisions of the European Court of Human Rights shall be binding on the territory of Ukraine (Part 1 of Article 2), and its case-law shall be applicable in the national courts as a source of law (Article 17, 2006).Therefore, we will attempt to identify and group the most common provisions of the court judgments of the above-mentioned judicial authority, which are referred to by national courts when passing judgments in criminal proceedings, in which evidence was based particularly on factual information on a person's implication or participation in criminal activities obtained with the help of covert forces, means, measures and operations used by law enforcement agencies.

In addition to the protection of personal data and the right to privacy, the notion of a person's private life includes the right to establish and develop relationships with other human beings (ECHR, 1992). The concept of "private life" also covers the physical and moral integrity of a person, including his or her sexual life. One of the social aspects of private life is the freedom to unite with other people (X and Y, 1985). The state is authorised to regulate certain aspects of the realisation of freedom of sexual relations as a part of a person's private life, in order to protect public morals (Modinos, 1993). Secret surveillance violates a person's right to private life (Klass, 1984). The collection and use of information about a person without their consent is an interference with their privacy. This rule covers both official censuses of a person (X, 1982) and obtaining their fingerprints and photographing during an investigation (Murray, 1994). The collection of information is justified, but it does not mean that the storage and use of such information will not constitute a legal wrong. For instance, fingerprints obtained during the investigation of a crime should be destroyed in case a person is dismissed as a suspect of a crime (ECHR, 31.01.1995).

The European Court of Human Rights has enshrined the general principle of a fair hearing, which declares that the public interest cannot justify the use of evidence obtained as a result of incitement by law enforcement agencies (Bannikova, 2010, Ramanauskas, 2008, Veselov et al., 2012). According to the above-provided case law, such evidence shall be considered inadmissible, since it was obtained as a result of a significant violation of the human right to a fair hearing, which is enshrined in Paragraph 1 of Article 6 of the European Convention on Human Rights. The above-mentioned legal position meets the requirements of the Ukrainian legislation, in particular the provisions of Part 1 of Article 87 of the Criminal Procedure Code of Ukraine. European Court of Human Rights points out that incitement takes place when the law enforcement officers or people acting on their instructions step beyond an essentially passive investigation, but with an aim of establishing a crime, i.e. obtaining evidence and initiating a criminal case, exercise an influence such as incitement the commission of an offence that would otherwise not have been committed (Ramanauskas, 2008). This court has also developed a number of aspects for distinguishing incitement from permissible conduct of law enforcement agencies (Bannikova, 2010), namely: a) substantive aspect (presence/absence of significant features of incitement by law enforcement agencies); b) procedural aspect (whether the court can check information about possible incitement during a hearing on the basis of adversarial and equality principle). Regarding the substantive aspect, the European Court of Human Rights notes that the state shall have at its disposal concrete and objective evidence confirming that the accused has taken specific steps to commit the offence for which he or she will subsequently be persecuted; any information relating to an existing criminal intent or offence being committed shall be verifiable, and the public prosecution shall be

able to demonstrate whenever it is necessary that it has good and sufficient cause to carry out operational activities; any information obtained as a result of covert activities shall comply with the requirement that the investigation is conducted in an essentially passive manner. In particular, this aspect excludes any actions that can be interpreted as an influence on the accused as to incite the commission of an offence, such as initiating a contact, repeated offer, persistent reminders etc. (Bannikova, 2010, Vanyan, 2005, & Veselov et al., 2012).

Sepil, 2013 concerns the prosecution of the applicant for the illegal sale of drugs, which was discovered and terminated in course of undercover test purchasing operation – which, as the applicant states, incited him into the commission of the crime. When determining whether Article 6 §1 of the European Convention of Human Rights was violated due to entrapment, the European Court of Human Rights assesses the situation (1) for the presence of elements of incitement of a person to commit a crime by law-enforcement officers (substantive aspect) and (2) for state's compliance with its positive obligations to properly examine a person's statement for his or her having been incited to commit a crime by law-enforcement officers (procedural aspect). According to the European Court of Human Rights, the incitement of a crime essentially occurs when law enforcement officers do not confine themselves to an essentially passive investigation of circumstances of a person's possible commission of a crime in order to collect relevant evidence and, on reasonable grounds, bring him or her to justice, but incite that person to commit a crime. When determining whether law-enforcement officers have confined themselves to the essentially passive investigation of the circumstances of the possibly committed crime, the European Court of Human Rights considers two factors: the existence of grounds for taking the relevant measures and the involvement of law enforcement officers in the commission of the crime. The European Court of Human Rights recognizes specific and sufficient factual data indicating that a person may have committed a crime as appropriate grounds for taking the above-mentioned measures. With regard to the role of law enforcement officers in the commission of the crime, the European Court of Human Rights examines the moment when they start implementing the relevant measure in order to determine whether they have merely "joined" a crime that a person has already started committing without any instigation. If the prosecution does not have clear evidence that the incitement, in fact, did not take place, it is up to the domestic court to examine the person's statement about their being incited to commit a crime, to establish the relevant factual circumstances of the case and to find out whether there are elements of the incitement. Therefore, instigation of the crime in the sense in which it is prohibited by Article 6 §1 of the European Convention of Human Rights occurs when there are no grounds for carrying out the relevant measures, law enforcement officers are not confined to passive investigation or the domestic courts neglect their positive obligations indicated above. First of all, in the above-cited case, although the applicant had previously been prosecuted for possession, use and sale of drugs, as well as the presence of the detention order based on the guilty plea for his using illegal drugs, the European Court of Human Rights refused to accept aforementioned evidence provided by the Turkish government as the basis for conducting test purchasing operation against the applicant. The European Court of Human Rights issued such a verdict since this information was revealed to the Turkish authorities already after the applicant's detention as a result of the undercover operation carried out against him, which, accordingly, could not have been the basis for the decision to conduct this operation. In this case, the European Court of Human Rights also noted that the possession and use of narcotic drugs do not equal their sale, in respect of which a test purchasing operation was carried out. Although it should be noted that, as had already been mentioned, the applicant had a criminal background of drug trafficking. The Turkish authorities also referred to the fact that the applicant turned out to possess more drugs than the

