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PROVOCATION TO CRIMES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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This paper explores the features of qualifying the deeds of law enforcement bodies as a provocation (incitement) to crimes with taking into account the legal positions of the European Court of Human Rights.

Keywords: European Court of Human Rights, Strasbourg Court, provocation to crimes, human rights.

At the contemporary stage of international relations development at the time of globalization and integration of socio-cultural, economical, legal sectors of various countries, national legal systems [12, 4-7], the rights of man have become an integral part of any civil society, the highest manifestation of its moral and legal values. In this regard, in international public law has been formed a practice of their systematization through the conclusion multilateral international treaties, which reflect the obligation of States to comply with the fundamental principles of respect and protection the rights of man and citizen.

Thus, in international legal literature, appeared the notion of "human rights standards", which are the obligations of States not only to provide persons under their jurisdiction certain rights and freedoms, but also do not infringe these rights and freedoms.

It should be noted that the above standards are developed not by separate countries, but by derivative subjects of international law – international organizations. The leading organization in the field of international relations is the Council of Europe that over the last few decades has turned into a major regional integration organization, the membership of states in which indicates the presence of high levels of democracy and respect for basic features of a constitutional state.

One of the most important achievements of this organization is the establishment of a common for all Europe standards' system of fundamental human rights, the core of which is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – Convention, European Convention). At present time the Convention structure consists of a preamble, three sections, fourteen additional protocols and is a model for the unification of normative and legal acts on human rights of countries in other regions of the world (for example, constitutional acts in almost all the countries of the post-Soviet area).

Section I of the Convention "rights and freedoms" (articles 2-18) contains the substantive provisions of the Convention defining the rights and freedoms that must be observed by States-participants.

Section II "The European Court of Human Rights" (articles 19-51) establishes a special mechanism to protect the rights guaranteed under the Convention, establishes the European Court of Human Rights, the procedure and jurisdiction.

Section III "Other Provisions" (Articles 52-59) contains the final rules on the procedures for the entry into force of the Convention, conditions of its denunciation, and establishing reservations.

Due to the fact that, since the signing of the Convention, the text has been revised several times, were signed by a total of 14 protocols, each of which is a separate international agreement, supplementing the Convention by new rights, principles and guarantees and structurally separated from the main part. In order to systematize all protocols can be conditionally classified into two groups, the first of which is designed to improve the control mechanism of the Convention, first and foremost, in order to enhance the role of the European Court of Human Rights in the system of protection and complying with the inalienable rights of man (protocols No. 2, 3, 5, 8, 9, 14). The second group is aimed at addition the Convention new rights, principles and guarantees (No. 1, 4, 6, 7, 12, 13).

To determine the essence and significance of the Convention it is appropriate to characterize and classify it on various grounds.

On the content of enshrined norms the Convention includes the following categories of rights and freedoms:

- personal and political rights (the right to life – article 1; to dignity in the form of the prohibition of torture and other inhuman; freedom of movement – article 2 of Protocol No. 4, etc.);
- socio-economic rights (the right to respect for private property – article 1; to education – article 2; to freedom of thought, conscience and religion –article 9; to freedom of expressions – article 10 of Protocol No. 1).

Under the chronological approach the enshrined in the Convention guarantees are the rights of first generation, i.e. the rights that have been recognized in the national constitutions of the post bourgeois era (18th-19th centuries) [13, 14-16].

However, the specificity of the European framework for the protection of human rights lies in not only an implementation of an international act that unifies all the natural rights and freedoms, but also in the creation of a supervisory body for compliance with the Convention norms – the European Court of Human Rights.

The European Court of Human Rights (hereinafter referred to as the European Court, the Strasbourg Court) is an independent supranational justice authority, which monitors compliance with the fundamental human rights by all States-participants of the Convention at the European level. During the consideration of specific complaints from private individuals against the acts and decisions of authorities and officials of the States-participants of the Council of Europe the European Court of Human Rights providing uniformity at the same time solves an important task of interpretation of the Convention norms. The content of the norms laid down in the document is substantially supplemented and refined in the judicial practice of the European Court, which is actually the second most important source of European human rights standards.

