
Undercover Investigator in Legislation of the United States and the United Kingdom

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Abstract

In this day and age, one of the specific ways of responding to organized crime is covert operations which, as a measure of an undercover investigation, are a very important form of legal and criminalistic actions. The most efficient tactic of covert operations is deploying an undercover investigator. The success of undercover agent missions is reliant on meticulous planning of every stage of the investigation, in this way the actions of undercover agents can prevent the future criminal activity of suspects and members of criminal organizations. The research subject of this paper encompasses the criminal procedure analysis of an undercover investigator in the legislation of the United States of America and the United Kingdom. This paper aims to compare the legal framework of commissioning an undercover investigator in two compatible legal systems to identify the elements that differentiate between these models and the legal solution in the Republic of Serbia. In the conclusion, we highlight the advantages and disadvantages of the observed differences.

Keywords: undercover investigator, organized crime, infiltration, inciting agent, felony

Undercover Investigator in Legislation of the United States and the United Kingdom

Classical methods and approaches to uncovering and proving crimes have been made obsolete under the demands of the modern age and the overall complexity of criminal activity. Traditional criminal methods, although they have reached a high level of development, have proven ineffective and inefficient in preventing and suppressing organized crime (Vuković & Bošković, 2012). For the past few decades, modern society has been trying to find appropriate ways and mechanisms to adequately counter one of the most difficult and complex forms of criminal activity – organized crime. Scope and forms of its manifestation, as well as the connection of organized crime to holders of political and economic power as well as the vast corruption potential (Bjelajac, 2015, p. 48) due to the acquisition of great financial power by committing various crimes, makes organized crime much more difficult to uncover, combat and prove, which, in turn, make the risk of this type of crime multiple times greater than the danger of the most serious classical crimes. Furthermore, criminal acts of organized crime employ modern resources of science and technology (Matijašević & Zarubica, 2020), especially means of communication, which increases the possibilities of criminal activity at the international level.

Undercover, covert, police operations involve different methods of a certain level of infiltration and secrecy, different intensity of instigating crime, where the true identity of the undercover investigator must remain unknown to other persons. The essence, in broader terms, of these new police tactics, is that the police officers engage in a certain relationship with suspects, and to some extent participate in the commission of crimes themselves, all in order to gather evidence and prosecute the alleged persons in criminal proceedings. Unlike in the European legal systems, where an undercover investigator can only be a police officer or officer of another state body, in the United States of America (the USA, henceforth) an undercover agent, in addition to the law enforcement officer or Federal Biro of Investigation (FBI, henceforth) agents, criminals can be hired as informants.

Our aim in this paper is to present the specifics of this special evidentiary action in the United States of America and the United Kingdom, the conditions under which an undercover investigator can be hired, as well as the analysis of their tasks during the engagement.

The methods used in this research are the normative method, which was used to analyse the legal regulations related to the topic in question, the comparative method, which we used in the comparative analysis of the undercover investigator institute in the legislation of the United States, the United Kingdom, and in the European continental legal system. Furthermore, the method of content analysis was used, which was employed to fully understand the basic concepts that are the subject of this research.

Undercover Investigator in the Legislation of the USA

In the USA, the institute of the undercover investigator is not prescribed by a single act, but by general provisions in the form of guidelines, instructions, guides, or directives from the Attorney General. In the USA, there is the institute of an undercover, secret agent, which, like an undercover investigator in European countries, infiltrates a criminal environment under a changed, false identity in order to gather evidence regarding organized crime (Jevremović, 2020). In the USA, in the Attorney General's guidelines on undercover FBI operations, an agent undertaking an undercover mission is defined as a member of the FBI or other federal, state, or local police force, acting on instructions and under FBI control, and whose connection to the FBI is concealed from third parties during the investigation, through a secret or false identity. Therefore, the basis for deploying an undercover agent is based on Federal Justice Department's guidelines, which prescribe detailed approval procedures for conducting all undercover investigations involving FBI or police officers. The approval procedure is based on the principle of multi-stage decision-making of multiple instances of the FBI and The Department of Justice, depending on the duration of the undercover mission. These guidelines stipulate that an undercover agent may be used only when there is reasonable doubt that a certain person has committed a crime. The guidelines also contain a very rigorous framework regarding the actions of an undercover investigator

and contain rules on covert investigations that are short-term and conducted locally, unlike those conducted based on approval by the Federal Prosecutor's Office or the Committee for conducting covert investigations (The Committee, henceforth). As for “particularly sensitive investigations”, such as those involving politicians or civil servants, special approval is required by the Committee, whose members are the heads of the FBI and the Department of Justice. The guidelines stipulate that only the FBI director can authorize participation in covert operations in which the use of force by undercover agents may occur or injury to third parties can happen. As we've seen, the involvement of undercover agents in the USA is not regulated by Law but through bylaws, specifically the aforementioned guidelines.

