

Artículo de investigación

Comparative legal analysis of responsibility for crime provocation in some countries of the Council of Europe

Сравнительно-правовой анализ ответственности за провокацию преступлений в некоторых странах Совета Европы

Análisis jurídico comparativo de la responsabilidad por provocación de delitos en algunos países del Consejo de Europa

Recibido: 3 de junio del 2019

Aceptado: 13 de julio del 2019

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SPIN code: 7953-0634

Abstract

The article is devoted to the consideration of the issues of responsibility regulation for provocation of a crime and for violation of operational - search legislation in some countries of the Council of Europe, as well as the possibility of using this experience by the Russian legislator.

The article analyzes the criminal and operational-search legislation of foreign countries, the judicial practice of the European Court of Human Rights, and statistical data on the number of complaints filed under Article 6 "The right to a fair trial", the European Convention on Human Rights and Fundamental freedoms for the 2008-2018 year.

Key words: Provocation of crime, operational - search measures, the ECHR.

Абстрактный

Статья посвящена рассмотрению вопросов регулирования ответственности за провокацию преступления и за нарушение оперативного законодательства поиск в некоторых странах Совета Европы, а также возможности использования этого опыта российским законодателем.

В статье анализируется уголовное и оперативно-розыскное законодательство зарубежных стран, судебная практика Европейского суда по правам человека, а также статистические данные о количестве жалоб, поданных по статье 6 "Право на справедливое судебное разбирательство" Европейской конвенции о защите прав человека и основных свобод за 2008-2018 годы.

Ключевые слова: Провокация преступления, оперативно - розыскные мероприятия, ЕСПЧ.

Resumen

El artículo está dedicado a la consideración de cuestiones de regulación de responsabilidad por provocar un delito y por violar la legislación operativa, buscar en algunos países del Consejo de Europa, así como la posibilidad de utilizar esta experiencia por el legislador ruso.

El artículo analiza la legislación penal y de búsqueda operativa de países extranjeros, la jurisprudencia del Tribunal Europeo de Derechos Humanos, así como datos estadísticos sobre el número de denuncias presentadas en virtud del Artículo 6 "Derecho a un juicio justo" del Convenio Europeo para la Protección de los Derechos Humanos y las Libertades Fundamentales para 2008 -2018 años.

Palabras clave: Provocación del delito, operativa - medidas de búsqueda, el CEDH.

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Introduction

At present, the issues of regulation of responsibility for provocation of a crime and for violation of operational - search legislation have been repeatedly raised in the scientific literature. First of all, the attention of the scientific community to this problem is related to the prevalence of this kind of actions committed by persons authorized to carry out operational - search activities, in cases of corruption, as well as related to drug trafficking.

The problem of studying this phenomenon is relevant not only for the Russian Federation, but also for many foreign countries, including the Council of Europe member states.

The article analyzes the legislation of the countries that were part of the Union of Soviet Socialist Republics and recognize the jurisdiction of the European Court of Human Rights (Azerbaijan, Estonia, Georgia, Latvia, Lithuania, Ukraine), because of historically determined similar approaches to the formation of criminal legislation. In addition, the legislation of such countries as Spain, Poland, Germany is analyzed in the article.

The concept of provocation of a crime, formulated by the ECHR in 2008, is examined; the statistics of complaints (from 2008 to 2018) of a violation of the right to a fair trial, as provided for in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which includes complaints about provocation of crime, are summarized and analyzed in the article.

Based on the study of criminal and sectoral legislation in the field of operational and investigative activities in selected countries of the Council of Europe, the article analyzes the possibility of using this experience by the Russian legislator.

Methodology

The article uses a comparative legal method of scientific research, which is one of the main methods in the study of legal phenomena, which makes it possible to identify the general, particular and individual in the legal systems of modern times. The application of this method is to use such comparison methods as functional - matching functions that a particular state institution performs, normative - using terms and categories of specific legal systems to analyze legal norms and legislative decisions, textual - analyzing which textual design is more

productive affects the implementation of legal norms on a national scale. Within the framework of the study, the criminal and operational-search legislation of the following countries was analyzed: Azerbaijan, Estonia, Georgia, Latvia, Lithuania, Ukraine, Spain, Poland, Germany. Analysis of the legislation of these countries allowed us to establish similarities and fundamental differences in the legal regulation of responsibility for provocation of a crime both by law enforcement officers and by others. In addition, the use of this method allowed us to determine how relevant provocation of crime is to the institution of complicity in each particular country.

