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Investigating Cases by Undercover or Real Identity Investigators and Collaborators

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Abstract: "Evidence is the main nerve of the criminal process. They shed light on nebulous issues in the criminal process", said professor Ioan Tanoviceanu (1913; Boţic, 2016, p. 132). Today, the notion has kept the same metaphorical meaning, as the entire activity of judicial bodies is based on the notion of evidence. The activity of the judicial bodies starts from the moment of initiation of the criminal process. The existence of the criminal process, seen as a report of criminal procedural law, is in turn conditioned by the birth of the legal report of substantive criminal law (Florea et al., 2019; Florea & Galeş, 2020). As is known, the material criminal conflictual report arises from the violation of substantive law norms, or more simply from the commission of a crime (Damian et al., 2021). The purpose of the entire activity of the judicial bodies, especially in the criminal prosecution phase, is to reconstruct the criminal course of action (iter criminis) and to decide on the merits of the case as a result of the administration of the evidence obtained legally and in good faith (Apostu, 2016; Apostu & Petrescu, 2017). Only in such conditions can the "satisfaction" of fairness be offered, which increases the confidence of litigants in the justice system and finally in the educational role of the criminal process (Mateuţ, 2019, p. 28).

Keywords: *Evidence; means of proof; evidence; guilt; factual circumstances.*

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1. Introduction

In this successive geometry of events, there are three main components of the evidentiary mechanism in the criminal process: the evidence (*probationes*), the means of proof (*media probandi*) and the evidentiary procedures (*modus probandi*).

The entire sequence must take place in consideration of one of the fundamental principles of the criminal process, namely the principle of finding out the truth. Rightfully so, in the doctrine, the question "Finding whose truth?" was born (Boțic, 2016, p. 128). The question, although at first sight it seems a simple one, is based on a foundation provided by the Romanian legislator in the Criminal Procedure Code (Romanian Parliament, 2014). Consequently, we must bring to light the numerous provisions of the Criminal Procedure Code that make direct reference to the notion of "evidence" ("judicial bodies have the obligation to ensure, based on evidence..."), concluding by affirming that, in essence, the truth that both court decisions and ordinances express is judicial truth, considered by some authors (Mateuţ, 2019, p.445) to be a species of objective truth, of pure truth (Romanian Parliament, 2014) . Therefore, the judicial bodies, through the documents that emanate from them or that belong to them, reflect the truth that emerges from the evidence administered in the case.

2. The notion of investigator, collaborator and informant

Although the provisions of art. 138 paragraph (10) provides a definition of the research method as "the use of a person with an identity other than the real one for the purpose of obtaining data and information regarding the commission of a crime", we appreciate that this is formulated in a excessive general way, that does not allow the concrete delimitation of the notions of investigator, collaborator or informer, the latter being even slightly marginalized legislatively, the only mention being included in the provisions of art. 149 paragraph (3) of the Criminal Procedure Code (Romanian Parliament, 2014). In such conditions, related to the notion of informant, we must consider Law no. 218/2002 on the organization and operation of the Romanian Police, republished (Romanian Parliament, 2020), which uses the notion of informant in art. 32 paragraph (1) as a means of obtaining information in complex cases involving serious crimes or special modes of operation.

No other paragraph provides any definition regarding the informants. This lack of clarity is also maintained regarding the notion of collaborator. In elucidating the legal issue, we will have to refer to the

provisions of art. 148 para. (4) of the Criminal Procedure Code (Romanian Parliament, 2014), which states that "undercover investigators are operative workers of the judicial police", therefore, *per a contrario*, informers and collaborators will not be part of the judicial police, but third parties, "who understand how to help judicial bodies in investigative activities" (Udroiu, 2021, p. 480).

3. Conditions for authorizing the evidentiary procedure

Regarding the conditions for authorizing the evidentiary procedure, we must note that the crimes for which there must be a reasonable suspicion in order to warrant special surveillance methods, although at a first reading seem to be identical, they are slightly different from those provided by art. 139 paragraph (2) of the Criminal Procedure Code (Romanian Parliament, 2014). This difference leads to the idea of increasing the presumed seriousness of the crimes for which surveillance methods can be used, a fact highlighted, for example, by the exclusion of the general phrase of crimes "against patrimony", or the exclusion of rape crimes. The same idea is also supported by the visible raising of the general maximum of the prison sentence in the case of presumed serious crimes from 5 years, as provided for in the matter of technical supervision, to 7 years (Romanian Parliament, 2014, art. 148 para. 1 letter a) .