Unlike in the European legal systems, where an undercover investigator can only be a police officer or officer of another state body, in the USA an undercover agent, in addition to a law enforcement officer or FBI agent, criminals can be hired as informants (Škulić, 2015, p. 525). Therefore, the possibility that the undercover investigator may also be a person who comes from a criminal background, as stated, in the USA yields good results. Also, the fundamental difference between these two institutes in the specified legal systems is that in the USA, it is characteristic that undercover agents can infiltrate the criminal environment for a very long time, while in countries of continental Europe, the involvement of an undercover investigator is time-limited.

According to the above-mentioned, it is noted that the tasks of an undercover investigator, or an undercover agent, are as follows:

- 1) determine whether a crime is being prepared, if it is already underway, or if it has been committed;
- 2) determine the identity of all persons involved in the case;
- 3) gather evidence for the court;
- 4) find smuggled, stolen, or similar goods and
- 5) determine the best time for a sudden police incursion into a criminal meeting or the capture of their leaders (Marinković, 2009).

All undercover FBI operations are conducted under the authority of the United States Attorney General under the USA code. At the very beginning of

the Guidelines, it is said that the use of covert techniques is a legally permitted and irreplaceable technique that serves to uncover, prevent and indict white-collar crime, corruption, organized crime, terrorism, and illegal trafficking of controlled substances. The Guidelines prescribe general standards for authorizing undercover operations, and in this context, any official wishing to obtain consent or authorization for a covert operation, he proposes, should consider the pros and cons of such an operation. There are two types of such operations: secret operations approved by the competent special agent (Group II operations), and secret operations approved by the FBI Headquarters (Group I operations), (Marinković, 2010, p. 410). In the first case, the operation of group II missions, secret operations approved by the competent special agent, authorization to implement this measure may be given for a maximum period of six months and extended for another six months, but not longer than one year. The operating costs of conducting this operation must not exceed 50 thousand dollars, except when investigating the illegal trade of narcotics, when the costs can be twice as high. In the latter case, in the case of covert operations approved by the FBI Headquarters, or Group I operations, they may not last longer than six months without a possibility of extension, unless extraordinary circumstances arise.

In the USA, the FBI's Guidelines for Undercover Operations prohibit an undercover agent from engaging in illegal activities unless necessary to: obtain information, knowledge, or evidence that pursues the goals of prosecuting the perpetrators of the most serious crimes; preserving the credibility of the undercover agent; elimination of mortal danger or grievous bodily harm to an undercover agent. Accordingly, an undercover agent may, in exceptional cases, engage in illegal activities. Incitement to commit a crime is also prohibited, except in accordance with the rules relating to "entrapment" – avoiding the trap, acting in measures and actions that constitute illegal investigative techniques such as illegal wiretapping and search, as well as, participating in any act of violence, while the undercover agent has the right to take reasonable self-defence measures to protect his or her own life or the lives of others. A report on the measures taken is submitted to the competent prosecutor and the FBI Headquarters. However, there is no consistent legal act in the

USA that would regulate the deployment of undercover investigations in a uniform way. So far, only the federal state of Iowa has regulated the conditions of amnesty of an undercover investigator who committed a crime within the undercover operation, provided that:

- 1) the agent is not the initiator of the criminal offence;
- 2) that he did not intentionally injure any person who did not participate in the operation;
- 3) that he acted with the knowledge and approval of the competent persons or that it was a matter of a subsequent danger that couldn't be avoided;
- 4) the overall behaviour of the undercover investigator indicates behaviour appropriate to the situation in which there were no other alternatives.

In the USA, the activities and identity of an undercover agent are largely protected by a plea deal, because no evidence is presented in that case, so the undercover agent will not appear as a witness in the proceedings, and therefore there will be fewer problems in with concealing the identity of the agent. The Supreme Court of the United States, in proceedings related to drug-related crimes, accepts the acquittal of an undercover agent in the event of the violation of the rights of others, due to the inability of an undercover officer to act effectively in any other way, in other words, to collect evidence for the procedure in another way.

In the USA, the problem of “entrapment”, or the problem of criminal responsibility of persons who committed the crime with active cooperation, encouragement, and incitement of an undercover agent, appeared at the end of the 19th century. Initially, little attention was paid to this problem, but even before the beginning of the 20th century, there was a case when the suspect was acquitted based on incitement.