The formal legal method is a specific system for processing and analyzing existing legal norms and existing legal practice. Its essence lies in the definition of legal concepts, in the identification of external signs of legal phenomena, their differences from each other, in the establishment and creation of logical structures based on legislative concepts.

The use of this method in the study allowed to identify certain signs of such a legal phenomenon as provocation of a crime and to establish its differences from the lawful activities of law enforcement officers, based, inter alia, in the practice of the ECHR.

In addition, the use of this method allowed to investigate the legal regulation of the grounds and mechanisms for conducting separate operational-search measures, in particular, test purchases, operational supplies, as well as operational experiments. The identified differences made it possible to formulate separate proposals for the reform of the operational-search legislation in the Russian Federation, including the improvement of ways to counter the provocation of crime by persons authorized to carry out operational-search activity.

The method of interpretation of legal norms implies the use of the following methods of interpretation: grammatical, systematic, logical, historical-political, special legal, teleological (target), functional.

The evaluative nature of such a legal phenomenon as provocation of a crime implies the use of a method such as the method of converting legal norms, expressed in the

application of the functional method of interpretation.

Results and discussion

The European Court of Human Rights (hereinafter - the ECHR), having considered a large number of cases involving the use of evidence obtained through the conduct of operational-search measures (hereinafter - the OSM) in the criminal process, continues to note that there is a systemic problem with provocation of a crime with parties to law enforcement in the Russian Federation.

The most typical situation is when the applicant claims that the authorities that conducted the operational-search measures incited him to commit a wrongful act. Accumulating such complaints, the ECHR considers them from the point of view of the observance of the right to a fair trial, as provided for by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention).

Part 1 of Article 6 of this Convention states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." (Guidelines for Article 6 of the Convention. The right to a fair trial (criminal law aspect) Council of Europe / European Court of Human Rights, 2014 p.6.).

The ECHR finally formulated the definition of a crime provocation in 2008 as an activity of police officers or security forces or other persons acting on the basis of instructions given to them, influencing a subject to provoke an offense that could not have been committed otherwise, in order to establish the possibility the commission of an offense and, thus, provide evidence and initiate criminal prosecution. (The case of *Ramanauskas v. Lithuania*).

It should be noted that the problem of evaluating the evidence obtained through the operational -

search activities (OSM) is not new for the ECHR. In the practice of this Court, there are a number of such decisions made in respect of many Council of Europe member states.

In order to study the differences in the legislative regulation of the provision of evidence obtained through OSM, as well as responsibility for provoking a crime by law enforcement officers and their agents, we studied the legislation of some Council of Europe countries on this issue. The subject of this study was the legislation of the countries that were part of the Union of Soviet Socialist Republics and recognize the jurisdiction of the European Court of Human Rights (Azerbaijan, Estonia, Georgia, Latvia, Lithuania, Ukraine), due to historically based on similar approaches to the formation of criminal law.

In addition, the legislation of such countries as Spain, Poland, Germany was analyzed. These countries of the Romano-Germanic legal family are selected because of the minimum number of complaints of provocation of a crime received by the European Court of Human Rights in 2009–2018. (Overview 1959-2017).

