

Improvement of Interdisciplinary Relations of Criminal Law and Operative Search Activity

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Abstract: In Russia, several independent sciences are engaged in the study of methods of crime counteraction. They include criminal law and the doctrine of operative search activity. The links between these two branches of knowledge are not well understood. At the same time, during the implementation of secret police activity, situations often arise when officers are forced to perform actions similar to a crime. This article is devoted to the analysis of such situations. The aim of the study is to develop proposals for improving the interdisciplinary relations of criminal law and operative search activity. In order to achieve it, the following tasks were solved: a retrospective analysis of the dynamics of the development of links between criminal law and operative search activity was carried out; the state of legal support for causing harm during operative search activity was studied; proposals for amendment of the current legislation were made. The research is based on comparative legal, sociological and formal logical methods. Based on the results of the study, the authors proposed the *de lege ferenda* norm, establishing criminal lawfulness for causing harm during operative search activity. The obtained results contribute to the development of ties between the two sciences and the improvement of the activities of law enforcement agencies in crime counteraction.


1 INTRODUCTION


A crime, as a social phenomenon, constantly changes and is in dynamics. New ways of crimes commission appear regularly, and previously known techniques are improved. In such conditions, a state cannot use the same methods of counteraction as it did many years ago. In this regard, the covert activity of law enforcement agencies, aimed at crimes detection, as well as identifying the persons who committed or committing them, acquires special relevance.

It should be noted that the legal doctrine of many Western states has long known the problem of legal justification for limiting human rights and committing acts similar to a crime during secret operations. Such situations are considered from the position of the concept of “necessary evil”. One of its founders is Gary T. Marx, who published a book “Undercover: America’s Police Investigation” in 1988 (Gary T. Marx, 1988). Its essence lies in the fact that it is necessary to recognize admissible “evil”, which is expressed in deceit or harm to objects of

criminal law protection by law enforcement officials in order to bring to criminal responsibility the persons who have committed crimes (Jacqueline E. Ross, 2002). In this aspect, one should agree with V. Murphy that values are shifting towards utilitarianism in modern society, when collective security is above the rights and interests of an individual (Murphy, B., 2020). In the Russian legal doctrine, this direction is relatively new and insufficiently studied (Shkabin G.S. 2020).

The purpose of this study is to formulate specific proposals for improving the interdisciplinary relations of criminal law and operative search activity (hereinafter – OSA). In order to achieve it, the following tasks were solved: the history of the development of relations between criminal law and operative search activity was studied; the analysis of the state of legal support for causing harm during covert operations of law enforcement agencies was made; the author’s version of changing the current criminal legislation is proposed.

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2 MATERIALS AND METHODS

During the research, regulatory legal acts of various levels were studied: international conventions and agreements, laws of the Russian Federation, countries of Europe, Asia and America. In addition, the scientific works of both Russian and foreign scientists – specialists in the field of criminal law and operative search activity were used in the article. Also, the results of a sociological study were taken as the basis. For the period from 2009 to 2020, the authors interviewed 502 respondents, including law enforcement officials, judges, scientists and academic staff. The materials of 283 criminal cases were studied, in which the results of operative search activity, considered by the courts from 2001 to 2020, were used.

Comparative legal, sociological and formal logical research methods made up the methodology of this article.

3 RESULTS AND DISCUSSIONS

For a long time, it was stereotypically believed that the branch of criminal law does not in any way influence operative search activity in the Russian Federation. On the contrary, many scientists believed (and some of them still think so) that only the last term serves to solve the problems of criminal legislation. It is due to the fact that the covert activity of law enforcement agencies in crime counteraction was outside the scope of discussion of the general scientific community for a long time.

Scientific researches of the problems of the relations between criminal law and OSA was one-sided. In the Russian doctrine of criminal law, which is a priori open, these issues were not actually considered. At the same time, the need for them was of an objective nature. Therefore, in the second half of the twentieth century, in the already incipient science of OSA, dissertations of complex and system-forming significance began to be defended.

This situation lasted until 1992, when the RF Law “On Operative Search Activity in the Russian Federation” was adopted. After some time, it was replaced by the Federal Law “On Operative Search Activity” (hereinafter – the Federal Law “On OSA”) in 1995. It was from this moment that the large-scale legal regulation of the OSA actually begins, which, accordingly, gave a new impetus to the corresponding scientific developments. V.I. Mikhailov (Mikhailov V.I., 1995; Mikhailov V.I., Fedorov A.V.) and A.Yu.

