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THEORETICAL ASPECTS REGARDING THE INTEGRATION OF SPECIAL INVESTIGATIONS IN THE CRIMINAL PROCESS OF THE REPUBLIC OF MOLDOVA

The article is devoted to the issue of the interaction of the special investigation activity and the criminal process. The purpose of the paper is to conduct, based on theoretical research, scientific investigations on the integration of special investigations in the criminal process of the Republic of Moldova. The objectives of the paper include the analysis of contradictory theoretical views on the subject, establishing the legal nature of special investigative measures and the legal nature of the results obtained by performing them.

Keywords: special investigation activity, criminal trial, criminal investigation, evidentiary procedure, evidence.

1. Introduction

Since 2012, the new model of criminal justice, based on foreign experience, has been operating in the Republic of Moldova. This model has been the result of a broader judicial reform, accompanied by adherence to and alignment with international legal standards, the recognition of international law as part of the domestic legal system and the use of foreign experience in the national interest

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and style. One of the significant novelties of the modernization of the criminal process was the integration of the special investigation activity (SIA) in the criminal process.

But this integration has essentially changed things. SIA from a priority proactive activity has become a priority reactive activity, which has considerably diminished the anti-criminogenic potential of this type of activity.

In the context of the recovery, a working group (4) was set up in 2015 to propose and put forward appropriate proposals to remove legislative impediments in the field of special investigations so that it becomes possible to carry out special investigative measures not only to detect and investigate crimes, but also for: revealing, preventing, stopping criminal attacks; identifying the people who organize and commit them; the search for missing persons or those who hide from the criminal investigation bodies or the court or evade the execution of the sentence; detecting goods from illegal activities and collecting evidence on these goods; collecting information about possible events and / or actions that could endanger state security.

Due to the lack of consensus and conflicting views on the legal nature of special investigative measures integrated in criminal proceedings, their relationship with prosecutions, the relationship between the results obtained by carrying out those measures and the evidence obtained through traditional evidentiary procedures to this day, it has been possible to draft a law that would have been voted in the plenary of the Parliament of the Republic of Moldova.

In the following, we will analyze to the opinions of experts in the field of special investigations and criminal proceedings who have expressed themselves on the issue addressed in the hope that we will obtain clarity in this regard.

2. Main part

Analyzing the issue of the legal nature of special investigative techniques (special investigative measures) included in the Romanian Criminal Procedure Code, Professor Nicolae Volonchu said: "It is difficult to outline the legal nature of these new institutions, as they are certainly not evidence, no means of proof. The special techniques are rather similar to the classic evidentiary procedures found for a long time in criminal legal regulations. But here a specific note appears. An on-site investigation, reconstitution, confrontation, lifting of objects or search takes place with full knowledge of this activity by the investigated person, while in the case of special investigative techniques they remain hidden from the subject" (Deacon, 2013).

In general, determining the legal nature of MSI is a very controversial doctrinal issue, with some researchers considering that these are evidentiary proceedings and must belong to criminal proceedings, while others remain adamant that they have a different legal status (Udroiu, Slăvoiu, Predescu, 2009).

According to the arguments of the proponents of the first concept, in a certain historical period, mentions the Russian researcher Baranov A.M., the preliminary investigation was artificially divided into two types of independent procedures: the special investigation activity and the criminal investigation activity (preliminary investigation, criminal investigation). However, says the researcher, "the methods of collecting information about a crime in both types of activity are practically the same, but to delimit them and avoid confusion, different names have been introduced and separate procedures have been established for the production and practically recording the same actions" (Baranov, 2006:160). In his vision, "with the legalization of the special investigation activity, methodological and technical-legal errors were committed. The secret evidence-gathering procedures have been strengthened in another activity, and the information obtained as a result of their implementation should be used in criminal proceedings. The laws on special investigative activity have failed to eliminate this contradiction" (Baranov, 2006:161).

In general, we can agree with Baranov A.M. that at a certain historical moment the two types of activity were divided. However, it is not very clear what the author meant by the expression "artificially". It seems, however, that everything that is done by man is artificial. Or we cannot say that the preliminary investigation in both its forms (public and secret) came from God or naturally. The thing is that both the criminal investigation and the special investigation activity went hand in hand throughout the entire evolutionary process of mankind. When civilization, however, reached a certain level of development and enshrined the rights of the person as supreme social values, it was considered absolutely normal that in order to exclude judicial errors and avoid punishing innocent people, the basis for their accusation should no longer be evidence obtained in a non-transparent manner is allowed, provided that the data subject is deprived of the opportunity to defend himself. It was therefore obvious that prosecution, only through its public form of gathering evidence, would have been if not unnecessary then extremely difficult. Respectively, in its help, non-transparent procedures continued to be used permanently, not to collect evidence, but useful information for the evidence process. Namely, in order to specialize, streamline and develop these two branches of activity, the respective division was made.