The Criminal Code of the Republic of Azerbaijan of 1997 does not provide for liability for provocation to certain types of crimes, but contains a provision on liability for violation of legislation on operational-search activity. So, Art. 302.1 of the Criminal Code of the Republic of Azerbaijan states: "Implementation operative - search actions by not authorized persons, as well as implementation of these actions by authorized persons, but without grounds provided by the legislation, entailed essential infringement of rights and interests of person protected by the law – is punished...". (Criminal Code of the Republic of Azerbaijan). Thus, this provision establishes the criteria for the delimitation of lawful and unlawful implementation of operational - search activities. The object of the crime are the interests of justice. Operational-search activity in the Republic of Azerbaijan is regulated in detail by the Law of the Republic of Azerbaijan "On Operational-Search Activity" dated 10.28.1999 No. 728-IQ. (Law of the Republic of Azerbaijan "On operational investigative activities" dated 10.28.1999). This regulatory legal act, among other things, establishes the limits of the powers of the subjects of operational investigative activities. Clause 2 of Part 1 of Article 8 states: "Subjects of operational - search activities are prohibited to incite a person to offenses in the exercise of their powers." Thus, the Criminal

Code of the Republic of Azerbaijan, establishing a criminal law prohibition for violating the law on operational investigative activities, recognizes including incitement to commit a crime (its provocation) by law enforcement agencies as criminal.

The Criminal Code of the Republic of Estonia also does not provide for liability for provocation to certain types of crimes, but contains a provision on liability for carrying out illegal operational - search activities. Article 315 of the Estonian Penal Code establishes responsibility for carrying out an unlawful investigative action or secretly collecting information, as well as for unlawfully concealing or destroying information collected through an investigative action or tacitly performed by a person having the right to carry out an investigative search activity or secretly collecting information. (Criminal Code of the Republic of Estonia 2002).

The Criminal Procedure Code of 2003 and the Law on Operational - search Activity of 1994 of the Republic of Estonia use the concept of "crime imitation", which means creating the situation and conditions, as well as checking the possibility of committing a crime. (Criminal Procedure Code of the Republic of Estonia 2005).

A rigid procedural framework, going beyond the limits that can be made by imitation of crimes a real crime, limits conducting such an operational-search action. The line between the first and second is very thin. Therefore, it is especially important to follow the rules prescribed by the procedural law. (Livshits Y., 2004.). In the event of non-observance of procedural rules and provocation of the commission of a crime, the authorized persons are prosecuted under Section 315 of the Estonian Criminal Code (The security police opened a criminal case).

The 1999 Criminal Code of Georgia defines the notion of complicity in a crime in Article 23: "Participation in a crime means the deliberate joint participation of two or more persons in the commission of an intentional crime". (Criminal Code of Georgia / edited by Z. K. Bigvav. SPb. 2002. P. 99). The instigator is "... the person who inclined another person to commit an intentional crime." (Criminal Code of Georgia / edited by Z. K. Bigvav. SPb. 2002. P. 99). In addition to the general definition of the instigator, in comparison with other foreign criminal codes of the post-Soviet space, the legislator of this country is the only one who established a special rule prohibiting the provocation of a crime. Article

145 of the Criminal Code of Georgia states: "Provocation of a crime, that is, the incitement of another person to commit a crime in order to bring him to criminal responsibility - shall be punished ...". (Criminal Code of Georgia / edited by Z. K. Bigvav. SPb. 2002. P.191).

In our opinion, this provision is primarily intended to prevent the commission of such unlawful actions by law enforcement agencies. The Law "On Operational Activities" of Latvia in 1993 in Article 15 provides the possibility of holding such an operational event as the "Operational Experiment", the essence of which is to create certain conditions (situations) to establish the possibility of committing a crime. (Law "On Operational Activities" of Latvia).

The conduct of this operational event should take place only in strict accordance with the Criminal Procedure Code and the Law "On Operational Activities". Operational experiments can be carried out only with the consent of the prosecutor and only in relation to persons whose criminal activities are reliably known. In order for the operational experiment not to be a provocation of a crime, a person must be able to freely choose his behavior. This requirement directly follows from Article 4 of the Law "On Operational Activities", according to which, when conducting an operational experiment, it is prohibited to incite (provoke) to commit a crime. In case of violation of this rule, an authorized person may be held liable for falsifying evidence (Article 289 of the Latvian Criminal Code) or inciting to commit a crime. (Anrijs Kavalieris Provocation or operational experiment).

