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CRIMINAL PROCEDURE CONCEPT OF INSTIGATION. THE ECHR PERSPECTIVE AND COMPARATIVE LAW

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Abstract: *In the actual criminal code system, the principle of fair evidence administration is a fundamental one. Within this principle, it is ruled the prohibition of the judiciary bodies to instigate, directly or indirectly, an individual to commit or continue to commit a criminal offence in order to obtain case evidence. Procedural loyalty or fairness is a corrective principle of the evidence freedom fundamental that allows usage of any evidence means which is not prohibited by law.*

Key words: *instigation, police, agent, ECHR, evidence, criminal.*

1. Introduction

In the Romanian procedural law, the concept of instigation to commit an offence emerges within the analysis of the principle of fair evidence administration, which in turn, relates to the lawfulness of the criminal trial (art.2 of the Romania Criminal Procedure Code).

The principle of fair evidence administration is the regulation that prohibits the use of any strategy or treatment which aims to dishonestly manage any evidence. This principle, as it is stipulated in article 101 paragraph 3 of the Criminal Procedure Code, forbids the judiciary bodies or any other intermediaries to instigate an individual to commit or to continue to commit a criminal offence in order to obtain evidence.

As the internal law neither defines what is meant by the procedural notion of "instigation" nor mentions the reason of this procedural concept, and given that its source is represented by the ECHR jurisprudence and other state laws, I believe that for the clarification of the concept and implicitly for a fair settlement of the case, we must consider this source legislation, namely ECHR jurisprudence, other state laws, comparative law and doctrine.

The reason for sanctioning the unfair behaviour of the judiciary bodies, in case of police instigation, lies in the avoidance of any abuse of the judiciary bodies, any setup done to an innocent individual facing an atypical, forced situation (Edwards and Lewis vs. The United Kingdom no. 39647/98 and 40461/98, § § 46-48). The state is committed to pursue criminal offences having been forbidden to generate offences. It is not permitted to instigate the unsuspected individual by persistently influencing him/her.

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Within ECHR jurisprudence it has been shown that the public interest in crime control cannot justify the use of evidence obtained as a result of police instigation, in which case the right to a fair trial has been violated „from the very beginning" (Teixeira de Castro vs. Portugal, paragraph 36 and 39).

2. Canada

Regarding the basis of the instigation concept, the Supreme Court of Canada, in the case Amato vs. The Queen from 09.08.1982, pointed out the necessity *of protecting the judiciary system from the abuse of the state accusatory*.

Within the second most important case of the Canadian jurisprudence on instigation, R c. Mack (Supreme Court of Canada from 15th December 1988), the judges justified the instigation as follows: *the issue at stake is to maintain the respect for those values that hold the unity of the community, on the long run. One of these fundamental values relates to preserving the purity of the act of justice (...). A major advantage of the admission of the instigation plead consists in the development of some standards of conduct regarding the state* (Puşcaşu, 2010, p. 54).

3. Australia

In Australia, the famous case that the doctrine refers to is Ridgeway vs. R (High Court of Australia from 19th April 1995), whereby, at paragraph 27, it was stipulated that the basis of this solution for evidence exclusion lies in the principles *and fundamental standards of the state and justice*, allowing a critical and wilful criminal behaviour of the state bodies to lead to the evidence admission for an individual conviction being totally opposite to these principles and standards. Between the state interest of crime suppression and the public interest of a fair justice administration must prevail the latter, *but the court ought to consider also the effects of its choice, assuming the resolution of leaving free a potential guilty individual only in those circumstances in which it is clear and indisputable that without the conduct of the state bodies, the individual would have remained a lawful citizen.*

Seeing that the public interest cannot justify the use of evidence obtained as a result of police instigation (Delcourt vs. Belgium paragraph 25), it can be concluded that the instigation concept is based on the necessity of disregarding the abusive behaviour of the prosecution bodies, that *ab initio* and definitively affects the right to a fair trial for the accused.

Therefore, when someone faces instigation, even if the act exists, is typical and illegal, judiciary bodies are required not to hold accountable the instigated offender whatever the legal remedy provided by the internal law (evidence exclusion, acquittal, prosecution or trial suspension etc.).

Specialised doctrine notices that instigation represents an unfair action performed to obtain evidence consisting in knowingly inducing an individual to commit an offence (the provoking agent is practically, from the perspective of the substantive law, the instigator that leads an individual to take criminal attitude) or to continue to commit an offence; in this way, the instigation is one of the nullity roots within the criminal trial that subsequently results in the exclusion of the evidence obtained from instigation (Udroiu, 2014, p. 213).

4. United States of America

In the Attorney General's Guidelines on the Federal Bureau of Investigation's Undercover Operations the need for thorough avoidance of instigation to offences is expressly specified, the concept of entrapment being identified when „*the state inculcates in an individual's mind, that is not otherwise susceptible to commit an offence, a propensity to commit an offence and an inducement to perform those offences with the purpose of obtaining the sanctioning of the perpetrator*" .

