



THEORETICAL AND PRACTICAL ASPECTS OF ESTABLISHING LIABILITY FOR CRIMINAL PROVOCATION

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Abstract: This article analyzes the theoretical, legal, and practical aspects of establishing criminal liability for the provocation of a crime (entrapment / incitement to commit a crime). The study examines the concept of crime provocation, its legal nature, and the criteria for ensuring legality during operational-search activities. The author explores the existing gaps in national criminal legislation and the experience of foreign countries, proposing and developing recommendations to improve the independent norm of liability for crime provocation, as well as substantiating the inadmissibility of evidence obtained as a result of such actions.

Keywords: Provocation of a crime, criminal liability, operational-search activity, entrapment, incitement, admissibility of evidence, fair trial, legal guarantees, abuse of power, criminal legislation.

Article 88 of the Criminal Procedure Code provides for a prohibition on inciting a person to commit unlawful acts and accusing them of a crime committed as a result of such incitement.

The study of complaints regarding operational-search activities revealed that the majority of these complaints are related to the presence of elements of provocation in operational-search activities, especially for crimes involving bribery, the illegal acquisition or transfer of currency values, and the illegal trafficking of narcotic drugs or psychotropic substances.

This is evidenced by the fact that the controlled acquisition of narcotic drugs is carried out on the basis of a decision issued against another person, or is formalized after the event is actually held, these decisions are approved by an official who is not authorized, and they do not contain information about the purpose, place, time and objects of the event¹.

This, in turn, indicates the low efficiency of departmental control over operational-search activities.

Due to the lack of a clear definition of this operational-search measure, it is difficult to draw a line between the lawful actions of officials of the body carrying out operational-search activities and actions that provoke a socially dangerous act².

The main problem here is related to the mechanism for verifying the defendant's arguments regarding the commission of a crime as a result of incitement to commit unlawful acts during the consideration of a criminal case on its merits.

The social danger of provocation to commit a crime lies in the fact that as a result of this action, not only is a specific person unjustifiably held criminally liable but also the principles of

¹ Шатохин И.В. принцип уважения и соблюдения прав и свобод человека и гражданина в оперативно-розыскной деятельности: дис. ... канд. юрид. наук. Барнаул, 2018. С. 72.

² Лаптев П.А., Федоров А.В. О необходимости совершенства Российского оперативно-розыскного законодательства с учетом Постановления Европейского Суда по правам человека по делу «Ваньян против Российской Федерации» // Наркоконтроль. 2006. № 4. С. 38.

justice are violated, a lack of trust in the overall activities of law enforcement agencies and the rule of law arises in society, and the legitimacy of court sentences for such crimes is undermined.

Article 17 of the Law "On Operational-Search Activity" includes the incitement and incitement of citizens to commit offenses among the restrictions in operational-search activities.

In the process of conducting R&D, it is impermissible to create conditions in which the object of the event does not have the opportunity to choose its own behavior³.

According to the European Court of Human Rights, the issuance of a sanction by an authority independent of the body conducting the operational-search measure, including the court or the prosecutor's office, is a guarantee of protection against possible provocation during the operational-search measure of supervised seizure. However, in the court's opinion, departmental control over operational-search activities is not sufficiently effective⁴.

The European Court of Human Rights, in its decisions in the cases "Vanyan v. Russia" (December 15, 2005) and "Khudobin v. Russia" (October 26, 2006), specifically addressed the issue of provocation during operational measures of supervised seizure. In particular, during the consideration of Vanyan's complaint, it was established that the applicant's acquaintance was involved in a controlled operational measure by the officers of the criminal investigation department and through him gave the applicant money for the purchase of drugs.

Methods of persuasion and extortion should be understood as any form of influence on the consciousness and will of the object of PPP (persuasion, bribery, persuasion, assignment, order, request, pressure)⁵.

According to S. Radkinsky, provocation to commit a crime differs from incitement and is distinguished by the following features:

the subject of the provocation depends on the purpose of ensuring the emergence of the desired behavioral model of the subject being provoked, which are only external signs of the criminal act

provocative behavior is carried out through the unilateral intentional activity of the guilty person, which is not captured by the consciousness of the person being provoked;

the provocateur intends to use the provoked "criminal" act of the person not to achieve a joint criminal result, but to shame or create artificial evidence of the accusation;

the purpose of the provocateur's actions is to entail harmful consequences for the provoked person;

the presence of only a direct intent on the part of the provocateur, directed not at the type and consequences of the crime committed by the involved person, but at the fact of its commission⁶.

