УДК 343.1
DOI https://doi.org/10.32782/2524-0374/2025-5/60

LIMITS OF PERMISSIBILITY IN COVERT INVESTIGATIVE ACTIONS: CRIME PROVOCATION THROUGH THE PRISM OF JUDICIAL PRACTICE

МЕЖІ ДОПУСТИМОГО ПІД ЧАС НСРД: ПРОВОКАЦІЯ ЗЛОЧИНУ КРІЗЬ ПРИЗМУ СУДОВОЇ ПРАКТИКИ

Skrypal P.V., 3d year student at the Faculty of International and European Law
Yaroslav Mudryi National Law University

Hlushchenko T.I., 3d year student at the Faculty of International and European Law
Yaroslav Mudryi National Law University

This article explores the complex and pressing issue of the limits of permissible actions by law enforcement authorities during the conduct of covert investigative (search) activities, particularly in situations where there is a risk of entrapment or provocation to commit a crime. It provides an in-depth analysis of how Ukrainian criminal procedural legislation–namely, the provisions of the Criminal Procedure Code of Ukraine–regulates such measures while also drawing attention to gaps in legal practice that may lead to violations of human rights. The focus is placed on the correlation between the concepts of «covert investigative (search) actions» and «provocation» within both national legislation and European legal standards. The article offers a theoretical reflection on the nature of criminal provocation, identifying it as a specific form of abuse of authority by pre-trial investigation bodies. A significant portion of the research is devoted to analyzing the case law of the European Court of Human Rights, particularly the landmark judgments in *Ramanauskas v. Lithuania* (2008), *Teixeira de Castro v. Portugal* (1998), *Mills v. Ireland* (2016) *and Ramanauskas v. Lithuania (No. 2)*, which played a key role in establishing standards for the admissibility of evidence obtained through the involvement of state agents. Special attention is also given to the case law of the Supreme Court of Ukraine, analyzing decisions that illustrate the ambiguity and inconsistency in the national judiciary's approach to evaluating the admissibility of evidence obtained through covert operations. The article emphasizes that proper legal qualification of such circumstances requires careful assessment: whether lawful oversight of criminal behavior occurred, or whether there was unlawful provocation. Moreover, the article addresses the procedural consequences of establishing the fact of provocation. It highlights that if evidence is proven to have been obtained as a result of provocation, such evidence must be deemed inadmissible and loses its evidentiary value. This, in turn, may serve as grounds for an acquittal or for a reassessment of the defendant's criminal liability. The analysis presented in the article is of considerable importance for improving national legislation on the conduct of covert investigative (search) actions and aligning it with European standards.

Key words: covert investigative (search) actions, entrapment, Criminal Procedure Code of Ukraine, European Court of Human Rights, Supreme Court, inadmissible evidence.

У цій статті досліджено складне та актуальне питання меж допустимості дій правоохоронних органів під час проведення негласних слідчих (розшукових) дій, зокрема у випадках, коли виникає ризик провокації до вчинення злочину. Ґрунтовно проаналізовано, яким чином українське кримінальне процесуальне законодавство, а саме положення Кримінального процесуального кодексу України, регулює проведення таких заходів, а також акцентує увагу на прогалинах правозастосовної практики, що можуть спричинити порушення прав людини. Увагу зосереджено на співвідношенні понять «негласні слідчі (розшукові) дії» та «провокація» в межах як національного законодавства, так і європейських правових стандартів. Стаття містить теоретичне осмислення природи провокації злочину та виокремлює її як особливу форму перевищення повноважень органами досудового розслідування. Значну частину дослідження присвячено аналізу практики Європейського суду з прав людини, зокрема рішень у справах *Teixeira de Castro v. Portugal* (1998), *Ramanauskas v. Lithuania* (2008), *Ramanauskas v. Lithuania (No. 2)* та *Mills v. Ireland* (2016), які стали ключовими у формуванні стандартів допустимості доказів, здобутих за участю державних агентів. Значну увагу зосереджено на практикці Верховного Суду, окремо аналізуючи постанови, які демонструють неоднозначність підходів до оцінки допустимості доказів, отриманих унаслідок оперативних дій. Підкреслюється, що правова кваліфікація подібних ситуацій потребує глибокого зважування: чи мав місце законний контроль над правопорушенням, чи ж відбулася недопустима провокація. Окремо розглянуто наслідки встановлення факту провокації з точки зору кримінального процесу. Зазначено, що у випадку доведення, що докази у справі отримано внаслідок провокації, вони визнаються недопустимими і втрачають доказове значення. Це, у свою чергу, може стати підставою для виправдувального вироку або перегляду правової оцінки вини обвинуваченого. В цілому, наведений у статті аналіз має суттєве значення для вдосконалення національного законодавства у контексті проведення негласних слідчих (розшукових) дій та його впорядкування відповідно до європейських норм.