Apart from the previously highlighted aspect, there are no differences regarding the conditions that must be met for the authorization of such evidentiary methods, thus maintaining the necessity of the existence of proportionality and subsidiarity in the matter of art. 139 paragraph (1) of the Criminal Procedure Code (Romanian Parliament, 2014).

Also, as a condition of authorization, the hypothesis provided by art. 148 para. (10) of the Criminal Procedure Code (Romanian Parliament, 2014), which states that in order to be able to use the method of using collaborators, in addition to the general authorization conditions, a condition related to subsidiarity must be met, in our opinion, in order for the prosecutor to assess that the activity of the undercover investigator is not sufficient or not possible. So, for the purpose of this analysis, we separate the rule according to which the main method of carrying out the evidentiary procedure is the use of undercover investigators, and the subsidiary method will be that of calling on investigators with real identity or, as the case may be, of collaborators.

Finally, we must highlight the provisions of art. 148 paragraph (3), which include the possibility that only the undercover investigator can use some of the special surveillance methods, when the prosecutor deems it

necessary in the investigative activity, provisions that will find their applicability not by reference to the conditions provided by art. 148 paragraph (1), but in relation to the conditions provided by art. 139 of the Criminal Procedure Code (Romanian Parliament, 2014). Also, the non-inclusion of the notions of collaborators or investigators with real identity in the article is relatively regrettable, potentially leading to solutions to reject the prosecutor's requests by reporting to the person who will have to implement the respective measure. We propose that, *de lege ferenda*, the provisions of art. 148 paragraph (3) be completed, at least with the phrase „investigator with real identity", considering that legal problems may arise by extending the use of a collaborator, who is not a member of a judicial body and therefore will not be able to be authorized to implement the measure of technical supervision.

4. Particular problems regarding the evidentiary procedure

The particular problems with the special evidentiary procedure are raised by the regulatory differences between surveillance measures, which as we have noted so far represented the general disposition of the law, and the use of undercover, real-identity investigators and collaborators. Thus, in this matter, the authorization procedure belongs exclusively to the prosecutor, who will order the performance of the evidentiary procedure either *ex officio* or at the request of the criminal investigation body (Romanian Parliament, 2014, art. 148 paragraph 2). As a differentiating element, in contrast to the duration for which the surveillance measures are taken, is the fact that the authorization ordered by the prosecutor will be for a maximum period of 60 days (Romanian Parliament, 2014, art. 148 paragraph 1), following that subsequently, it can be extended for well-justified reasons, as long as the total duration of the evidentiary procedure does not exceed one year in the same case and with respect to the same person (Romanian Parliament, 2014, art. 148 paragraph 9).

As an exception, the duration may be longer than one year in the case of limited offenses provided by law. We believe that the existence of such a legal framework makes it possible to use the special method for very long periods of time, which can easily lead to serious violations of the rights guaranteed by the European Convention. So, we propose, together with other authors (Mateuț, 2019, p. 722) that de lege ferenda the implementation of a procedure that prevents arbitrariness in this matter, a procedure that involves the judge as the sole guarantor of the authorization and extension, under legal conditions, of the evidentiary procedure.

Regarding the activity of the investigators or collaborators, this is represented by the collection of data and information in accordance with the ordinance by which they were authorized, which they will later make fully available to the prosecutor on the basis of a report (Romanian Parliament, 2014, art. 148 paragraph 5).

5. Conclusions

Finally, we must show that the Romanian legislator gave special attention to the protection of undercover investigators and collaborators by regulating, through the provisions of art. 149, the rule of the non-disclosure of identity by those who have the right to know the identity of the respective persons. In the same way, both the people involved, as well as their family members or other people who suffer repercussions from the activity they undertake, will be able to benefit (Romanian Parliament, 2014, art. 149 paragraph 3) of the special protection measures for threatened witnesses (Romanian Parliament, 2014, art. 125 et seq.).

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