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THEORETICAL-PRACTICAL OBJECTIVES AND SOLUTIONS
REGARDING THE EFFICIENCY OF THE SPECIAL INVESTIGATION ACTIVITY

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Summary

The article presents a special study in the field of special investigative activity being at the intersection of several sciences, namely: criminal law, criminal procedure, etc., which proves the complex nature of the problem under study. The experience of applying the provisions of the Law on Special Investigation Activity in practice often signals us about the lack of finalization of certain norms in the law, their lack of coordination with criminal, criminal procedural and other legislation, which negatively influences the results of the fight against crime, the efficiency of the activities of the authorities whose specialized subdivisions carry out special investigative and criminal prosecution activities in the direction of detecting, counteracting, investigating/researching, discovering and preventing crimes, as well as searching for criminals.

Keywords: *special investigation activity, crime fighting, effectiveness, criminal law, criminal process, criminal investigations, investigation officer, evidence, respect for human rights, freedoms, dignity.*

Introduction. There are various fragmentary descriptions about the specific activity of special services/ subdivisions in national and international literature. However, less is known about the legal regulation of the Special Investigation Activity, because it is not possible to find in the public scientific and didactic literature generalized and systematized objective materials about these regulations. Simultaneously with the accumulation of knowledge about the sources of legal regulation of this activity in the past and present, a pressing need arose for the description of this interesting topic. Lately, a visible development of the process of regulating special investigative activity has been observed; often this is done spontaneously, without taking into account the “lessons of history” and conclusions regarding mistakes and confusions on the one hand and past performances and successes on the other.

Since gaining independence, Republic of Moldova has gone through various difficult periods, accompanied by contradictions between the three powers of the state: legislative, executive and judicial, as well as negative processes in the political, economic

and social spheres of society's life. Has the situation changed radically during the recent years? Recent estimates of society's development show us that some negative factors related are not completely uprooted. This is due to a weak legal control mechanism, the inadequacy of normative acts, low level of activity of some civil servants from various public state authorities etc.

In the following, we propose to address the streamlining of the Special Investigation Activity in order to assess how it can be used in the process of investigating "...investigation of alleged or committed crimes..." [1, Art.1, para.(2)].

Methods and materials applied. Theoretical, normative and empirical material was used in the preparation of this publication. The research of the current subject was possible through the application of several scientific investigation methods, specific to the theory of special investigative activity: logical method, comparative analysis method, systemic analysis, etc.

Research purpose. The purpose of this work is to analyze in-depth the efficiency of the Special Investigation Activity, based on the statements of researchers in the respective field and to develop recommendations for improving the legal basis that regulates this specific activity.

Depending on the intended purpose we aim to achieve the following objectives: a) research of the legal regulation of the special investigative activity; b) development of proposals for the improvement of the normative regulations regarding the special activity of investigations in the context of community law; c) advancement of theoretical-practical solutions regarding the efficiency of the Special Investigation Activity.

Discussions and results obtained. The need to improve the legislation on special investigations arises due to several factors, namely: socio-economic, political, criminological, the last having a decisive influence. The increase in the number of crimes [12], the hidden nature of the motives and conditions that favor the occurrence of crimes; the high level of latent crimes, the increase in the level of organized crime, the transformation of crime into a professional occupation, the aggressiveness of the defense of criminal interests, the internationalization of criminal activity and other circumstances dictate the need to improve the legal regulation of the Special Investigation Activity. Such a need is also conditioned by the fact that, at present, the entire system of protection of legal norms does not effectively ensure the solution of the questions of fighting crime, as a result of which society as a whole remains unprotected.

Under current conditions, a new correlation has emerged between the institutions of the Criminal Code and the legislation on Special Investigation Activity, which:

- a) Stimulates the research activity of the subjects of the Special Investigation Activity;
- b) Stimulates the post-criminal activity of the objections of the Special Investigation Activity;
- c) Ensure the rights and freedoms of individuals in the process of carrying out special investigative measures [2, p.66].

Referring to the emergence of these legal institutes as a result of the synchronous reform of criminal legislation and the formation of the Special Investigation Activity, shortcomings in the legal regulation in criminal legislation are noted in the legal literature and amendments are proposed to improve the existing situation [3, p.18-22].

In this regard, there is a pressing need to determine at the legislative level the circumstances which will allow the release from criminal liability of subjects who carry out

special investigative activity (special investigative measures), forced in certain situations, while carrying out investigative missions [9, Art.36], and to exceed the limit of the law, strictly speaking, to “commit” crimes.