Constantly emphasizing that the Convention is a living document, i.e., it is able to adapt its content to the development of society, the Strasbourg Court has demonstrated the ability to deduce from it, and such provisions, which are far away from the original intentions of the authors of its text. Interpretive activity of the Strasbourg Court is not limited to a simple explanation of international treaty norms. The Court often deduces new provisions from the Convention, which are recognized by the Court as inherent in the Convention or arising from it. This way of an official interpretation in the theory of law commonly referred to as an evolving one. (*author's note*. for the first time evolving interpretation method was applied by the European Court of Human Rights in the case "Tyrer v. UK", where it was established that corporal punishments, which were not contrary to human rights standards that existed at the time of the adoption of the Convention, during the consideration of the case ceased to conform to the principles and values of European society. Therefore, the Court refused to follow the original intentions of the authors of the document and recognized that corporal punishments of schoolchildren violate article 3 of the Convention). Due the possibility of evolving way of interpreting, the Convention is not considered as a set of stuck norms, but as a document that is constantly evolving and must be interpreted in

the light of current conditions. As a result Court activity quite often turns into a genuine legislative policy.

As an argument in favor of the above statement can serve the decision of the Strasbourg Court from October 06, 2005 on the case "Hirst v. United Kingdom" [7] regarding the automatic loss of active electoral rights of persons serving sentences in prisons. The Court recognized that such a limitation of voting rights was only possible as an individual sanction type for specific categories of offenders, but not as a common ban for all convicts. In interpreting the Strasbourg Court referred to article 3 of Protocol No. 1 of the Convention, which provides that States-participants of the Council of Europe undertake to periodically hold free elections by secret ballot, to ensure the free expression of citizens' will in formation of the legislative branch of state power.

As can be seen, in its literal wording the cited article does not in itself guarantee the electoral rights of convicts. However, the Court interpreted that these rights derive from it and this may require legislative reforms in several countries of the Council of Europe, including the Russian Federation.

Became axiomatic the formula: Convention norms are applied in such form in which they are interpreted by the European Court. It has never been enshrined anywhere, but is recognized by all the states-participants of the Council of Europe, regardless of to which legal family belongs the legal system of a state-participant, whether it recognizes judicial precedent as the source of law or not.

Russia, acting as a full member of the Council of Europe since 1998, takes the rules of the Convention as part of the national legislation on the basis of part 4 article 15 of the Constitution. At the same time, recognizing the provisions of the Convention, our state is under an obligation to comply with the case-law of the European Court, which, in turn, proves the existence of a precedent as the main source of Russian law [13, 143-147].

History evidences repeated references by the Supreme Court of the Russian Federation to the precedents of the European Court. An example is the decision of the Plenum of the Supreme Court of the RF No. 5 dated October 10, 2003 "On application by the courts of general jurisdiction generally recognized principles and norms of international law and international treaties of the Russian Federation", in accordance with paragraph 10 of which law enforcement activity of Russian courts must be carried out in line with practice of the Strasbourg Court in order to avoid violation of the Convention [9].

However, the need to comply with the views of the European Court of Human Rights also applies to the executive authorities. Thus, section 2.1 of the decision

of the Constitutional Court of the Russian Federation No. 2-P dated February 05, 2007 states that the case-law of the European Court of Human Rights, along with the rules and ratified protocols of the Convention, is an integral part of the Russian legal system [8]. In this regard, the aforementioned sources must be taken into account by the federal legislator in regulating social relations and law enforcement agencies in the application of relevant law norms.

Through the practice of the European Court all branches of the Russian law are constantly being upgraded, including the criminal law. Moreover, there are direct references to the European Court in codified acts of many procedural branches [1; 2; 3].

One of the urgent problems of criminal-law nature in judicial practice (both the Strasbourg Court and national courts) is the question of responsibility for the provocation of a crime (*author's note*. Despite ongoing doctrinal debate among scientists, law enforcers and lawmakers on the issue of correlation the concepts of "provocation" and on the correlation between the concepts of "provocation" and "incitement" in the theory of criminal law, in this article these terms are synonymized). Crime provocation committed by law enforcement officials is quite common in law enforcement practice. This problem is particularly relevant in cases involving drugs, namely offences under articles 228-228.1 of the Russian Criminal Code.

Provocation is also often takes place in cases of bribery and commercial bribery (articles 204, 290, 291 of the Criminal Code RF), infringement of copyright and related rights (part 2 article 146 of the Criminal Code RF) and others.

