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Non-Observance of Constitutional Laws and Freedoms of the Person and the Citizen in Criminal Legal Proceedings Connected with Illegal Methods Application in Operative Officers' Activity

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The article considers interrelation between illegal methods of law enforcement agencies operative officials' activity and occurrence of an investigator's, inspector's, public prosecutor's and the court criminal case errors, connected with non-observance of constitutional laws and freedoms of the person and the citizen in criminal trial, namely the right not to be subjected to tortures, cruel or humiliating human dignity treatment.

Keywords: Errors, illegal methods of investigation, torture, cruel or humiliating human dignity treatment, physical and psychic violence.

Point

Criminal legal proceedings, despite its authoritative, state – compulsory nature cannot be anti-humane and brutal.

Article 21 of the Constitution of Russian Federation sets forth, that nobody should be exposed to tortures, violence, another cruel or humiliating human dignity treatment or punishment, and article 50 of the Fundamental law of Russia highlights that it is inadmissible to use evidence received with infringement of the Federal law in the course of administering justice. Deviations of operative officers and the subjects conducting criminal trial from the requirements stated in specified articles are **illegal (unlawful)**

methods of conducting operatively – search activity and preliminary investigation.

Example

As practice of authors' of the article right protective activity shows it is rather a rare occasion where an investigator, an inspector personally applied illegal methods in the form of tortures, physical or mental violence towards persons on remand.

The accused during preliminary investigation, and more often – at judicial and execution of a sentence stages, make a statement on application of illegal methods – various threats, beatings by operative officers or detaining in so-

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called «press – huts» of a temporary detention centre (TDC), a pre-trial prison (PTP), etc. used by operative officers in the course of inquiry or preliminary investigation

Every statement of the kind is subject to official, investigatory and public prosecutor's inspections conducted by the heads of law-enforcement bodies divisions, inspectors, public prosecutor's officials, however only few signals of the kind fall within the category of proved criminal – punishable acts, as a rule, they are most outrageous, obvious, riveted attention of human rights protection organisations or mass media.

Over last years all mass media almost daily inform about another beating at militia. But, in our opinion, the greatest alarm causes not even facts of beatings but the fact that firstly, many people accept it as reality as a natural order of things, and secondly, that officials administering lawlessness, practically always remain unpunished. According to the outcomes of our researches in the course of criminal case proof illegal methods of conducting preliminary investigation, whether criminal (both revealed, and not revealed, both proved, and not proved) or not criminal resulted in slander or false confession of the innocent; to incompleteness, one-sidedness, bias in establishment of all circumstances on the case; to essential infringements of criminal – procedural law.

Efficiency of militiamen official activity (and first of all – divisions of criminal investigation department, service of local militiamen, etc.), State agency on drug dealing control is estimated first of all, as well as in former times by indexes of revealed and detected crimes. And to increase these indexes which material compensation of officers, their career growth depend on they use all means, including, those not matching law requirements.

A suspect, the accused as a result of illegal methods application towards them by law

enforcement bodies officials being intimidated and psychologically broken, while interrogating by an investigator, inspector, in court gives confessing testimony «voluntary» which can be both true (a suspect, the accused is really guilty, has committed a crime, but he gave confessing testimony only after application violence and tortures towards him) and false, including – slander, false-confession. Such wrong, incomplete, inaccurate testimonies give rise to the chain of at least, investigatory, public prosecutor and judicial errors as well as crimes committed by investigators, inspectors, public prosecutors and judges sometimes. In due time A.D.Bojkov wrote figuratively about investigation and proceeding of a known criminal Mikhasevich case resulted in tragic consequences for many innocent persons:

«What words can professional lawyers' work on this case be characterised with? It is clear, that operative militia officers and investigators dislodged confessions from the innocent out of purely careerist reasons just to report grave crime disclosing. What about the judge and the state prosecutor position? They would say afterwards, that had been misled by the proofs collected by preliminary investigation. But it is unpersuasive explanation. Investigation forced arguments, its gaps procedural infringements were visible to unaided eye. Elementary bona fide in case study and its check during judicial examination was not observed».

And further, in our opinion A.D.Bojkov makes an important conclusion:

«Meanwhile, groans of victims of justice are not ceasing. They like Klaas ashes knock at heart hopelessly and unpromisingly.

It means that the problem of judicial knowledge improving and negative factors action weakening in justice remain. It has remained for a long time and is stimulus for both fundamental scientific researches, and search for optimum

decisions connected with judicial – legal reform in our country «(Bojkov, 1997).

Immediate implementation of organizational and procedural measures on prevention of illegal methods of conducting preliminary investigation in Russian law enforcement agencies seems to be extremely urgent.

