

CURRENT ISSUES OF HUMAN RIGHTS VIOLATIONS DURING THE PERFORMANCE OF SPECIAL INVESTIGATIVE MEASURES

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Abstract

Human rights and dignity are taken into account when drafting any law in a democratic state and the law governing special investigations in this area is no exception. Society's perception of the purpose of the Special Investigation Activity (SIA) is often wrong or distorted. One of the most common ambiguities in this regard is due to the dichotomy which consists in the fact that they are intended to defend the rights and legitimate interests of the person, and on the other hand the need to restrict certain rights (inviolability of private and home life, secrecy of correspondence - hereinafter referred to as civil rights) under special conditions, to ensure the security of people against crime.

Respect for human rights is not ensured by being harmless and gentle with the criminal phenomenon, on the contrary, the prevention and fight against crime is an objective of human rights. Each state has a positive obligation to protect its society against this scourge, and its duty, through its competent bodies, as well as through the legal instruments of obtaining information called Special Investigative Measures (SIM) is to prevent and investigate anti-social events.

Although SIM, by their nature, can be more or less intrusive, their realization remains perfectly legal when they are carried out in accordance with the rule of law.

At the same time, in practice, it has been found that civil rights violations have sometimes been admitted to the realization of SIM in the name of preventing and combating crime, which has become the latest excuse against which human rights violations have been committed. This study is dedicated to the subject of violations of civil rights in the realization of SIM, the correct definition of which has a special importance for the practical solution of the problem of respect for civil rights in the realization of SIM.

Keywords: *civil rights, special investigation activity, violation of human rights, special investigative measures, offenses etc.*

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1. Introduction.

An important guarantee of compliance with the law in the special investigation activity is the supervision of this activity, which can be structured

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in: control by the supreme organs of state power, judicial review, control by prosecutors and departmental control.

We can also look at the guarantees of the special investigation activity in terms of respect for human rights and freedoms. The idea of human rights has its roots in the philosophy of ancient Greece and in religion: all people are equal before God. The document pages contain excerpts from the most important human rights texts: “Virginia Bill of Rights” (1776), “Declaration of Independence of the United States of America” (1776), “Declaration of Human and Citizens’ Rights” since the French Revolution (1789), “Universal Declaration of Human Rights” signed by the United Nations in 1948, European Convention on Human Rights signed on 4 November 1950 in Rome, entered into force on 3 September 1953.

Human rights are the rights of all human beings, meant to protect them from possible abuses of the state, eternally valid rights that in principle cannot be restricted by any state. From the time of the struggle against absolutism, they were considered to be “innate” and “inalienable” rights. Human rights are based on fundamental human rights, and from them derive the right to the free development of the personality, equality before the courts and non-preferential treatment, freedom of religion and conscience, freedom of expression, of the press, of information and of education, freedom of assembly and association, freedom of circulation, freedom of profession and employment, inviolability of the domicile, guarantee of property and right of inheritance, the right to asylum and petition, as well as related rights, such as the guarantee that no one will be unjustifiably arrested.

Man enjoys rights inherent in human beings wherever he may be, regardless of his status or the region in which he was born, place of residence, the way he works or lives, regardless of nationality, race, sex, faith, religion and philosophy, material status, because these rights have a universal character, the very universal character of human rights.

In the current context, the issue of fundamental human rights and freedoms is one of the most important issues in both the national political life of each state and in the international political life. No legal provision may be interpreted as restricting or infringing on human rights and fundamental freedoms, which must be recognized by the laws of any country.

2. General considerations regarding the violation of civil rights in the process of carrying out the SIM

Although human rights are particularly relevant in the twentieth century we cannot talk about their observance in the realization of SIM without talking about the opposite phenomenon of observance - namely the non-observance of these rights, or about the violations admitted to the realization of SIM.

The analysis of the violations will also be the general criterion for assessing the state of respect for civil rights when carrying out the SIM. In particular, this can be judged by the total number of infringements, their types, the nature and degree of public danger, the prevalence among other omissions in the service which are not taken into account.

At the same time, the analysis of the mechanism of their commission is, in essence, the only real way to identify the causes of the violations taken into account and the conditions that contributed to it. Based on this, it is possible to improve the legislation on SIA by developing practical measures to prevent possible violations of civil rights.

