

## Investigator's covert-nature procedural activities

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**Abstract.** Over the years, most of the Russian processualists denied the investigator's right to engage in actions of covert nature and deemed it impossible to integrate the norms of criminal intelligence legislation in the Code of Criminal Procedure of the Russian Federation adopted on 18.12.2001 No. 174-FZ, rightly referring to the impossibility to vest a single duty-bearer engaged in a preliminary investigation with unprecedented powers. Meanwhile, the latest decades have been marked by active legislative activity in many countries, which in fact has turned covert criminal intelligence and surveillance into a procedural activity. These innovations became specific of a number of countries regardless of their legal system belonging to the Romano-Germanic or Anglo-Saxon legal system, testifying to more profound roots of the problem. The study is also relevant in terms of dissatisfaction, expressed by the Russian law-enforcement authorities, with the crime solvency rate and with the interaction of criminal intelligence detectives and internal affairs investigators. The goal of the study is to identify the procedural provisions governing the investigator's covert-nature activities and related law enforcement problems. The methodological framework of the research comprises general and particular methods of scientific knowledge: dialectical, systemic, deductive, inductive; synthesis, analysis; comparative legal analysis, statistical and other methods. Results and novelty: it was concluded that the Code of Criminal Procedure provides for the regulation of the investigator's confidential-nature activities inherent in covert criminal intelligence and surveillance and requiring more detailed elaboration, as concerns the issues of securing the rights of partakers of the said activity; the authors express doubt regarding the justification of the legislator's differentiation of covert activities under criminal cases into covert investigative actions (Art. 185, 186, 186.1 of the Code of Criminal Procedure) and covert operational and investigative operations that are in fact identical to the former (Art. 6, Cl. 9-11 of the Russian Federation Federal Law No. 144-FZ as of 12.08.1995 "On criminal intelligence and surveillance").

**Keywords:** covert investigative activities, criminal intelligence and surveillance

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## **1 Introduction**

For many years, a number of scientists have been categorically denying the very idea of the investigator's being engaged in covert-nature activities, while other scholars favour admissibility of such actions and, moreover, the need for them. The mere fact of the existence of such scientific discussion is sufficient to assert the relevance of the given subject; however, our survey with the participation of investigators and criminal-intelligence law enforcement agencies (LEA) showed the importance of resolving these issues for law enforcers per se. Survey was made for 1,241 officers of the interior bodies authorised to engage in the preliminary investigation or criminal intelligence and surveillance; judges; coverage area – 75 constituent entities of the Russian Federation. The purpose of the study is the identification of procedural provisions governing the investigator's covert-nature activity and related law enforcement problems. The set purpose determined the need to consider the following objectives: analysis of the criminal procedure legislation in Russia and other countries; identification of problem areas inherent in the law of criminal procedure in the context of the research.

## **2 Methods**

The methodological framework of the research comprises general and particular methods of scientific knowledge: dialectical, systemic, deductive, inductive; synthesis, analysis; comparative legal analysis, statistical and other methods.

## **3 Results**

The research allowed the authors to specify the provisions of the Code of Criminal Procedure of the Russian Federation (CCP) governing the investigator's covert-nature activity; it was concluded that its substance and methods are actually identical to those practiced in particular operational and investigative covert operations; at the same time, the authors noted that the mechanisms ensuring the enforcers' rights are flawed.

## **4 Discussion**

As provided by the current legislation, the key methods of the investigator's activity focus on investigative actions. According to the rules enshrined in the CPP, their legality assumes the obligation to clarify them to lawsuit participants before the process is started: explaining the procedures involved in the action; the rights, obligations and, in cases set by the legislator, the criminal liability of involved entities; the use of technical means; protocolling the progress of the action and its results; the right to review the investigative action protocol; statement of comments demanding supplementation or specification of the protocol, etc. (Art. 164, parts 5 and 6). The above provisions refer to the transparency of the investigator's activities; this, coupled with the absence of the term "covertness" in the Code of Criminal Procedure, has motivated a number of scholars to assert that no elements of covert activities are present in the investigator's activities.

