CZU 343.1:342.7
DOI https://doi.org/10.52388/2345-1971.2022.e1.08

DEVELOPMENT OF SPECIAL INVESTIGATION ACTIVITIES IN RELATION TO CRIMINAL PROCESS AND HUMAN RIGHTS [1)]

Boris GLAVAN
Doctor of law, associate professor,
"Stefan cel Mare" Academy of the Ministry of Internal Affairs of the Republic of Moldova,
Chisinau, Republic of Moldova
e-mail: *boris.glavan@mai.gov.md;*
https://orcid.org/0000-0002-3838-4308

The paper is devoted to the field of special investigative activity and criminal proceedings. Through the historical research method, the evolution of the special investigation activity in relation to the criminal process and the institution of human law is studied and analyzed. The study shows that no distinction was initially made between special investigations and criminal proceedings. Subsequently, as human rights are exploited, these two types of activity are divided, the criminal process becoming a public form of investigation of crimes and special investigations being kept secret, fulfilling the function of providing information on the criminal process and ensuring security. Our country's adherence to international law on human rights has led to the legalization of special investigations separately from criminal proceedings. Later, also under the influence of human rights, the partial reintegration of the two forms of investigations followed. Thus, the whole evolutionary process of special investigations is divided into four consecutive stages: the first stage begins in ancient times and ends in the ninentieth century. XIX; the second stage lasts until the end of the twentieth century. XX; the third stage begins with the legalization of the special investigation activity and the last stage begins with the reintegration of the special investigation activity and the criminal process.

Keywords: *special activity and investigative measures, criminal process, criminal prosecution, human rights.*

EVOLUȚIA ACTIVITĂȚII SPECIALE DE INVESTIGAȚII ÎN RAPORT CU PROCESUL PENAL ȘI DREPTURILE OMULUI

Prezentul articol este consacrat domeniului activității speciale de investigații și procesului penal. Prin metoda istorică de cercetare este studiată și analizată evoluția activității speciale de investigație în raport cu procesul penal și instituția drepturilor omului. Studiul arată că inițial nu s-a făcut deosebire între investigațiile speciale și procesul penal. Ulterior, pe măsura valorificării drepturilor omului, aceste două genuri de activitate sunt divizate, procesul penal devenind o formă publică de cercetare a infracțiunilor iar investigațiile speciale fiind ținute în secret, îndeplinind funcția de asigurare cu informații a procesului penal și cea de garantare a securității de stat. Aderarea țării noastre la actele internaționale cu privire la drepturile omului a determinat legalizarea investigațiilor speciale separat de procesul penal. Ulterior, tot sub influența drepturilor omului, a urmat reintegrarea parțială a celor două forme de investigații. Astfel, întreg procesul evolutiv al investigațiilor speciale este divizat în patru etape consecutive: prima etapă începe în epoca antică și se termină în sec. XIX; etapa a doua durează până pe la sfârșitul sec. XX; a treia etapă începe odată cu legalizarea activității speciale de investigații și ultima etapă începe cu reintegrarea activității speciale de investigații și procesul penal.

Cuvinte-cheie: *activitate și măsuri speciale de investigaţii, proces penal, urmărire penală, drepturile omului.*

[1)] *The paper is developed within the research project "Conceptual approaches on special investigative activity under the rule of law" Abordări conceptuale privind activitatea specială de investigații în condițiile statului de drept", cipher 22.00208.8007.07/PD I, supported from the state budget.*

DÉVELOPPEMENT D’ACTIVITÉS D’ENQUÊTE SPÉCIALE EN RELATION AVEC LA PROCÉDURE PÉNALE ET LES DROITS DE L’HOMME

Le document est consacré au domaine de l’activité d’enquête spéciale et des procédures pénales. À travers la méthode de recherche historique, l’évolution de l’activité d’enquête spéciale en relation avec le processus pénal et l’institution du droit humain est étudiée et analysée. L’étude montre qu’aucune distinction n’était initialement faite entre les enquêtes spéciales et les poursuites pénales. Par la suite, à mesure que les droits de l’homme sont exploités, ces deux types d’activités se divisent, la procédure pénale devenant une forme publique d’enquête sur les crimes et les enquêtes spéciales étant tenues secrètes, remplissant la fonction d’informer sur la procédure pénale et d’assurer la sécurité de l’État. L’adhésion de notre pays au droit international des droits de l’homme a conduit à la légalisation d’enquêtes spéciales distinctes des poursuites pénales. Plus tard, également sous l’influence des droits de l’homme, la réintégration partielle des deux formes d’enquête a suivi. Ainsi, l’ensemble du processus évolutif des enquêtes spéciales est divisé en quatre étapes consécutives: la première étape commence dans les temps anciens et se termine au XXe siècle. XIXe; la deuxième étape dure jusqu’à la fin du siècle. XX; la troisième étape commence par la légalisation de l’activité d’enquête spéciale et la dernière étape commence par la réintégration de l’activité d’enquête spéciale et de la procédure pénale.

Mots-clés: *activité spéciale d’enquête, mesures spéciales d’enquête, procédure pénale, poursuites pénales, droits de l’homme.*

РАЗВИТИЕ СПЕЦИАЛЬНО-СЛЕДСТВЕННЫХ МЕРОПРИЯТИЙ В КОНТЕКСТЕ УГОЛОВНОГО ПРОЦЕССА И ПРАВ ЧЕЛОВЕКА

Данная статья посвящена сфере специально-розыскной деятельности и уголовного судопроизводства. Методом исторического исследования изучается и анализируется эволюция специально-розыскной деятельности применительно к уголовному процессу и институту прав человека. Исследование показывает, что изначально не проводились различия между специальными расследованиями и уголовным судопроизводством. В последующем, по мере эксплуатации прав человека, происходит разделение этих двух видов деятельности, при этом уголовный процесс становится публичной формой расследования преступлений, а специальные расследования засекречены, выполняя функцию информирования об уголовном процессе и обеспечения безопасности государства. Приверженность нашей страны международному законодательству в сфере прав человека привела к легализации специальных расследований отдельно от уголовного судопроизводства. Со временем, также под влиянием института прав человека, последовала частичная реинтеграция двух форм расследования. Таким образом, весь эволюционный процесс специальных исследований делится на четыре последовательных этапа: первый этап начинается в древности и заканчивается в XIX веке; второй этап длится до конца XX века; третий этап начинается с легализации оперативно-розыскной деятельности, а последний начинается с воссоединения оперативно-розыскной деятельности и уголовного процесса.