Taking into account that the Special Investigation Activity precedes the criminal trial, serves the interests of the latter, the results of which are achieved in the criminal-procedural order, it is fair to consider that the thoroughness and efficiency in this sphere largely derive from the criminal and criminal-procedural activity. Criminal procedural legislation practically serves as a benchmark for the Special Investigation Activity, determining the formation of the special investigation practice. For these reasons, we can state that, depending on the level of coordination of special investigative legislation with criminal procedural legislation, of course, it also depends on the effectiveness of the Special Investigation Activity in the fight against crime.

To make the Special Investigation Activity more efficient, some criminal law norms are of particular importance:

1) Reasonable risk [7, Art.40]. The provisions of this article are taken into account during the execution of special investigative measures, operative experiment, undercover investigation, etc.

2) Voluntary renunciation of committing a crime [7, Art.56]. The provisions of this norm are of particular importance for the formulation of departmental norms, which regulate the basis for taking persons into operational records, as well as the reasons for terminating the investigative follow-up.

3) Release from criminal liability in connection with active repentance [7, Art.57]. The provisions of this norm are of major importance for solving the following tasks:

Developing the bases for ordering, authorizing, conducting, extending, terminating and recording the investigation/ information processing of participants in criminal groups, organizations (formations);

Creating departmental training methodologies of citizens to collaborate with the authorities whose specialized subdivisions carry out special investigative activities (with the exceptions provided for) [9, Art.15, point (6)], or to contribute in another way which is not prohibited by law, to special investigative activities;

Documenting the criminal activity of members of criminal groups by using persons released from criminal liability due to active repentance or voluntary renunciation of the crime.

As the need to counter organized crime increases and the qualitative change in the forms of its manifestation increases, the problem of improving the professional skills of investigation officers within the authorities whose specialized subdivisions perform special investigative activity, becomes more and more apparent, especially in questions related to the operational penetration into the criminal environment through the long-term infiltration of undercover investigators or persons trained in carrying out a specific special investigative measure. Today these measures are not popular and do not result in effective results due to insufficient legal and criminal defense of infiltrated persons.

The confidential activity of persons who carry out special missions of the authorities specialized in performing of special investigative activity, is constantly linked to the risk of forced participation in the commission of criminally prejudicial acts, in connection with which they require legal defense. The author C.V. Surcov, originally characterized the peculiar event, the need for legal and criminal defense of these categories of subjects

of operational investigative activity is based on the fact that these people are forced to balance between “permitted tricks and prohibited deception” [2, p.68].

According to the provisions of Law No.59/2012 of the Republic of Moldova on Special Investigative Activity: “*the investigation officer is the authorized person who, on behalf of the state and within the limits of his competence, carries out special investigative activity in accordance with the provisions of this law*” [9, Art.9, point (1)], resorting, as the case may be, to the help of natural and legal persons [9, Art.7, point (1), letter b)] and of specialists [9, Art.7, point (1), letter f); Art.36², point (2)] from different fields of knowledge, as well as of citizens who collaborate voluntarily [9, Art.15], confidentially [9, Art.12, para.(1), letter b)], with the specialized subdivisions.

The tasks performed by confidential employees often enter into contradiction with the principle of legality, in other words, the need to act strictly within the limits of the law. In some states, the legislator regulates this legal institute, establishing exceptions to the principle of legality, in other states, the general circumstances are directly provided for in the criminal law, the presence of which releases the person from criminal liability [4, p.21-25].

The legislation of the Republic of Moldova contains several symbolic and declarative legal norms for the protection of persons who provide assistance to the authorities whose specialized subdivisions carry out special investigative activity. Thus, Article 15 of the Law on special investigative activity is entitled, as follows: “Confidential employees”. According to paragraph (5) of the same article: “*In order to ensure the security of confidential employees, their family members and relatives, special investigative measures are allowed to be carried out for their protection in the manner established by law*”. In para.(1), point 1), letter b) of Art.19 [9] as basis for ordering special investigative measures serves the substantial evidence: “*regarding endangering the security of the investigating officer, undercover investigator, confidential employee or their family members, witnesses and other participants in the criminal process*”. Also in this context, the regulation provided for in para.(3) of Art.39 is presented, namely: “*The activity of confidential employees is under the control of the Prosecutor General or a special prosecutor empowered by order of the Prosecutor General*”. These are the only legislative provisions that to some extent describe the problem under investigation. Unfortunately, the current situation in this area is not quite good, compared to the legislation of other states.

Thus, the Czech Criminal Code contains the following legal norm: “A police officer who performs the duties of an agent under the provisions of special laws and who participates in the activity of an organized criminal group or supports this gathering of persons cannot be held criminally liable for participating in the criminal organization, if he commits this act with the aim of detecting the criminal who committed a crime within this association”. Simultaneously, the limits of the confidential employee’s behavior while performing his/her duties are regulated by the Police Law: “The police officer, who performs his duties as an agent, is obliged to follow the instructions of the hierarchically superior body, as provided for by this law. He must not perform other duties. In his activity he must choose those measures that are useful for the fulfillment the duties, and that do not harm the rights of other persons” [5].