The resolution of the Supreme Court from 19th May 1958, SHERMAN vs. THE UNITED STATES stipulated that *for establishing the existence of instigation one must set out the difference between the trap laid for an innocent and careless person and the trap laid for an unsuspecting offender*.

The Supreme Court of Canada, in the case Amato vs. The Queen from 09.08.1982, stated that instigation exists if *the police outline is conceived in such a shocking and outrageous way that affects the credibility of justice administration* (Puşcaşu, 2010, p. 51-52). Furthermore, within the above-mentioned resolution, one of the judges considered that instigation may occur only where *the police tactics does not allow any constitution of an independent criminal intention* (Puşcaşu, 2010, p. 52).

Likewise, the Australian Court ruled that the level of involvement of the state bodies in the criminal conduct is relevant for the court to make a decision; specifically, if those state bodies lead an accused to the commission an offence to which the accused's contribution has only a secondary role (in this case an example was given when an undercover policeman committed a theft and afterwards sold the good to another individual aiming to accuse him/her of concealment – par. 28).

5. Netherlands and Russia

In the Dutch law, an extremely important regulation stipulates in article 126 letter g) point 2 of Criminal Procedure Code that the prosecution body is not permitted to induce any individual to commit an offence other than the one that has already been planned (Puşcaşu, 2010, p. 72).

In order to distinguish instigation from accepted conduct, in the case BANNIKOVA vs. RUSSIA, the Court outlined the criteria from previous related practice and settled the following main test of instigation (par. 37-50):

1) IF THE OFFENCE WOULD HAVE BEEN COMMITTED WITHOUT THE INTERVENTION OF THE AUTHORITIES (if state agents conduct the investigation of the criminal offence in a passive manner -Teixeira de Castro point 38);

Firstly, I consider obvious the fact that nobody can ever know exactly what could have happened in a certain circumstance, whether the perpetrator would have committed the respective offence without the state's intervention.

Precisely because of this, the Court claimed to be necessary for clues indicating that the accused would have committed the criminal offence anyway, even without the interference of the prosecution bodies, to prevail (Sandu vs. The Republic of Moldova par. 38 ... *whether there had been any indication that the offence would have been committed without such intervention*).

To find out whether the undercover police officers conducted their investigation in a passive manner, the Court assessed various considerations: the European Court made the

distinction between the action of the police officers that creates the criminal intention which was previously non-existent and the circumstances in which the claimant had already had the propensity to commit criminal offences; the susceptibility to commit criminal offences must be prior to the commencement of the state bodies' activities. The court verifies if there are reasonable objective doubts from which might result that the accused had been involved in criminal activities or would have been predisposed to commit an offence.

Proof of this susceptibility is mainly made with items certified before the beginning of the state agents' activity, but it can also be made with elements acquired afterwards (Bulfinski vs. Romania par. 41 or ALI vs. Romania par. 99).

In the case of Teixeira de Castro the instigation for the commitment of the offence was proven since nothing showed that without the police officers' intervention, the criminal offence would have nevertheless been committed. Likewise, in the case Ramanauskas vs. Lithuania, the court stipulated that the law is violated if there is no evidence in the case that, without the interference, the offence would have been committed. As well, in the case of Vanyan vs. Russia the police bodies did not have any proof from which to result that, before the intermediary's intervention, a propensity for the accuser to act as a drug dealer could have been identified. (Udroiu, 2014, p. 214-218).

In the case of Sandu vs. Moldova from 11th February 2014 par. 33, the European Court stated that in order to verify if the accuser was induced to commit the offence, the court must establish if he\she would have reasonably been engaged in the related criminal activity before the interference of the police. The court gives a special attention to the data acquired by the police based on which the perpetrator would be reasonably suspected. Lack of this data would be a severe indicator of the abusive conduct of the state's agents.

Whenever it was considered that judiciary authorities had valid reasons to suspect a preliminary illegal activity of the perpetrator (Eurofinacom vs. France, Sequeira vs. Portugal, Miliniene vs. Lithuania), the European Court assessed the non-existence of the instigation. Accordingly, the European Court links to the doctrine of „passive" activity that must be performed by the state's agents, as a recognized concept within Anglo-Saxon custom, where it is shown that there is no instigation when an individual suspected of committing or preparing to commit an offence takes advantage of „the opportunity" given by the undercover investigators, within circumstances from which it results that he/she would behave in the same manner as when „opportunity" would be provided by another person. Thereby, a check out is performed in order to conclude whether the state's agents have created a straightforward opportunity by simply offering the perpetrator a common circumstance (with no exceptional feature) to commit the offence.

Regarding this subject, the case of R. vs. Loosley outlined the following assertion: the criterion that must be taken into account when evaluating the policemen's behaviour is to know whether they have given to the accused an extraordinary opportunity to commit the offence, an opportunity that could not be normally offered by other persons (Puşcaşu, 2010, p. 58).