However, we consider the opinion of this scientist that the provocation carried out in the course of operational-search activities in order to expose criminal activities, identify the circle of guilty persons, and prevent serious crimes, although it harms the protected object, is socially

³ В.Каримов. Тезкор-кидирув фаолияти:дарслик/-Тошкент, Lesson press, 2021. 164-б

⁴ Веселов и др. против России [Электронный ресурс]: постановление ЕСПЧ по делу от 2 октября 2012 г. П. 126. Доступ из справ.-правовой системы «КонсультантПлюс»

⁵ В.Каримов. Тезкор-кидирув фаолияти:дарслик/-Тошкент, Lesson press, 2021. 164-б

⁶ Радачинский С.Н. Провокация преступления как комплексный институт уголовного права: проблемы теории и практики: Автореф. дисс. ... докт. юрид. наук. – Н.Н., 2011. – 12 б.

useful, some forms of provocation are a circumstance that excludes the criminality of the act, because this approach is based on the unethical concept that the end justifies the means.

In general, the main difference between the provocation of a crime and lawful activity aimed at exposing a person who has committed a crime is related to the participation of law enforcement officers in the formation of intent to commit a crime.

Although the person being prosecuted did not argue that the charges against them were the result of provocation and pleaded guilty, the legality of the operational-search measure must be assessed during the trial.

In this regard, it is advisable to supplement paragraph 8 of the Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan No. 24 dated August 24, 2018, "On certain issues of applying the norms of the criminal procedure law on the admissibility of evidence", and to establish that the court, regardless of the defendant's admission of guilt, must verify the admissibility of the evidence obtained during the operational-search event, including the legality of the operational-search event.

In judicial practice, in cases where a person confesses to their guilt in an explanatory note issued after their detention and subsequently does not plead guilty in the investigation and court, there are instances of filling the gap in the body of evidence by questioning operatives who conducted operational-search activities and received explanatory notes.

However, the fact that confessions given without the participation of a defense counsel cannot be used without further confirmation during the investigation and trial also limits the possibility of indirect use of these testimony.

At the same time, there are no obstacles to the interrogation of operatives to fill gaps regarding circumstances beyond the detainee's testimony, including the grounds and procedure for conducting operational-search activities, as well as issues related to the identification and seizure of evidence.

However, the testimony of operatives in court regarding the presence of confidential information regarding the defendant's intent to commit a crime prior to the operational event is insufficient to prove the existence of prior intent if this information was not submitted to the court and was not verified by the court.

Consequently, the presence of information regarding the defendant's intent to commit a crime prior to the operational-search measure and the possibility of verifying this information in court are considered means of verifying the presence of a pre-existing intent.

Operational-search measures for supervised seizure and supervised delivery are most often conducted against individuals for whom there is operational information regarding their involvement in criminal activities. However, in order to prove the presence of premeditated intent in these persons, it is required to record this information in a procedural form and use it in proving.

Even in some developed countries (USA, Germany), due to the fact that provocation is permitted in operational-search activities and it is impossible to identify a crime without provocation in certain types of crimes, some scholars have put forward the idea of the existence of "provocation within the framework of the law⁷, there is no limit on which level of provocation is "under the law".

⁷ Миллюков С.Ф., Никуленко А.В. Неочевидные решения проблем силового противодействия преступности // Всероссийский криминологический журнал. 2021. Т. 15, № 1. С. 36–45.

The European Court of Human Rights has also stated in its rulings that the Convention for the Protection of Human Rights and Fundamental Freedoms does not prevent the use of sources, such as an anonymous whistleblower, at the preliminary investigation stage if the nature of the crime so requires. However, authorities are required to prove that there were sufficient grounds for organizing a non-public event, to have accurate and objective information about the preparation of a crime, and to be able to verify any information used by the authorities⁸.

In general, the European Court of Human Rights distinguishes between two types of incitement to crime:

1. a provocation committed by law enforcement agencies or other persons acting on their behalf;
2. provocation committed by other persons who are not employees of law enforcement agencies and do not act on their instructions.

At the same time, in the court's opinion, a presumption applies to the arguments regarding a provocation committed by law enforcement agencies or other persons acting on their behalf. That is, proving the absence of provocation against a person is the responsibility of law enforcement agencies. The absence or failure to provide such evidence implies the existence of a provocation and precludes the criminal liability of the person who suffered from the provocation⁹. That is, the court distinguished between the material and procedural aspects of the provocation of a crime and assessed the fact that the evidence proving the presence of intent formed in the person before the operational measure was not discussed in court as a violation of the person's right to a fair trial.

The procedural criterion for the provocation of a crime is:

- 1) failure to provide the accused or defendant with the opportunity to file a motion for provocation during the investigation or trial;
- 2) the accused or defendant filed a motion during the investigation or trial regarding the provocation to commit a crime, but the investigative body and courts failed to verify the evidence regarding the presence or absence of provocation (the grounds for conducting the criminal investigation, the involvement of law enforcement officers in the commission of the crime, or the degree of incitement or pressure to commit the crime).