The issue of the admissibility of illegal actions of a confidential employee, in connection with his use in performing reconnaissance tasks in the criminal environment, is rationally resolved in the legislation of Ukraine. Here the confidential employee is ab-

solved of liability for the unlawful acts he committed in the crisis situation, if they were necessary for the performance of his duties” [6, p.359].

In the Law regarding the Operational Investigative Activity, the legislator of the Russian Federation [13], in our opinion, made an attempt to regulate this important question. In para.(4), Article 16 of the aforementioned Law, it is stipulated that, during the defense of the life and health of persons, their constitutional rights and interests, as well as to ensure the security of society and the state from criminal attacks, it is permitted to forcibly prejudice social relations protected by law, committed by a person holding a responsible position, who carries out operational (special) investigative activity, or a person who assists them, acts committed under the conditions of the legal fulfillment by these persons of their official and public duties. As we have observed, the legislator equally ensures legal protection both to the person with responsible positions within the authority with competences in the field of special investigative activity, and to the persons who provide the latter with confidential assistance.

In order to improve the existing situation, we propose to supplement Art.15 of the Law on special investigation activity with a new paragraph – (5¹) with the following content: “Within the process of defending the life and health of individuals, their constitutional rights and freedoms, as well as in order to ensure the security of society and the state from criminal attacks, it is permitted to forcibly prejudice social relations protected by legislation, committed by confidential employees, acts committed under the legal conditions of fulfilling official duties or achieving socially useful goals, if it was not possible to achieve the pursued goals in any other way”.

All decisions within the framework of criminal prosecution are based on the provisions of the Criminal Code and Criminal Procedural Code, but are not based on the Law on special investigative activity. Due to these facts, it is rational to supplement Article 15 of the Law on special investigation activity with paragraph (9): “Confidential employees, trained to carry out special investigative activities, through a written or verbal agreement, who carry out special tasks within criminal groups and associations, are exempt from criminal liability according to the legislation in force”.

In addition, we propose to stimulate the activity with confidential employees by adopting the following legal norm. New paragraph (9) of Art.15 of the Law on special investigative activity: “confidential employees trained in carrying out special investigative activities, and who carry out special missions for the prevention and investigation/research of crimes, the detection of persons and the circumstances of the commission of crimes and who personally committed a crime without serious damage, but compensated for the damage caused, may be exempted from criminal sanctions in accordance with the legislation in force”.

Nor can Art. 57 of the Criminal Code be considered applicable for the legal defense of persons who perform tasks of the authorities whose specialized subdivisions carry out special investigative activities and infiltrate criminal organizations. According to this article “A person who has committed a minor or less serious crime for the first time may be released from criminal liability if, after the crime has been committed, he/she voluntarily denounced himself/herself, actively contributed to its discovery, compensated for the value of the material damage caused or, in some other way, repaired the prejudice caused by the crime” [7, para.(1)]. Practice and reality show us that confidential employees, infiltrated into criminal groups, in most cases in the past have been convicted multiple times.

In addition, as a rule, members of organized criminal groups commit serious and particularly serious crimes, for which reason the confidential employee may have a connection to the latest. This is the real life.

At the same time, Art.40 of the Criminal Code provides for one of the causes that removes the criminal nature of the act – the well-founded risk: “*The act, provided for by criminal law, which caused damage to interests protected by law in the event of a justified risk for the achievement of socially useful goals does not constitute a crime*” [7, para.(1)]. The risk is considered justified if the socially useful purpose pursued could not be achieved without a certain risk and if the person who admitted it took the necessary measures to prevent causing damage to interests protected by law [7, para.(2)].

Taking into account the above, we propose adding a new Article 40² to the Criminal Code with the following content: “An act, provided for by criminal law, which has not seriously prejudiced social relations protected by criminal law, committed justifiably by an undercover investigator for the purpose of fulfilling special tasks of defending the rights and legitimate interests of citizens, society and the state from serious, particularly serious and exceptionally serious crimes, for the documentation of which special investigative measures are carried out, does not constitute a crime”. The existence of this legal norm in the Criminal Code of the Republic of Moldova will establish a real mechanism for legal protection of persons who perform confidential tasks of the authorities whose specialized subdivisions carry out special investigative activity, as well as will expand the possibilities of engaging members of criminal organizations and groups in confidential collaboration based on information materials.

