

THE CONCEPT AND THE FUNDAMENTAL GUARANTEES OF LEGALITY OF SECRET INVESTIGATIVE ACTIONS

VAHE YENGIBARYAN*

Yerevan State University

Abstract. This article discusses a number of important issues regarding the implementation of secret investigative activities. Secret investigative operations, as operations carried out during pre-trial proceedings, have specific tasks aimed at detection and prevention of crimes, collection of evidence and identification of the person who committed the crime. In the legal and linguistic sense, “covert” means a secret, non-public, inconspicuous practice, the purpose of which is to provide evidence necessary for the investigator’s actions. The probative value of secret investigative operations is largely determined by the protection of the guarantees provided by law during their implementation. Compliance of national legislation with international standards is essential to ensure the legality of covert investigative activities. The position of the European Court of Human Rights on this issue emphasizes that the competent authorities of the states can carry out secret operations to ensure the protection of public safety, but there must always be clear and effective guarantees for the protection of human rights. The guarantees established by the state for the implementation of secret investigative activities are intended to exclude human rights violations, possible interferences and abuses. For example, according to Article 243 of the Criminal Procedure Code of the Republic of Armenia, secret investigative actions are carried out based on a court order and only in the event that gathering evidence by other means is impossible. In the case of conducting secret investigative activities, priority is given to the proportionality of the interference with personal data and the protection of private life and fundamental rights. The legislation of Armenia also sets clear restrictions on the scope of persons against whom secret actions can be carried out, including with the permission of the court. The author concludes that secret investigative actions, being an independent type of state activity carried out by law enforcement agencies within the scope of the functions assigned to them by law, are subject to implementation in accordance with the nature of that activity, its purpose and the legality conditions set by the legislation,

* Professor at the YSU Chair of Criminal Procedure and Criminalistics, Doctor of Legal Sciences, Professor. Email yengibaryan@ysu.am, ORCID - 0000-0002-0402-7097



This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.

The article received 11 September 2025,
reviewed 29 September 2025,
accepted for publication 03 November 2025

© The Author(s) 2025

always guaranteeing a fair balance between the public interest and the rights of the individual.

Keywords: *secret investigative operations, legality, fundamental guarantees, human rights and freedoms, criminal trial, evidence collection, court decision, criminal proceedings, RA Constitution, European Court, private communication, public security.*

Introduction

Covert investigative actions are carried out during pre-trial proceedings to solve specific problems, the resolution of which must be ensured as a result of their implementation. The purpose of covert investigative actions, in a broad sense, is to combat crime; in this context, it is to prevent and solve crimes, for which purpose information is collected, evidence relevant to the resolution of the case is obtained, and persons who have committed crimes are found.

In a philological sense, covert means hidden, not publicized, not visible, not noticed, not outwardly expressed, having no external manifestation¹. From a legal point of view, in particular, L. O. Krasavchikova defines a secret as certain information about the actions of a certain person (citizen, organization, state) that is not subject to publication².

Chapter 30 of the current RA Criminal Procedure Code is dedicated to the legal regulation of covert investigative actions. Although they are not new criminal procedural institutions in their nature and content, their systematic incorporation into criminal procedural legislation can be considered one of the innovations of the current code.

To get a general idea about covert investigative actions, it is necessary to refer to the views expressed by legal scholars on the matter.

For example, A. M. Baranov proposes to introduce a non-public method of collecting evidence into the Criminal Procedure Code and give them the quality of procedural actions³.

According to K. S. Doronin, a covert investigative action can be characterized as a special procedural action intended to obtain evidence by covert (disguised) methods using special means. The participants in the criminal proceedings,

¹ Eduard B. Aghayan, "Hayastan" (Armenia) Publishing House, Yerevan, 1976, p. 217. http://www.nayiri.com/imaginedictionaryBrowser.jsp?dictionaryId=24&dt=HY_HY&pageNumber=233

² Krasavchikova L. O., *Private Life Under the Protection of the Law*, 1983, p. 160.

³ Doronin K. S., "The Concept of a Covert Investigative Action in Criminal Procedure" // *Bulletin of Moscow University. Series 11. Law*. 2017.

including the participants in the investigative actions, should not be informed about the purposes of their execution, with the exception of those carrying out the action⁴.

B. M. Nurgaliev and K. S. Lakbaev noted that disguised investigative actions are aimed at clarifying the circumstances subject to proof during criminal proceedings and are carried out without notifying the participants in the criminal proceedings and those providing the information. They can be carried out only when the circumstances to be proved cannot be established otherwise.