Shumilov (1995) were the first scientists who devoted their open works to the relations of criminal law and OSA.

The obvious insufficiency of comprehensive interdisciplinary studies of the problems of OSA led to systemic contradictions in the previous period. So, in the operative search legislation, norms appeared that did not correspond to the subject of its regulation. We are talking about two legislative provisions. The first is Part 4 of Art. 16 of the Federal Law “On OSA”, contains a special type of circumstance that excludes the criminality of a deed of officials who carry out OSA and caused harm. In foreign literature, this kind of action is called a “sanctioned crime” (Brendon Murphy, 2016) or harm to a third party during undercover police operations (Joh, Elizabeth E. and Joo, Thom-as Wuil, 2015), which usually consists of infiltrating in organized criminal groups (Kruisbergen EW, 2017). The second provision is Part 4 of Art. 18 of the Federal Law “On OSA”, a special type of exemption from criminal liability for members of a criminal group who cooperate with the authorities that carry out OSA. Based on the system of Russian law, the above mentioned legal provisions should be provided exclusively in the Criminal Code.

Due to their branch inconsistency, these norms have practically never been applied. According to the studied materials of criminal cases, in which the declassified results of OSA were used, not a single fact of the application of Part 4 of Art. 18 FL “On OSA” was not established. Only one case of the application of Part 4 of Art. 16 of the Federal Law “On OSA” was recorded in judicial practice.

At the same time, attention should be paid to the fact that the criminal legislation of some former republics of the USSR already has norms regulating the legality of causing harm during covert operations of law enforcement agencies (Belarus, Kazakhstan, Kyrgyzstan and Ukraine). The legal grounds for their appearance were international documents (the UN Convention against Corruption, the UN Convention against Transnational Organized Crime). Recommendations on the harmonization of the legislation of the member states of the Collective Security Treaty Organization, which indicate the advisability of supplementing national criminal law with a provision on an independent circumstance that excludes the criminality during operative search activity was adopted in St. Petersburg.

Thus, after the adoption of laws on operative search activity in Russia, a situation arose when there was objectively a need for criminal-legal regulation of operative search activity and at the same time there were no corresponding norms in the Criminal Code.

Due to the lack of direct criminal law regulation of such situations and in the presence of a natural need for it, a domestic law enforcement officer has long used the analogy of the norms of criminal law. Such actions were not assessed under Part 4 of Art. 16 of the Federal Law "On OSA", and according to the rules of Art. 39 of the Criminal Code of the Russian Federation, as an emergency or Art. 41 of the Criminal Code of the Russian Federation, as a reasonable risk.

A few years later, from about 2005 to 2010, the law enforcement practice has changed significantly in this issue. Investigative bodies and courts simply stopped giving a criminal-legal assessment of the legality of the actions of persons carrying out operative search activities. So, if in the period from 2001 to 2004 such an assessment was carried out in 67 % of cases, then from 2009 to 2020 we did not establish such facts. Despite this, the majority of the interviewed respondents (more than 65%) believe that the Criminal Code should contain a special rule that excludes the criminality of causing harm during operative search activity.

It can be said that a comprehensive regulation of operative search activities has developed in Russia. It is a combination of the two models that C. Harfield distinguishes. The first "model of negative liberty" ("a negative liberty model") exists in those states where a secret agent can do anything that is not specifically prohibited. The second "model of positive authority" ("a positive authority model") is typical for countries where the covert activities of law enforcement agencies are regulated by law (Harfield C., 2018). To some extent this situation is resembling with the one that exists in the United States. In this state, there is no direct legislative regulation of the actions of undercover agents, which are similar to a crime. At the same time, such actions are assessed from the point of view allocated in the theory of criminal law – the protection of state power or the protection of the authority of law enforcement agencies (Joh Elizabeth E., 2009).

The situation with the problem of crime provocation develops in a similar way. After the case of Vanyana against Russia considered by the ECHR in 2005 and the direct prohibition of provocation of a crime in Art. 5 of the Federal Law "On OSA", the situation has changed insignificantly. The lack of proper legal regulation of the conduct of operative search operations leads to the fact that, on the one hand, the ECHR recognizes the decisions of the Russian courts as inconsistent with the European Convention on Human Rights, and on the other hand, the bodies carrying out OSA, finding themselves in a

legal vacuum or, at best, in situations of insufficient legal regulation, are forced to independently form the rules of conduct that would suit both the investigation and the courts.

