DOI: 10.46741/2686-9764-2021-15-3-642-649
UDC 343.13

Legislative Regulation of the Activities of Intelligence-Gathering Units of the Penal System in Ensuring the Execution of Punishment

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Abstract
Introduction: the article analyzes legislative norms regulating the activities of operational units of the Federal Penitentiary Service of Russia. *Aim:* by analyzing the norms of the current intelligence-gathering, penal enforcement and criminal-procedural legislation, to put forward proposals for introducing amendments to certain norms so as to improve the effectiveness of legal regulation of the activities of operational units of the penal system. *Methods:* comparative legal method, empirical methods of description and interpretation, theoretical methods of formal and dialectical logic. Private scientific methods: legal-dogmatic method and the method of interpretation of legal norms. *Results:* having analyzed certain norms of the current intelligence-gathering, penal enforcement and criminal-procedural legislation, we see that the norms under consideration are in a certain contradiction, and there are also gaps in the legislative regulation of the activities of operational units of the Federal Penitentiary Service of Russia. *Conclusions:* we argue that structural operational units of the territorial and central management bodies of the Federal Penitentiary Service of Russia can conduct intelligence-gathering activities outside the territory of correctional institutions, including cases when such activities are conducted according to regulations set out as the tasks of intelligence-gathering activities in institutions executing sentences in the form of imprisonment. We also argue that operational units of the territorial bodies of the Federal Penitentiary Service of Russia can conduct intelligence-gathering activities aimed at establishing the location of convicts, those who have escaped from correctional institutions, their detention and delivery to the investigator (inquirer) for conducting investigative actions. We note legal gaps in the legislative regulation of these measures and propose amendments to legislative acts aimed at improving the effectiveness of law enforcement practice.

Keywords: Federal Penitentiary Service, operational units, intelligence-gathering activities.

12.00.12 – Criminalistics; forensic expert activity; intelligence-gathering activity.

For citation: Ivankov I.A. Legislative regulation of the activities of intelligence-gathering units of the penal system in ensuring the execution of punishment. *Penitentiary Science,* 2021, vol. 15, no. 3 (55), pp. 642–649. DOI 10.46741/2686-9764-2021-15-3-642-649.

The current state policy aimed at humanizing criminal penalties is manifested, among other things, in reducing the number of persons sentenced to imprisonment. This statement is also confirmed by statistical data. Thus, if in 2009 more than 790 thousand people were kept in correctional institutions of various types of regime, then in 2020 their number reduced to about 400 thousand [2].

At the same time, in correctional institutions, there is a very large percentage of recidivism, including that related to prison crime. To counteract crime, institutions and bodies of the penal system are empowered to apply a set of means to convicts so as to achieve the goals of criminal punishment.

The legal regulation of the means of reformation of convicts and the prevention of prison-related offences committed by inmates and by other persons are among major issues in the present-day development of the penitentiary system of Russia.

Regime is one of the means to achieve the goals of criminal punishment in the form of imprisonment. Regime also creates conditions for the application of other means of reformation to inmates [9].

Previously, in several works, we have considered regime and the means of ensuring it in correctional institutions [1; 3]. According to Part 1 of Article 82 of the Penal Enforcement Code of the Russian Federation, regime in a correctional institution is understood as the procedure for the execution and serving of imprisonment established by law and regulatory legal acts corresponding to the law [9]. That is, in other words, regime is the legal order established by law during the execution and serving of a custodial sentence.

Intelligence-gathering activity is one of the means of maintaining law and order in the execution of punishment in the penal system. The most significant impact on this legal institution in the execution of a custodial sentence is provided by penal enforcement and intelligence-gathering legislation.

At the same time, the importance of legal regulation of intelligence-gathering activity and the need for its improvement at the present stage of development of society and the state is beyond doubt. These issues have been repeatedly considered at meetings of the Federal Assembly of the Russian Federation. After Federal Law 144-FZ of August 12, 1995 "On intelligence-gathering activity" (hereinafter – Federal Law 144-FZ) entered into force, many amendments and additions have been regularly made to it.

While recognizing the advantages of this Law, we believe that some of its norms are not formulated quite clearly and are in certain contradiction with penal enforcement legislation.

In accordance with the legislation of the Russian Federation, operational units of the Federal Penitentiary Service (hereinafter – FSIN Russia) are one of the subjects of intelligence-gathering activity, and they have the right to carry out this type of activity. At the same time, when the operational units under consideration engage in intelligence-gathering activity, there arise certain issues of legislative regulation.