Ключевые слова: *специально-розыскная деятельность, специальные розыскные мероприятия, уголовный процес, уголовное преследование, права человека.*

Introduction

An important role in solving the current problem of the special investigation activity (ASI) is played by the historical research method of this type of activity in relation to the criminal process (PP) and the rights of the person. It is known that the social purpose of ASI, like that of PP, consists in ensuring and protecting the supreme social values provided by the Constitution of the Republic of Moldova, among them fundamental human rights (the right to life, health, freedom, etc.). It is also known that ASI constitutes a very effective, or perhaps even the most effective, legal means of combating crime - an antisocial phenomenon that not only threatens or harms the respective values, but also damages them. The only inconvenience emanating from the

ASI consists in its specific (secret) character of realization which, more or less, is correlated with the restriction of some individual rights. In relation to this fact, panic, phobia, mistrust, skepticism is created in society, sometimes unjustifiably, sometimes intentionally questioning the importance and social utility of this activity.

Ignorance or insufficient knowledge of the evolutionary process of ASI in relation to PP and the rights of the person inevitably leads to underutilization of the anti-criminogenic potential of special investigations, or, on the contrary, leads to abuses by the bodies competent to carry out special investigative measures (MSI). The lack of necessary knowledge in this field can negatively influence the development prospects of ASI, especially in the conditions of the transformations of all social spheres caused by the global impact of the technological-scientific revolution in recent years. The reactive method of protecting constitutional values has recently proven to be less effective in identifying and removing threats that have literally already advanced into a new generation. Changes in the field of ASI have become not only necessary, but also inevitable, or the opportunities of new technologies will have a clear advantage over those who pay attention to social values, but not those who have the task of protecting them.

The problem of the changes that could be made in the field of ASI relates to finding and keeping the golden balance between the general interest of society regarding the protection of constitutional values against the new generation of threats, on the one hand, and the individual interest regarding the respect of the rights and freedoms of the person, on the other hand. Studying the historical aspects of the relationship between ASI and the concept of human rights will help us understand in which direction the balance will have to be tipped to bring it to a state of equilibrium.

The study methodology includes traditional research methods: logic, analysis and synthesis, deduction and induction, observation and comparison. Based on the analysis of relevant materials (specialized literature, national and foreign legislation, other relevant materials) appropriate conclusions are formulated.

Basic content and discussions

Stage I. The roots of ASI stretch back to the most remote times, the skills of tracking, observing, recognizing and searching were formed in our ancestors from the time when the only source of existence was hunting and gathering the harvest of the garden of heaven.

The emergence and development of primitive communities and the formation of organizational leadership structures determined the need for their protection and security, and the skills of surveillance and defense were successfully applied not only to predatory animals, but also to barbarians and scavengers. To neutralize the dangerous actions of the enemy, spies were used, being sent to the opposite camp to perform various tasks (gathering information, disinformation, recruiting former enemies, etc.). The achievement of these tasks was ensured by such actions as bribery, blackmail with the dissemination of compromising materials, exploitation of human weaknesses (the desire for revenge and affirmation, jealousy, etc.). Perhaps the decisive battles waged by such outstanding leaders as Alexander Macedon, Hannibal, Genghis Khan, Frederic II would not have been won without the application of methods and investigation procedures specific to the respective periods [1, p. 7].

Back then there was no distinction between what we call today ASI and PP. All investigations into conflict report resolution depended on the skills of the report participants. Due to the lack of professionalism for such works, the Divine judgment was most often resorted to (the oath; drawing lots; ordeals)

[2]. The situation at that time did not require the creation of specialized investigation bodies. The problems of the security of private life did not belong to the competence of the state, which only gets involved in exceptional situations (mass disturbances, calamities, etc.) [3, p. 4].

The concept of human rights at that stage was in the process of formation, being found in the thinking of the ancient philosophers Confucius (552-479 BC), Pythagoras (6th century-490 BC), Plato (427- 347 BC), Aristotle (384-322 BC). Back then, rights were only for certain social groups. Later, in the thinking of the Stoic philosophers, the idea of universal natural rights was promoted [4, p. 36].

Magna Charta (1215) was the first known text in history to guarantee some liberties to what were then called “free people”. This act appeared as a result of the struggle of various social categories against feudal absolutism [5, p. 30].

The struggle for power and the desire to maintain it, as well as the constant threat of riots and other crimes, led the leaders of the states to pay special attention not only to external security issues, but also to ensuring internal order, a fact that led at the establishment of police bodies whose duties included secret listening, tracking and denunciation as ways of obtaining information [6, p. 3].

It should be emphasized that investigative procedures throughout the evolution of ASI were used both for the purpose of combating crime and for informative and counter-informative purposes, to ensure the security of the state and its leader. Thus, the history of ASI cannot be divided from the history of special services [7, p. 12].

The centralization of power strengthened the role of the state in public life and, therefore, the competence of state bodies also expanded, including in the fight against crime. This trend led to the demise of the private criminal process. As a result, the process started regardless of the existence of the victim’s complaint, the criminal’s guilt being proven by the judicial authorities. The public and verbal form of the process was replaced by the secret and written one, and torture had become the main means of obtaining the recognition of guilt - the main objective of the criminal process [8].