“Entrapment” is handled by the courts in various ways, such as:

- 1) grounds for exclusion of prosecution;
- 2) procedural interference with the investigation;
- 3) mixed solutions;
- 4) violation of the right to fair treatment.

The bottom line is that a person caught in entrapment avoids punishment (Feješ, 2006, p. 418). FBI Guidelines also indicate that in the implementation

of undercover operations, “entrapment” must be avoided with great care. The trap occurs when the state authorities incite an idea to commit a crime in a certain person, who is not inclined to commit criminal activity and then lead him to commit it, in order to prosecute him.

In this context, authorization for any undercover activity that contains elements of inciting an individual to commit a crime must not be granted until the person granting the authorization is fully persuaded that:

1. “that it is sufficiently clear to potential subjects that these are illegal activities;

2. that the nature of inciting is justified, having in mind the character of the illegal transaction in which the individual is invited to participate;

3. that it can be reasonably expected that illegal activities will be exposed through incitement and

4. that one of the following restrictions is met – the existence of reasonable doubt that the subject is involved, or is likely to be involved, in the incited illegal activity or similar illegal behaviour, or that such an opportunity has been created for illegal activity based on the belief that a person who is attracted to such an opportunity, or is offered it, has a predisposition to be involved in planning illegal actions” (Marinković, 2010, pp. 418-419).

Every undercover agent must receive guidelines and instructions not to plan or induce criminal activity, not to take part in events with elements of violence, and not to use illegal means to gather evidence.

On the issue of “entrapment”, the US Supreme Court has formed two opinions: subjective (majority) and objective (minority). According to the subjective understanding, for “entrapment” to exist, it is necessary:

- 1) that the police officer incited a criminal offence;
- 2) that the suspect would not have committed the criminal offence without it;

- 3) and that the purpose of the undercover investigator was to obtain evidence for the prosecution.

According to the supporters of this view, which is also the ruling opinion, the suspect should be acquitted or convicted depending on his predisposition to commit the crime he is prosecuted for. The jury is competent to determine

the existence of “entrapment” and predispositions, and in the case, it determines that there was “entrapment”, the public prosecutor has no right to appeal against the decision due to the prohibition of double jeopardy. Previously, it was not possible for the suspect to deny committing the act he is charged with and to invoke “entrapment”, while in recent times this has become possible. In case the suspect manages to make it probable that he committed the crime due to incitement by secret agents, the burden of proof shifts to the public prosecutor, and he has to prove the existence of a predisposition to commit a crime.

In order to prove the predisposition of the suspect, the existence of certain circumstances around the suspect is determined, such as previous life, the previous conviction of that person for the same or similar criminal offences; the conduct of the suspect after the commission of the crime and his deposition; the suspect's reaction to the agent's incitement, whether he wanted to give up, how long it took him to accept the offer; the reputation of the suspect in the environment in which he lives and works; and the ability to commit a specific crime, their expertise and preparedness (Abadinski, 2004, p. 434).

A subjective point of view is exposed to several critiques that have some merit, but it is believed that an objective point of view brings with it even more doubts and problems, which in turn means that there is a larger number of supporters of the subjective point of view.

Proponents of the objective opinion, criticize the subjective theory and emphasize the irrelevance of the predisposition, and only take into account the behaviour of the undercover investigator and therefore assess whether he has exceeded the limit of his powers or not. According to this theory, “entrapment” is a procedural, not a material obstacle to a conviction. Accordingly, the defendant will not be convicted even though there are all the conditions for a conviction, as such, a conviction would be contrary to the general interest aimed at combating and preventing police abuse. Contrary to the subjective understanding, here the burden of proof is on the side of the defendant because he has to prove that the police exceeded the limits of their official powers. The decision on the existence or non-existence of

“entrapment” is made by the court, not the jury, as in the case of subjective opinion, because it is considered a procedural issue.

In recent times, some mixed solutions have been developed in the USA, which sought to overcome the shortcomings of both subjective and objective theories. Some mixed solutions require the cumulative existence of elements of both theories, where in order for “entrapment” to exist, the defendant must prove that he had no predisposition at the time of the crime and that the secret agent's behaviour was such that the average person without predisposition for the commission of a criminal offence, would be led to commit such an offence. Other mixed solutions, which we consider to be better and more legitimate, provide an alternative fulfilment of the conditions, it is enough for the defendant to prove that he was not predisposed to commit an illegal act or that the agent on an undercover mission exceeded his authority. Such solutions use the advantages of the mentioned theories in the right way, unlike the previously mentioned mixed solutions, which emphasize the shortcomings of both understandings.