So, after the named decision of the ECHR, the conduct of test purchases was reduced to a minimum in the internal affairs bodies. After the cases of the ECHR "Bykov v. Russian Federation" in 2009, "Bannikova v. Russian Federation" in 2010, "Lagutin and others v. Russian Federation" in 2014, the conduct of sting operations was sharply reduced. The ECHR has repeatedly pointed out that "test purchases and sting operations are fully within the competence of operative search authorities and that this system is characterized by structural evasion from providing guarantees against police provocation" (see, for example: The Case "Lagutin and Others v. Russian Federation" dated 24 April 2014 and others).

The situation has not been resolved to this day. It is confirmed by the fact that the ECHR again ruled in favor of the majority of the applicants in the case "Kumitsky and Others v. The Russian Federation" in view of the provocation of a crime in 2018.

4 CONCLUSIONS

Thus, we believe that the unofficial rule on "protection of a representative of state power" should find its criminally legal confirmation. Situations of harm caused during operative search activities must be regulated in a separate norm of Chapter 8 of the Criminal Code of the Russian Federation. It could be Article 391 "Causing harm during an operative search operation" with the following content:

1. "It is not a crime to forcefully cause harm to the interests protected by criminal law during an operative search operation by an authorized person who acts in order to prevent, suppress or solve a crime, if this activity did not exceed the limits of causing harm during the conduct of an operative search measure.
2. Exceeding the limits of harm infliction during the conduct of an operative search measure shall be deemed intentional infliction of death or serious harm to the health of another person, or violation of sexual inviolability or sexual freedom of a person, or deliberate infliction of other harm that clearly does not correspond to the nature and the degree of public danger of the crime being prevented, suppressed or solved."

This proposal to supplement the Criminal Code of the Russian Federation with a new circumstance

excluding the criminality of a deed during the conduct of operative search operation is based not only on the study of domestic doctrines of criminal law, and operative search activity, and law enforcement practice. It takes into account the experience of foreign legislation and the recommendations of international documents ratified by the Russian Federation. Our edition of Art. 391 of the Criminal Code of the Russian Federation is not just a solution to particular problems of administration of law and a gap in legal regulation. It is aimed at observing the principle of the consistency of law and does not undermine the foundations of the codification of criminal legislation. This proposal is an expression of the idea of a compromise between excessive abstractness and excessive casuistry of the further development of the entire institution of lawful infliction of harm.

REFERENCES

- G. T. Marx, 1988. *Undercover: Police Surveillance in America*. Copyright Date. Published by University of California Press. p. 280.
- H. Clive, 2018. Undercover policing – a legal-comparative perspective. *In Comparative Policing from a Legal Perspective*.
- Ross, J. E., 2002. Tradeoffs in Undercover Investigations: A Comparative Perspective. *In the University of Chicago Law Review*. 69(3). pp. 1501-1541.
- Joh, E. E., 2009. Breaking the Law to Enforce it: Undercover Police Participation in Crime. *In Stanford Law Review*. 62. p. 155.
- Joh, E. E. and Joo, T. W., 2015. Sting Victims: Third-Party Harms in Undercover Police Operations. *In Southern California Law Review*.
- Kruisbergen, E.W., 2017. When Other Methods Fail... Infiltrating Organized Crime Groups in the Netherlands. *In Contemporary Organized Crime*. Chapter 15. Publisher Springer Editors Hans Nelen Dina Siegel.
- Mikhailov, V. I., 1995. The development of criminal legislation and some issues of operative search activities of the special services of the states-participants of the CIS. *In the Bulletin of the Interparliamentary Assembly*. 4. p. 61.
- Mikhailov, V. I., Fedorov, A. V., 1996. Model legislation of the CIS member states on the fight against organized crime. *In Scientific notes of the St. Petersburg name of V.B. Bobkov branch of the Russian Customs Academy*. 1. pp. 70-74.
- Murphy, B., 2016. Deceptive apparatus: Foucauldian perspectives on law, authorized crime and the rationalities of undercover investigation, *In Griffith Law Review*. 25(2). pp. 223-244.
- Murphy, B., 2020. Regulating Undercover Policing: Subjects, Rights and Governmentality. *In Critical Criminology*. no. 28. pp. 65–84. <https://doi.org/10.1007/s10612-020-09504-6>
- Shkabin, G. S., 2020. Criminal and operative search legislation: problems of interdisciplinary relations and prospects for improvement. (Review of the V Interdepartmental scientific and practical conference) *In State and Law*. 7. pp. 144-150.
- Shumilov, A. Yu., 1995. On the formation of criminal investigation law. *In News of higher educational institutions. Jurisprudence*. 1. pp. 45-51.