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law enforcement officers wanted to buy from him in the course of the undercover operation, In reply, the European Court of Human Rights pointed out the applicant's immediate admission of the fact that he was using the drug he had sold in the course of test purchasing operation, which he occasionally bought from another person (O. Anishchak, 2013).

In the case of Volokhy in Ukraine, the European Court of Human Rights indicated the need for changes in Ukrainian legislation, as there are no clear boundaries and conditions of surveillance, as well as sufficient guarantees of protection against abuse (ECHR, 2006). The general requirements of fairness expressed in Article 6 of the European Convention of Human Rights apply to proceedings in all forms of criminal charges, from the simplest to the most complex. The public interest cannot justify the use of evidence obtained as a result of police incitement. There is no reason to believe that without intervention by agents the crime would have been committed. Such intervention and its use in dubious criminal proceedings meant from the outset that the applicant had been permanently deprived of the right to a fair trial. Accordingly, it can be stated that the violation of Article 6 §1 of the European Convention of Human Rights indeed took place (A. Miliutin, 2019).

In countries with Anglo-Saxon law, there is no clear distinction between criminal action and operative-search operation, and therefore between investigative and detective actions and methods (V. Klymchuk, 2018).

In the Federal Republic of Germany, pursuant to §§ 110a-110c of the Criminal Procedure Code, the criminal investigation can involve undercover agents represented by the police officers, who work undercover and, subsequently, can participate in legally significant action without the right to commit a crime, except in the case of necessary defence and extreme necessity. In France, the use of police agents is stipulated in Article 706-81 of the Criminal Procedure Code, which authorises the latter to watch persons suspected of serious or less serious offences by pretending to be another perpetrator, accomplice or dealer in stolen goods. For this purpose, a judicial police officer receives special permission to use a synthetic identity and perform, if necessary, certain actions that are clearly provided for in the Code of Criminal Procedure, which may, under normal circumstances, contain elements of a crime. In the UK, informants involved in the commission of a crime have the right to file a claim for abuse of procedural rights if they are charged with a crime whose commission or participation was necessary in order not to give themselves away. The Criminal Procedure Code of Switzerland allows undercover agents to commit acts that violate drug trafficking laws, as well as to use counterfeit banknotes, but that will be that. Undercover agents cannot incite anyone to the commission of the crime and direct the commission of serious offences. At the same time, their activity in relation to a person's decision to commit a crime can only be of helping nature. The Criminal Procedure Code of Lithuania prohibits instigating a person to commit a crime during crime reconstruction in order to identify the person who committed the crime. In accordance with Article 32 of the Criminal Code of the Republic of Lithuania, the person, who reconstructs the circumstances of the crime through its imitation according to the official order of the law enforcement agency, cannot be arraigned on a criminal charge for reconstructing the committed or alleged crime. In Moldova, undercover agents are expressly prohibited to incite the commission of a crime (M. Bahryi, 2017).

The European Court of Human Rights emphasises that in cases when the activities of undercover agents are aimed at inciting a crime, and there is no reason to believe that the crime would have been committed without their intervention, such actions go beyond the notion of the undercover agent and can be considered an incitement; intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined (Vanyan, 2005). The European Court of Human Rights has pointed out in its case-law that undercover operations

must be carried out in an essentially passive manner without any pressure being put on the applicant to commit the offence through means such as taking the initiative in contacting the applicant, insistent prompting, the promise of financial gain or appealing to the applicant's sense of compassion (Nosko, & Nefedov, 2014).

It is well known that the undercover activities of all law enforcement agencies are primarily aimed at detecting the secret illegal activities of criminal groups. At the same time, undercover forces of the law enforcement agency obtain and record factual data that may have evidentiary value for the future prosecution of accomplices in a crime that is being prepared, continues or committed. It is undercover work that ensures the covert and confidential use of forces, means and measures of law enforcement activities when overt methods of combating crime are ineffective.

The introduction of law enforcement and intelligence officers, as well as other persons into organised criminal groups, provides a unique opportunity to achieve the following goals: to clarify the structure, composition, head of an organized criminal group, to determine the distribution of roles among all of its members, to identify their relationship with other groups; to determine the mechanism of illegal activities, to establish crimes and other acts threatening the national interests of Ukraine; to establish the scope of persons aware of the criminal activities of the group, who can act as informants and witnesses, to determine the means of recording and documenting crimes for use as evidence; to determine the location of persons, to ensure tactical operations, collecting other intelligence information that cannot be obtained by other means (V. Burba, & O. Suvorov, 2019).