Ключові слова: негласні слідчі (розшукові) дії, провокація злочину, Кримінальний процесуальний кодекс України, Європейський суд з прав людини, Верховний Суд, недопустимі докази.

The process of investigating criminal proceedings is associated with the implementation of a significant number of procedural actions, the effectiveness of which directly influences the establishment of the circumstances of the criminal offense and the overall realization of the objectives of the criminal proceedings. Primarily, this concerns the conduct of investigative (search) actions.

Thus, part 1 of Article 223 of the Criminal Procedure Code of Ukraine (CPC of Ukraine) states that «investigative (search) actions are actions aimed at obtaining (collecting) evidence or verifying already obtained evidence in a specific criminal proceeding».

For a more specific understanding of the concept of "investigative (search) actions", particularly covert investigative (search) actions (hereinafter referred to as CIAs), we have referred to legal doctrine, the regulatory framework of Ukraine, and scientific literature.

Ukrainian legislation, specifically Article 246 of the Criminal Procedure Code (hereinafter referred to as CPC of Ukraine), defines that «covert investigative (search) actions are a type of investigative (search) actions, the information about the facts and methods of their conduct shall not be disclosed, except in cases provided by this Code» [1].

If we turn to scientific literature, at least two approaches to the understanding of the concept of "investigative actions" have emerged. The first approach, which is quite trivial in our opinion, is characterized by a broad interpretation of this term. In particular, proponents of this approach believe that investigative actions refer to all procedural actions of the investigator [2].

The second approach is based on the connection to evidence collection. In this sense, investigative actions are the actions of the investigator or prosecutor aimed at collecting the evidentiary base. It is worth noting that this approach is

more framework-based in understanding the concept, but it is the one followed by most scholars [2].

Unfortunately, the criminal procedural legislation of Ukraine does not provide a clear definition of the concept of provocation of a crime. However, one of the few provisions that refers to this concept is part 3 of Article 271 of the Criminal Procedure Code of Ukraine, which states that "during the preparation and conduct of measures to control the commission of a crime, it is prohibited to provoke (incite) a person to commit this crime for the purpose of its subsequent detection, assist a person in committing a crime they would not have committed had the investigator not facilitated this, or influence their behavior with violence, threats, or blackmail for the same purpose. Items and documents obtained in this way cannot be used in criminal proceedings" [1].

In addition, paragraph 1 of part 7 of this same article states that "the prosecutor, in their decision to conduct control over the commission of a crime, in addition to the information provided for in Article 251 of this Code, must state the circumstances that indicate the absence of provocation of a person to commit a crime during the covert investigative (search) action" [1].

Covert investigative (search) actions are among the primary tools for obtaining evidentiary information. In such cases, various types of covert investigative actions may be used, including tracking technical devices, audio or video surveillance of individuals, and operations aimed at combating crime. At the same time, the aforementioned measures often raise concerns regarding compliance with the European Convention on Human Rights (ECHR), particularly the right to respect for private and family life (Article 8) and the right to a fair trial (Article 6). Particular attention should be given to cases involving provocation by law enforcement agencies, where individuals are induced to commit crimes they would not have otherwise committed. Such practices distort justice, creating the illusion of a crime rather than uncovering real wrongdoing. When uncovered, these actions render proceedings unfair and the resulting evidence inadmissible.

The case law of the European Court of Human Rights is key in addressing this issue. The Court has repeatedly affirmed that provocation violates the principles of equality of parties and adversarial procedure. In the context of covert actions, provocation may amount to a violation of Article 6 of the ECHR. Therefore, the Court's jurisprudence warrants close attention, as it outlines clear criteria for distinguishing unlawful provocation from permissible investigative methods–an essential guide for aligning national practices with European human rights standards.

Considering the provisions of Part 5 of Article 9 of the Criminal Procedure Code of Ukraine, which stipulates that criminal procedural legislation is applied taking into account the practice of the European Court of Human Rights (ECHR), it is possible to refer to relevant decisions of this court in order to determine the criteria for the provocation of a crime [1]. This approach allows for the integration of international human rights standards into national legal practice and ensures a clearer interpretation and application of the norms regulating provocation of a crime.

Before proceeding with the analysis of specific cases in which provocation to commit a crime occurred, it is appropriate to focus on the theoretical aspects of this phenomenon and the approaches to its definition in the practice of the European Court of Human Rights.

In its jurisprudence on crime provocation, the ECHR has formulated two key criteria on the basis of which the existence or absence of provocation is assessed: the material and procedural criteria.

The material criterion involves determining whether there was an active role played by state bodies (in particular, law enforcement agencies) in encouraging a person to commit a crime that they might not have committed without external influence. The Court examines whether the criminal initiative came from the person themselves, or whether it was artificially created by state agents for the purpose of obtaining evidence or exposing a criminal offense. If it is established that the state was the source of the initiative to commit the crime, it constitutes unacceptable provocation [3].

