



COVERT ACTIONS

My thanks to Forum Penal for the honourable invitation to take part in the 1st Criminal Law Congress. I would like to summarise a few points from my speech.

An undercover operation is doubly secret: firstly, because it is not included or reported in the criminal case in which the suspects are being investigated; and secondly, it is secret because it usually originates from contacts made by an anonymous collaborator who informs the police.

Undercover agents don't advertise their services, nor do the people they are targeting request their services. The link between the two is the collaborator. Collaborators are born and move within the criminal world and, in this context, they establish contacts and negotiations with suspects about the commission of crimes, most often resulting in the provision of the means necessary for the commission of criminal offences.

This moment in the negotiations is of great procedural importance since it is during this first contact that it is clarified who had the criminal initiative and, consequently, whether or not the citizen was provoked into committing a crime, violating the provisions of article 126 of the CPP and, to that extent, jeopardising the entire covert action and contaminating the evidence in the discovered case.

Once the first contacts have been made, the suspects are introduced to the undercover agents - criminal investigation officers - belonging to a department of the Judicial Police.¹ Negotiations between the suspects and the undercover agents are now finalised and the joint plan to commit the acts is defined. This phase is of equal procedural importance because it is important to clarify what acts were carried out by the undercover agents and to what extent they favoured

¹ UPAT (Prevention and Technological Support Unit)



and fuelled the commission of the acts, namely by helping the suspects to overcome obstacles that they would otherwise not have been able to, which would invalidate the undercover action.

Under Law 101/2001, of 25 August, defendants are not informed² at any point in the proceedings that an undercover action has been carried out. This omission in the law violates several principles enshrined in the Constitution of the Portuguese Republic, particularly the principles of accusation, defence guarantees, equality of arms and procedural loyalty³.

On the other hand, in the few cases in which the defendant is aware of the existence of the covert action, his access is limited to the final report⁴ and if it is deemed absolutely indispensable in evidential terms.

This solution is openly contrary to the principles and values of the Constitution in terms of criminal procedure, as it limits defendants' rights of defence in the face of a covert measure as drastic and invasive as the undercover agent. The defendant cannot be deprived of the means necessary to scrutinise the legality of the covert action. Knowledge of the decision to authorise and control this means of surveillance is indispensable, without which he cannot assess compliance with the assumptions or the violation, namely the material limits, the consistency of the suspicion, the proportionality and subsidiarity of the measure. No less important is knowledge of the interaction between the collaborator/accused/undercover agent in order to analyse their actions throughout the *criminal iteris*.

² The majority of cases involving covert actions are judged without the judges being aware of the existence of this hidden method of investigation.

³ Legal systems similar to ours prescribe the duty to clarify or inform that a covert action has been carried out in that case. This is the case in German procedural law (§101) and the Swiss Code of Criminal Procedure (269 et seq.).

⁴ Summary of the undercover action drawn up by the criminal investigation officer.



While it is true that the judge is responsible for preventive protection, while respecting fundamental rights, it is the defendants who are responsible for reactive protection, i.e. the possibility of subsequent control of the legality of the authorisation and execution of the measure.

Much less can the defendant be conditioned from accessing the undercover action according to a criterion of absolute indispensability for the evidence. What is uninteresting for the judicial authority may be absolutely crucial for the defendant's defence.

All these limitations on access to covert action leave the constitutionality of Article 4(1) of Law 101/2001 uncovered, since it follows from Article 32(1) that the Constitution guarantees "all the guarantees of the defence".

Carlos Melo Alves