With regard to the subject of this research, it is important to clarify the scope of subjects authorised to be introduced into the criminal environment for identification of non-obvious accomplices in criminal activities. This aspect has been thoroughly studied in the research papers of the Ukrainian scholars, particularly N. Abdullaiev, A. Anapolskyi, P. Andrushko, V. Burba, V. Kotov, O. Lemeshko, A. Rysheliuk, O. Suvorova. Based on the summary of their research, we can outline the following structure of subjects that can be introduced into the criminal environment: 1) staff and non-staff employees of operative-search, intelligence and counterintelligence agencies; 2) members of organised groups or criminal organisations with which the law enforcement agency has established secret (during operative-search, intelligence or counterintelligence operations) or confidential cooperation (during the pre-trial investigation); 3) persons who agreed to cooperate with the law enforcement agency. For the sake of convenience, we will further use the term "undercover agent" in this research.

On the following pages, we will summarise the use of undercover agents by the National Police of Ukraine, which can be generalised as follows:

1.To conduct undercover operations (e.g. operative-search ones) to find out the immediate information that will be of interest for the criminal intelligence unit depending on its functions and missions. In this case, the undercover agents carry out general search activities for any factual data that may have elements of criminal offence committed or being prepared, and establish the scope of people who may be of intelligence interest.

2. For criminal intelligence analysis within the detective case. In this case, the undercover agent acts purposefully with full transparency (when targets of the investigation are already known) or partial transparency (targets of the investigation are unknown, but there is actual data on criminal activity), i.e. in general the undercover agent knows where, what and whom he is supposed to look for.

3. To conduct covert investigative actions with the involvement of persons with whom confidential cooperation was established or undercover agents of the criminal intelligence unit. Procuring evidence involves the undercover agent who is to carry out specific tasks defined by the investigator (prosecutor).

In the first case mentioned above, the undercover agent can accomplish

the tasks set by in the criminal intelligence unit in an essentially passive manner (i.e. using their professional aptitude and spying capabilities), but in the next two instances. the passive manner would be ineffective. In addition, the Ukrainian legislation provides more solid legal grounds for the use of undercover agents for special missions to uncover the criminal activities of an organised group or criminal organisation, which can be identified as a detective measure taken in course of criminal intelligence analysis for detective case or as a secret investigative search action during a pre-trial investigation in a specific criminal proceeding. In the first case, this process is formalised in writing by the act of implementation, and in the second case – by the decision of the investigator or prosecutor. Less regulated is the possibility of using the undercover agent to conduct one-time operative-search operations (operational and technical measures, test purchasing operations) or control over the commission of a crime in criminal proceedings.

The legislation of Ukraine in the field of combating crime regulates the activities of law enforcement agencies in countering non-obvious (latent) crime and its subjects (known and unknown persons), in particular, the provisions of Article 6 of the Law of Ukraine "On Operative-Search Operations" authorise especially determined subjects (defined in this Law) to conduct operative-search operations in relation to crimes that are being prepared. It means that the law enforcement agency is aware of the elements of the crime committed or being prepared, but its accomplices remain unknown. At this stage of countering crime, the main task of the law enforcement agency is to establish the involvement of the particular person in a criminal act, which is unusually established with the help of undercover agents of law enforcement agencies. Undercover agents, regardless of whether they are agents or police officers who act under cover of a law enforcement agency, having previously given voluntary consent and realising the danger of their profession and the risks associated with it, are introduced into the criminal environment in order to assist law enforcement agencies in neutralising the criminal groups with their subsequent destruction, i.e. bringing accomplices to justice, confiscating assets and property obtained through crime. In contrast, criminals take various actions not to be exposed. Such actions abide by neither civil ethics nor law, while law enforcement agencies are obliged to strictly comply with both national and international law. To put it straight, this is sort of a war, where an attacker feels free to do what he wants on foreign territory, while a defending party must take into account the protection means so as not to harm its citizens and not to exceed the limits of the so-called justifiable defence. As one can see, the warring parties are not on pari passu basis. It is generally believed that the resources allocated and provided by the state to combat crime are significantly wider than those available to criminals to commit criminal offences and counter law enforcement agencies. However, the effectiveness of their use by the criminal environment is much greater, which is confirmed by a significant number of identified criminal offences and persons involved and a very small number of court convictions and property (valuables) confiscated to the state income.

The criminal environment, which consists of individuals, organised groups and criminal organisations, is essentially an anti-society that sponges on the society as a whole, the state and its citizens. It is difficult for society to accept a person who has committed an act that trespasses against social or moral values and, thus, turned out to be a betrayer once or several times. The anti-society also draws upon its own rules, which are established and regulated by criminal lords, corrupt officials, and criminal subculture. Members of both civil and criminal society must effectively prove their worth. In the first instance (civil society) it is done through education, socially useful activities, respect for social and moral values, taxpaying, but the second instance presupposes activities useful for the criminal environment and corrupt officials which help them not only thrive but also develop, gradually obtain legal status, penetrate into the top government echelons, support adoption

of the respective laws and turn state institutions into secret criminal organisations.