Under the influence of the European Court July 24, 2007 was passed the Federal Law No. 211-FL "On Amendments to Certain Legislative Acts of the Russian Federation in Connection with the Improvement of Public Administration in the Field of Combating Extremism", according to which article 5 of the Law "On Operational-Investigative Activity" was amended as follows: bodies implementing operational-investigative activity are prohibited to incite, induce, encourage, directly or indirectly, to commit unlawful acts (provocation).

In other words, crimes provocation legally recognized unlawful method of operatively- investigative activity. However, despite the decent level of doctrinal elaboration and extensive experience of the European Court on crimes provocation on the part of law enforcement officials, national courts still makes glaring mistakes in cases of this category. Evidence of this can be the case "Veselov and Others v. Russia. The essence of the case is the fact that a few years ago, three citizens of Russia (Viktor Veselov, Maxim Zolotukhin and Igor Druzhinin) filed

complaints in Strasbourg (complaints number 23200/10, 24009/07, 556/10) [15] with statement that their guilt in national courts had been proven in violation of the European Convention and that they had risen to provocations of undercover police agents (militia at that time), who were inciting these citizens to commit crimes.

October 02, 2012, the European Court issued a decision, in which it found a violation of paragraph 1, article 6 of the Convention in respect of all three applicants who had been found guilty of the crimes that had been provoked. In favor of the applicants had been collected in a total of 15 600 euro in compensation for moral damages and court costs. And this is just the tip of an iceberg. This decision of the European Court is likely to become the leading precedent for another 150 similar cases against the Russian Federation, which are under consideration.

However, in all fairness, it should be noted that before the said case back in 2005 the European Court adopted a decision on the case "Vanyan v. Russia" from December 15, 2005, which contained the basic legal criteria to qualify law enforcement actions as a provocation [4].

In decision to the above case the European Court interpreting the provisions of the Convention concluded that "if the crime was allegedly provoked by the actions of secret agents, and there was no suggestion that it would be done without any intervention, then these actions were no longer agent's activity and constituted an incitement to commit a crime. Such an intervention and its use in criminal proceedings can lead to irreparably undermined principle of a fair court proceeding" [16]. The European Court also pointed out that law enforcement officers did not have reason to suspect the applicant of drug trafficking.

Thus, the intervention of the police and the use of obtained evidences in criminal proceedings against the applicant violated the spirit of the Council of Europe Convention.

The above results of interpretative activities of the European Court reflected in the decision of the Plenum of the Supreme Court of the Russian Federation No. 14 from 15.06.2006 "On judicial practice in cases of crimes related to drugs, psychotropic, potent and toxic substances" [10]. It explains, in particular, that results of operational-investigative activity could form the basis of a verdict, if obtained in accordance with the requirements of the law and indicate the presence of a culprit's intent on illicit trafficking in narcotic drugs or psychotropic substances, which has been formed independently of the activities of operational units employees, and the preparatory steps of a suspect necessary to commit a wrongful act.

Summing up the legal position of the European Court on cases involving provocation, we can select the following scheme of qualification law enforcement actions as a crime provocation.

First, we should focus on the definition of the concept of "provocation", which is contained in the resolution on the case "Ramanauskas v. Lithuania": "provocation by the police happens in cases where law enforcement officers or persons acting on their behalf are not limited to the investigation of criminal activity mainly passively, but have an impact and incite the commission of a crime, which otherwise would not have been committed, in order to solve a crime, namely, to obtain evidence of its commission and initiate criminal prosecution..." [5] [author's translation].

Regarding the above definition national courts often make it difficult to understand the phrase about carrying out an investigation by law enforcement agencies "mainly passively". This concept consists of two aspects: firstly, the existence of grounds for conducting a covert operation, and, secondly, the actions of the authorities in the course of its implementation.

Speaking of the first aspect, the case-law of the European Court establishes that must be objective suspicions that an offense would have been committed without the intervention of law enforcement authorities. Moreover, any preliminary information that an entity has already had intent to commit a crime must be verifiable. Law enforcement agencies should be able to demonstrate that they had a good reason for carrying out an infiltration mission. A mere allegation of police officers that they had information on the participation of a person in the committing of an offence shall not be taken into account.

The question about the moment, when authorities has begun a covert operation, is closely linked to the criterion of objective suspicion. National courts have to determine what exactly has taken place – a simple joining of law enforcement agencies secret agents to a being committed offense or incitement to the committing.