Article 1 of Federal Law 144-FZ establishes the following legislative definition of intelligence-gathering activity: it is a type of activity carried out openly and secretly by operational units of state bodies authorized to do so by this Federal Law (hereinafter referred to as the bodies carrying out intelligence-gathering activity) within the range of their powers through intelligence-gathering procedures in order to protect the life, rights and freedoms of man and citizen, and property, and ensure the security of society and the state from criminal encroachments (emphasis added – I. I.).

From our point of view, it is legitimate to single out two questions from the definition given by the legislator. The first question is who has the right to conduct intelligence-gathering activity in the execution of custodial penalties, and the second question is in what way this activity is conducted.

Let us consider the legislative regulation of the first question.

In accordance with Paragraph 8 of Part 1 of Article 13 of Federal Law 144-FZ, operational units of FSIN Russia have the right to conduct intelligence-gathering activity on the territory of the Russian Federation. In accordance with Part 3 of the article under consideration, the head of the specified body is entitled to determine the list of operational units authorized to carry out intelligence-gathering activity, their powers, structure and organization of their work.

In other words, according to Federal Law 144-FZ, all structural operational units of FSIN Russia have the right to conduct intelligence-gathering activities when executing custodial sentences.

In accordance with Part 1 of Article 5 of the Law of the Russian Federation "On institutions and bodies executing criminal penalties in the form of imprisonment", the penal system includes:

1) institutions that execute punishments;

2) territorial bodies of the penal system;

3) the federal executive body authorized to execute punishments (hereinafter referred to as the federal body of the penal system).

In accordance with Articles 7–8 of the law "On institutions and bodies executing criminal penalties in the form of imprisonment", territorial bodies of the penal system are established by the federal body of the penal system on the territories of constituent entities of the Russian Federation. Territorial bodies of the penal system manage penal institutions subordinate to them. The regulations on the federal body of the penal system, its structure and the maximum number are approved by the President of the Russian Federation.

Speaking about the powers of FSIN Russia as a federal executive body authorized in the field of execution of punishments, we note

that FSIN Russia is entrusted with organizing intelligence-gathering activities carried out by institutions (emphasis added – I. I.) of the penal system in accordance with the legislation of the Russian Federation [8].

Speaking about the penal enforcement legislation, we can note that Paragraph 2 of Article 14 of the law under consideration grants the right to carry out intelligence-gathering activity, in accordance with the legislation of the Russian Federation, to operational units of institutions executing punishments. In more detail, this type of activity in correctional institutions is regulated by Article 84 of the Penal Enforcement Code of the Russian Federation. Part 1 of this article clarifies the tasks of intelligence-gathering activities in correctional institutions (we will return to it later); and according to Part 2, intelligence-gathering activities are conducted by operational divisions of correctional institutions (emphasis added – I. I.). At the same time, it is necessary to pay attention to Part 2 of Article 84 of the Penal Enforcement Code of the Russian Federation, which legally establishes the right to carry out intelligence-gathering activities by other authorized bodies within their competence.

Based on the meaning of this norm, intelligence-gathering measures can be carried out in correctional institutions by all bodies that conduct intelligence-gathering activities in accordance with intelligence-gathering legislation, apparently, including the management bodies of the penal system.

It follows from the above that when the set of the legislative acts under consideration is applied in the law enforcement practice, this norm can be interpreted ambiguously. After all, neither the territorial nor the federal body of the penal system is endowed with the norms of other legislative acts of the penal enforcement legislation in the execution of a sentence in the form of imprisonment with the right to conduct intelligence-gathering activity.

Question two. How is intelligence-gathering activity carried out when sentences in the form of imprisonment are executed?

From the definition given by the legislator, it follows that intelligence-gathering activity is carried out only through intelligence-gathering measures. The purpose of their implementation is also determined by the legislator. In order to achieve the goal specified by the law, Article 2 of Federal Law 144-FZ establishes a list of tasks of intelligence-gathering activity. The analysis of normative prescriptions of Article 2 allows us to assert that the tasks of intelligence-gathering activity include counteracting crime, with the exception of the task of determining the location of missing persons, since the legislator has not defined the criminal nature of this phenomenon.

With regard to the specifics of functioning of institutions that execute custodial sentences, Article 84 of the Penal Enforcement Code of the Russian Federation specifies the tasks of intelligence-gathering activity carried out by the operational division of correctional institutions, including:

– ensuring personal safety of convicts, correctional personnel and other persons;

– identification, prevention and disclosure of crimes being prepared and committed in correctional institutions and violations of the established procedure for serving sentences; etc. (emphasis added – I. I.).