We are convinced that in the absolute majority of cases, the organiser of the criminal activity does not want to be punished, and prisoners cherish liberty most of all. Therefore, one of the most difficult tasks of the undercover agent is to earn the "enemy's" trust. Due to fear of imprisonment, the latter is often convinced that all "newcomers" (new members of the criminal group) collaborate with law enforcement agencies. One of the dangerous means of confirming trustworthiness in organised groups commonly motivated by either greed or violence is to take a test task by inflicting bodily harm on a victim, which directly threatens his or her life and health. The latter is strictly prohibited for an undercover agent, although there are situations when there is no choice: they are to choose either their own life or someone else's. As a result, the undercover agent is brought to justice. Usually, it is difficult to predict an unfavourable development of the operative-search operation. The national legislation contains only several general rules that are supposedly designed to protect an undercover agent from the strict punishment for committing an intentional, albeit forced criminal offence. In particular, Article 42 of the Criminal code of Ukraine envisages the exemption from liability for committing an act justified at risk; Article 43 of the Criminal Code of Ukraine outlines specificities of imposition of punishment to a person undertaking a special mission to prevent or uncover criminal activities of an organised group or criminal organisation (2001).

The Ukrainian courts occasionally declare covert activities conducted by law enforcement agencies against the subject of the crime as an incitement. The unskilled work of undercover agents or police officers cannot be considered the main reason for that, because an undercover agent has to face the criminal environment one on one. He is to conduct a special mission relying solely on his or her own professionalism, experience and ability to survive in a hostile environment. On top of the, he is also to perform detective, intelligence or counterintelligence missions, strictly observing the law. On an everyday basis, the undercover agent is hiding behind the legend playing a role in accordance with a behavioural pattern predetermined by the law enforcement agency. An unintentional deviation from the legend may pose an immediate threat to his or her life. It is well known that professional skills and search capabilities form the basis for the formal admission of the undercover agent or police officer to operational information related to the criminal environment. However, access to specific factual data is provided by the subject of crime, who is aware of the danger from revealing such information. Passive behaviour of the undercover agent or imitation of the criminal activity that bears formal elements of the crime does not always allow to disclose secret criminal activities and previously unknown accomplices of a higher level than the crime abettor, co-conspirator or perpetrator.

The legend, behavioural pattern, imitation of illegal activities have a common goal – to establish credibility with the subject of criminal environment that theoretically assumes the danger of a new person's direct or indirect awareness about the illegal activities of the subject or his/her involvement in such activities. The undercover agent should create conditions under which the initiative and intent to commit the crime is shown by the subject of the criminal environment him/herself.

According to the provisions of the national criminal law, an abettor shall be a person who has persuaded another accomplice to commit a criminal offence, namely, inducing another accomplice to commit a criminal offence in the sense of arousing desire (belief in desirability, benefit, need), arousing determination or strengthening the intention of another accomplice to commit a criminal offence. The specific criminal law regulation (Part 4 of Article 27 of the Criminal Code of Ukraine) defines the ways of persuading another accomplice to commit a criminal offence, in particular, persuasion (systematic or one-time urgent request

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(persuasion) of a person), bribery (providing or promising to provide a person with material or other benefits), threat (intimidation of a person to cause harm), coercion (harassment by violence, damage to property, blackmail), persuasion in another way (instruction, advice, order, call, order), which can be expressed in both open and veiled forms. In addition, criminal actions in Ukraine are recognised as active actions of a person to facilitate the commission of a crime by providing tools or means of removing obstacles, pre-promised concealment of a criminal, property obtained by criminal means, its sale, concealment of traces of a criminal offence (Part 5 of Article 27, 2001).

The operational combination, as well as the imitation of criminal activity by the undercover agent, can and should at least formally contain elements of aiding and abetting, which will ensure credibility of legend and behavioural pattern of the undercover agent or police officer and make the subject of the criminal environment believe in the imaginary criminal capabilities of the undercover agent embedded in a life-threatening criminal environment to accomplish a task of the state represented by the law enforcement agency. One should admit that the passive behaviour of law enforcement agency aimed at formal implementation of the methods of aiding and abetting in order to detect criminal intents and crime committed by the subjects of the criminal environment is generally disproportionate to the risks that the undercover agent constantly faces for the sake of the national interests. It is highly unlikely that passive waiting will bring the law enforcement agency the desired results and there is no guarantee that another criminal offence will not be committed at the same time without being unsolved for a long while. Therefore, taking into account the international case law based on judicial decisions, the state must take full responsibility for the undercover operations by law enforcement agencies, whose undercover agents put their lives at risk, not for the sake of their own interest, but for the sake of the society, country, each and every honest person who has nothing to be afraid of, as even if their rights and freedoms are violated the state will guarantee the full compensation for material and moral damage and officially refute suspicions. Ukraine is gradually moving in this direction particularly after having introduced the concept of a "model decision". Based on the circumstances of a particular case, the essence of contentious relations and the content of claims, the Supreme Court provides a sample interpretation of the regulatory order. This sample, according to the stare decisis principle, is mandatory for lower-level courts to take into account when delivering judgments in similar cases (D. Hudyma, 2019). This certainly points to an effective reinterpretation of the significance of decisions of the Supreme Court as the highest court in the Ukrainian judicial system, which ensures the constancy and unity of judicial practice for lower general jurisdiction courts. This also confirms that the state takes steps to introduce the elements of "case law", although some experts, in particular judges, see this as "unification of judicial practice but not case law, since the term "case law", which has been long theoretically and practically applied and interpreted primarily in the countries with Anglo-Saxon law, has acquired quite a lot of features creating a rather complicated and multifaceted system that is much more complex than simply "binding force" of the legal stance of the Supreme Court" (N. Blazhyvska, 2020).