The Lithuanian legislator included an imitation in the framework of the procedural law contained in two sources - the Law on Operational Activities and the Criminal Procedure Code. Lithuanian criminal legislation regards imitation as a model of criminal behavior (imitation) by authorized official bodies carrying out operational activities aimed at preventing (terminating) a crime.

A distinctive feature is that due to the complex nature of the institution of imitation of crime in Lithuanian law, the legitimacy of its implementation is made up of a set of preliminary and basic (general) conditions arising from the interaction of basic social principles regulated in the Lithuanian Constitution.

As an advantage when comparing with the Russian sectoral legislation regulating the

procedure for carrying out operational - search activities, it is necessary to emphasize the material aspect that the imitation model of criminal behavior of the simulator is considered in systemic unity with the specific corpus delicti provided by the relevant article of the Lithuanian Criminal Code.

This method imposes on law enforcement officials of different levels the obligation to effectively assess the prospects for imitation actions from the point of view of criminal law qualification of the act, and any deviation from this criterion indicates ignoring the universal principle of legality in law.

The difference between imitation of criminal behavior and provocation of a crime is in the real absence of harm to the legally protected interests of society and the state, i.e. sign of public danger. (Orlov D., 2013).

By analogy with article 304 of the Criminal Code of the Russian Federation, article 370 of the Criminal Code of Ukraine provides for liability for provoking a bribe or a commercial bribery. However, there are fundamental differences in the objective and subjective signs of the composition of these crimes. Judging by the analysis of Article 370 of the Criminal Code of Ukraine, the legislator's approach to designing the composition of a provocation is in many ways reminiscent of the prescriptions once contained in Article 171 of the Criminal Code of the Ukrainian SSR. Firstly, the objective side of the provocation is to consciously create the circumstances and conditions that led to the offer or receipt of a bribe, or commercial bribery. The criminal legislation of Ukraine provides for liability only for provocation of one crime - bribes. In contrast to Article 304 of the Criminal Code of the Russian Federation, in the framework of Article 370 of the Criminal Code of Ukraine, a crime is considered to have been completed from the moment the situation and conditions are created that cause either giving or receiving a bribe. Secondly, the purpose of provocation in the disposition of Article 370 of the Criminal Code of Ukraine is to expose the one who gave or received a bribe or undue advantage. Thus, the provocation is aimed not only at inducing the person to receive a bribe, but also at its proposal. Thirdly, the subject of the crime is only an official, and the victim, on the contrary, is any person. A provocation by an official of a law enforcement body is a qualifying sign of an act and carries a more severe punishment (Part 2 of Article 370 of the Criminal Code of Ukraine). Fourthly, the criminal law of

Ukraine considers the sphere of official and professional activities related to the provision of public services to be the object of provocation of bribes or commercial bribery. (Shmonin A.V., 2013).

The Criminal Code of the Republic of Poland, adopted in 1997, regulates the institution of complicity, not fixing its general concept, and provides for the types of accomplices established in criminal law: performer, leader (organizer), instigator and accomplice.

Considering aiding as a less dangerous act, the legislator provided for the possibility of applying to the helper emergency mitigation of punishment. A person who, wanting another person to commit a crime, inclines him to this is subject to liability for incitement.

In addition to this provision, the criminal law of Poland considers as a more dangerous kind of incitement - provocation of a crime, i.e. incitement of another person to commit a prohibited act with the purpose of initiating criminal prosecution against him (Article 24). In this case, the rules do not apply, providing for voluntary refusal of accomplices, emergency mitigation of punishment for an accomplice who voluntarily tried to prevent the commission of a crime (Article 23), the instigator's responsibility for the attempt, if the perpetrator did not complete the crime, the possibility of applying emergency mitigation of punishment or his punishment in the absence of an attempted crime (Criminal Code of the Republic of Poland 2001.). The Spanish Penal Code of 1995 states in article 18 that provocation of a crime is an integral part of the institution of complicity, and such actions are the direct inducement of a person to commit a crime by means of press, radio or other means of such action, which promotes the announcement of information, or in front of people. If the speeches of a person in front of the people or in the mass media have an apologetic meaning in relation to crime and contain a direct incentive for third parties to commit crimes, in this case, these actions are considered criminal. (Criminal code of Spain. Madrid, 2011).