However, there is a problem with this chapter - the process of identifying violations of civil rights in the implementation of the SIM has a rather high degree of latency. Some of the results of controls by institutions empowered with this right remain hidden.

As shown in the report on the activity of the Public Prosecutor's Office of the Republic of Moldova for 2020, "special investigation activity is a very sensitive area in terms of interference, especially in the privacy of the person, special attitudes in their application being necessary. As the special investigation activity is a "confidential" or even "secret" area of the activity of the prosecutor and other institutional bodies, only some statistical data will be reflected" – the violations recorded in the process of carrying out the SIA remain for the time being also under the secrecy initial probably.

It should be noted that the ECHR has provided that sometimes evidence of infringements of SIM rights is not necessarily mandatory, since the possibility of proving them is difficult or impossible to obtain. The very presence of certain legislation which has allowed the intrusion to take place may convince the Court that interference has taken place, even if it has not been substantiated. Unfortunately, the Republic of Moldova has been the subject of such a conviction at the ECHR, not for violations of civil rights, but because the legislation did not contain sufficient safeguards against abuses by national authorities.

The legal provisions governing SIA must meet the triple test: clarity, predictability and pursue a legitimate purpose, and the interference made in accordance with such legislation is considered justified and compatible with art. 8 of the Convention.

Violation of a person's civil rights exists when the legal framework regarding the SIA, which entails the disciplinary, contravention or criminal liability of the investigating officers for the illegal acts committed during the execution of the special investigative measure, is not respected (art. 13 of the law on SIA). Every violation of the legal norms for which liability is provided, endangers or harms a certain social value, and depending on their social danger, the state is determined to apply legal coercive measures to combat them.

In order to determine the social danger, various criteria are used, these being first of all, the life and health of the person, his honor and dignity, which are inseparable from his rights and freedoms. Consequently, violations of citizens' rights and freedoms are deliberately dangerous from a social point of view. However, although they are considered dangerous, they fall into the category of non-serious or even minor offenses under the Criminal Code.

The realization of the SIM is also conditioned by the reasonable suspicion regarding the preparation or commission of a serious crime, particularly serious or exceptionally serious, with the exceptions established by law.

At the same time, the following question arises: why the legislator set exactly such a level from which it would be possible to restrict civil rights and achieve SIM? Perhaps it makes sense to reduce the level from which it is possible to restrict human rights or, on the contrary, to increase it to particularly serious crimes?

It is likely that SIM's authorization was based on the seriousness of the offense by the legislature in order to respect the proportionality between the restricted right and the need for the measure to be taken, only that this premise creates a vicious practice in which most criminal cases (from specialized prosecutors) start with the qualifier committed by an organized criminal group or a criminal organization, as mentioned in the Synthesis of the Results of the Verification of the Activity of the Specialized Prosecutor's Offices. The imposition of this rating gives the offense the appropriate gravity to order and authorize the SIM. Subsequently, as mentioned in the same summary, the persons are removed from prosecution, sometimes even in full, are released from custody and criminal cases are sent to court for minor offenses, only in the case of persons with a lesser role of involvement in the commission of crimes, criminal penalties are non-custodial.

The analysis showed that as a result of the application of these procedures, which we have just talked about, in the period August 1, 2016-2019; only 10% were cases of crimes committed by organized groups out of the total number of cases examined with a sentence.

The problem of determining the level from which human rights are restricted to the realization of SIM does not seem to have an ideal solution. Within the SIM, there is a risk of restricting the civil rights of third parties who, as may be shown later, have no attribution to the crime. The legislator did not reach a consensus on this issue.

In a separate opinion of the Consultative Council of European Judges, which considers that, "regardless of the seriousness of the offenses, courts should, at any stage of the investigation, ensure that restrictions on individual rights are limited to those actions which are strictly necessary to protect the public interest".

3. Civil society's perception of the realization of SIM.

SIA is meant to protect the public interest from anti-social activities, especially at the current stage when the methods and techniques of committing criminal activity are increasingly sophisticated and camouflaged, so state bodies are forced to use the legal arsenal provided by law in the same secret way (Glavan, 2019:48).