Hence, after having earned the trust of the criminal environment, one can only expect that their passive behaviour alone will let them establish contacts with new subjects, who, in addition, must reveal their criminal intents on their own. The harmonisation of the national laws and bylaws with the European case law will regulate the use of the elements of operative-search activities, namely undercover activities as a part of operational combination. Summarising the constitutive rules and regulations, we can formulate an axiom that the use of an operational combination is considered legitimate if the illegal activities are initiated by the subject of the criminal environment, i.e. the specific person, who, according to the factual data of law enforcement agency, is involved in the preparation or

commission of the criminal offence, as well as other illegal activities. National legislation prohibits inciting the person, who does not show criminal intent, to commit the criminal offence, which the European Court of Human Rights interprets as incitement of the crime.

The selection, training and introduction of the undercover agent into the criminal environment is accompanied not only by risks dangerous both for his/her life and the lives of his/her loved ones but also by significant financial costs on the part of the state represented by the law enforcement agency for material support of the legend and certain behavioural pattern, imitation of illegal activities, secret compensation costs or compensation for damage caused to law enforcement agencies under justified risk in order to achieve a socially useful goal – exposing criminal activity. The introduction of the undercover agent into the criminal environment usually takes place when two conditions are fulfilled: 1) firstly, the law enforcement agency, as the subject of the operational search, intelligence or counterintelligence activities, is reasonably oriented and reliably aware of the presence of illegal activities directly or indirectly related to the preparation or commission of grave and especially grave crimes predominantly by the organised group (criminal organisation), less often by a particular subject; 2) secondly, it is not possible to detect and stop such activities using other forces, means, measures and methods. In accordance with the provisions of national law, secret cooperation is possible as part of the operational search, intelligence or counterintelligence activities, and confidential cooperation is allowed as part of undercover activities of the pre-trial investigation body in specific criminal proceedings. This status quo coincides with the legal stance of the European Court of Human Rights, which has repeatedly emphasised that the state must have concrete and objective evidence confirming that the accused has taken specific steps to commit an act for which he is later prosecuted. At the same time, any information concerning an existing intention to commit an offence or an offence being committed must be verifiable, and a public prosecution must be able to demonstrate at any stage that it has sufficient grounds to carry out an operational measure.

Law enforcement officers must first respond to information about preparations for a crime or the beginning of such actions, and only then investigate it. The key question to be answered is who formed such intent in the person. If it is proved that the person's intent to commit a crime arose independently, and it was just timely prevented, then there is no incitement. And yet, in order to start any active actions, law enforcement officers should have objective information about the preparation for a crime. If the authorities claim that they acted on the basis of information received from a private individual, the European Court of Human Rights distinguishes between an individual complaint and information received from a person cooperating with the police or from an informant. Simultaneously, there is a risk that an agent or informant will play the role of "agents provocateurs", which allegedly violates Article 6 §1 of the European Convention of Human Rights (V. Frankiv, 2020).

Therefore, law enforcement agencies, in particular the police, take such actions when there is solid evidence suggesting organised crime, grounds for taking such actions and documentary proof of involvement of known and unknown persons in the crime. The level of public danger and consequences of criminal activity previously unknown to the law enforcement agency is also assessed. In other words, the undercover activities of the law enforcement agency are not initiated without reason, and even more so, it does not pursue an operational and preventive goal, since, as already mentioned, the entire process is accompanied by the highest risks and significant material costs. In the process of criminal intelligence analysis of subjects that are directly or indirectly related to the criminal environment, the attention of the undercover agent focuses on a specific known or previously unknown person (group) who compromise themselves, i.e. according to the analysis of the

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law enforcement agency, such person (group) is characterised by skills, abilities, behaviour, status, and sometimes specific actions that do not always seem criminal in nature. But the latter happens less often due to the fact that the criminal world is aware of the methods of undercover activities of law enforcement agencies. Therefore, when the undercover agent as a new potential formal accomplice to illegal activities waits passively for active actions that should contain elements of crime, even without taking test tasks, it compromises his/her status, calls him/her into question, which causes distrust. Even the slightest signs of distrust in the undercover agent introduced into the criminal environment can threaten his/her life. Depending on the type of criminal organisation, the dangerous agent can be eliminated immediately or in a short time, not sufficient to remove a person from the criminal investigation and ensure proper protection protection. The question about the criminal environment's feeling remorseful about neutralising or destroying a non-agent is clearly rhetorical. Due to booming organised crime on both global and national levels, dangerous international criminal trends, as well as extreme risk the undercover agent puts him/herself at – danger to his/her life – the very essence of the boundaries of the undercover activities related to incitement of crime and conducted by the undercover agent or police officer need to be reviewed by introducing the concept of active incitement to crime. It should be recognised that the imitation of criminal activity or illegal behaviour by the undercover agent; purposefully making a person aware of his/her capability to commit a crime; demonstration of skills and abilities that can be used to achieve the criminal goal – each of the mentioned actions is formally considered incitement, and together they can be equally considered directed incitement, which depending on the operational search, intelligence or counterintelligence situation in combination with possible life troubles can provoke the absolute majority of people to an illegal act or even a crime.

