

# Criminal Legal Regulation of Lawful Infliction of Harm in the Course of Covert Actions of Law Enforcement Agencies: Legislative Experience of the Republic of Kazakhstan

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**Abstract:** Article 35 of the Criminal Code of the Republic of Kazakhstan provides the legitimacy of infliction of harm in the course of criminal intelligence, counterintelligence measures, criminal intelligence and surveillance operations. This provision is a criminal-law guarantee of safety of law enforcement officers involved in covert operations to counter crime. However, the authors' analysis of this legal regulatory provision revealed a high probability of violation of the rights of persons who have caused harm in the implementation of the named actions. This circumstance requires scientific attention and broad discussion in the professional community. The purpose of the article is a research of Article 35 of the Criminal Code of Republic of Kazakhstan from the construction point of view and its correlation with other legal regulatory provisions of the Criminal Code of Republic of Kazakhstan and sectoral legislation; the tasks - to examine the verbal formulation of the construed regulatory provision of the Criminal Code of Republic of Kazakhstan to eliminate its contradictions with other legal regulatory provisions of the Kazakhstan legislation, develop proposals for improvement of proper quality of fixing circumstances excluding criminality of action in Article 35 of the Criminal Code of Republic of Kazakhstan. The significance of the study for the practice of application of Article 35 of the Criminal Code of Republic of Kazakhstan is justified by the author by making proposals to eliminate the problematic nature of the legislative construction of this regulatory provision for its uniform application and strengthening the ability of Article 35 of the Criminal Code of Republic of Kazakhstan to become an effective regulator of social relations.

## 1 INTRODUCTION

The criminal regulation of inflicting harm in the course of covert operations by law enforcement agencies has been known to the legislation of the Republic of Kazakhstan since 2001. The Criminal Code of the Republic of Kazakhstan was supplemented with Article 34-1 "Operative investigation activities". This regulatory provision, for the first time, provided for the grounds and conditions of infliction of harm to legally protected objects in the course of operative investigation activities. Nevertheless, as I.S. Borchashvili rightly notes, the institution of circumstances precluding criminality was still far from perfect (Borchashvili 2012). As a result, when the new Criminal Code was

adopted in 2014, the regulation of harm in the situations under consideration was changed. Article 35 was titled "Operative investigation activities or covert-investigative actions". Sometime later, in 2016, this provision was amended. The regulation appeared to regulate the harm caused to the interests protected by the Criminal Code when carrying out counterintelligence activities.

It should be noted that the institution of circumstances precluding criminality has been the subject of many studies, such as N.N. Turetsky (2005), R.M. Stepkin (2006), A.A. Tsygankov (2011), A.P. Dmitrenko (2010) and others. However, criminal law doctrine hardly focused on analyzing the implementation of surveillance, counter-intelligence and covert investigative measures. Article 35 of the Criminal Code has not been widely discussed,

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although this provision is not without controversy. These circumstances make the research into the topic of interest.

## 2 MATERIALS AND METHODS

The material for the research was criminal, criminal procedural and investigative legislation of the Republic of Kazakhstan, the Law of the Republic of Kazakhstan on counterintelligence activity, scientific works of Kazakh, Russian and foreign scientists on the issues of operative-investigative activity, correlation of covert and non-covert investigative actions.

The methodological basis of the research was the dialectical method of cognition and specific scientific methods such as formal-logical, logical-legal, system-structural, comparative-legal, functional, which together allowed to make conclusions and develop recommendations to improve Article 35 of the Criminal Code of the Republic of Kazakhstan.

## 3 RESULTS AND DISCUSSION

Detective work has always been given special importance in the fight against crime (D.L. Carter, 2009). Therefore, the issues of the use of materials of operational and investigative activities in criminal proceedings (Carter & Carter, 2009; Murphy, 2020), their evidentiary value (Ratcliffe, 2002), integration of operational and investigative and criminal procedural activities (Amirkhanov, 2016), criminal legal support of operational and investigative activities (Shkabin, 2018) are still relevant. In this regard, of interest is the construction of article 35 of the Criminal Code of the Republic of Kazakhstan, which enshrines as circumstances that exclude bringing a person to criminal responsibility, inflicting of harm in the implementation of operational-search, counterintelligence activities or covert investigative actions.