The development of capitalism (16th-17th centuries) led to the emergence of the bourgeoisie in Europe, consisting of merchants and craftsmen. Their plea for equal rights with aristocrats [9, p. 40] led to massive riots resulting in the adoption of a series of important documents regarding the protection of human rights: Petition of Rights (1628) [10]; Habeas corpus (1679) and Bill of Rights (1689) [11, p. 28]; Virginia Declaration of Rights (1776) [12]; United States Declaration of Independence (1776) [13]; Declaration of the Rights of Men(1791) [14]; Declaration of the Rights of Man and Citizen (1789) [15].

The social upheavals of the XVIII century led to the change of the form of the criminal process from inquisitorial to accusatorial, the accused having the right to administer the evidence, and the sending to court being ordered by the people’s representatives, who also participated in the administration of justice through the Jury Courts [16, p. 9-10].

The influence of the French Revolution was particularly strong on the entire European continent, including the Romanian Countries. The aspirations of unity and national emancipation, corroborated with the great ideas of the French Revolution, were found in the program documents of the 1848 revolution in Transylvania, Moldova and Wallachia [17, p. 32-33].

In Russia, the French Declaration was perceived by many as contradicting the divine and natural principles that determined that people cannot be equal, including before the law [18, p. 10-15].

The appearance in the XIX-th century of professional and organized crime as a result of a combination of factors (the industrial revolution, the growth of the population of the cities, the expansion of the bourgeoisie, etc.) that "flooded" practically all the countries of Western Europe made it clear that the common sense and sound judgment that had started to lead the state organs were powerless in the fight against the new criminality [19, p. 97]. There was a need to create more effective means and methods, to develop special measures to protect citizens against criminal attacks, to ensure the inevitable punishment of the guilty [20, p. 14-15].

The first founder of the secret police is considered to be Eugene François Vidocq (France, year 1811 - "La Sûreté"). He is credited with inventing new methods of gathering information: undercover surveillance, disguise, searching for suspects, assisting during official searches, operative records of recidivists, publishing in newspapers the reports of wanted criminals, organizing brothels, traps and other techniques for detecting criminals who could not be identified by traditional means [21, p. 41].

The social context of the time required the formation and development on the French model of specialized criminal police subdivisions in England (1829 - "Scotland Yard") [22], in the USA (1844 - NYPD - New York City Police Department) [23], from Russia (1866 - "Сыскная полисия") [24].

Stage II. In the context of the worldwide expansion of the concept of human rights, the judicial reform of the 1960s of the 19th century of the Russian Empire separated the preliminary investigation from the activity of the police, which was tasked with carrying out by ASI. The basis of the reform was the idea of excluding unfounded procedural coercion. It was taken into account that the investigation was often started without a certain basis and therefore, people were brought to court pointlessly, and the judges in turn were busy with useless things. On the other hand, the problem of the guarantees of the coercive nature of the preliminary research needs to be solved. The solution was found in concretizing and detailing the evidentiary procedures. Therefore, it was agreed that only public procedural actions can and should be detailed (on-site investigation, search, collection of objects, presentation for recognition), the rest, i.e., special investigative actions, should remain secret, their performance remaining unexplained [25, p. 114]. As a model, the French experience was taken into account, which until then had proven its effectiveness [25, p. 83].

According to the CPP (Criminal Procedure Code) of 1864 of the Russian Empire [26] when the signs of the crime were unclear, doubtful or the sources of communication about the crime were unreliable, the police were obliged, before reporting the case to the criminal investigation body, to entrust themselves through the criminal investigation (дознание) if the case really took place and if it contained the signs of the crime (art. 253). When carrying out the criminal investigation, the police had the power to collect all the necessary information by means of special investigations (розыск), interrogations and secret pursuits without, however, carrying out searches or seizure of objects (art. 254). As a general rule, the performance of actions that implied an interference in the sphere of personal rights was allowed only within the framework of the criminal investigation, being the prerogative of the investigator (criminal investigation officer) who possessed true judicial independence [25, 84].

Thus, ASI stood out as an unofficial police activity aimed at secretly identifying the criminal [27, p. 89]. Later, in 1908, within the police subdivisions, then the militia, specialized subdivisions (сыскные одеждание) were created that carried out criminal investigation

and special investigative activity [28, p. 65]. The activity of these subdivisions was regulated by departmental instructions in which certain guarantees regarding the respect of the rights of the person were also found. The instruction of August 9, 1910 prohibited “the collection of information concerning the private lives of persons not connected with the duties of the police for the prevention, suppression and investigation of crime, such as the collection of personal and family information, information about divorce or the affairs of various persons, the collection of information about the solvency of individuals, or the collection of information in the interest of third parties” [29, p. 65]. In other words, it was about the prohibition of the restriction of the right to private life, if it was not related to solving the tasks of the police.

The research carried out allows us to state that until the Russian revolution of 1917, the unjustified restriction of the rights of the person by the state bodies was prevented in two ways. First, in unclear cases the person’s rights could not be restricted without a preliminary control. Second, the decision to interfere with someone’s rights was made by an independent and impartial body - the investigating judge.

With the establishment of Soviet power, these methods were liquidated. The criminal investigation (дознание) ceased to be regarded as an activity without interference with the rights of the person, and the investigator lost his judicial independence. As a result, the apparently solved problem regained its old relevance. According to Russian researchers, the political regime established after the October Revolution was, from a historical point of view, a step backwards, because it rejected such democratic values as individual freedom, the rule of law, human rights, state of the law [30, p. 185]. Since the previous decision was considered obsolete, the issue of guarantees of the rights of the person was solved by introducing a new procedural institution: *the initiation of criminal prosecution*, materialized formally by issuing an ordinance [31, p. 285-287].