As we have already noted, intelligence-gathering activity is carried out through intelligence-gathering measures. The legislator lists the grounds for their implementation in Article 7 of Federal Law 144-FZ. One of the grounds is the information that has become known to the bodies carrying out intelligence-gathering activity (in our case, FSIN Russia) about the signs of an illegal act being prepared, committed or having been committed, as well as about the persons preparing, committing or having committed it, if there are not enough data to resolve the issue of initiating a criminal case. In accordance with the definition of the Constitutional Court of the Russian Federation, the Federal Law under consideration regards illegal act as a criminally punishable act, i.e. a crime [7].

Thus, it is prohibited to conduct intelligence-gathering activity in relation to the facts of preparation and commission of violations of the established procedure for serving a sentence by convicts. At the same time, violations of the established procedure for serving a sentence often become conditions for committing prison-related offences. For example, the production of artisanal alcoholic beverages, the use of cellular communication devices by convicts, the creation of groups that oppose the administration of the correctional institution and the participation of convicts in them, etc.

On the other hand, violations of the established procedure for serving a sentence can act as spontaneous (not requiring preparation) and one-time, or they can be continuous, requiring preparation and having a secretive nature.

Article 116 of the Penal Enforcement Code of the Russian Federation distinguishes these violations of the order of serving a sentence by introducing the concept of malicious violation of the established order of serving a sentence by persons sentenced to imprisonment and by listing the acts that are classified as malicious violations.

We think that Part 1 of Article 84 of the RF Penal Enforcement Code requires adjustments in terms of a clearer regulation of the grounds for conducting intelligence-gathering measures in order to identify, prevent, suppress and disclose violations of the established procedure for serving sentences, as well as persons who plan, prepare, commit and have committed them.

In order to eliminate the contradictions between the legislative acts that regulate intelligence-gathering activities and the execution of criminal penalties, it is necessary to consider the issue of amendments to the current legislation. They can be as follows:

In Article 84 of the RF Penal Enforcement Code: identification, prevention, suppression and disclosure of malicious violations of the established procedure for serving a sentence, as well as persons who plan, prepare, commit and have committed them, if there are no sufficient grounds for bringing them to justice provided for by law.

In the Federal Law 144-FZ: to supplement Article 2 of the specified Federal Law with the task of "identifying, preventing and disclosing malicious violations of the established procedure for serving a sentence being prepared and committed in correctional institutions and pre-trial detention centers";

to supplement Article 7 of this law with Paragraph 7 "the disclosed information about malicious violations of the established procedure for serving a sentence or detention is the basis for carrying out intelligence-gathering measures in institutions executing sentences in the form of imprisonment and in pre-trial detention centers".

The next issue in the field of legislative regulation of the activities of operational units of FSIN Russia is the place where intelligence-gathering measures are conducted and the powers of the operational units of the territorial and central management bodies of the penal system.

We have already noted that in accordance with intelligence-gathering legislation the powers of operational units are determined by the head of the body that conducts intelligence-gathering activity. But this statement is true, without taking into account the requirements of penal enforcement legislation.

One of the tasks of intelligence-gathering activity in institutions executing custodial sentences is to search for convicts who have escaped from correctional institutions, as well as convicts who evade serving custodial sentences (emphasis added – I. I.).

The question arises concerning the legislative act on the basis of which the operational units of FSIN Russia carry out activities to establish the location of persons who have escaped from correctional institutions.

Of course, the answer is obvious – on the basis of Article 2 of Federal Law 144-FZ. However, would the answer be really so, if we consider the activities of operational units of FSIN Russia not only from the standpoint of intelligence-gathering legislation, but also penal enforcement legislation?

We think that in this context there arises a legitimate question concerning the powers of the employees of operational units of territorial and central management bodies of the penal system to conduct intelligence-gathering activities outside correctional institutions.

First of all, based on the letter of the law, the solution to this task is assigned to the operational units of correctional institutions. In other words, the operational division of the institution executing custodial sentences, in order to perform this task, has the right to carry out a set of intelligence-gathering measures aimed at establishing the location of the person who has escaped or who is evading serving the sentence.

In addition, in accordance with Paragraph 8 of Article 14 of the Law "On institutions and bodies executing sentences in the form of imprisonment", correctional institutions are given the right to inspect vehicles and check documents when conducting operations to detain convicts, who have escaped or are evading serving their sentences, in places where they are likely to appear.