Covert investigative actions can be defined as an activity carried out by order of the investigator during pre-trial proceedings on the basis of a court decision, within the competence of the investigating body, to protect human and civil rights and freedoms, state and public security from illegal encroachments, aimed at obtaining evidence relevant to the proceedings, if it is reasonably impossible to obtain that evidence by other means.

Ensuring the criminal procedural prospects of the results of covert investigative actions is directly conditioned by the observance of the guarantees of their lawfulness. The guarantees of the lawfulness of covert investigative actions are the procedural regulations and procedures that are designed to exclude violations of human rights during the performance of the actions under discussion, as well as to exclude various types of interference as much as possible.

Main Research

The legal basis for covert investigative actions as a specific area of the state's law enforcement activities is formed by the legal acts that contain legal norms regulating the public relations that arise, change, and cease during the implementation of the aforementioned actions. Among these, the Constitution of the Republic of Armenia is particularly important as the fundamental law of the state.

The Constitution, while enshrining the rights and freedoms of man and citizen, also defines the possibility of their restriction in the public interest. These rights can be restricted only by law for the purpose of protecting state security, the economic well-being of the country, preventing or detecting crimes, public order, health and morals, or the fundamental rights and freedoms of others.

Within the scope of covert investigative actions, the restriction of human and civil rights may relate, in particular, to rights enshrined in the Constitution, such as

⁴ Nurgaliev B. M., Lakbaev K. S., "Covert Investigative Actions: History, Concept, Problems, Prospects" // *Current Problems of Using the Situational Approach in Legal Science and Law Enforcement*.

the inviolability of one's home, the freedom and secrecy of communication, and the right to respect for private and family life.

Article 29 of the 1948 Universal Declaration of Human Rights provides: "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."

In this context, it is necessary to refer to the position of the European Court of Human Rights that "when (...) a balance was struck between, on the one hand, the respondent State's interest in protecting security with the help of secret surveillance measures, and on the other hand, the seriousness of the interference with the applicant's right to respect for private life, the competent national authorities have a certain margin of appreciation in choosing the appropriate means to be used to achieve the legitimate goal of national security."

However, [according to the European Court of Human Rights], there must be sufficient and effective safeguards to prevent abuse. Thus, the Court takes into consideration all the circumstances of the case, for example, "the nature, scope, and duration of the possible measures, the reasons required for their ordering, the bodies authorized to permit, carry out and supervise them, as well as the type of legal remedy provided by national law"⁵.

It is obvious that the implementation of covert investigative actions involves an interference with fundamental human rights and freedoms. Therefore, even when deciding on the choice of a particular covert investigative action, as well as throughout its implementation, it is necessary to take into consideration the positive and negative obligations assumed by the state regarding the protection of human rights and freedoms, while constantly maintaining the necessary balance between public and individual interests. In particular, as the Court of Cassation emphasizes in the case of Gor I. Sargsyan, based on the nature of operational-investigative activities, when choosing the type of a relevant measure and implementing it, the competent authorities must, in line with the principle of proportionality, also ensure adequate protection of the right to a fair trial, respect for private and family life, and other fundamental rights and freedoms⁶.

⁵ See the European Court of Human Rights' judgment in the case of Roman Zakharov v. Russia, December 4, 2015, application No. 47143/06, paragraph 232; judgment in the case of Irfan Guzel v. Turkey, February 7, 2017, application No. 35285/08, paragraph 85.

⁶ Moreover, the necessity of maintaining the necessary balance between public and private interests is also emphasized in point 4.4 of the Constitutional Court of the Republic of Armenia's decision DCC

In the case of *Sefilyan v. Armenia*, the European Court noted that in its case law regarding secret surveillance measures, the European Court has developed the following minimum safeguards that must be established by law to prevent abuse of powers: “the nature of the crimes that can be a basis for a surveillance decision; the definition of the categories of people whose telephones can be subject to wiretapping; the limited period of telephone wiretapping; the procedure to be followed for the study, use, and storage of the data obtained; the precautionary measures to be taken when providing this data to other parties; and the circumstances in which the recordings can or must be deleted or the tapes destroyed”⁷.

The European Court also noted that the choice of measures aimed at achieving the pursued goals, while in principle falling within the state’s own margin of appreciation, has a broad or narrow manifestation depending on the nature of the right to be protected. For example, “given the fundamental importance of the rights guaranteed by Article 8 [of the European Convention] to self-determination of identity and physical and moral inviolability, the margin of appreciation reserved to States in matters of home is narrower if the matter relates only to the rights protected by Article 1 of Protocol No. 1 [of the European Convention]”⁸.