In this question, is of considerable importance the precedential ruling of the European Court on the case "Sequeira v. Portugal" [6], in which was found that there was no provocation on the part of law enforcement agencies, as citizens, A. and S. asked to cooperate with the investigation police department only after the applicant (the subject of an offense) had contacted with A. to arrange the delivery of cocaine to Portugal. From this point A. and S. acted as secret agents under the supervision of the investigation department with the permission of the prosecutor's office of the country. In other words, only after the voluntarily applicant's request the police started monitor the crime. Exactly this procedural factor distinguishes

this case from the case "Teixeira de Castro v. Portugal" [11], in which namely the police initiated the crime, but did not join the being committed one, as it was in the case "Sequeira v. Portugal".

Drawing a line between legitimate penetration of a secret agent and a provocation to an offense, the European Court considers the issue whether the applicant has been influenced to commit a crime by the police or agents-provocateurs. Relying upon the European Court's legal positions following the results of considering the above cases, we can safely assert that such an authorities' behavior like a repeated proposals to the commission of a wrongful act, despite the initial refusal of the very subject or persevering request is not a passive behavior.

On the issues of repeated proposal the case "Ramanauskas v. Lithuania" serves as a leading law enforcement benchmark. Being a prosecutor, the applicant argued that he had been privately asked by an unknown person who later turned out to be a member of a special anti-corruption police unit. The employee offered the applicant a bribe of 3000 dollars for the promise to contribute to the acquittal of a third party. Initially the applicant refused, but later agreed, after a police officer repeated his offer several times. A police officer informed his superiors, and in January 1999, the Deputy Attorney General sanctioned provocation of the bribe. Shortly thereafter, the complainant took a bribe from the employee. In August 2000, he was convicted of taking a bribe in the amount of $ 2500 and sentenced to imprisonment.

The European Court noted that the actions of the police officer and getting acquainted with the applicant went beyond passive monitoring of existing criminal activity: there was no evidence that the applicant has ever previously committed crimes, in particular those related to corruption, all meetings of the applicant and the police officer took place at the initiative of the last.

Thus, there is a provocation, if intent to commit a crime initially absented and was formed solely by the actions of operational law enforcement officers. The main question is who took the initiative. A person should start criminal activity on its own, without any external interference. Operational-investigative activities should monitor already ongoing criminal processes, but not promote to and, all the more provoke crimes.

Applying the above criteria, the European Court places the burden of proof on the public authorities. To this end, it ruled that the prosecution party had to prove the absence of provocation, provided that the statements of the accused were plausible.

Due to the numerous mistakes made by law enforcement agencies in investigations and courts in consideration this category of criminal cases, the Supreme

Court of the RF took decision on the generalization principle legal positions of the European Court on complaints against provocation of offenses, as a result of which the Presidium of the Supreme Court of the RF 26.06.2012 approved "Overview of the judicial practice in criminal cases on crimes related to illegal trafficking in narcotic drugs, psychotropic, potent and poisons substances" (hereinafter – Overview).

In this overview national judicial bodies are given clarifications about the cases, in which the results of the operational-investigative activity, used by the bodies of preliminary investigation to prove the guilt of particular individuals in committing acts related to illegal drug trafficking, should be recognized as inadmissible evidence. Also in the overview for the first time was given the definition of the term "Provocation on the part of law enforcement officers in carrying out operational-investigative activity".

With reference to the provision in paragraph 14 of the Plenum resolution No. 14 from 15.06.2006 it is said, that under provocation of drug pushing should be understood incitement, inducing, encouraging, directly or indirectly, to commit illegal actions aimed at the transfer of narcotics drugs to law enforcement officers (or secret agents).

However, up to this day, take place significant violations by law enforcement officials in the implementation of operational-investigative activity and by courts in consideration the cases of this category, what is certainly not acceptable in a legal state, in a State-participant of the Council of Europe.

Of course, it is not so easy to change the sense of justice among law enforcers and judicial community. But also it would be wrong to give up on the generally accepted principles of fair trial, which are not compatible with the provocation of crime by the authorities. It is important to absorb the principles of a fair trial enshrined in article 6 of the Convention and decisions of the ECHR, and to introduce into the consciousness of ordinary citizens and law enforcement officials the need for strict adherence to generally accepted in a civilized society principles of fairness in administration of justice.

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