A.S. Barabash has drawn serious attention to criminal-procedural struggle against illegal methods in criminal legal proceedings issues. A.S.Barabash and his students, including the authors of the given article, being engaged in the right-protection activity, suggest the following recommendations on examination of citizens' complaints about illegal application of physical and psychic influence measures by law enforcement bodies' officers:

1. It is imperative to observe requirements of the Russian Federation Code of Practice at accepting a claim on illegal physical or psychic violence application by officers. At the decision on cancellation of a criminal case instituting refusal the head of an investigatory division should take measures to institute a criminal case as there are legal grounds for it in most cases. When additional check is really necessary, the terms established by the law for it should not be exceeded.

2. The investigator being reported on officers' illegal actions should take urgent measures to register vestiges of a crime. During a received application check procedural actions should not be reduced only to obtaining explanations. Just after receiving a report on tortures and violence application it is necessary to examine a crime scene paying special attention to presence of possible blood satins, tools of tortures, traces of other persons presence on a crime scene, etc. In case of immediate examination failure of a crime scene, the investigator is obliged to provide protection of a crime scene and to prevent any other persons from access to it.

3. According to the Russian Federation Code of Practice article 179, in cases, when the matter brooks no delay inspection can be carried out before criminal proceeding institution. Such a necessity always exists in terms of this category of cases. In case physical injuries on an applicant's body are detected within the examination there is a ground for the positive decision on criminal proceeding institution. In this event criminal proceeding can be instituted both upon the fact, and against certain persons in terms of signs of corpus delicti provided by the Russian Federation Code of Practice article 286. Criminal proceeding upon the fact is instituted if in the course of the inspection it has been established that the applicant could have most likely been traumatised being under jurisdiction of law enforcement bodies, but there are no data about the persons who have presumably committed a crime.

4. Criminal proceeding instituted against certain persons, even if further their non-participation is not found out should be investigated comprehensively, in full measure and objectively to establish all circumstances which are subject to proof. This requirement follows not only from national legislation, but from practice of Strasbourg court either demanding an effective investigation of the person's complaints about tortures and other violence inflicted by representatives of authority. A number of its decisions highlight the state body duty to prove that physical injuries at the victim arisen when he was under police officers authority have appeared not because of the fault of the latter. In these cases it is prescribed to establish a really guilty person and his non establishment entails implementation of the state body presumption of innocence with all the ensuing consequences.

5. It is important to conduct immediate and comprehensive and detailed interrogations of the persons suffered from application of tortures and violence; persons whom the victim name as

inflicting harm; persons with whom the victim had been before detention or at the moment of detention; persons who from the victim or other persons know of wrongful influence applied to the victim. The following people should be interrogated: the victim's cellmates; persons who were transported together with him in a convoy van; the family and relatives of the victim; medical workers who assisted the victim, examined him in a detention centre, pre-trial prison; convoy, detention centre on duty, pre-trial prison's officers, etc.

6. It is necessary to appoint the victim's forensic examination immediately, and to conduct judicial – psychological, and in rare cases judicial – psychiatric examination as well in order to determine moral sufferings degree inflicted to the victim. It is necessary to seizure all medical documents where the facts of illegal physical and mental violence application and its application consequence can be recorded to provide for possibility of examinations conduction.

Besides, in our opinion, it is necessary to undertake the following:

1. At detention of the person suspecting in crime commission up to placing him in a detention centre's cell:

a) to conduct his *complete* medical examination;

b) to ensure his protection by a defence counsel selected by him or a lawyer on duty *without fail* ; to ensure a face-to face meeting of the arrested person and his defence counsel prior to the first interrogation beginning *without fail*;

c) not simply, as the Russian Federation Code of Practice article 11 requires to explain to the suspect his rights, duties, but immediately to hand over to the arrested person against his signature similar to many European states written «*Declaration of the rights of the arrested person*» where, besides all other rights in court,

the right and procedure of filing a complaint to the public prosecutor about illegality and groundlessness of detention, the right to protection, article 51 of the Constitution of the Russian Federation provision would especially be emphasized ;

d) *the decision on brining a person to answer a case as a suspect* is handed over by an investigator, an inspector with assistance of a defence counsel immediately. «It would promote not only to observe a suspect's rights, but to create conditions to get admissible evidence either»(Khaliulin, 1997.)

The video shooting should obligatory be used for it could fix first of all a physical and mental condition of the interrogated person without fail at interrogation concerning a grave or especially grave crime category. To make participation of a supervising public prosecutor (or his deputy, an assistant) during a suspect's interrogation about these crimes obligatory in accordance with the General public prosecutor's of the Russian Federation order.