Thus, according to Article 8 of the European Convention:

1. “Everyone has the right to respect for his private and family life, his home and his correspondence.”
2. “There shall be no interference 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 of the European Convention protects the secrecy of “private communication” regardless of the content (...) and form of the communication. This means that the protection of Article 8 applies to the secrecy of all “exchanges” through which individuals communicate with each other. (*Frerot v. France*, 12.06.2007, application 70204/01, § 53).

The task of national courts is to control and ensure that the activities of the competent authorities do not violate the rights defined by Article 8, Part 1 of the

1526 of April 28, 2020, in the context of appealing decisions allowing the implementation of operational-investigative measures.

⁷ See the European Court’s judgment in the case of *Sefilyan v. Armenia*, October 2, 2012.

⁸ European Court of Human Rights’ judgment in the case of *Gladysheva v. Russia*, December 6, 2011, application No. 7097/10, paragraph 93.

Convention. According to Article 8, Part 2 of the Convention, interference with the rights defined by Article 8, Part 1 is allowed only when “it is in accordance with the law and is necessary in a democratic society (...) for the prevention of disorder or crime.” Therefore, the decision allowing the interference must show how the national courts have applied Article 8, Part 2.

When choosing a specific type of covert investigative action, the idea of distinguishing the discretionary scope reserved for the state, based on the nature of the interference with a person’s rights, is reflected in Article 242, Part 1 of the RA Criminal Procedure Code. According to this article, a covert investigative action can only be carried out when there are sufficient grounds to assume that it may result in obtaining evidence relevant to the given proceedings, and at the same time, it is reasonably impossible to obtain that evidence by other means.

One of the main goals of a democratic society is to limit the arbitrariness and abuse of state bodies. In this regard, the RA Criminal Procedure Code contains an important legal provision that establishes the guarantees for the lawfulness of covert investigative actions.

As a result of a systematic analysis of the norms of the RA Criminal Procedure Code, we can distinguish elements of the lawfulness of covert investigative actions, such as their duration, the circle of persons against whom they can be carried out, the types of crimes within which certain covert investigative actions can be carried out, the minimum threshold that must be overcome for them to be carried out, the conditions for the preservation or elimination of unforeseen results, as well as the scope and conditions for the use of special technical means, and so on.

However, it should be noted that the current RA Criminal Procedure Code, emphasizing the importance of the criminal procedural institution of covert investigative actions, has dedicated a separate norm to the guarantees of their lawfulness.

Thus, it follows from the formulation of Article 243 of the RA Criminal Procedure Code that such guarantees are:

- The non-absolute prohibition of the use of data obtained about a person during a covert investigative action under certain conditions.
- A specific circle of persons against whom certain covert investigative actions can be carried out.
- A specific circle of persons to whom the information to be obtained as a result of a covert investigative action may reasonably relate.
- The general deadlines for carrying out certain covert investigative actions, as well as their total duration.
- The specific grounds for terminating a covert investigative action.

- The direct prohibition of carrying out certain covert investigative actions when a person is communicating with their lawyer.
- The circle of special technical means and the subjects authorized to use them during the performance of covert investigative actions, as well as the conditions for their use.

If, during the performance of a covert investigative action, information, materials, and documents about a person were obtained, the receipt of which was not foreseen by the decision to perform the given action, then they cannot be used in the criminal proceedings, except in cases where the investigating body acted on the basis of a court decision and in good faith. It is possible, however, that as a result of a covert investigative action, information is obtained that, although containing data about a crime being prepared, committed, or having been committed, was not foreseen by the decision to carry out the given action. In order for such information not to go unnoticed, and on the other hand, for the covert investigative action not to be carried out for other, disguised purposes, the RA Criminal Procedure Code has provided for the mandatory requirement of the simultaneous presence of the following two conditions for the lawfulness of using such information, materials, and documents in the proceedings: a) the investigating body must have acted on the basis of a court decision, i.e., it must have performed the covert investigative action specified in the court decision under the relevant conditions set by the court decision, and b) the investigating body must have acted in good faith (RA Criminal Procedure Code, Article 243, Part 1).

Taking into consideration that the performance of covert investigative actions implies interference with a person's constitutional rights, the RA Criminal Procedure Code has limited the circle of persons against whom such actions can be carried out. When defining the circle of persons, the basis has been not only or not so much the person's status, but: a) the existence of facts about the person's alleged commission of a crime. For example, the covert investigative action of controlling digital, including telephone, communication can be carried out against a person who does not have any procedural status but about whom there are facts indicating the alleged commission of a crime. b) the existence of certain connections with the person who allegedly committed the crime. For example, the covert investigative action of controlling digital, including telephone, communication can be carried out with the close friend of the person who allegedly committed the crime, who is in constant telephone contact with the person who allegedly committed the crime.