Meanwhile, the relevant terminology has been enshrined in many statutory legal acts regulating criminal intelligence and surveillance (CIS). For instance, the legislator, already in the first articles of the Russian Federation Federal Law No. 144-FZ as of 12.08.1995 "On criminal intelligence and surveillance", mentions both public and covert forms of CIS. At the same time, a significant part of information pertaining to CIS is classified as a state secret (Art. 5, Cl. 4 of the Russian Federation Law No. 5485-1 as of 21.07.1993 "On national

security information”).

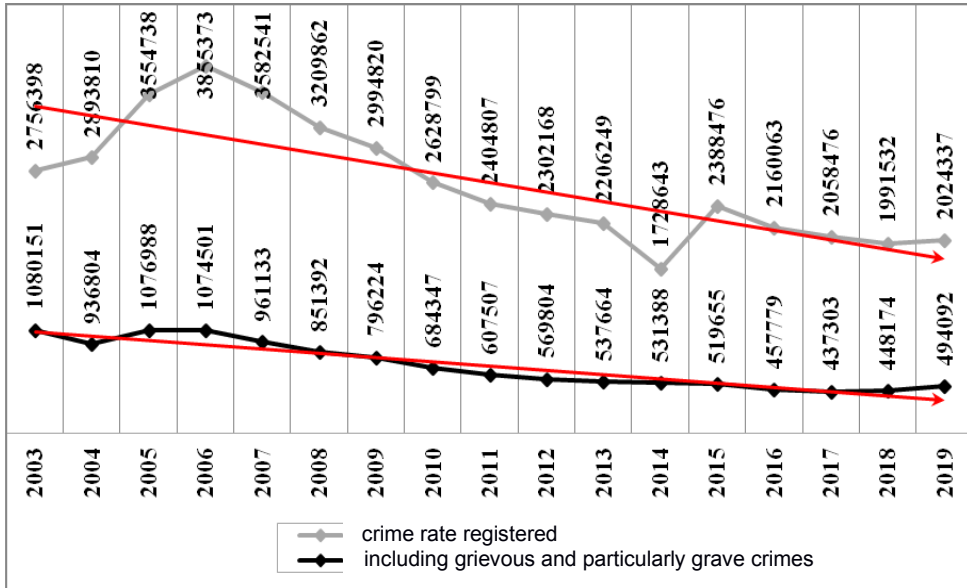
In this regard, the legislator allowed obtaining confidential information only to operational units of state agencies authorised by FZ “On CIS”, provided there are grounds for operational and investigative operations (OIO) (Art. 6 of FZ “On CIS”). The investigator is not officially included in the named operational units and, accordingly, is not vested with the authority to engage in OIO. The investigator is guided exclusively by the CCP in his activities and is not in the position to use the means and methods of CIS. In turn, criminal intelligence detectives are not entitled to carry out investigative actions without due instruction from the investigator (Art. 38, Cl. 4, part 2 of the CCP).

Given that the substance of covert activities excludes, in the course of their implementation, awareness of persons being the object thereof about their rights and, moreover, about the initialisation of the said activity, about the entities implementing it and the obtained results, the authors note: 1) direct use of CIS results in official argumentation is impossible, and; 2) the data obtained in the course of CIS are non-competitive against the evidence obtained through investigative actions, since this work was carried out without proper safeguards for the rights of involved parties. At the same time, in the course of the survey, the judges referred to the fact of the increased and appreciable influence of operational and investigative data on sentencing under grievous and particularly grave crimes.