But society still fears that this unknown legal instrument, which claims to protect it, will not violate its rights and freedoms.

This is probably due to the Soviet past of the Republic of Moldova, a period in which violations of any rule of law reached its peak. It is no coincidence that the mere mention of the special services of the time (KGB, NKVD) is associated with iniquity (Calcavura, 2020:237-242).

Although more than a quarter of a century has passed since independence, society's perception of the role of SIA and especially SIM has not changed much, but they have remained a kind of "scarecrow" for much of society.

By way of example, since the publication of the first law regulating SIA (1994), the authors of human rights reports have been concerned about the provisions of this law. As we can see in the communication, the lawyers were very concerned about it; it was considered that the law would be a fertile ground for committing a series of human rights violations, being proposed even its annulment.

The subdivisions created to enforce the law were not overlooked either, as an example of the establishment of the Department for Combating Corruption and Organized Crime, which obviously could accomplish SIM, it was written that: "the employees of the department have functions that are contrary to human rights and fundamental freedoms guaranteed by the Constitution".

We also find authors who argue that this activity is absolutely vital to the fight against crime.

Author Gusev V. argues that "limiting or prohibiting the realization of SIM will create a paradox when: the state will not be able to restrict the rights and freedoms of the offender, who in turn (by offense) violates the rights and freedoms of the victim, guaranteed by the Constitution of that state" (1972:45).

4. The challenge in the context of SIM achieving

Another challenge is to document certain categories of offenses for which the competent services are required to have recourse to an undercover investigator.

In the law 59 on SIA (art. 30 paragraph 6) and in the CCP (art. 136 paragraph 6) it is mentioned: "The undercover investigator is prohibited from provoking the commission of crimes." It is not clear why the above-mentioned normative acts prohibit provocation only in conducting undercover investigation, and it is not a general rule common to all SIM.

In this regard, the ECHR in *Gafton v. Germany* (judgment of 30 June 2008) discloses the principle of “Poisoned Tree Fruits”, prohibiting the use of evidence which is lawfully administered but which is derived (in close connection) from evidence obtained illegally. In other words, if the probative source “tree” is struck by nullity, then all the evidence obtained by its “fruit” will be the same.

Analyzing the decisions of the national courts, we note that it is often invoked when carrying out the SIM that those who carried out the measure assumed the duties of a “provoker”.

Therefore, the part of the defense requesting that the means of evidence obtained later and derived from this probative source, such as the statements of the injured parties, witnesses and other evidence, within the meaning of art. 94 of the Code of Criminal Procedure should not be admitted as evidence and therefore should be excluded from the file.

We note that in the terminology glossaries of the Special Services (KGB) of the USSR we find such a term as “provocative agent” which was described as “inciting actions that would aim to compromise, or weaken the work capacity of an organization by blackmail, bribery, and extortion of its staff that could lead to their arrest.” A very important detail from the same source shows that “the challenge is an activity specific to capitalist countries (FBI of the USA)” (Maslennikov, 1972: 89). Obviously, such an approach cannot be accepted as fair, excluding from the start a possible challenge from its own employees.

Another similar example given this time by a Constitutional Court on the subject of SIM was as follows: “Criminal activity does not belong to the sphere of a person’s private life, and the conduct of SIM (including secret ones) to solve operational tasks cannot be considered as a violation of constitutional rights”

At present, there is no mechanism to ensure the collection of information only in connection with the alleged criminal activity of the person, with which sometimes the sphere of privacy will inevitably be interfered with.

5. The concept of violation of civil rights

In order to be able to establish violations of civil rights, they must be of a legal nature in order to receive a legal assessment based on legal norms. Any violation of civil rights must be expressed in the form of a mandatory restriction on investigative officers from certain actions or inactions based on legal rules. Thus, in order to establish the list of signs which constitute a precondition for the qualification of the actions of the investigating officers, it is necessary to draw up a general concept of violation of civil rights.

Some researchers have put forward a number of mandatory conditions and characteristic signs that need to be taken into account when determining civil rights violations during conducting SIM.

The author Gorodilov A. mentions that in order to establish the violation of civil rights the deed must be accompanied by:

- committing a crime, offenses, disciplinary violations;
- the presence of a special subject endowed with tasks to perform SIM, whose implementation is subject to control and supervision;
- linking these unlawful acts to the official duties of the person and causing damage by admitting violations of the rights and interests of participants in relations in the field of SIA (2006: 41).