Undercover Investigator in the Legislation of the United Kingdom

In the United Kingdom (the UK, henceforth), the Undercover Investigator Institute has long been used to prevent and combat organized crime, terrorism, and drug-related offences. The National Criminal Intelligence Service of the United Kingdom always points to the dangers of organized crime, the police have long used various methods of undercover investigations and operations, guided by the principle that everything that is not explicitly prohibited is allowed. This resulted in a high degree of independence and autonomy of local police services, with great powers and authority. In order to protect human rights from various abuses, it is mandatory to respect the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and their consistency in practice. To this extent, the Declaration on Ethical Standards and Secret Investigation Techniques was adopted, which obliges state bodies, primarily police services, to respect the mentioned convention. The entire activity of the undercover investigator, the authorizations, conditions, and methods of the investigator's actions are not precisely

legally regulated but are regulated by the guidelines of the Ministry of the Interior. These guidelines prohibit inciting criminal activity, as such conduct results in criminal liability. The guidelines of the Metropolitan Police oblige the police chief, before starting the mission of an undercover investigator, to give instructions and advice to refrain from any action that could be interpreted as provoking criminal activity (Jović, 2008, 37). Certain problems may arise during the application of the said institute in cases related to narcotics, because in that case the activity of the investigator is debatable since he participates in the drug trade, and as a consequence of all this, illegal actions may occur. In the British legal system, provoking a suspect is not a basis for his release from responsibility, but can only be a mitigating circumstance when sentencing. According to the 1989 Law on the Prevention of Terrorism, there is no criminal liability for a person who, with the express approval of the police, participates in the commission of a crime related to financial assistance and fundraising for terrorist groups, while collecting evidence for these crimes and against suspects.

In the case when an undercover investigator or informant needs to participate in criminal activity, this may be allowed if the following conditions are met:

- 1) active non-participation in the planning and execution of a criminal offence;
- 2) passive actions and reactions;
- 3) participation in the preparation of a criminal offence in order to gather evidence and apprehend suspects (Joh, 2009, p. 160).

In the UK, the use and conduct of informants and undercover agents are partly regulated by the same provision of The Regulation of Investigatory Powers Act (2000), which defines these categories as "secret intelligence human resources", this institute represents – a person who establishes or maintains personal or any other relationship with a person, trying, in secret, to enable everything to be done in order to:

- covertly using that relationship to obtain information or to provide access to information to another person,

- covertly disclosing information obtained through the use of such a relationship or arising from the existence of such a relationship.

The request for the use of an informant should be given in writing and should include the following information (Joh, 2009, p. 163):

- the reasons why it is necessary to use the informant in a particular case;

- the reasons why the use of the informant is considered to be proportionate to what is desired by this procedure;

- the purpose for which the informant will be used, and for which he will be entrusted with certain tasks;

- in the case of a specific investigation or operation, information on the nature of that operation or investigation should be provided;

- the nature of the tasks to be entrusted to the informant;

- required level of approval;

- details of any potential collateral interference in the private sphere and the reasons why this is justified;

- details regarding confidential information that is likely to be obtained thanks to the given use of informants (Joh, 2009).

The use and conduct of the informant are lawful and permissible, provided that approval is given for its engagement and that the conduct of the informant is following that approval. The basic conditions for issuing an authorization in the United Kingdom are based directly on Article 8 (2) of the European Convention, which specifically means that an authorization for the use of an informant may be granted if one of the following conditions exists:

- interest in national or public security;

- prevention or detection of crime or prevention of riots;

- Britain's economic interest;

- protection of public health;

- proportionality of the use of the informant to what needs to be accomplished by using this tactic.

Conclusion

The involvement of an undercover investigator, like any other special evidentiary action, essentially has an “ultima ratio” character, but this is even more emphasized in this specific evidentiary action. Subsequently, it is necessary to point out that this measure is used only in exceptional cases and concerning certain criminal acts, because only in that way can the necessary efficiency and success can be achieved. Special evidentiary actions, including the institute of an undercover investigator, represent one of the most effective actions taken in combating organized crime, but also other serious forms of crime, as well as criminal acts “without a victim”, the so-called consensual crimes, which include the illegal trade in drugs, weapons, and corruption crimes.

The application of this special evidentiary action, due to all its specifics, brings certain problems in terms of the possibility of human rights abuse, the danger to the reputation of the police, and the trust of citizens in the police force.