In this context, it is worth noting that European states did not know such a guarantee, still keeping the traditional idea about the forms of preliminary investigation [32, p. 10]. Later, an alternative to the French version appeared in Germany (1974) and other European states that generally abandoned the prosecution phase, keeping only the criminal investigation phase. It must be said that Germany at that time was facing a series of terrorist acts, among which was the terrorist attack at the Olympic Games in Munich. During the criminal trials, the defense side abused a lot of its rights: it did not show up at the court hearings, sabotaged their proceedings, sent messages between the prisoners and their freed accomplices, etc. In this sense, the “Great Reform of Procedural Law” did not have a liberal-democratic character, but aimed at simplifying the criminal investigation procedure and suppressing abuses of rights by the defense [33]. Since the criminal investigation had retained its police nature and therefore still needed judicial legitimacy to carry out the MSI, the role of the mechanism for the protection of individual rights in these countries was transferred to the institution of judicial control [34, p. 29-32]. Such changes could not go unnoticed by researchers of the post-Soviet space. In the course of some modern polemics about the initiation of criminal prosecution, the view was expressed that the existence of the institution of initiation of criminal prosecution loses its meaning under the conditions of the emergence of judicial control [35, p. 38-40]. Moreover, the German approach became the main point of reference for post-Soviet reformers who are still debating whether to keep or drop the prosecution stage.

After the Second World War, a series of international acts were adopted, aimed at guaranteeing human rights internationally,

among them: the Universal Declaration of Human Rights (1948); International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (1966); first (1976) and second (1989) Optional Protocol on Civil and Political Rights.

The USSR was in no hurry to accede to the respective international acts. However, in the post-war years, several measures were taken to exclude the shameful experience of police bodies regarding non-compliance with the law, unjustified arrest of citizens, committing acts of corruption and other serious violations. However, the social value and effectiveness of ASI was never questioned. Arrears were only in the legal regulation of the procedures and techniques specific to this activity.

At the official level, there was very brief talk about ASI. In *the Basics of the criminal legislation of the Union and of the Union Republics* adopted in 1958 by the Supreme Soviet of the USSR there was a simple remark according to which the criminal investigation bodies were obliged "*to undertake the necessary operative investigative measures*" in order to detect the crimes and the persons who committed them (art. 29). Pursuant to this act, the Criminal Procedure Codes of all the Union Republics, including that of the RSSM (Moldovan Soviet Socialist Republic) from 1961, were developed, which included similar provisions.

In paragraph (1) of art. 100 of the CPP of the RSSM (Moldovan Soviet Socialist Republic) it was provided: "*It is the responsibility of the criminal investigation bodies to take operative investigative measures, including the use of video and sound recordings, filming, photography in order to discover the evidence of the crime and to the people who committed it, the identification of the factual data, which can be used as evidence in the criminal case after their verification, in accordance with the criminal procedure legislation*".

Pursuant to paragraph (2) of the same article, the criminal investigation bodies also had the obligation to take all the necessary measures to prevent and solve the crime and to apply, if necessary, state protection measures against the persons who provided help in the criminal process, if there was a danger to their life, health or property.

The predominantly secretive nature of ASI has often generated mistrust of its results by the judiciary, prosecutors, lawyers and criminal investigation officers, and for society, the operative activity has always been associated with illegalities and abuses by investigating officers.

A special role in the formation and development of the institution of human rights during the Soviet period was played by the adoption of the Constitution of the USSR in 1977 [36], in which, for the first time, the principle of legality was consolidated, obliging all state bodies to ensure the protection of law and order, the interests of society, the rights and freedoms of citizens (art. 4). In this Constitution, in addition to the previously guaranteed rights to the inviolability of the person (art. 54) and the inviolability of the home (art. 55), the right to the protection of private life of citizens (art. 56), the right to judicial protection (art. 57), the right to challenge the actions and demand compensation for the caused damage by the illegal actions of officials (art. 58).

Despite the constitutional guarantees, operative (special) investigative activity in the former USSR remained regulated at the level of secret departmental acts. In those acts, the concept of the rights of the person as a legal institution was not mentioned, the principle of socialist legality being considered a priority. The attention of the academic environment was focused on studying and developing the content of the principle of legality, this being understood not only as strict compliance with laws and regulations, but also as compliance

with the rights, freedoms and legitimate interests of citizens.

In the specialized literature of those years, attention was drawn to the fact that in the process of verifying primary information, situations could arise restricting the rights and legally protected interests of citizens, organizations, institutions and businesses. It was considered absolutely inadmissible to violate the rights and interests of citizens, and not only those not involved in the crime, but also those subject to checks. It was strictly forbidden to organize operative actions against honest citizens. Also, such actions as falsification, provocation and disloyalty were considered unacceptable (Atamadjitov V.M. - 1986).

Researchers Frolov V. Yu., Cecetin A. E., Penkin V. S., Mitrofanov E. A. by developing in 1991 the draft of the USSR Law “On investigative operative activity in the Ministry of Internal Affairs”, were among the first to try to fill the legislative vacuum regarding the protection of rights and the legitimate interests of citizens against crimes, as well as ensuring guarantees against abuses and the unfounded application of special investigative measures regarding law-abiding citizens[37, p. 119].

Stage III. The post-Soviet period can be considered as a new stage in the evolution of ASI in relation to PP (Criminal Procedure) and human rights. This stage is marked by the change of the paradigm of legal sciences, in which the idea of the rule of law and the equality of the parties in the relationship between the citizen and the state begins to prevail.

The adoption at the beginning of the 90s of the last century of a special law regarding operative investigative activity both in our country and in the rest of the ex-Soviet republics, marked a key historical moment in terms of the conceptualization of the relationship between ASI and rights the person.