2. At detaining persons on remand in the pre-trial prison:

a) to ensure every detainee's medical examination daily ;

b) to conduct his medical examination before and after the detainee's conversation or interrogation by some of the operative officers, investigators and inspectors.

In legal literature it is V.S.Shadrin that has made a deserving support proposal on necessity of introducing a special article revealing the essence of illegal methods of investigation conduction into the Russian Federation Code of Practice (Shadrin, 1997).

Proceeding from the sense of article 21 of the Constitution of Russian Federation, provisions of chapter 16 of the Russian Federation Code of Practice, international – legal documents, we propose the following formulation of the article

in the Russian Federation Code of Practice which could follow article 164 «General rules of conducting investigatory actions».

«Article 164-1 Illegal methods at criminal cases investigation.

It is inadmissible to apply the following to the process participants at investigation of criminal cases:

- 1 **Physical violence** that is, inflicting different gravity bodily harm, beating or committing other violent actions caused physical pain.
- 2 **Mental violence** that is, humiliation, grave insults, other illegal or immoral actions (omissions) as well as threats of committing physical or mental violence to the person.
- 3 **Tortures**, that is, various deprivations and hardships: deprivation of sleep, food, water, medical aid, noise exposure, etc., application of sophisticated violence.
- 4 **Severe or humiliating human dignity treatment** that is, confinement in dangerous to life and health conditions, mismatching international – legal standards of detainees' treatment.

Scientific and other tests that is, hypnosis, medicamentous influence and other tests without official approval or consent of criminal proceeding participants subjected to admissible tests. All proofs received with application of illegal methods of investigation are inadmissible and cannot be used at proving».

In our opinion attitude and testimony transformation of the defendant as a result of application of inadmissible methods of conducting investigation to him whether not noticed or most terrible ignored by the judge is a bad judicial error or, sometimes criminal negligence grown on a fertile field of investigatory and public prosecutor's errors.

Resume

That is why we consider obligatory and very scrupulous court's respond to complaints of defendants and (or) their defence counsels, legal representatives about application of inadmissible methods of operatively – search support of preliminary investigation to defendants to be important and we believe significant to fix a provision in the Russian Federation Code of Practice, that at registering similar complaints from defendants, the algorithm of court's actions should be the following:

1. Scrupulous check of similar complaints during judicial investigation: detailed interrogation of the defendant about circumstances of inadmissible methods application; interrogation of all possible witnesses of unlawfulness of officers; obligatory and immediate conduction of the defendant's examination as well as forensic examination in court – residual signs of physical violence remain long enough; study of necessary documentation – register-books and documents of detention centre in court, pre-trial prison, «Emergency first aid», fracture clinics, etc.).

2. Transfer of copies of all materials of judicial examination under the complaint about application of illegal methods of conducting investigation to the public prosecutor for check and decision-making under the Russian Federation Code of Practice articles 144.145.

3. Suspension criminal proceeding within the term determined by court before getting materials with the final decision of the investigator, public prosecutor according the complaint made by the defendant about application of illegal methods of conducting preliminary investigation towards him.

Taking into account materials received from the public prosecutor as well as the decision, and also taking into account proofs obtained during judicial investigation, the court in a *consultative room* should pronounce

judgement or decision : or consider the complaint of the defendant and (or) his defence counsel, legal representative about application of inadmissible methods to the defendant at preliminary investigation of a criminal case which have not been proved or to recognise all proofs received with application of illegal methods (including, for example, reports of a search, seizure after interrogation of the suspect where he was subjected to violence, even if the search , seizure conducted subsequently were resultant under the rule of «fruits of the

poisoned tree») inadmissible under the Russian Federation Code of Practice article 75.

The court can pass an accusatory sentence only in the event if credible, authentic and sufficient evidence left after «filtration» allow to pass such a sentence. Otherwise, the equitable sentence, cessation of criminal prosecution on the case follows.

And in each case it is important to pass a special court decision (ruling) on infringements of the law revealed on a criminal case according to the general prevention order.

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**Несоблюдение в уголовном судопроизводстве
конституционных прав
и свобод человека и гражданина,
связанное с применением незаконных методов
в деятельности оперативных работников**

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В статье рассматриваются взаимосвязь между незаконными методами служебной деятельности оперативных сотрудников правоохранительных органов и появлением в уголовном деле ошибок дознавателя, следователя, прокурора и суда, связанных с несоблюдением в уголовном процессе конституционных прав и свобод человека и гражданина, в частности, права не подвергаться пыткам, жестокому или унижающему человеческое достоинство обращению.

Ключевые слова: ошибки, незаконные методы расследования, пытки, жестокое или унижающее человеческое достоинство обращение, физическое и психическое насилие.