The notion of undercover investigator is reflected in the Criminal Procedure Code: “undercover investigator – official person who confidentially carries out special investigative activity, as well as another person who confidentially collaborates with criminal prosecution bodies” [8, point 20), Art.6].

In addition to all this, the norms from the Special Part of the Criminal Code are of particular importance for the special investigation activity, the elucidation, investigation/documentation, counteraction, and prevention of which are the tasks of the special investigation activity.

A particular problem of combating crimes at present consists in the mass and uncontrolled use by the security services of commercial structures of special technical means, predestined for the secret obtaining of information, meaning “de facto” that they carry out special investigative measures, the prerogative of carrying out which is exclusively of the authorities whose specialized subdivisions carry out special investigative activity [9, Art.6, para.(2)].

If the authorities whose specialized subdivisions perform these measures in accordance with the legislation [8, Art.134; 9, Art.27], including on the basis of the authorizations of the investigating judge, prosecutor, head of the specialized subdivision, then commercial structures armed with the latest technology illegally acquire confidential information not only about the company’s employees, its competitors, violating the constitutional rights and freedoms of individuals, but also apply these special technical means to the employees and service premises of law enforcement bodies. At the same time, it is “prohibited to use special technical means to secretly obtain information by natural or legal persons not authorized in this regard by law” [9, point 9), Art.27].

In jurisprudence, it is unanimously recognized that criminal procedural legislation

constitutes an important element in ensuring the legal and organizational basis of the special investigation activity. The problems of correlation between criminal procedural norms and special investigative norms have been researched in the works of the following scholars: V. Cușnir, B. Glavan, A. Pungă, M. Gherman, Al. Cicala, D.I. Bedneacov, B.T. Bezlepchin, V.I. Zajițchi, D.B. Grebelischi, E.A. Dolea, V.A. Lucașov, M.P. Poleacov, A.P. Rijacov, V.G. Samoilov, C.V. Surcov, A.A. Ciuvilev, M.A. Șmatov, A.Iu. Șumilov.

Thus, V.G. Samoilov, back in the 1980s, wrote about the need to improve criminal procedural legislation in order to ensure maximum results in the area of special investigation activity. In addition to the requirements of the Criminal Procedure Code on the detection, with the help of the special investigation activity, of crimes signs and of the persons who committed them. The author proposed to supplement the Criminal Procedure Code with provisions on the obligation of the criminal investigation body to take actions in order to detect factual data, which contribute to the investigation of the object of the evidence and the establishment of the objective truth, in other words, the solution of the tasks of criminal justice. The scholar considered that this norm will correctly orient investigation officers towards the effective implementation of special investigative measures, aimed at collecting the information necessary for crime prevention and ensuring public order, and criminal prosecution officers – to make maximum use of the results of the operative investigative activity [10, p.9-11].

The aforementioned scholars emphasize that there is an indispensable connection between the special investigation activity and the criminal procedure activity, which is expressed through the following features:

- 1) Solidary character (elucidation, suppression, prevention and discovery of crimes);
- 2) Direct provision in the criminal procedural legislation of the obligation of criminal prosecution bodies to undertake the special investigative measures necessary for the purpose of detecting crimes, the persons who committed them, as well as for the purpose of crimes' preventing and suppressing;
- 3) Orientation of special investigative measures towards informational provision of the criminal process, carried out by specialized subdivisions, criminal investigation bodies and courts;
- 4) Procedural-criminal nature of the grounds for carrying out special investigative measures;
- 5) Establishment in the special investigation legislation of the order for the use of the results of the special investigation activity for the preparation and implementation of criminal and judicial prosecution actions;
- 6) Legislative provisions on judicial control over the respect for the rights and freedoms of individuals during the implementation of special investigative measures.

Unlike special investigative activity, criminal procedural activity regulates the activity of a limited group of officials and bodies (courts, prosecutors, criminal investigation officers, specialized subdivisions), the relations between them and the participants in the criminal process, with persons within the framework of criminal prosecution and the resolution of cases in court. At the same time, these related activities have interchangeable links with each other on a number of positions. Many aspects of this problem, especially questions related to the interdependence of special investigative and criminal procedural activities, are touched upon in a number of scientific works from different points of view [11].

Conclusion. Considering that crime, as a product of people's social behavior, constitutes a perpetual category of any human society, this phenomenon will undoubtedly be present in all contemporary socio-economic formations in the future. The state and society will constantly feel the need to use special investigative activity in the interest of defending citizens, society and the state from criminal attacks. Studying the specialized literature and systematizing the practice of applying the national legislation and of other states regarding the special investigation activity, allow us to conclude that improving the legislation and its application practice, represents one of the most important problems of both criminal science and criminal procedure.

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