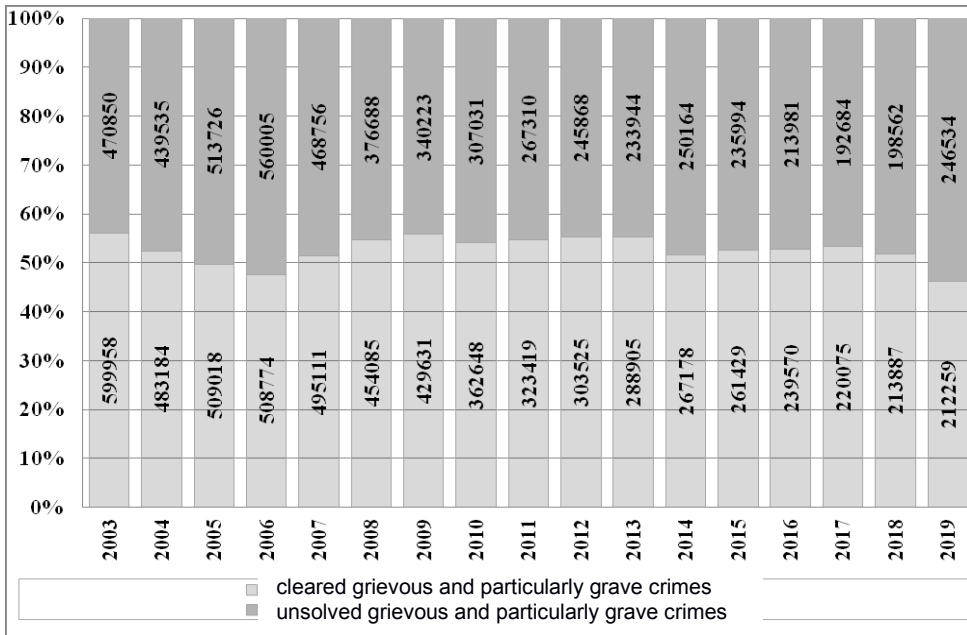
Legal experts refer to combining efforts aimed at exposing and clearing crime as to the interaction of the investigator and the criminal intelligence detective exercised according to the principle of split jurisdiction. The feasibility of splitting the powers to engage in publicly-disclosed and covert activities does not generally raise a doubt of the researchers, since the concentration of powers in “the hands” of a single entity may adversely affect the enforcement of individuals’ rights through passing procedural judgments under the influence of non-procedural information.

Unfortunately, the efficiency of the considered interaction does not always meet the expectations of the enforcer. Fifty-five percent of investigators and fifty-nine percent of criminal intelligence detectives, out of 1,241 LEA officials interviewed in the survey, noted the need to improve such interaction. Trying to resolve the problems identified in the survey, 37% of investigators and 19% of criminal intelligence detectives spoke in favour of vesting the investigator with the right to engage in covert OIO. Regretfully, the respondents proved to be unable to explain their position or to propose specific steps for the realisation of this initiative.

The imperfect interaction between the investigative and operational units has a negative impact on the crime solvency rate. Although the Russian crime rate has been declining in recent years (Fig. 1), the crime solvency rate for grievous and particularly grave crimes leaves much to be desired (Fig. 2). The crime solvency rate is also adversely affected by qualitative changes in crime which, according to the researchers [1-3], has become highly organised and technologically equipped. Hereinafter, statistical data posted on the official website of the Ministry of Internal Affairs of the Russian Federation were used.



**Fig. 1.** Crime rate registered in the Russian Federation, including grievous and particularly grave crimes – from 2003 to 2019.



**Fig. 2.** Number of cleared and unsolved grievous and particularly grave crimes registered in the Russian Federation from 2003 to 2019.

Although most of the national processualists denied the possibility of introducing the norms of criminal intelligence legislation in the CCP until recently, the realisation of the need to change approaches to covert activities under criminal cases made the researchers reconsider the scholarly views on the problem under consideration. The attitude towards covert activities began to change in Russia along with the process of inclusion of CIS in the criminal procedure legislation of many countries (for instance, §100a, 100b, 100c, 100i, 110a

of the Code of Criminal Procedure adopted in the Federal Republic of Germany [4]; section VIII, Chapter 2 of the Code of Criminal Procedure of China adopted on 01.07.1979 (as revised on 14.03.2012), Art. 246 of the Code of Criminal Procedure of Ukraine adopted on 13.04.2012 No. 4651-VI, Chapter 3<sup>1</sup> of the Code of Criminal Procedure adopted in the Republic of Estonia on 12.02.2003, Chapter XVI<sup>1</sup> of the Code of Criminal Procedure adopted in Georgia on 09.10.2009 No. 1772, and others).