In art.3 of Law 45/1994 were provided the fundamental principles of this kind of activity, among them, together with the principle of legality, was the principle of respecting the rights and freedoms of the person. Thus, the legislator separated the concepts of legality and respect for the rights of the person in ASI.

The content of the principle of respecting the rights and freedoms of the person in the operative activity of investigations was detailed in art.5, which ensured the right to challenge the actions of the body that exercises the operative activity of investigations to the higher hierarchical body, to the prosecutor or to the training judge (para. (2)); the right to request explanations about the unfounded application of the operative investigations (paragraph (3)); The right to compensation for the damage caused in the case of the violation by the body exercising the operative activity of investigating the rights and legitimate interests of the natural and legal persons (paragraph (4)). The guarantees of respect for the rights and freedoms of the individual were also included in a number of other provisions of the same law regarding the MSI (special investigative measures) (art.6); the grounds (art.7) and the conditions for their implementation (art.8) etc.

In a few months after the adoption of Law no.45/1994, the Constitution of the Republic of Moldova, July 29, 1994, which set the legal basis for a modern civilized state based on the principles of democracy, separation, priority and freedoms of person, was adopted. Because the Constitution has a supreme legal force and a direct effect of its norms, the state bodies in the field of ASI followed from that moment and further to rely on constitutional principles: the state recognition of the rights and freedoms and dignity of humans (art. 1), their guarantee in accordance with the recognized general principles and norms (art.4), equality of citizens before the law (art.16), the presumption of innocence (art.21), respect and protection of intimate, family and private life (art.28), inviolability of domicile (art.29), inviolability

of the secret of correspondence (art.30), and others.

While the attention of the Moldovan politics, as well as of the other ex-Soviet republics, was oriented towards glorifying the rights and freedoms of the person, the criminal environment took the maximum of this situation, appreciating it as the assignment of positions from the bodies of protection of law norms. In addition, the evolution of the technical-digital progress at the end of the millennium has made available to the interlocking world new opportunities for rapid, dynamic and unlimited distances. Very soon, national criminal groups have made strong connections with international ones. The expansion of new technologies (internet, mobile phones) and their exploitation in criminal interests have made traditional evidentiary procedures less effective for documenting new forms of criminality: acts of corruption, protectionism, trafficking in human beings, drugs, weapons, money laundering etc. The only adequate means of countering the new wave of organized crime remained MSI by conducting of which it was possible to obtain information necessary to control the pace of the rapid development of that phenomenon. Shortly thereafter, their advantage diminished significantly. The information obtained by performing the MSI was increasingly more difficult to cross the threshold of criminal evidence for more formal reasons: the evidence was canceled because it was collected until the start of the criminal investigation or because it was obtained by the investigation officers and not by the prosecution officers, because the investigation officers would have had only the competence to supervise but not to record the information obtained by carrying out the MSI, etc.

The situation had become extremely complicated and the shock produced by the US terrorist act on September 11, 2001 pushed the international bodies to issue a series of important acts against the new crime by which the national laws are recommended for the admissibility of the MSI to investigate serious crimes [38; 39; 40; 41; 42].

Stage IV. The first in the ex-Soviet space that made such legal reforms were the Baltic countries: Lithuania (2002), Estonia (2003) and Latvia (2005), integrating MSI in the CPP (Criminal Procedure Code) model. Later the same path was followed by Moldova (2012), Ukraine (2012), Georgia (2014), Kazakhstan (2014), Kyrgyzstan (2019).

It should also be mentioned that practically in all the countries that have followed the path of integrating the ASI into the CPP, the laws that directly regulate special investigations continue to operate at the same time, the only exception being Estonia, which has definitively renounced such a law.

Therefore, the MSI were divided into two categories: 1) MSI provided by the CPP performed only within the limits of PP and 2) MSI provided in separate law made outside PP. Respectively, the information obtained by carrying out the first category of measures are used in the probative process, and those obtained by the second category of measures cannot enjoy such value.

Thus, we note that the issue of capitalizing on the results obtained by carrying out MSI regulated by a law other than the CPP has remained unresolved. Only the capacities of reactive criminal investigations have been increased, while the potential of special preventive investigations has essentially decreased due to the reduction of the number of MSIs that could be carried out in this regard. In the implementation of the legal reform in 2012, an important role was played by the case of Iordache and others against Moldova, through which the ECtHR drew the attention of the national authorities to the fact that Law no. 45/1994 regarding operative investigative activity did not offer sufficient guarantees against possible abuse special investigative

measures. In the local interpretation, these observations were understood in the sense that the guarantees against possible abuses can only be ensured within the limits of the criminal process.

In this context, but also taking into account the increase of the crime level of some kinds of crimes, drug trafficking, corruption, organized crime, the question became extremely current: what would be more rational from the state bodies, to wait for the criminal intention and then to act, or to gather information and to suppress the criminal act immediately?

In the next years after the reform, crime, in the national space, has expanded even more, being more and more felt in the top management of the country. In the period 2012-2014, financial amounts of over 13.3 billion Moldovan lei (767 million dollars, equivalent to 12% of the country's annual gross domestic product and higher than the total liquidity of banks) were stolen from the country's banking system [43], the beneficiaries who are not currently held accountable for the criminal proceedings. In 2019, suffocated by endemic corruption, thefts and illicit privatizations in the public, total control over the judicial system, exercised by the oligarchy and the numerous attacks on citizenship rights and freedoms, the Parliament declared the Republic of Moldova "captured state" [44].