Regarding the methodological and technical-legal errors of legalization of the special investigation activity, invoked by Baranov AM, it seems that the error is not in the field of the law of the special investigation activity, but in the CPC

where the mechanism should have been regulated for the admission of information obtained as a result of special investigative measures. Proponents of this concept themselves acknowledge that the problem is in the preconceived notion of some jurists that the results obtained outside the criminal investigation, including through special investigative measures, should not be admitted in the evidentiary process. The CPC is the law that must regulate the evidentiary procedures that allow the verification of any type of information, including those obtained through special investigative measures. If the information submitted to the criminal investigation body is not possible to verify, and not only in terms of veracity but also in terms of the legality of their administration, they should not be admitted as evidence. Therefore, the issue of the admissibility of the results of the special investigation measures should not have been solved in the text of the Law on the special investigation activity, but in that of the CPC.

Comparing the delimitation of the spheres of criminal procedure and the operative investigation activity in Russia and abroad, Volynsky A.F. stressed that in none of the countries of Western Europe is there such a categorical and artificial distinction between SIA and criminal procedure, and in some of them the so-called "police investigation" has historically developed and found legislation, organic public and secret methods and procedures for obtaining evidence, but under the effective control of the judicial authorities (Volynsky. 2004: 5).

Frankly, such arguments are a bit exaggerated. If we look at the legislation of the Baltic countries (Estonia, Lithuania and Latvia), members of the European Union, then we will see that there is still a difference between evidentiary procedures and special investigative measures, while the rest of the ex-Soviet republics, which adhered to the merger special investigation measures with prosecutions actions (Ukraine, Kazakhstan, Georgia, Kyrgyzstan), try to eliminate any difference between them.

In order to give the SIA results the status of evidence, according to the proponents of the same concept, it is necessary to give criminal procedural character to the methods and secret means of collecting information (evidence), ie to regulate them by criminal procedural law. In this way, says Baranov A.M., "from the minds of lawyers, the reasons that prevent the use of information obtained as a result of the secret collection of evidence (obtained today within the OIA) will disappear" (Baranov, 2006:164).

The same idea was expressed by researchers Mazunin Ya.M. and Mazunin Ya.P.: "if the secret proceedings will be given the procedural form, then" the credibility of the information obtained as a result of the AOI will have priority over the criterion of admissibility and the content over the form of evidence" (Ya. Mazunin, P. Mazunin, 2015).

Therefore, the problem rather lies in the stereotype of the thinking of some lawyers who consider unacceptable as evidence the information obtained through SIM just for the simple reason that it is not provided in the CPC. In essence, things did not change even after the inclusion of SIM in the CPC. Now, as before, in order to become evidence, the information obtained by performing the SIM must first pass the admissibility exam and only after that we can discuss about the evidence. If the results obtained by performing the SIM fail this exam, then we have no evidence.

Contrary to the views indicated above, it is the researchers' arguments that disapprove of the concept of including SIM in the criminal procedure law. Russian Professor Sheifer S.A. is one of the most remarkable experts belonging to this group. In his view, the fusion of procedural elements with those of special investigations seems deeply erroneous and especially from a methodological point of view. The professor draws attention to the fact that the norms that regulate the development of criminal prosecution actions form a specific institution of the criminal process. It has a rich content and covers many prescriptions that determine the procedure of a criminal prosecution. Their implementation gives rise to a complex system of legal relations that accompanies the collection of evidence. It can be argued that the legal relationship is the most important sign of a criminal prosecution action, without which the action cannot be considered a criminal prosecution. But legal relations cannot take place when secret measures are taken, because the parties to the process do not participate and cannot participate in the report. Thus, concludes the expert, the merger of criminal prosecution and operative investigations is unacceptable, because it destroys the fundamental foundations of the criminal process (Sheifer, 2015: 121).