As for the grounds for terminating covert investigative actions, it should be noted that they are clearly and exhaustively defined in the aforementioned legal norm, according to which a covert investigative action is terminated if:

1. the need for it has ceased.
2. the preliminary investigation has ended.
3. the period specified by the decision of the competent court or the general period for the performance of the covert investigative action has expired.

In general, ensuring the protection of the accused is one of the guarantees for the realization of the right to a fair trial. In this regard, it is extremely important for the legislator to establish guarantees for the realization of the right to defense in connection with the performance of covert investigative actions.

Thus, with the exception of the control of financial transactions and the imitation of receiving or giving a bribe, all other covert investigative actions are prohibited when the person against whom the action is to be carried out is communicating with their lawyer. In any case, information obtained as a result of monitoring such communication is subject to immediate destruction; otherwise, it would essentially mean violating a person's constitutional right to defense. The prohibition on collecting, storing, or using information or materials that constitute legal professional privilege is absolute; therefore, the exception provided for in the RA Criminal Procedure Code regarding the use of information constituting legal professional privilege obtained as a result of a covert investigative action is not applicable. This is the reason why the RA Criminal Procedure Code obliges the immediate destruction of information obtained as a result of monitoring communication with a lawyer, even if it was not initially intended to collect such information and it was only found during or after the covert investigative action that the person was communicating with their lawyer.

However, the legislator establishes exceptions to the general rule, particularly in the case of the implementation of the covert investigative actions of controlling financial transactions and the imitation of receiving or giving a bribe, which stems from the nature and specific purpose of the mentioned actions.

Thus, we can state that in connection with the communication between the accused and their defense attorney, the state, through the criminal prosecution bodies, must, on the one hand, refrain from unnecessary interference in these communications within the framework of its negative obligation, and on the other hand, within the framework of its positive obligation, guarantee the proper organization of these communications, ensuring the full protection of a person's fundamental rights⁹.

As one of the important guarantees of the lawfulness of a covert investigative action, the RA Criminal Procedure Code has regulated the duration of such actions by setting time limits.

⁹ The Court of Cassation's decision No. AVD/0028/01/16 of September 18, 2019.

Thus, permission to carry out a covert investigative action can be given by the court for a period not exceeding three months each time. However, regardless of the person's procedural status or the absence of such a status, the total period of any covert investigative action carried out against the same person cannot exceed twelve months in the same proceedings.

The investigating body is responsible for carrying out the covert investigative actions in the prescribed manner, on time, and effectively. From a tactical point of view, the correct choice of the time period for a covert investigative action is extremely important. Given the fact that a number of fundamental rights are restricted during their execution, they cannot be carried out for an excessively long period. In the case of such time limits, the primary question becomes when to start the covert investigative action. It is necessary to choose a time period during which a person is more likely to show active and proactive behavior, establish contacts with different people, or carry out a certain exchange of information.

The Constitution proclaims the right to life of everyone; "no one may be arbitrarily deprived of life"¹⁰. The European Court also repeatedly states in its decisions that Article 2 of the Convention places an obligation on the State to protect the right to life of everyone. In other words, the right to life places an obligation on the state to do everything possible so that a person's life is not endangered. This means that the preliminary investigation and investigating bodies must take all possible measures available to them to obtain all the necessary evidence related to the case. However, in all cases, the state undertakes to assume positive and negative obligations to protect a person's right to life, regardless of the effectiveness of the methods used to achieve the pursued goal. The above applies to the technical means used during the performance of covert investigative actions. The law enforcement agencies must under no circumstances allow the use of special technical means during the performance of covert investigative actions to cause harm to human life. The requirement to define the list of technical means used during the performance of covert investigative actions is conditioned by the fact that technical means that can cause harm to human life and health, as well as the environment, should not be used. It is forbidden to use special technical and other means intended for obtaining secret information (developed, programmed, adapted) and to perform covert investigative actions by state bodies, subdivisions, or natural and legal persons not authorized by the RA Criminal Procedure Code. As we have already mentioned, in this case, the investigating body, in accordance with the RA Criminal Procedure Code, performs the covert investigative actions.

¹⁰ Article 24 of the Constitution.