In another paper the author Mahmutov T. makes another classification, and in addition to the presence of the legal liability provided (crimes, etc.), and the subject authorized to carry out SIM, the author also adds the following:

- The presence of a real act (action or inaction), committed consciously and voluntarily.
- Presence of a public danger, i.e. causing harm or creating a threat of harm to the civil rights of an individual.
- Presence of illegality, i.e. infringement of a rule of law which provides for a certain order of conduct or decision-making.
- Presence of guilt in causing harm to public interests (civil rights) (2007:62).

These characteristics are derived from the legislation of the Russian Federation, which in many cases also corresponds to the national legislative framework of the Republic of Moldova.

By the provisions of paragraph 1 of art. 14 of the Criminal Code of the Republic of Moldova, the legislator established that “the crime is a prejudicial act (action or inaction), provided by the criminal law, committed with guilt and punishable by criminal punishment”. Art. 10 of the Contravention Code stipulates that the contravention is the wrongful act - action or inaction - with a lower degree of social danger than the crime, committed with guilt, which violates the social values protected by law, is provided by this code and is subject to sanction.

Thus, the general basis of legal liability is the commission of a prejudicial act, provided by law committed with guilt by persons legally fit to bear liability.

In this context, special attention was paid in the theory of the state and law, to the signs necessary for the imposition of legal liability, which is defined as the composition of the crime (Cicala, 2021:68).

The composition of the crime includes the object and the objective side, the subject and the subjective side.

The object of the offense in question is the rights and freedoms of a person and of a citizen in the implementation of the SIM.

The objective side consists of the actions or inactions of the investigating officers expressed by the non-fulfillment or improper fulfillment of their official duties which led to the violation of civil rights.

A mandatory sign of the objective side is the presence of a causal link between the action or inaction of the SIA subjects which led to the triggering of harmful consequences.

The consequences of performing the SIM in violation of the law can be material or moral, and the person who was the target of such violations needs to have repaired the damage caused.

The actions of investigating officers must meet at least two main criteria. First of all, to be directly associated with the activity of the investigation officer, Criminal Code of the Republic of Moldova expressly provides art.177 paragraph 2 letter b; 178 paragraph 2 letter a; art. 178 paragraph 2 letter a, violation of civil rights “using the service situation”.

Secondly, SIM must be directed against the legitimate interests of individuals or contrary to the purpose and tasks for which they were intended.

The subject of the violation of civil rights in the realization of SIM may be the officers from the specialized subdivisions mentioned in art. 6 of law 59 on SIA.

It is well known that third parties who assist investigating officers in carrying out SIA tasks are often involved in carrying out SIM; about such persons the author Efremov A. claims that they cannot violate civil rights in the realization of SIM. If, on their own initiative, in the course of assisting the measure, they are committing illegal actions, they are liable as perpetrators of the appropriate act, even if this happened during the execution of the SIM (Efremov, 2001:68).

For the subjective side of the violations in question, it is necessary to establish in the act of the SIA subject a certain psychic attitude towards the violation of civil rights in the form of intent or recklessness. If the investigating officer in carrying out the measure is aware that his actions are outside the legal framework and are causing harm or endangering the civil rights protected by law, the perpetrator shall act with direct intent. If he acts recklessly, he may not be aware of the prejudicial nature of his actions / inactions, although he should have been aware of the circumstances.

Conclusion

In our view, the wording of the general concept of infringement of civil rights in the performance of the SIM provides that the investigating officers should be found guilty (actions or inactions) containing the composition of an offense under criminal law, as well as a misdemeanor or disciplinary offense committed in connection with or as a result of fulfilling his official duties provided by law.

We believe that to the SIM should be given higher priority in national policy because it includes all the basic material and intangible needs of people, such as protection against crime, protection of rights and legitimate interests, property, etc., without which no human being can lead a dignified existence.

It also requires an analysis of the types of violations of civil rights in the realization of SIM, which will allow us to resolve their generic in a timely manner and outline measures to eliminate the causes and conditions that contribute to the commission of violations.

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