In cases where substantial evidence, such as the controlled acquisition of narcotic drugs, is obtained as a result of a non-public event, the government must prove that there were sufficient grounds to conduct the non-public event¹⁰.

Therefore, the information about the preparation of a crime, which serves as the basis for conducting an OSA, must be objective, verifiable, and indicate the reality of the criminal behavior, not its mere probability.

⁸ Носко и Нефедов против России: постановление Европейского Суда по правам человека по делу от 30 октября 2014 г. Жалобы № 5753/09, 11789/10, п. 51, 52 [Электронный ресурс]. Доступ из справ.-правовой системы «КонсультантПлюс»

⁹ Teixeira de Castro v. Portugal, Reports 1998-IV: постановление ЕСПЧ от 09.06.1998 // СПС «Консультант Плюс». Дело «Раманаускас (Ramanauskas) против Литвы» (жалоба № 74420/01): постановление ЕСПЧ от 05.02.2008 // СПС КонсультантПлюс.

¹⁰ «Веселов и другие (Veselov and Others) против Российской Федерации»: постановление ЕСПЧ от 02.10.2012 // СПС Консультант-Плюс.

Therefore, the primary criterion for determining the presence or absence of signs of provocation in an OSA is to ascertain whether the legal grounds and conditions for conducting the OSA have been observed, and whether the operation is aimed at preventing a real, not a probable, crime being prepared.

Therefore, the position of the European Court of Human Rights on incitement to crime is as follows:

- the public interest in solving a crime does not justify the use of evidence obtained through provocation, as this leads to a violation of the accused's right to a fair trial;
- the burden of proving that the accused person had pre-existing intent before the operational activity is placed on the law enforcement agency;
- the failure to provide evidence of pre-existing intent, or the refusal to provide it on grounds of confidentiality, serves as a basis for finding the fact of provocation to be confirmed (presumption);
- the defense must be given the opportunity to review the evidence presented by the body that conducted the OSA.
- Independent oversight (prosecutorial or judicial) must be established over the conduct of OSAs.

Therefore, establishing liability for provocation of a crime serves as a legal guarantee aimed at preventing the subjects of an OSA from abusing their legally granted powers to create artificial evidence for an accusation and to prosecute an innocent person.

This is because the grounds for conducting an OSA are objective data, and the legislator's separate definition of the grounds and conditions for conducting an OSA is aimed at guaranteeing individual rights in an OSA.

In accordance with Article 15 of the Law of the Republic of Belarus "On Operational-Search Activity", an operational experiment is envisaged to be conducted with respect to a citizen about whom there is information of criminal activity, and when the following conditions are present:

- the existence of a report concerning a less serious, serious, or particularly serious crime that is being prepared, committed, or has been committed against a citizen or their relatives;
- it must be conducted with respect to a specific person (not an unknown person);
- the body conducting the operational-search activity must possess preliminary information about the crime being prepared, committed, or having been committed.

Article 304 of the Criminal Code of the Russian Federation, Article 396 of the Criminal Code of the Republic of Belarus, Article 349 of the Criminal Code of the Republic of Kazakhstan, Article 321 of the Criminal Code of the Republic of Tajikistan, Article 370 of the Criminal Code of Ukraine, Article 348 of the Criminal Code of the Kyrgyz Republic, and Article 212 of the Criminal Code of Turkmenistan establish liability for provocation of a crime.

However, the Criminal Code of the Russian Federation provides for liability only for provocation of bribery and commercial bribery. In the Republic of Belarus, liability is provided for three crimes, in the Republic of Tajikistan (bribery), in the Republic of Kazakhstan for 18 corruption-related crimes, and in the Criminal Code of Turkmenistan for (provocation of giving or receiving a bribe, drug trafficking).

In the United Kingdom and the United States, a provocation carried out by the police is called an "entrapment", which is determined by courts using subjective and objective criteria.

In terms of subjective characteristics, the characteristics of the individual and the level of mental development of the suspect are taken into account, as the inclination to commit a crime may have existed prior to the encounter with a police agent¹¹.

In particular, the case of the UK House of Lords "Regina v. Looseley" case, it was noted that it is unacceptable for the state to incite citizens through its secret agents to actions prohibited by law with subsequent criminal prosecution; such actions are considered provocations, and the actions of police agents must be qualified as an abuse of power and an encroachment on criminal justice¹².

In some US states, including California, Texas, and Michigan, the objective criterion is applied. The objective criterion allows for the determination of the degree of police influence on criminal behavior, as well as when the intent to commit a crime arose.