Conclusion

In conclusion, we can state that the main prerequisite for ensuring the criminal procedural prospects of the results of covert investigative actions and their effective use is the unwavering observance of the conditions provided for by domestic legislation and various international legal acts during their performance. In other words, the credibility of the result of any covert investigative action is directly proportional to the observance of the guarantees of its lawfulness. Moreover, it should be noted that such guarantees are mainly related to the time limits of covert investigative actions, the specific circle of persons, the scope of special technical means used during their performance, and the subjects authorized to use them, and so on.

Thus, stating that covert investigative actions, being an independent type of state activity carried out by law enforcement agencies within the functions reserved for them by law, are subject to being carried out in accordance with the nature of that activity, its purpose, and the conditions of proportionality set by the legislation, they constantly guarantee a fair balance between the public interest and individual rights.

Conflict of Interests

The author declares no ethical issues or conflicts of interest in this research.

Ethical Standards

The author affirms this research did not involve human subjects.

Reference list

1. Case of Philis v. Greece, judgment, 27 August 1991, paragraph 59.
2. Civil Case No. ED/28676/02/19, Civil Case No. ED/8708/02/21, etc.
3. Civil Procedure Code of the Republic of Armenia, adopted on February 9, 2018, RA State Bulletin 2018.03.05/16 (1374), Article 1, Part 2.1.
4. Constitution of the Republic of Armenia, adopted on 06.12.2015, RA State Bulletin 2015.12.21/Special Edition, Art. 1118.
5. D.A. Fursov, I.V. Kharlamova, Theory of justice in a brief three-volume presentation on civil cases: in 2 volumes. Moscow, 2009, Vol. 2: Civil proceedings as a form of administration of justice, 33-57 pages
6. Decision of the RA Court of Cassation on administrative cases No. VD/7101/05/20 and civil cases No. 2/6443/02/24 of 10.09.2024 on Subordination
7. Decision of the RA Court of Cassation on civil case No. ARAD/2024/02/14 of 10.10.2024,

8. E. A. Adzinova, Ensuring the constitutional right to judicial protection in the economic sphere: Abstract of the dissertation for obtaining a scientific degree of candidate of legal sciences. M., 2006;
9. European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 04.11.1950, RA State Bulletin 2002.06.05/17 (192), Art. 367.
10. <http://disputeresolutionblog.practicallaw.com/strike-out-and-summary-judgment-saeed-and-another-v-ibrahim-and-others/> ,
11. <https://lawdit.co.uk/readingroom/strike-out-under-cpr-3-4> ,
12. <https://www.lexisnexis.co.uk/legal/guidance/strike-out-for-failure-to-comply-with-a-rule-practice-direction-or-order-cpr-3-42c>,
<https://www.casemine.com/judgement/uk/5a938b3e60d03e5f6b82badf>
13. <https://www.lexisnexis.co.uk/legal/guidance/strike-out-no-reasonable-grounds-for-bringing-or-defending-the-claim-cpr-3-42a> , <http://wbus.westlaw.co.uk/parts/3pd.shtml>
14. <https://www.mills-reeve.com/publications/issuing-claim-forms-can-involve-abuse-of-process/>,
15. N.A. Gromoshina, Differentiation and unification in civil proceedings: dissertation of a Doctor of Law. Moscow, 2010, 99-292 pages.
16. O. V. Ivanov, On the relationship between substantive and civil procedural law, Jurisprudence, 1973, No. 1, p. 50.
17. S. Yu. Katz, Constitutional right of citizens to judicial protection (Civil procedural aspect), Problems of socialist legality at the present stage of communist construction. Brief theses of reports and scientific communications of the republican scientific conference on November 21-23, 1978, Kharkov, Publishing House of the Kharkov Law Institute, pp. 135-137.
18. Simplification of the civil procedural form: problems of theory, legislation, judicial practice and organization of judicial activity: collection of scientific articles based on the materials of the International scientific and practical conference (St. Petersburg, North-West branch of the Federal State Budgetary Educational Institution of Higher Education "Russian State University of Justice", June 2, 2023) / Comp. and editor L.V. Voytovich. - St. Petersburg: Asterion, 2023, 496 pages.
19. V. M. Zhukov, (Viktor Martenianovich), Theoretical and Practical Problems of the Constitutional Right to Judicial Protection: Dissertation for the obtaining of a scientific degree of Doctor of Law in the form of a scientific report, which also functions as an abstract. Moscow State Law Academy, M., 1997, Bibliography, p. 49-51.
20. V. V. Butnev, On the concept of the mechanism for protecting subjective rights, Subjective right: Problems of implementation and protection. Vladivostok, 1989, p. 9.