However, referring to the norms of this law (Articles 7–8) regulating the rights and obligations of the territorial and federal management bodies of the penal system, we do not find a legislative consolidation of the right of these bodies to carry out intelligence-gathering activity.

Part 1 of Article 7 of the Law "On institutions and bodies executing sentences in the form of imprisonment" states that a federal body of the

penal system establishes territorial bodies of the penal system in constituent entities of Russia, and Part 4 of the same article establishes a provision on the management of territorial bodies by institutions of the penal system subordinate to them.

Article 8 of the law under consideration is actually a reference to the Decree of the President of the Russian Federation that approves the position, structure and maximum staffing of the federal body of the penal system [6].

First of all, it is worth noting that from the point of view of the legislator, the process of carrying out intelligence-gathering measures to establish the location of the convict by operational units of territorial bodies and by the federal administrative body of FSIN Russia is already questionable, since the wanted person is not located on the territory of the correctional institution and the security territory adjacent to the institution.

One may object that the fulfillment of the tasks stipulated by the legislator in Article 2 of Federal Law 144-FZ applies to all bodies authorized to carry out intelligence-gathering activity, including FSIN Russia. However, what about the norms of penal enforcement legislation?

In accordance with the above norms of penal enforcement law, employees of operational divisions of territorial bodies and the central management body of FSIN Russia have no powers to establish the location of a convicted person who has committed an escape, by conducting intelligence-gathering activities outside a correctional institution.

Thus, the conclusion arises that intelligence-gathering measures aimed at establishing the location of the wanted person, from the point of view of the legislator, can only be carried out jointly with operational police officers; and the suspect should be detained by operational police officers.

At the same time, we consider detention as a measure of procedural coercion. In other words, we are talking about criminal procedural relations.

Let us consider the criminal procedural norms regulating detention as a measure of procedural coercion.

In accordance with Paragraph 11 of Article 5 of the RF Criminal Procedure Code, the detention of a suspect is a measure of procedural coercion applied by an inquiry body, an inquirer, or an investigator for a period of no more than 48 hours from the moment of the actual detention of the person on suspicion of committing a crime.

Based on the wording presented above, this measure of procedural coercion can be applied by the body of inquiry. And in accordance with Paragraph 1 of Part 1 of Article 40 of the RF Criminal Procedure Code, other executive bodies authorized by federal law to carry out intelligence-gathering activity are classified as the bodies of inquiry, except for internal affairs bodies. That is, FSIN Russia is an investigative body, and, accordingly, its employees have the right to detain persons who have escaped. At the same time, in accordance with Article 92 of the RF Criminal Procedure Code, a protocol of detention must be drawn up within three hours after the detainee is delivered to the body of inquiry.

But the following question immediately arises: which institution or body of the penal system acts as an investigative body in this case? In other words, where should the officers who made the arrest take the detainee: to the territorial management body of FSIN Russia in the RF constituent entity in which the suspect was detained, or to the correctional institution from which the escape was made?

Let us assume that if the wanted person is detained by the officers of the penal system, he/she is delivered to the internal affairs body on the territory of which the arrest was made. But in this case, the norm of Article 14 of the Federal Law of the Russian Federation “On the police” is violated [4]. In this norm, the legislator formulated the requirement that wanted persons can be detained by police officers for the period necessary for the transfer of the detainees to the employees of the penal system of Russia.

At the same time, attention is drawn to the fact that this norm requires that the wanted person should be detained by police officers (emphasis added – I. I.) rather than penal officers.

While considering criminal procedure norms, we see that the investigative jurisdiction on the grounds of a crime provided for in Article 313 of the Criminal Code of the Russian Federation, is assigned to the internal affairs bodies [10].

A criminal case on the fact of the escape was initiated by the internal affairs body, on the territory of which the correctional institution from which the escape was committed is located. Accordingly, the detainee must be taken to the correctional institution from which he/she escaped. In this institution, on the basis of Article 10 of the Federal Law “On the custodial deten-

tion of suspects and those accused of committing crimes" [5], this convicted person may be held in the institution, but in isolation from other convicted persons serving their sentences.

The next issue is the transfer of the detainee to the place where the correctional institution is located, and their delivery to the investigator (inquirer) for the purpose of conducting procedural actions.

If we talk about the internal affairs bodies, then in this case everything is defined by law. After being detained by the officers of the operational police unit, the wanted person is taken to the internal affairs body and, subsequently, to the investigator (inquirer) in charge of the criminal case, for conducting investigative actions. If the investigator (inquirer) is geographically located outside this internal affairs body, then the transfer of the detainee is carried out by the convoy of the Ministry of Internal Affairs.