It is necessary to say that recognition of inflicting of harm in the implementation of domestic intelligence activities as a circumstance precluding public danger of act is not new for Kazakhstan criminal legislation, it was introduced in the Criminal Code of the Republic of Kazakhstan in 1997 by the Law of the Republic of Kazakhstan "About making changes and additions in some legislative acts of the RK on strengthening of the struggle against organized crime and corruption" of March 16, 2001. With the

adoption of the current Criminal Code of the Republic of Kazakhstan the legislator has expanded the list of circumstances that exclude criminality of a deed. To operative-search actions counterintelligence actions and informal investigatory actions were added. This is due to the fact that the Criminal Procedure Code of the Republic of Kazakhstan of 2014 divided investigative actions into transparent or traditional and tacit, conducted with the use of forms and methods of law enforcement operations (Akhanov, Khan, 2016). At the same time, six special investigative measures enshrined in the Law on Law Enforcement Operations, in the Criminal Procedure Code of the Republic of Kazakhstan are referred to tacit investigative actions: 1) tacit audio and (or) video monitoring of a person or place; 2) tacit monitoring, interception and withdrawal of information transmitted over electric (telecommunications) communication networks; 3) tacit acquisition of information on connections between subscribers and (or) subscriber devices; 4) surreptitious taking of information from computers, servers and other devices designed to collect, process, accumulate and store information; 5) surreptitious control of mail and other consignments; 6) surreptitious penetration and (or) inspection of a place. Two covert investigative actions - covert observation of a person or place and covert control purchase are similar to the general operational and investigative activities enshrined in the Law Enforcement Operations Act. Thus, the Kazakh legislator, having copied and transferred general and special operational-investigative measures to the Criminal Procedure Code, tried to give operational-investigative materials the force of evidence. At the same time, domestic intelligence activities were artificially divided into domestic intelligence activities and tacit investigative actions (Akhanov, Khan, 2018). The distinction between them is made by legislative enshrining - some are enshrined in the operative-investigative legislation and others in the Criminal Procedure Code of the RK. Also, the criteria for distinction are the subjects of authorization, as well as the stages of the criminal process at which the relevant actions are applied (operational-investigative activities may be carried out without registration of a criminal offense in the Unified Register of pre-trial investigations, and covert investigative actions are carried out only within the pre-trial proceedings, that is, within the registered or initiated criminal case). But, as already mentioned, these activities, in fact, remain operative-investigative, and they are carried out by bodies carrying out law enforcement operations. In this regard, Kazakh scientists rightly

draw attention to the inadmissibility of combining two different in form and essence types of activities - investigative and operative-investigative, as this leads to the liquidation of the latter (Akhpanov, Khan, 2016, Karl, 2019). Therefore, some authors propose to exclude unspoken investigative actions from the Criminal Procedural Code of the Republic of Kazakhstan (Ayupov, 2019).

Therefore, following the artificial division of law enforcement operations into two types - operative-investigative and tacit investigative activities, according to the logic of the legislator, there was a need to recognize the harm caused in the implementation of tacit investigative activities, excluding liability under the Criminal Code of the Republic of Kazakhstan, on a par with the harm caused in the implementation of domestic intelligence activities. Subsequently, in connection with the adoption of the law of the Republic of Kazakhstan on counterintelligence activities, which is an operational and investigative activity (Suleimenov, 2017), Article 35 of the Criminal Code of the Republic of Kazakhstan is adjusted, supplemented by counterintelligence activities, harm caused during the implementation of which is also not a criminal offence.

Based on this, we can conclude that there is no fundamental difference between Article 341 of the Criminal Code of the Republic of Kazakhstan of 1997 and Article 35 of the Criminal Code of the Republic of Kazakhstan. Operational-investigative measures remain at the core, some of which in the updated version have become tacit investigative actions. At the same time, we cannot but recognize that the enumeration in Article 35 of the Criminal Code of the Republic of Kazakhstan of activities, from which the harm caused will not be recognized as a criminal offence, is carried out in exact adherence to the letter of the law.

As part of the strengthening of humanization, given the fact that the domestic intelligence activities and covert investigative actions are directly related to the invasion of human privacy, amendments were made to the law on domestic intelligence activities and the Criminal Procedure Code of the Republic of Kazakhstan. They consist in the fact that a person in respect of whom such activities were carried out has the right to demand the materials that served as a reason for operational-investigative activities. This person, within 15 days from the moment of being notified about carrying out uncovered investigative actions, has the right to appeal to court for their recognition as illegal and if the damage was caused - for its compensation (parts 5, 6, article 106 of the

Criminal Procedure Code). Accordingly, current legislation does not exempt from compensation of harm and bringing a person to civil liability (art. 9 of Law of the Republic of Kazakhstan on Law Enforcement Operations Act, art. 17 of Law of the Republic of Kazakhstan on counter-intelligence activity). But it is presumed that bringing to criminal liability for infliction of harm in such a case will be impossible by virtue of Article 35 of the Criminal Code of the Republic of Kazakhstan.