The present research puts particular stress on the concept of a "lawful act", which must correspond to the following criteria: 1) to determine the admissibility and legality of the deed taking into account other essential elements of the act; 2) to distinguish the act from other types of circumstances that exclude criminality of the act; to be explicitly provided for in the criminal law or have unambiguous interpretation; 3) not to be derived from other features; 4) to characterise, as a rule, one element of the lawful act (Yu. Mantuliak, 2005).

Therefore, investigation of the activities of the undercover agent in relation to exposing the criminal activities of the particular person should be investigated in a comprehensive manner only, taking into account not only operative-search, intelligence and counterintelligence findings but also psychological factors. We agree that there is an unjustified cautiousness about the possible violation of the rights and freedoms of citizens and limiting the power of entities authorised to counter crimes, while neglecting the rights and freedoms of persons who have already been subjected to criminal influence from persons selling restricted or prohibited items and substances (S. Popov, 2018). Numerous and systematic offers to sell narcotic drugs or weapons should not be considered an incitement to crime; in contrast, physical and psychological coercion to do so should be considered incitement. A person who considers himself not guilty of any crime, who, due to a confluence of difficult circumstances, an unfavourable operative-search, intelligence or counterintelligence situation, got into wrong place and at wrong time, by virtue of which the operational unit mistakenly decided on his possible involvement in a secret illegal activity and who was subjected to targeted criminal analysis, has the right for legal protection of his allegedly violated rights and freedoms, which is guaranteed by national and European legislation. The state, in case of confirmation of the damage caused to the protected interests, must compensate the damage caused and "clean" the reputation of the person in his family and society. If the actions of a law enforcement agency show signs of active

incitement to a crime, the state can offer all necessary mechanisms for conducting an objective investigation (e.g. newly created law enforcement agencies, such as the State Bureau of Investigation and the National Anti-Corruption Bureau of Ukraine, the reformed Attorney General's Office) and bringing law enforcement officials to justice (reformed judicial system), which would not have been possible without the comprehensive support and participation of the United States of America and the European Union and in case Ukraine's had chosen a wrong path of pro-Russian integration. In addition, there are ten powerful subjects of operative-search activities in Ukraine, which, according to the plan of the legislative power representative – the Verkhovna Rada of Ukraine – are authorised to provide a prompt response in all spheres of public life vulnerable to crime in order to prevent timely its preparation and commission, thus protecting a person from arbitrary violation of his or her rights and freedoms by any law enforcement agency.

The analysis of the case-law of the European Court of Human Rights concerning the difference between incitement and legitimate methods of investigating crimes, which involve the so-called "infiltration" of law enforcement officers into criminal groups for committing crimes, shows that such criteria are formulated in rather abstractedly. At the same time, it is also clear that it is impossible to narrow down such criteria (R. Babanly, & O. Tarasenko, 2020).

Law enforcement agencies of the Russian Federation conducted a covert operation targeted at a business leader who allegedly ordered a contract killing of his former business associate, and a supposed contract killer reported the preparation of the crime to law enforcement agencies. The cover operation presupposed that the alleged perpetrator visited organiser's house in order to inform the latter about execution of the murder; their conversation was secretly recorded by law enforcement officers who were outside the house. Several days earlier, the crime was staged, which was widely covered in the mass media (press). According to the common position of the European Court of Human Rights, there was no entrapment on the part of the undercover agent who, acting as the perpetrator of the crime (murder) in course of the operative experiment organised by the law enforcement agency, used an audio recorder to record the conversation about organising the murder during his visit to the contractor's house (Bykov, 2009). According to the partially dissenting opinion of ECHR Judge J.-P. Kosta, this ploy, despite its specific characteristics, is not in itself far removed from the ruses, traps and stratagems used by the police to obtain confessions from persons suspected of criminal offences or to establish their guilt, and it would be naïve, indeed unreasonable, to seek to disarm the security forces, faced as they are with the rise in delinquency and crime (2009). The different partly dissenting opinion was voiced by Judge D. Spielmann, who was joined by four other Judges believing that in the present case the purpose of staging was to make the applicant talk. The covert operation undermined the voluntary nature of the disclosures to such an extent that the right to remain silent and not to incriminate oneself was rendered devoid of all substance. As in the Ramanauskas case, the applicant was entrapped by a person controlled from a distance by the authorities, who staged a set-up using a private individual as an undercover agent. Thus, according to Judges, the information obtained in such a way was disclosed by means of entrapment, against the applicant's will (2009).

In fact, there are two opposite stances on the lawfulness of the undercover agent's behaviour during clearance of crime.

The Supreme Court of Canada distinguishes between "dirty tricks" (which are considered socially outrageous) and simple "trickery", concluding the following: "Behaviour [of the authorities] that outrages society should be stopped in every possible way". If a police officer pretends to be a prison chaplain and listens to a suspect's confession, this is a socially outrageous behaviour; the same conclusion can be drawn if he pretends to be a state-appointed lawyer, who tries to elicit

testimony from suspects and accused persons; injecting sodium thiopental ("truth serum" − author) to a suspected diabetic under the guise of a daily dose of insulin and using his or her statements as evidence would also outrage society; but in general, pretending to be a drug addict with the aim of destroying the drug supply channel would not outrage society; it is also permissible to impersonate a truck driver for the purpose of conviction a drug dealer (K. Leimer, 1981).