Perhaps the criminogenic situation would not have become so serious if the special investigation services had at least the same powers as before the reform. It is welcome to increase the reactive capacity of criminal investigations through the admissibility of carrying out MSI in the criminal investigation phase. The idea of diminishing the ability of special services to act until the start of the criminal investigation and after the termination of this procedural stage seems unsuccessful to us. The fact that special investigative services have been prohibited from carrying out MSI relevant to the performance of ASI tasks (art. 2 of Law no. 59/2012) is a matter that only benefits the criminal elements and in no way the honest law-abiding citizen. Practically all the potential of the ASI (special investigation activity) was concentrated in the criminal investigation phase, the rest of the PP segments, as well as those outside it, remained more vulnerable than before the reform. The situation has become so complicated that even the convicted persons who are evading the execution of the sentence can no longer be found, located, searched by carrying out the MSI authorized by the investigating judge and mostly by the prosecutor. In general terms, it can be stated that the effectiveness of the activity of the subjects who carry out special investigations has been considerably reduced.

It should also be mentioned that the said reform strongly shook the foundations of the theoretical-methodological system of the criminal process which prevents the understanding and uniform application of the legal provisions. First of all, there was confusion about the relationship between ASI and PP. It is not clear how they should be treated as part of a whole or as two distinct types of activity. According to the CPP, it would seem that we are talking about the same specialty. The very existence of Law no. 59/2012 already proves that ASI is distinct from PP. The nomenclature of scientific specialties [45] also divides these specialties: 554.03. - Criminal procedural law and 554.04. - Criminalistics, judicial expertise, operative investigations. In this context, the rhetorical question is imposed: to which of these two specialties are the research subjects related to the special investigative measures in the criminal process?

There are also uncertainties about the relationship between MSI and prosecutions, are both the evidentiary procedures or only the last? If we admit that MSI are probative procedures, then how do we explain that the evidence obtained after their performance has

a lower value than the evidence obtained by conducting the criminal prosecution actions (Article 101 paragraph (5) CPP). But doesn't this discrimination of evidence go against the PP principle: "*no evidence has a predetermined value for the criminal investigation body or the court"* (art. 27; art. 101 para. (3) CPP)? And in general, it is not clear whether the principles provided for in Law no. 59/2012 are the basis for carrying out the MSI provided for in the CPP, because some principles (of harmlessness; combining public and secret methods) provided for in the law are not found in the code.

In order to rectify this situation, through the Decision of the National Security, Defense and Public Order Commission CSN/7 no. 257 of June 10, 2015, it was decided that the Government, through the Ministry of Justice, should create a working group and submit, according to the established procedure, the draft law for the amendment and completion of some legislative acts aimed at the special activity of investigations resulting from the problems identified in the application of the legislation corresponding to. Since then, several drafts have been submitted to amend the ASI (special investigation activity) legislation, but due to conflicting opinions, the work continues today.

Conclusions

The entire evolutionary process of ASI in relation to PP and human rights can be divided into several consecutive stages, each stage being specific to certain special features.

The first stage is also the longest, covering the period between antiquity and the XIX-th century. Specific to this stage is the fact that there was no distinction between the procedures of ASI and those of PP. Because certain rights of the litigants were not required to be respected, evidence was collected both publicly and secretly. The general population had no rights, only the aristocracy enjoyed them. If the conflict report arose between an aristocrat and a peasant or slave, justice was always on the side of the aristocrat.

The second stage starts from the XIX-th century and lasts until the end of the 20th century. The recognition of the rights of the person conditioned the resolution of conflict reports based on the law, which led to the emergence of the CPP in which certain rules for collecting evidence to establish the truth were already indicated. Guaranteeing the rights of the person suspected of committing a crime was ensured by detailing the evidence collection procedure and offering equal chances for defense. As a result, there was a split between the special investigations and the criminal process, because non-transparent evidence collection procedures by their nature could not ensure equal chances of defense. In these conditions, ASI developed separately from PP as a kind of secret information activity, being focused on several directions: reactive, aimed at ensuring the good course of PP; preventive, aimed at revealing, preventing and ending crime preparation activities and threats that endanger the security of the state; search and identification of persons and bodies. During this stage, ASI was regulated by classified departmental acts. We should not lose sight of the fact that towards the end of this stage the standards of respect for human rights increased, which led to the removal of ASI from the secret initials.

The third stage begins with the legalization of ASI. For the Republic of Moldova this moment corresponds to the adoption of Law no. 45/1994 on the operative activity of investigations. Thus, for the first time at the law level, the legal instruments (MSI) have been informed to the general public. At the same time, certain guarantees have been established in order to respect the rights of the investigated persons, the performance of MSI being prohibited for the achievement of other purposes and tasks than those indicated in the

law. During this stage, special investigations continued to be developed in the same direction as in the previous stage.

The fourth stage begins by integrating ASI in CPP. In general, we can distinguish two models of integration: the first West-European and the second East-European. Specific to the first model is the full integration of ASI in the CPP, which has its beginning in the years after 1970. According to this model, the special investigations are carried out throughout the PP and does not matter whether or not the criminal prosecution is started because it does not exist. It is only the criminal investigation (дознание) exercised by the police in the activity of which the MSI are carried out. If necessary, the results of the special investigations are used in the court as evidence.

Specific for the second model is the fact that ASI is not integrated to the CPP. In the countries that have adopted this model, they continue to operate separate laws that regulate ASI. This model has its beginning in the early years of this millennium. Our country joined this model in 2012, the year in which the legal reform was made in the field of special investigations, producing essential changes at concept level and crime fighting strategy. Thus, by reforming ASI, it was tried to divide this kind of activity into two parts. The first part has a reactive character and is regulated by the CPP, and the second has a preventive character, of searching and revealing the threats to the citizen and the state and is regulated by Law no.59/2012 on the special investigation activity. Therefore, the first party is responsible for fulfilling the task of investigating and discovering crimes, and the second of the rest of the tasks indicated in art.2 of Law no.59/2012. In this way only the information obtained by performing the first part of the ASI are used in the probative process, the rest of the information will continue to be only informative.