And what if the escaped convict was detained by the officers of the operational unit of FSIN Russia? From our point of view, the detainee could be placed in a pre-trial detention center located in the constituent entity of Russia in which he/she was detained. Then, special convoy units could transport them to the place where investigative actions will be conducted. However, there are no legal grounds for placing a detained convict in a pre-trial detention center, since there is no court decision on their detention.

In order to resolve the above issues, we consider it necessary to amend certain legislative acts in order to eliminate contradictions and existing gaps in the legal regulation of the activities of operational units of the penal system in the execution of sentences in the form of imprisonment:

– Article 7 "Territorial bodies of the penal system" of the Law of the Russian Federation of July 21, 1993 no. 5473-1 "On institutions and bodies executing criminal penalties in the form of imprisonment" should be supplemented with Paragraph (Part) 3 of the following content: "In the territorial bodies of the penal system, operational units are created that manage the institutions of the penal system subordinate to them in the field of intelligence-gathering activities and conduct intelligence-gathering activities to address tasks provided for by penal enforcement legislation.

The list of operational divisions of territorial bodies of the penal system and their competence are determined by the normative legal act of the head of the federal executive authority that performs the functions of developing and implementing state policy and legal regulation in the field of execution of criminal penalties";

Article 74 "Types of correctional institutions" of the Penal Enforcement Code of the Russian Federation should be supplemented with:

- Part 10 of the following content: "A convicted person who has escaped from a correctional institution is put on the wanted list by the administration of the correctional institution and is subject to detention for up to 48 hours. This period may be extended by the court up to 30 days";

- Part 11 of the following content: "The announcement of the search for persons sentenced to imprisonment is carried out by the operational units of the penal system";

- Part 12 of the following content: "Intelligence-gathering activities in the search for convicts who have escaped from a correctional institution are carried out by operational units of the penal system independently or in cooperation with operational units of other state bodies defined by Federal Law 144-FZ of August 12, 1995 "On intelligence-gathering activity" within their competence, and operational units of other state bodies, defined by Federal Law 144-FZ of August 12, 1995 "On intelligence-gathering activity", within their competence".

- Part 1 of Article 84 should be amended as follows: identification, prevention, suppression and disclosure of malicious violations of the established procedure for serving a sentence, as well as persons plotting, preparing, committing and having committed them, if there are no sufficient grounds for bringing to justice provided for by law.

In the Federal Law "On intelligence-gathering activity":

- Article 2 should be supplemented with the task of "identification, prevention and disclosure of malicious violations of the established procedure for serving a sentence being prepared and committed in correctional institutions and pre-trial detention centers";

- Article 7 should be supplemented with Paragraph 7: "The information that has become known about malicious violations of the established procedure for serving a sentence or detention is the basis for carrying out intelligence-gathering measures in institutions executing sentences in the form of imprisonment and in pre-trial detention centers".

In the Criminal Procedure Code of the Russian Federation:

- Part 5 of Article 108 of the Criminal Procedure Code should be worded as follows: "The adoption of a judicial decision on choosing a preventive measure in the form of detention in the absence of the accused is allowed only if the accused is declared on the international wanted list or if the accused has escaped from the place of detention or serving a custodial sentence";

- Article 396 of the Criminal Procedure Code of the Russian Federation should be supplemented with Paragraph 4.2. of the following content: "The issues specified in Paragraph 18.2. of Article 397 of this Code are resolved by the court at the location of the institution executing the sentence in which the convicted person is serving the sentence in accordance with Articles 73 and 74 of the Penal Enforcement Code of the Russian Federation";

- Article 397 of the Criminal Procedure Code of the Russian Federation should be supplemented with Paragraph 18.2. of the following content: "On the placement in custody of the person sentenced to imprisonment with serving a sentence in a correctional institution, in accordance with Article 74 of the Penal Enforcement Code of the Russian Federation, who has escaped from the correctional institution, when he/she was detained by penal officers or police officers".

Thus, summing up the brief results of the legislative regulation of the activities of operational units of the penal system in ensuring the execution of custodial sentences, we can draw a number of conclusions.

First, several legislative acts have a legal impact on the effectiveness of the work of structural operational units.

Second, in order to increase the effectiveness of intelligence-gathering activities in the execution of a custodial sentence, it is necessary to use a comprehensive approach to legal regulation.

Third, we think that after the amendments to the legislative acts under consideration have been made, it will enhance the effectiveness of the operational units of FSIN Russia in solving the tasks stipulated by the penal enforcement legislation.

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Received July 6, 2021