In addition to the general rule, provocation under the criminal law of Spain is also a mitigating circumstance, as specified in articles 141, 151.168, 177 bis, 269, 304 and a number of others. For example, if a person has committed robbery, extortion, fraud or misappropriation of third parties under the influence of provocation, the court is obliged to impose a punishment significantly lower than the criminal law

originally for these elements of the crime. (Criminal code of Spain Madrid, 2011).

In the criminal law of Germany, under the instigation, in accordance with § 26 of the Criminal Code of the Federal Republic of Germany, is meant the inclination of another person to commit a deliberate unlawful act. According to the prevailing opinion in German jurisprudence, the instigator must enter into open contact with the instigated person and thus make him decide to commit the act. A person, who has already made a firm decision to commit an act, can no longer be inclined to this act. However, liability for aiding is possible if the decision to commit the act was strengthened, or the attempted incitement under § 30 (paragraph 1) of the Criminal Code of the Federal Republic of Germany, if it is a criminal offense in accordance with the definition in § 12 (paragraph 1) of the Criminal Code Federal Republic of Germany (Golovnenkov P., 2016).

Although the criminal law of Germany does not have a special rule providing for responsibility for provocation of a crime; the criminal police often encounter this in their work; the main task of which is not to react, but to pre-empt, not wait for reports of a crime, but actively intervene in criminal events, secretly penetrate into the environment of possible criminals, follow, if necessary provoke, in all cases recruit. In accordance with the departmental regulatory acts of the criminal police, provocation is understood: to force a person involved in a crime to act in unfavorable conditions, and thereby facilitate the task of apprehending and exposing the offender. The grounds and conditions for holding such events are also regulated in detail by this kind of departmental regulations. Thus, according to the leadership of police officers, an operative officer, under pain of personal responsibility, is prohibited from engaging in cooperation at his own discretion as an agent provocateur. The question of its admissibility in each specific case must be decided by the head of the criminal police in consultation with the prosecutor. (Gaiduk A. 1996).

After analyzing the criminal legislation of some countries of the Council of Europe, it is established that the legislation of individual states (Azerbaijan, Estonia, Latvia) criminalizes the violation of operational - search legislation (including the provocation of a crime by law enforcement agencies). The criminal legislation of other states either provides for a general ban on provocation (Georgia, Poland, Spain) or

prohibits the provocation of a specific crime (Ukraine).

Some of the reviewed states have developed operational-search legislation, in which operational-search measures related to the creation of certain conditions for establishing the possibility of a person committing a crime are limited by strict conditions designed to prevent the provocation of a crime (Estonia, Germany, Latvia, Lithuania).

An analysis of the statistics of complaints of the right violations to a fair trial, provided for in Article 6 of the Convention, which includes complaints of provocation of crime, showed that the greatest number of such complaints were filed against the Russian Federation (419), and the smallest in relation to Germany (12), Estonia (11), Georgia (15) and Latvia (14) for the period from 2008 to 2018. Per 100 thousand population, the largest coefficient belongs to Estonia (0.83), and the smallest to Poland (0.185), Spain (0.062) and Germany (0.014). The corresponding coefficient in Russia is 0.29. (Fact sand figures by State. ECHR).

Conclusion

The analysis made it possible to establish that in those European countries where there is criminal responsibility for provoking a crime or for violating operational - search legislation (Spain, Poland, Georgia, Estonia, Latvia), the number of complaints of a crime provocation received by the European Court of Human Rights significantly lower than in countries that do not have such a criminal prohibition.

The study suggests that further reform of the operational-search legislation in the Russian Federation should concern the improvement of ways to counter the provocation of crime by persons authorized to carry out operational-search activity. In this regard, it is possible to use the experience of some European countries, including more strictly regulating the grounds and mechanism for conducting separate operational-search measures, in particular, test purchases, operational supplies, and operational experiments. In addition, it is advisable to consider the possibility of establishing a special criminal law rule governing responsibility for provoking a crime.

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