Bibliography

1. ИЛЬИЧЕВ, В. А. *Оперативно-розыскная деятельность: курс лекций.* – М.: Эксмо, 2009 г. p. 7.

2. НИКИТИНА, Е. В. *Из истории развития средств доказывания.* Материалы международной научно-практической конференции «Уголовное судопроизводство: история и современность», посвященной 150-летию Устава уголовного судопроизводства Российской империи. Актуальные проблемы российского права. 2014. № 11 (48) ноябрь. С.2540-2545. . Disponibil: https://cyberleninka.ru/article/n/iz-istorii-razvitiya-sredstv-dokazyvaniya/viewer [Accesat 26.08.2021]

3. ЕЛИНСКИЙ, В. И. *История уголовного сыска в России (X – начало XX в.)*. М.,2004. С. 4.

4. *Введение в права человека.* Редакционная коллегия: Кнут В. Бергем, Гуннар М. Карлсен, Беата Слюдал. Норвежский Хельсинкский Комитет по правам человекаю Осло 2003. p. 36 Disponibil: https://iuristebi.files.wordpress.com/2011/07/e18390e18393e18390e1839be18398e18390e1839ce18398e183a1-e183a3e183a4e1839ae18394e18391e18390e183a2e18390-e183a8e18394e183a1e18390e18395.pdf [Accesat 26.08.2021]

5. DOLEA, I. *Drepturile persoanei în probatoriul penal: conceptul promovării elementului privat*. Chișinău. Cartea Juridică, 2009 (Tipogr. «Bons Offi ces» SRL). p. 30.

6. *Жандармы России* / сост. В. С. Измозик. СПб.: Нева, М.: Олма-Пресс, 2002 г. С. 3. [Accesat 26.08.2021] Disponibil: http://booksshare.net/books/history/izmokin-vs/2002/files/jandarmirospolrozisk2002.pdf

7. ЗАХАРЦЕВ, С. И., ИГНАЩЕНКОВ, Ю. Ю., САЛЬНИКОВ, В. П. *Оперативно-розыскная деятельность в XXI веке*. Юридическое издательство Норма. 2017. P. 12.

8. ВЛАДИМИРСКИЙ-БУДАНОВ, М. Ф. *Обзор истории русского права*. Киев, 1907. С. С. 659-661. Citat după Никитина Е.В. Из истории развития средств доказывания. Материалы международной научно-практической конференции «Уголовное судопроизводство: история и современность», посвященной 150-летию Устава уголовного судопроизводства Российской империи. Актуальные проблемы российского права. 2014. № 11 (48) ноябрь. С.2540-2545. [Accesat 26.08.2021] Disponibil: https://cyberleninka.ru/article/n/iz-istorii-razvitiya-sredstv-dokazyvaniya/viewer

9. *Введение в права человека*. Редакционная коллегия: Кнут В. Бергем, Гуннар М. Карлсен, Беата Слюдал. Норвежский Хельсинкский Комитет по правам человекаю. Осло 2003. p. 40 [Accesat 26.08.2021] Disponibil: https://iuristebi.files.wordpress.com/2011/07/e18390e18393e18390e1839be18398e18390e1839ce18398e183a1-e183a3

e183a4e1839ae18394e18391e18390e183a2e18390-e183a8e18394e183a1e18390e18395.pdf

10.https://ro.wikipedia.org/wiki/Peti%C8%9Bia_ dreptului [Accesat 26.08.2021]

11. CERBA, V. *Aspecte privind drepturile și libertățile fundamentale ale omului și cetățeanului.* Legea și viața. Mai 2016. p. 28. Disponibil online: http://www.legeasiviata.in.ua/archive/2016/5-1/5.pdf

12. The Virginia Declaration of Rights. [Accesat 26.08.2021] Disponibil: https://www.law.gmu.edu/assets/files/academics/founders/VirginiaDeclaration.pdf

13. The Declaration of Independence, July 4, 1776. [Accesat 26.08.2021] Disponibil: https://www.constitutionfacts.com/content/declaration/files/Declaration_ReadTheDeclaration.pdf

14. Bill of Rights. [Accesat 26.08.2021] Disponibil: https://www.archives.gov/files/legislative/resources/education/bill-of-rights/images/handout-3.pdf

15. Declarația drepturilor omului și cetățeanului [Accesat 26.08.2021] Disponibil: https://dreptuladrepturi.weebly.com/1789-declara355ia-drepturilor-omului-351i-ale-cet259355eanului-franta.html

16. DOLEA, I. *Curțile cu juraţi în procesul penal.* Chișinău, 1996. P. 9-10.

17. DOLEA, I. *Drepturile persoanei în probatoriul penal: conceptul promovării elementului privat.* Chișinău. Cartea Juridică, 2009 (Tipogr. «Bons Offi ces» SRL). p. 32-33.

18. БАРБИН, В. В. и др. *Обеспечение прав и свобод человека и гражданина в деятельности органов государственной власти:* учебник. М.: Академия управления МВД России, 2020. p. 10-15.

19. ЗИМИН, Е. *Механизм обеспечения конституционных прав человека в сфере деятельности полиции* (на примере США). Диссертация на соискание ученой степени кандидата юридических наук. Москва – 2015. p. 97.

20. GOLUBENCO, Gh. *Criminalistică: obiect, sistem, istorie* / Gheorghe Golubenco. Univ. Liberă Int. din Moldova. – Ch.: F.E.-P. „Tipogr. Centrală", 2008. P. 14-15.