When determining the legality of the actions of police agents, subjective criteria are irrelevant.

"Jacobson v. United States", the U.S. Supreme Court noted that the burden of proving the presence of intent formed before the commission of a crime lies with the prosecution¹³.

In accordance with §2.13 of the US Model Criminal Code, a law enforcement official or a person cooperating with them is considered a provocation if they encourage another person to commit a crime by forming, convincing, or instigating a false impression of the facts in order to obtain evidence of an attack. A person subjected to criminal prosecution shall be acquitted if they prove that their actions were the result of a provocation.

Although Article 82 of the Criminal Procedure Code establishes that if the results of operational-search activities indicate that a person has formed an intent to commit a crime, these results may be recognized as evidence, the fact that not only the results of operational-search activities, but also investigative actions can be the basis for accusing a person, the legal consequences of provocation in general are not established in the Criminal Procedure Code.

In our view, any evidence obtained as a result of a provocation must be recognized as inadmissible, and the obligation to familiarize the defense with evidence refuting the defendant's argument about the provocation, as well as to prove the existence of premeditated intent, is assigned to the prosecution, which serves as an additional procedural guarantee for protecting the rights of the individual.

Furthermore, the comprehensive and objective investigation of provocation appeals largely depends on the stable legal position of higher authorities..

Used literature:

1. Шатохин И.В. принцип уважения и соблюдения прав и свобод человека и гражданина в оперативно-розыскной деятельности: дис. ... канд. юрид. наук. Барнаул, 2018. С. 72.
2. Лаптев П.А., Федоров А.В. О необходимости совершенства Российского оперативно-розыскного законодательства с учетом Постановления Европейского Суда по правам

¹¹ The Subjective Test // Samaha J. Criminal Procedure. 7th ed. 2008. P. 363—367

¹² «Regina v. Looseley» [2001]. UKHL 53. Lord Nicholls. § 1. URL: <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011025/loose-1.htm>; Ashworth A. Re-drawing the Boundaries of Entrapment[2002]Criminal Law Review. Vol. 161.

¹³ «Jacobs on v. United States» 503 U.S. 540 (1992): United States Reports. Vol. 503. P. 540—561. URL: <http://www.supremecourt.gov/opinions/boundvolumes/503bv.pdf>

- человека по делу «Ваньян против Российской Федерации» // Наркоконтроль. 2006. № 4. С. 38.
- 3В.Каримов. Тезкор-қидирув фаолияти:дарслик/-Тошкент, Lesson press, 2021. 164-б
- 4.Веселов и др. против России [Электронный ресурс]: постановление ЕСПЧ по делу от 2 октября 2012 г. П. 126. Доступ из справ.-правовой системы «КонсультантПлюс»
- 5.В.Каримов. Тезкор-қидирув фаолияти:дарслик/-Тошкент, Lesson press, 2021. 164-б
- 6.Радачинский С.Н. Провокация преступления как комплексный институт уголовного нрава: проблемы теории и практики: Автореф. дисс. ... докт. юрид. наук. – Н.Н., 2011. – 12 б.
- 7.Милюков С.Ф., Никуленко А.В. Неочевидные решения проблем силового противодействия преступности // Всероссийский криминологический журнал. 2021. Т. 15, № 1. С. 36–45.
- 8.Носко и Нефедов против России: постановление Европейского Суда по правам человека по делу от 30 октября 2014 г. Жалобы № 5753/09, 11789/10, п. 51, 52 [Электронный ресурс]. Доступ из справ.-правовой системы «КонсультантПлюс»
- 9.Teixeira de Castro v. Portugal, Reports 1998-IV: постановление ЕСПЧ от 09.06.1998 // СПС «Консультант Плюс». Дело «Раманаускас (Ramanauskas) против Литвы» (жалоба № 74420/01): постановление ЕСПЧ от 05.02.2008 // СПС КонсультантПлюс.
- 10.«Веселов и другие (Veselov and Others) против Российской Федерации»: постановление ЕСПЧ от 02.10.2012 // СПС Консультант-Плюс.
- 11.The Subjective Test // Samaha J. Criminal Procedure. 7th ed. 2008. P. 363—367
- 12.«Regina v. Looseley» [2001]. UKHL 53. Lord Nicholls. § 1. URL: <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011025/loose-1.htm>;
- Ashworth A. Re-drawing the Boundaries of Entrapment[2002]Criminal Law Review. Vol. 161.
- 13.«Jacobs on v. United St ates» 503 U.S. 540 (1992): United States Reports. Vol. 503. P. 540—561. URL: <http://www.supremecourt.gov/opinions/boundvolumes/503bv.pdf>