It is worth mentioning also that the passive investigation of the criminal activity refers to the fact that the state bodies can exert some influence over the facts unfolding within certain circumstances, without considering instigation. For example, when the state's agents perform a supervised delivery (art. 138 par. 12 and art. 151 Criminal Procedure Code), it cannot be claimed a *de plano* violation of the stipulations of art. 101 par. 3 of

the Criminal Procedure Code, although the judiciary bodies allowed the commitment of a criminal offence (Miliniene vs. Lithuania, Blaj vs. Romania).

In conclusion, when the perpetrator has the propensity to commit a certain offence and the state's agents provide him/her only a common opportunity in this regard (not the tools to commit the criminal offence) means that the respective offence would have also been committed without the intervention of the state bodies and the passive manner of the investigation was complied with.

2) IF THE INVESTIGATION WAS MAINLY PASSIVE, THE COURT WOULD EXAMINE THE REASONS THAT UNDERPIN THE UNDERCOVER MISSION AND THE CONDUCT OF THE PERFORMING AUTHORITIES.

Therefore it must be checked whether the state's agents have acted with good or bad faith, whether they have followed the usual procedures for this type of circumstances, whether they have had a hidden purpose to hold accountable the one who supports instigation and so on.

In the case of R vs. Loosely, Lord Hoffman gave an example of a forbidden conduct of the state's agents: leaving a wallet in a park with the idea of catching the individuals that would potentially take it and by doing this the state's agents would become eligible for promotion; thereby, using human nature weaknesses for an inappropriate purpose is strictly forbidden.

3) IF THE STATE'S AGENTS SIMPLY JOINED THE CRIMINAL ACTIVITY OR THEY HAVE INDUCED IT;

In the case of Lagutin and others vs. RUSIA from 24th April 2014, in paragraph 92, the court judged that it is essential, within each case, to determine whether the criminal act is already in progress by the time of the police intervention (also see the case of Sequeira and Eurofinacom).

In the case of Miliniene vs. Lithuania, the court ruled that the state's agents only joined the criminal deeds by analysing who had the initiative and who carried a conclusive role in committing the offence. Also the court showed that the police had clearly influenced the events, but mentioned that the state's agents did not behave abusively during criminal investigation, which is mandatory within a democratic society (paragraphs 37-38).

In the case of Blaj vs. Romania from 8th April 2014, the European Court essentially considered that N.D. had promised T.G. to call to Mr. Blaj, president of an examination committee, in order for T.G. to promote an exam. After N.D. was caught in the act, the prosecution authorised him to bribe Mr. Blaj and that's what followed.

Therefore, giving N.D. a certain protection and providing the required technical material , the investigators had certainly influenced the events. However, considering the obligation to verify the criminal complaints and the importance to countervail the corrosive effects of corruption over the rule of law within a democratic society, the court assessed that the police did not override its roles. The court estimates that the investigators' interference did not decisively led to the commitment of the offence. The decisive elements were N.D.'s and the accuser's conducts. The investigators joined the criminal activity and did not lead it, so that N.D. played the role of an undercover agent rather than a provoking one. Moreover, there is no evidence that N.D. forced the claimant to accept the envelope that he had put on his desk (paragraph 110).

Regarding the instigation to commit an offence, in the case of SORRELLS vs. UNITED STATES from 19th December 1932 the following conclusion was drawn: The deception and tactics can be used to catch the ones involved in criminal activities. (...) there is

another problem when criminal intention arises at the state agents and they inculcate the susceptibility to commit the alleged offence in the mind of an innocent individual causing the commission of the offence so that they can investigate it (Puşcaşu, 2010, p. 37).

4) IF THE CLAIMANT WAS FORCED TO COMMIT THE OFFENCE;

One example of constraints may be the manipulation of the claimant's compassion by mentioning some drug withdrawal' symptoms (Vany an, par. 11 and 49). Therefore, with respect to the European standard, the judiciary bodies that suspect the involvement of an individual in a criminal activity must not have an active attitude for determining the „inactive" person to commit an offence, but only to provide him/her a „common temptation", an ordinary opportunity to break the law, within a game of roles whose performance aims a „passive observation" of perpetrator's conduct. If the individual suspected of the involvement in the criminal activity gives way to the temptation and commits the offence, it is considered that the activity of the judiciary bodies was performed exclusively to gather evidence and not to lead to illegal and unfair commission of a criminal offence. Consequently the evidence is not obtained through instigation.

In conclusion, the instigation represents the unfair action of the judiciary bodies or any other intermediaries performed to obtain evidence regarding the suspected individual. Knowingly leading an individual to commit an offence, based on a specific scenario directed by judiciary bodies, cancels the free will of the alleged perpetrator. Thus, the equitable framework of the criminal proceedings and of the entire trial is overruled. Failing to comply with the legality and faithfulness principles while managing the criminal evidence leads to exclusion of the illegal or unfair evidence.

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