21. ПРОКОФЬЕВ, В. *История возникновения сыска - уголовного розыска.* Современные проблемы права, экономики и управления. №1/2015. p. 41. [Accesat 26.08.2021] Disponibil: https://elibrary.ru/item.asp?id=25027484;

22. Скотленд-Ярд [Accesat 26.08.2021] Disponibil:https://ru.wikipedia.org/wiki/%D0%A1%D0%BA%D0%BE%D1%82%D0%BB%D0%B5%D0%BD%D0%B4-%D0%AF%D1%80%D0%B4

23. Înainte de înființarea NYPD, populația din New York, în jur de 320.000, era deservită de o forță formată din 1 pază de noapte, 100 de mareșali din oraș, 31 de polițiști și 51 de ofițeri de poliție municipale. La 7 mai 1844, statul New York a adoptat Legea poliției municipale, o lege care autoriza crearea unei forțe de poliție și a desființat sistemul de veghe nocturn. La cererea Consiliului comun al orașului New York, Peter Cooper a elaborat o propunere de creare a unei forțe de poliție de 1.200 de ofițeri. John Watts de Peyster a fost un prim avocat al implementării disciplinei și organizării stilului militar în forță. [Accesat 26.08.2021] Disponibil: https://en.wikipedia.org/wiki/History_of_the_New_York_City_Police_Department

24. Poliția de investigații a fost un serviciu de poliție al Ministerului Afacerilor Interne al Imperiului Rus din perioada 1866-1917, a cărui sarcină era să descopere infracțiunile, să efectueze o cercetarea penală asupra acestora și să caute criminali și persoane dispărute. [Accesat 26.08.2021] Disponibil: https://ru.wikipedia.org/wiki/%D0%A1%D1%8B%D1%81%D0%BA%D0%BD%D0%B0%D1%8F_%D1%87%D0%B0%D1%81%D1%82%D1%8C

25. КОНОВАЛОВ, С. Г. *Элементы германской модели досудебного производства в уголовном процессе постсоветских государств.* Диссертация на соискание ученой степени кандидата юридических наук. Москва – 2018. p. 114.

26. Устав уголовного судопроизводства от 20 ноября 1864 г. [Accesat 26.08.2021] Disponibil: https://constitution.garant.ru/history/act1600-1918/3137/

27. НОВИКОВА, Е. А., ШУМИЛИН, С. Ф. *Следственная и оперативно-розыскная деятельность: интеграция или взаимодействие* // Судебная власть и уголовный процесс. 2018. № 2. С. 89.

28. КАРЯГИНА, О. В. *История становления института дознания в уголовном процессе России.* Вестник Таганского института управления и экономики N.1/2016. p. 65.

29. ЕЛИНСКИЙ, В. И., ИСАКОВ, В. М. *Становление и развитие уголовного сыска в России* (X – начало XX в.) М., 1998. С. 65. [Accesat 26.08.2021] Disponibil: https://ru.b-ok.global/book/6117329/f7bd7b

30. *Права человека* / отв. ред. Е.А. Лукашева. М., 1999. p. 185.

31. ШЕВЕЛЬ, Д. В., АЛИСОВА, Е. А. *Становление и развитие института возбуждения уголовного дела в Российском и зарубежном уголовном процессе* // Политематический сетевой электронный научный журнал Кубанского государственного аграрного университета. № 133. 2017. С. 275-287

32. ВОЛОДИНА, Л. М. *Проблемы регламентации возбуждения уголовного дела* // Библиотека криминалиста. 2013. № 4. С. 10. [Accesat 26.08.2021] Disponibil: https://studylib.ru/doc/2176375/problemy-reglamentacii-vozbuzhdeniya-ugolovnogo

33. *Уголовно-процессуальный кодекс Германии.*

[Accesat 26.08.2021] Disponibil: https://ru.wikipedia.org/wiki/Уголовно-процессуальный_кодекс_Германии

34. ГОЛОВКО, Л. В. Постсоветская теория судебного контроля в *досудебных стадиях уголовного процесса: попытка концептуального переосмысления* // Государство и право. 2013. № 9. С. 29-32.

35. ДИКАРЕВ, И. С. *Стадия возбуждения уголовного дела – причина неоправданных проблем расследования* // Российская юстиция. 2011. № 11. С. 38-40.

36. Конституция Союза Советских Социалистических Республик. Принята на внеочередной седьмой сессии Верховного Совета СССР девятого созыва 7 октября 1977 г. [Accesat 26.08.2021] Disponibil: http://www.hist.msu.ru/ER/Etext/cnst1977.htm

37. ФРОЛОВ, В. Ю., ЧЕЧЕТИН, А. Е., ПЕНКИН, В. С. Митрофанов Е. А. *Закон РСФСР «Об оперативно-розыскной деятельности органов внутренних дел»* (инициативный авторский проект) / Информационное и правовое обеспечение деятельности органов внутренних дел: межвуз. сб. науч. тр. – Ч. 2. – Омск, 1991. – С. 119

38. Rezoluția 1373 (2001) Consiliului de Securitate al Națiunilor Unite privind amenințările la adresa păcii și securității internaționale cauzate de acte de terorism (adoptată la 28.09.2001).

39. Al doilea Protocol adițional la Convenția Europenă de asistență judiciară în materie penală (adoptată la 08.11.2001).

40. Convenţia ONU împotriva corupţiei (adoptată la New York la 31.10.3003).

41. Recomandarea Consiliului Europei (2005)10 cu privire la tehnicile speciale de investigaţii (20.04.2005).

42. Convenția Consiliului Europei privind spălarea, descoperirea, sechestrarea și confiscarea produselor infracțiunii și finanțarea terorismului (adoptată la 16.05.2005).

43. Operațiunea Titirezul [Accesat 26.08.2021] Disponibil: https://ro.wikipedia.org/wiki/Opera%C8%9Biunea_Titirezul

44. Hotărârea parlamentului RM nr.39 din 08.06.2019 pentru adoptarea Declarației cu privire la recunoașterea caracterului captiv al statului Republica Moldova.

45. Hotărârea Guvernului nr.199 din 13 martie 2013.