The guiding instructions of the Federal Court of Justice of the Federal Republic of Germany state: as part of the search and combat against especially dangerous and difficult-to-solve crimes, the use of police agents-provocateurs against both suspected and non-suspected people is fundamentally permissible, necessary and legitimate. This report indicates that it is impossible to enter the environment of drug and arms dealers without taking action that are not subjectively considered at least minor crimes, so such action is justified. It is claimed that the purchase of certain items (stolen items, weapons, drugs, etc.) as part of the undercover operation is a necessary prerequisite for gaining the trust of criminals with further access to the organisers of criminal activities (R. Hesner, & U. Khertsoh, 1990).

In the mid-70th, drug trafficking in New York was mainly under the control of the Bonnano family, whose criminal activities were exposed during the undercover operation Donnie Brasco named after the undercover alias of Federal Bureau of Investigation agent Joe Pistone, who worked undercover for 6 years. As a result, more than 200 charges and hundreds of sentences were announced to Mafia members (2019).

It is hard to believe that for 6 years of working undercover, the agent did not take any active actions to identify criminal activities against mafia members.

In the case "Miliniene in Lithuania", the initiative was taken by SS (law enforcement agency − authors), a private individual, who, after having understood that the applicant would demand a bribe to reach a favourable outcome in his case, complained to the police. Thereafter the police approached the Deputy Prosecutor General who authorised and followed the further investigation within the legal framework of a criminal conduct simulation model, affording immunity from prosecution to SS in exchange for securing evidence against the suspected offender. To the extent that SS had police backing to offer the applicant considerable financial inducements and was given technical equipment to record their conversations, it is clear that the police influenced the course of events. However, the European Court of Human Rights does not find that police role to have been abusive, given their obligation to verify criminal complaints and the importance of thwarting the corrosive effect of judicial corruption on the rule of law in a democratic society. Nor does it find that the police role was the determinative factor. The determinative factor was the conduct of SS and the applicant. O this extent, the Court accepts that, on balance, the police may be said to have "joined" the criminal activity rather than to have initiated it. Their actions thus remained within the bounds of undercover work rather than that of agents provocateurs in possible breach of Article 6 § 1 of the Convention (ECHR, 2008).

During 2017−2019, employees of criminal intelligent units of the National Police of Ukraine were trained on the basis of the higher education institution with specific training conditions that train police officers (Lviv State University of Internal Affairs, Ukraine). As a result of a sociological survey conducted by the method of a questionnaire organised by the scientific and pedagogical staff of the Department of Operative-Search Activity, it was found that 78 % of respondents, i.e. 209 employees of criminal intelligent units with access to agent operational activity, confirmed the ineffectiveness of passive behaviour of an undercover agent in a criminal environment in order to identify criminal intentions of subjects of non-obvious illegal activities; 72 % of respondents from the previous group were consistent with their opinion and agreed that undercover agents need to switch from passive waiting to active actions in order to identify person's criminal intent, which

should be enshrined in law by appropriate amendments to the national legislation; the latter would guarantee no prosecution for the active lawful conduct of the undercover agent in the criminal environment, if it formally contains elements of a criminal offence.

We support the opinion of scientists that the professional activity of persons working in the criminal environment, regulated by the current legislation, requires optimisation regarding the components of effective legal, social, physical and psychological protection of undercover agents who conduct special missions to uncover criminal activities (A. Subbot, 2013).

Conclusions. Guarantees of inviolability of human rights and freedoms determine the content and direction of the activities of the modern Ukrainian state. The correlation of guaranteed rights of undercover agents and the interests of society and the state in the fight against crime can be considered as a sort of indicator of the development of the law-bound state. Clear legal regulation of the lawful behaviour of the undercover agent, as well as his/her peremptory legal protection from acts at occupational risk, will undoubtedly contribute to increasing the effectiveness of combating crime in terms of implementing and observing the principles of the rule of law in all spheres of the public life of the state. Legal security of the undercover agent is the legal protection of the living conditions of the undercover agent against threats, which is guaranteed by international and national legislation. Legal security should not be an end in itself, but only a system of timely detection, prevention and neutralisation of real and potential threats to the implementation of state goals by legal means. Without proper legal safeguards of the undercover agent's activities, inhibiting the rise of organised crime loses its meaning, and the state's obligations in this area acquire only a declarative form.

Statutory regulation of occupational risk resulting from undercover operations, operative-search, intelligence, counterintelligence activities should be recognised as a socially determined prerequisite and the need for an effective fight against crime. Unfavourable conditions of operative-search work can be compared to an extreme situation in everyday life, which is essentially characterised by the emergence of exceptional circumstances characterised by danger, transience, information, organisational and legal uncertainty, the presence of warring parties. It is often difficult to distinguish between lawful methods of covert work aimed at detection of the criminal offence and actions, which can be actually considered incitement to a crime. Any imitation of criminal activity contains formal elements of incitement and instigation that can affect a person in different ways, depending on the situation and circumstances, which the person faces. The undercover agent working under constant risk should be granted the authority to take active actions to detect the criminal intents of a person who is can be a potential accomplice. The limits of active actions of the undercover agent, given the high criminal rate in Ukraine and public intolerance to crime, should be clearly regulated by national legislation, and not reduced only to passive behaviour in standby mode; at the same time, active outright entrapment or obvious systemic incitement of a person to commit a criminal offence should be excluded.