Ghinzburg A. Ya., A distinguished professor in Kazakhstan and a well-known specialist in the field of criminal proceedings and the OIA, also spoke in favor of not accepting the combination of the two types of activity (criminal prosecution and special investigations) as a whole. They are different in the form and in the essence. The institution of secret criminal prosecution, the professor claims, ultimately leads to chaos and destroys the entire scientific and methodological basis of the criminal process; destroys the imagination about the legal system of the criminal process and the practice of judicial evidence. In the evidentiary process, he continues, two types of information circulate: procedural, regulated by the CPC and non-procedural, including that regulated by the Law on Operational Investigations. In the composition of the procedural information obtained in accordance with the procedural law as a result of the criminal prosecution actions, the evidentiary information is highlighted, which constitutes the content of the evidence and which serves the evidentiary purpose. In the structure

of the non-procedural information, the information obtained as a result of the SIA is highlighted. In relation to the evidentiary process, such information is indicative, auxiliary (to decide the further direction of the investigation, the preparation and tactics of the criminal prosecution, etc.). Thus, these different types of state activities, which coexist and interact successfully, but are not mutually absorbed, solve the problem of consolidating the rule of law.

Professor Ginzburg A.Ya. it also considers it illegal to institute secret probation proceedings. According to the legislation, each criminal prosecution action must not only be defined, but also clearly and completely regulate its implementation both in form and content. The CPC does not regulate the procedure for carrying out secret actions, nor can it be done, as this is contrary to the legislation on state secrecy. Therefore, the professor asks: how can a secret investigation be carried out legally if its procedure is not provided by law? In addition, the professor continues, the merger of MSI with criminal prosecution actions, as well as the recognition of their results directly (without verification) as evidence, throws back the criminal process in a period of imprisonment not too far away (Ginzburg, 2013).

It is extremely difficult not to share these arguments, given that they are focused on absolutely logical and quite convincing reasoning.

Approaching the subject of the legal nature of the interception of telephone conversations provided, on the one hand, by the CPP of the Russian Federation (art. 186) and, on the other hand, by the Law of the operative investigations activity (p. 10 of art. 6), several researchers claim that in both cases it would be about carrying out the same operative investigative measure and not about a criminal investigation action, because, they say, the defining feature of the criminal investigation action is missing - the personal extraction of information by the criminal investigation officer through direct contact with footsteps (Sheifer, 2015: 122).

Indeed, the criminal investigation body does not carry out any cognitive operation and is limited only to issuing a request to the court for telephone interceptions and sending it for enforcement to the competent authority. In fact, there is only the request for information of an operational nature and not a criminal prosecution. This explanation also becomes valid for the other SIMs provided in the CPC, the criminal investigation body being limited only to the preparation of the documents necessary for the initiation and implementation of the investigative measures by another body, which in turn, in the end, making available to the initiator the results obtained.

While Russian criminals still oppose the introduction of SIM in their criminal law, experts in Kazakhstan are already discussing the exclusion of several covert actions from Chapter 30 CPC (controlled delivery; operational infiltration;

imitation of criminal activity; undercover investigation and (or) examination of the premises; covert surveillance of a person or premises; acquisition of control) because, they claim, their results do not meet the requirements of the evidence (reliability and possibility of verifying them by other criminal prosecution). The purpose of these covert actions, they rightly argue, is not the secret collection of evidence but, above all, the secret identification of signs of crime in the course of operational investigative activities (A.Akhpanov, N.Khan, 2016: 132).

Other researchers in Kazakhstan, following the scientific investigations carried out, understanding the issue discussed, have faced a dilemma: 1) the Western model of the criminal process is fully adopted (the powers of the investigating officer will merge with those of the prosecuting officer in one the person); 2) the failure to integrate MSI in the criminal process is acknowledged and the previous model is returned (Nurgaliev, Lakbaev, Kusainova, 2019).

3. Conclusions

The analysis of the literature allows us to conclude that the integration of special investigations in the criminal process, both in the Republic of Moldova and in other countries that have joined this model, generates serious problems that undermine respect for the rights and freedoms of participants in criminal proceedings. The problem of capitalizing on MSI results has not been fully resolved. By performing MSI, as before, no evidence is obtained, but information. This information can only become evidence if it meets the procedural requirements for evidence. From this point of view, things have not changed. In essence, the anti-crime potential of special investigations has been considerably reduced, with the most effective MSIs being allowed only during the prosecution phase and being banned outside its limits.

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