The above legislative activity was preceded by serious work of the public, of human rights advocates and scientists, aimed to develop due legal mechanisms to safeguard the rights exercised in the course of procedural covert activities.

In general, treating covert activities positively, foreign scholars note the imperfection of the current legislation and the absence of solutions to certain problems of law enforcement, related to:

1. the need to maintain confidentiality in criminal proceedings and set bounds to the flow of information about the private life of individuals in the global and online media [5]; control of the dissemination of information [6, 7];

2. de facto exclusion of privacy in the Internet connected with enhanced police monitoring of online activities [8];

3. insufficient juridical security of the foreigners' status in cases of "accidental tapping" of their telephone conversations by the police [9];

4. insufficient juridical security of the status of e-mail and cell-phone service providers [10];

5. existing obstacles to the provision of international legal assistance relating to "legal disputes"; lack of trust between official services; poor knowledge of other countries' jurisdiction; differences in political, cultural and legal aspects [11, 12];

6. imperfect mechanisms for safekeeping individuals' rights in a "high crime zone", in virtue of the absence of a definition for such zones and of due standards for substantiation of the valid status of these territories [13];

7. increased tendency to leak cellular-network and mobile-phone location data to the police [14, 15].

At the same time, the researchers found it reasonable for legal participants to have expectations of maintained confidentiality of their private data [16] or of their commercial secrets [17] obtained in the course of covert activities, and noted the need to secure the rights of individuals by informing the litigators of available evidence regarding the defendant's guilt; emphasised the need to guarantee inadmissibility of restricting public access to information on enforcement of criminal punishment in the form of the death penalty [18] and on the issues connected with the work of international judicial bodies [19].

Despite the long years of denying the possibility of investigator's covert work by the Russian researchers, the authors argue that there are certain provisions governing it, as enshrined in the CCP. For instance, informing a defendant in advance about expected search, seizure or sequestration of the latter's property seems not only meaningless, but also detrimental to the efficiency of investigation (Art. 182, 183, 115 of the CCP).

The elements of covert work are also present in case of arrestment of postal and telegraphic items, their inspection and seizure, control and recording of conversations, as well as in case of obtaining information on subscribers' communication and (or) subscriber terminals (Art. 185, 186, 186.1 of the CCP).

It is obvious for the authors that the history of the above investigative actions (that are referred to in this paper as covert investigative activities) is rooted in CIS where covert operational and investigative operations (OIO) are carried out in fact in the same manner and by the same authorised officials – such as control of mail items, telegraph and other messages, tapping telephone conversations and information retrieval from technical communication channels (Art. 6, Cl. 9-11 of FZ "On CIS"). Although the legislator preferred to camouflage

the similar legal nature of covert investigative actions and OIO by rewording their names, still the identity of covert activities is obvious.

The indisputable difference of covert investigative actions from covert OIO is that the former is carried out exclusively on the initiation of a criminal case and on the initiative of the investigator; the results of these actions are supposed to be made known to the parties of the process at the end of the investigation. Regretfully, the general features of these activities, as viewed by the authors, are distinguished by flawed mechanisms for safeguarding the rights of involved participants, as enshrined inter alia in parts 5 and 6 of Art. 164 of the CCP (no advance notification to the parties about the proceedings, about the procedural issues, about the participants' rights and duties, etc.). The investigator's lack of authority to control covert investigative actions independently, especially in the conditions of the objective impossibility of public control, is a serious gap in the CCP. The appropriateness of the formal split of covert activities into procedural work and operational/investigative work remains unresolved.

## 5 Conclusion

Based on the foregoing, the authors conclude procedural regulation of the investigator's covert activity which is inherent in covert CIS and needs more detailed elaboration of the issues involving safeguarding the rights of participants in this activity. In addition, the authors doubt a justification of the legislator's differentiation of covert activities under criminal cases – as split into covert investigative actions (Art. 185, 186, 186.1 of the CCP) and de-facto identical covert operational/investigative operations (Art. 6, Cl. 9-11 of FZ "On CIS").

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