However, the question arises - how consistent is Article 35 of the Criminal Code with the enshrined responsibility of persons for illegal actions as a result of the implementation of operational-search and counterintelligence activity? We must recognize that Article 9 of the Law of Kazakhstan on the operative-search activity and Article 17 of the Law of Kazakhstan on counterintelligence activity are referential. Therefore, their wording is not specific - for the commission of illegal actions in the implementation of the activities under consideration persons are liable established by the laws of the Republic of Kazakhstan. Based on the meaning of part 1 of Article 35 of the Criminal Code of the Republic of Kazakhstan for the harm caused as a result of such activities, a person shall not be held only criminally liable. However, according to part 2 of this article, the exclusion of criminality does not apply to persons who have committed acts "involving a threat to human life or health, an ecological disaster, a public disaster or other grave consequences". Thus, the legislator still imposes a restriction on the unreasonably broad, limitless exclusion of criminal responsibility established by part 1 of Article 35 of the Criminal Code of the Republic of Kazakhstan.

At the same time, such a restriction is inconsistent with the regulatory provisions of the law on counterintelligence activities, which confirm the possibility of just such situations involving a threat to life or health, of serious consequences, which may arise not only for operational officers, but also for confidential assistants. Therefore, in the event that confidential assistants are injured or harmed to their health or die, the law establishes the payment of a monetary allowance. In this regard, we believe that the Russian legislator should take into account and adopt the positive experience of the Republic of Kazakhstan and introduce into the Criminal Code a regulatory provision on the exclusion of the crime of harm during operational and investigative activities (Shkabin, 2017).

Certain inconsistency of Article 35 of the Criminal Code of the Republic of Kazakhstan is also seen with Article 15 of the Law of the Republic of

Kazakhstan on Law Enforcement Operations, which directly prohibits taking actions that create a real threat to life, health and property of citizens, except in cases of extreme necessity and necessary defense, as well as using violence, threats, blackmail and other illegal actions that restrict the rights, freedoms and legitimate interests of citizens and officials. Accordingly, during an operative infiltration into a criminal group, if an officer forcedly takes the life of a criminal, then for the qualification of his actions it will be necessary to apply Article 32 of the Criminal Code "Necessary Defense" or Article 34 of the Criminal Code "Extreme necessity", but not Article 35 of the Criminal Code, which in this case does not relieve the employee from criminal liability. In this regard, one cannot but agree with A. V. Nikulenko that "even not quite an active role of the operative in the commission of a robbery will entail criminal liability" (Nikulenko, 2019). Indeed, according to part 2 of article 35 of the Criminal Code of the Republic of Kazakhstan, the operative in the case in question should be held criminally liable, since his actions involve a threat to human life or health.

It follows from this that the circumstance precluding criminality of a deed enshrined in Article 35 of the Criminal Code of the Republic of Kazakhstan has a certain inconsistency with the regulatory provisions of sectoral legislation and at the same time is not unconditional. Thus, by virtue of part 1 of Article 35 of the Criminal Code of the Republic of Kazakhstan will be recognized as a circumstance precluding criminality of an act only if they were carried out in respect of group criminality. We are talking about various kinds of complicity which are listed in part 1 of Article 35 of the Criminal Code of the Republic of Kazakhstan - a group of persons, a group of persons by prior agreement, and a criminal group. In other words, legal force of Article 35 of the Criminal Code of the Republic of Kazakhstan does not cover operational-search, counterintelligence activities or covert investigative actions in detection of individual criminal activities, which in its turn contradicts to part 4 of Article 232 of the Criminal Procedure Code of the Republic of Kazakhstan, Articles 10, 12 of Law Enforcement Operations Act, which also allow their implementation in respect of individuals.

#### 4 CONCLUSIONS

In this regard, without disputing the validity of the introduction of Article 35 of the Criminal Code, given that there is Articles 32, 34, 36, 37 of the Criminal

Code, it is advisable to subject it to adjustment in order to harmonize with other provisions of the Criminal Code and sectoral legislation. Firstly, to amend Part 2 of Article 35 of the Criminal Code, as it is not consistent with Article 32, 34 of the Criminal Code. Secondly, to exclude from part 1 of Article 35 of the Criminal Code of the Republic of Kazakhstan the list of group crimes in which the conducted investigative, counterintelligence or covert investigative activities exclude their criminal liability as inconsistent with Article 4 of Article 232 of the Criminal Procedure Code, Article 10 and Article 12 of the law of the Republic of Kazakhstan on Law Enforcement Operations, which allow implementation of investigative measures or covert investigative actions in respect of specific individuals.

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