It is realistic and inevitable that special investigative means and covert, secret police operations imply a certain degree of violation of privacy, and encroachment on the rights of persons, but in that case, the emphasis must be put on a greater goal, and the protection of the whole of society. Consequently, every country tends to find and establish a balance between the need for effective prevention and suppression of serious crimes, on the one hand, and respect for privacy and guaranteed rights and freedoms of citizens, on the other hand.

The main problems and obstacles in the application of this special evidentiary action are reflected in the fact that the undercover investigator infiltrates the criminal environment in order to act secretly, in a covert manner in order to collect evidence and operational data necessary to initiate and end criminal proceedings. He must take care not to be detected, and he must also be careful not to commit a crime and endanger himself and the investigation.

The responsibility of the investigator is directly related to his efficiency.

Meaning, that the greater the freedom of action of the undercover investigator, the more efficient his work is, and the greater is the possibility of abuse, and vice versa. In this regard, it is necessary to make a sustainable and high-quality legal solution regarding the deployment of undercover investigators, where the limits of their powers will be clearly and concisely determined, as well as in which cases it is possible to give legitimacy to them committing crimes, and which crimes.

In the USA, a secret agent is allowed to commit a crime under certain conditions. In that sense, in the situation in which an undercover investigator cannot avoid committing a crime after the secret investigation has begun, he must inform and obtain approval from the competent officer of the Federal Police. If this is not possible for objective reasons, the undercover investigator may participate in the criminal activity without permission, but he must inform the Federal Directorate of the FBI within 48 hours. What is important to note is that in the USA, under the direction of the Federal Bureau of Investigation, secret agents are strictly prohibited from conducting two types of activities: coercion of persons who have no predisposition to commit a crime, and planning and participation in acts implying violence during a covert operation.

In the UK, according to the guidelines of the Ministry of the Interior, inciting crime is prohibited, that is, such behaviour entails the criminal responsibility of an undercover investigator.

In the Republic of Serbia, the undercover investigator uses similar methods, which consist of infiltrating a criminal group and covert action in order to gather the necessary evidence for uncovering criminal acts committed by a criminal group. The main difference is that in the Republic of Serbia the role of an undercover investigator can only be assumed by a police officer, or an officer of another state body, while in the USA and UK, apart from police officers a role of an undercover investigator can be assumed by an informant, as well as ex-criminals. Also, in the Serbian legal system, it is forbidden for an undercover investigator to incite criminal activity, in other words, an undercover investigator can't act as an agent provocateur, while in the USA an undercover investigator can incite a person to commit a crime,

in cases when the person in question is already showing a predisposition to commit a crime. However, it is forbidden for an undercover investigator to incite the will to commit a crime, unless that will was already present in the criminal. Additionally, the duration of undercover missions is not precisely defined, while in the Republic of Serbia the duration of an undercover mission can be a maximum of one year and six months. Although some differences between our legal system and the legal systems of the USA and the UK are evident, we believe that the existing solutions in Serbian legislation are adequate and that changing the duration of the undercover mission to indefinite and introducing the possibility of hiring an informant, would lead to misuse of basic human rights and multiple practical problems.

Finally, it is important to note that the success of an undercover investigator depends not only on the normative solutions contained in the laws but also on the criminalistic aspects of hiring an investigator, by which we mean, choosing a well-trained person who will infiltrate the criminal environment.

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Prikriveni islednik u zakonodavstvima Sjedinjenih Američkih Država i Velike Britanije

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Sažetak

U današnje vreme, specifični načini reagovanja na organizovani kriminal su prikrivene operacije koje su, kao mera prikrivene istrage, veoma važan oblik pravnih i kriminalističkih akcija. Najefikasniji metod u tom smislu je angažovanje prikrivenog islednika. Uspeh misije agenta na tajnom zadatku sastoji se u adekvatnom planiranju u svim fazama angažovanja, a delovanje agenta može da spreči buduća krivična dela koja se planiraju od strane osumnjičenih, odnosno članova kriminalnih organizacija. Predmet istraživanja ovog rada sastoji se u krivičnoprocesnoj analizi prikrivenog islednika u zakonodavstvu Sjedinjenih Američkih Država i Velike Britanije. Cilj rada je da se uporednom analizom zakonskih okvira angažovanja prikrivenog islednika u dva kompatibilna pravna sistema uoče elementi koji čine razliku između ovih modela i zakonskog rešenja u Republici Srbiji. U zaključnim razmatranjima autori ukazuju na prednosti i mane uočenih razlika.

Ključne reči: prikriveni islednik, organizovani kriminal, infiltracija, agent provokator, krivično delo