Ukraine needs to radically change its state policy by replacing the strategy of countering the crime with its combating, which will demonstrate that the authorities and the people are united in their intolerance to crime in all its manifestations and forms, especially since innovations in the field of fighting corruption are not only welcomed but also strongly supported by our international partners, particularly the United States of America and International Monetary Fund, with which collaborate. In the case of operative search work, the lack of codification of national legislation regulating law enforcement activities, mainly its internal inconsistency, accumulation of legal norms, ignorance of law enforcement agencies, and sometimes disregard for decisions of the European Court of Human Rights (in criminal proceedings based on the materials of agent operational and undercover

police work) lead to systemic legal nihilism, which eventually downplays the results expected by society in combating crime. At the state (legislative) level, it is necessary to regulate the general grounds and principles of cover work of law enforcement agencies, in particular by expanding the boundaries of passive behaviour of undercover agents during search activities in a criminal environment, to ensure the offensive of law enforcement agencies in the fight against crime. This will result in the formation of a true law-bound state and a law-based society capable of joining the European Union on equal terms and defending European values together.

It is obvious that the resources of law enforcement agencies of the European Union, the United States of America and other mature economies are much larger than ones in Ukraine; their state bodies and judicial systems are by an order less contaminated with corruption and fused with the criminal environment than ones in Ukraine; therefore, it is too early to introduce precedents from international law enforcement and judicial practice into national legislation and legal proceedings. The integration of decisions of the European Court of Justice into the National Criminal Procedure Code partially unbalances the criteria for a legal assessment of the limits of permissible behaviour of undercover agents introduced into the criminal environment to detect criminal intents in non-obvious subjects of criminal offences. The use of the latter in the law enforcement practice of Ukraine should be balanced with mandatory consideration of national, state, political, judicial enforcement realities and national criminal trends.

Conflict of Interest and other Ethics Statements
The authors declare no conflict of interest.

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НАСТУП НА ЗЛОЧИННІСТЬ:
ВІД ПАСИВНОЇ ПОВЕДІНКИ НЕГЛАСНОГО ПРАЦІВНИКА ДО АКТИВНИХ ФОРМ НЕГЛАСНОГО ВПЛИВУ НА СПІВУЧАСНИКІВ ЗЛОЧИННОЇ ДІЯЛЬНОСТІ

Анотація. Дослідження присвячується оперативній роботі правоохоронних органів в частині застосування негласних працівників для вирішення завдань оперативно-розшукової діяльності в злочинному середовищі щодо пошуку кримінальної активності раніше невідомих осіб (невідомих співучасників). В хронологічному порядку проведено комплексний аналіз основних положень національного законодавства та основоположних міжнародних актів, які урегульовують застосування негласної роботи правоохоронними органами в Україні. Встановлено, що європейські стандарти, які визначають межі правової поведінки негласних працівників в злочинному середовищі, здебільшого ґрунтуються на положеннях основоположних

міжнародних актів щодо захисту прав і свобод людини, прийнятих у період 1948-1980 років; саме ж українське законодавство в досліджуваній сфері почало формуватися у 90-х роках 20 століття, а українське судочинство лише з 2006 року почало активно враховувати європейську судову практику при ухваленні рішень, що стосуються досліджуваної проблематики.

Акцентовано, що ефективність правового урегулювання застосування негласної роботи правоохоронними органами залежить від здатності об'єднувати та спрямовувати позитивні чинники, які супроводжують дії правової норми, і блокувати ті, що перешкоджають. Розрізненість правових актів, які фрагментарно урегульовують правові засади застосування негласної роботи, негативно впливає на ефективність використання отриманих результатів у сфері боротьби із злочинністю, що пропонується вирішувати шляхом уніфікації їх положень з метою однакового застосування негласних методів правоохоронними органами у боротьбі із злочинністю у відповідності до європейських правових стандартів. Дотримання або ж виконання останніх для виключення умов провокації кримінального правопорушення (злочину) чи підбурювання до злочинної діяльності в частині урегулювання правової поведінки негласних працівників в злочинному середовищі є доволі проблематичним в умовах складної кримінальної ситуації, яка сьогодні склалася в Україні, оскільки лише пасивна поведінка негласних працівників не тільки не сприяє виявленню кримінальної активності і фіксації злочинних намірів співучасників, а, навпаки, здебільшого викриває їх перед злочинним світом, чим ставить під загрозу життя та здоров'я не лише негласних працівників, але й їхніх близьких.

Для підвищення ефективності боротьби із злочинністю в Україні обґрунтовується необхідність урегулювання на законодавчому рівні загальних засад допустимої правової поведінки негласних працівників в частині розширення меж їх повноважень із використанням активних форм викриття кримінальної активності осіб в злочинному середовищі.

Ключові слова: *підбурювання, провокація, негласний працівник, правомірна поведінка, пасивне очікування*

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FORMALIZATION OF HUMAN RIGHTS TO DIGNIFIED LIVING CONDITIONS IN INTERNATIONAL AND NATIONAL LEGAL ACTS

Abstract. The novelty of the article is to substantiate which living conditions should be considered as decent given the social orientation of the state economy, as well as as a figure of decent living conditions in terms of the main duty of the state to assert and ensure human rights and freedoms. The essential criteria of decent living conditions and their unification in the form of

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