The procedural criterion, in turn, involves evaluating how effectively the national courts considered the defendant's claims regarding provocation. The ECHR emphasizes that even in the presence of an admission of guilt or other evidence, courts must carefully examine the allegations of possible provocation by state agents. It is important to ensure transparency in the investigation and a fair trial that allows the person to exercise their right to effective protection from unlawful interference by the state [3].

These statements were made in cases such as *Malininas v. Lithuania*, *Ramanauskas v. Lithuania*, *Bannikova v. Russia*, *Vanyan v. Russia*, and *Akbay and others v. Germany* [3].

As a result of establishing the fact of provocation by law enforcement agencies, both the practice of the European Court of Human Rights and the norms of Ukrainian legislation adhere to the principle of inadmissibility of evidence obtained through a violation of human rights, particularly the right to a fair trial.

Based on the analysis of open sources, including materials published on the official website of the European Court of Human Rights, we find it appropriate to draw attention to a number of cases that are of fundamental importance for understanding the Court's approaches to the issue of crime provocation during the conduct of covert investigative (search) actions.

In Teixeira de Castro v. Portugal (1998) case, Mr. Francisco Teixeira de Castro, a Portuguese citizen with no prior criminal record, was convicted of drug trafficking based primarily on the actions and testimony of two undercover police officers. The case centered around two plain-clothed police officers who actively incited the applicant to commit a drug offense. The officers repeatedly approached an individual, V.S., suspected of minor drug offenses and pressured him to find a drug supplier. Unable to do so, V.S. eventually identified Teixeira de Castro as a potential source. The officers, pretending to be buyers, went with V.S. and F.O. to the applicant's home, where they offered him 200,000 escudos to purchase 20 grams of heroin. Teixeira de Castro accepted the request, obtained the heroin from a third party and delivered it as agreed. After delivery, the officers revealed their identities and arrested him. The important point in this regard is that in the present case there was no prior investigation, no judicial supervision and, in general, no reasonable suspicion that the applicant was involved in drug trafficking. The European Court of Human Rights found that the police officers were not simply observing or passively investigating, but rather actively participating in inciting the crime, thereby exceeding their powers as undercover agents. The Court found that the actions in question constituted a violation of Article 6 § 1 of the European Convention on Human Rights, which concerns a fair trial [4].

In Ramanauskas v. Lithuania (2008) case, Kęstas Ramanauskas, a Lithuanian prosecutor, was approached by a police officer offering a bribe of USD 3,000 to secure the acquittal of a third party. Although Ramanauskas initially refused, he eventually accepted the bribe after the officer repeatedly made the offer. The officer, acting under authorization from the Deputy Prosecutor General, was not simply investigating a crime but actively inciting it. He initiated contact with Ramanauskas, offered the bribe multiple times, and applied pressure to convince him to accept. In the present case, the domestic courts did not conduct a thorough investigation into the issue of provocation by the police officers, although throughout the trial Ramanauskas claimed that he had been forced to commit the relevant offence. It is significant that the applicant's conviction was based on evidence resulting from this provocation,

and all other facts were rejected. In turn, the European Court of Human Rights condemned the actions of the domestic court and pointed out the presence of provocation in the officer's actions. In addition, the ECtHR noted that without the officer's repeated suggestions and pressure, the crime would most likely not have occurred [5].

After individually examining the cases of the European Court of Human Rights, it is appropriate to move on to a comparative analysis. This approach allows for a deeper evaluation of the consistency in the Court's jurisprudence and highlights the key criteria used to determine whether state-provoked entrapment occurred. Particular attention should be given to the cases of Mills v. Ireland (2016) and Ramanauskas v. Lithuania (No. 2) – examples that reflect a consistent yet nuanced evaluation of state interference in an individual's criminal intent. These decisions provide a valuable basis for outlining the Court's position on the permissibility of covert investigative techniques in the context of the right to a fair trial.

In Mills case, the applicant's central argument was the allegation of entrapment by law enforcement authorities. However, upon analyzing the circumstances, the Court concluded that the complaint was inadmissible. A key point was the establishment of the passive role of state institutions in the course of events, as well as the applicant's prior predisposition to criminal behavior. Accordingly, the Court found no active interference capable of undermining the fairness of the judicial process [6].

Similarly, in the case of Ramanauskas (No. 2), the applicant argued that there had been provocation by state officials. However, in its judgment, the Court justified the lawfulness of the operation, emphasizing its legality and the proper level of oversight. The judicial body established that the law enforcement officers acted in accordance with applicable law and there was no intentional incitement to commit a crime [7].

Both judgments emphasize that the key factor in assessing whether there is a potential provocative interference is the extent to which their actions influenced the individual's decision-making. Where the criminal initiative emanated from the applicant and the authorities did not exceed permissible conduct, the Court will generally not find a violation of the right to a fair trial. Accordingly, the Court holds that secret investigative measures are acceptable provided they meet the standards of proportionality, legality and effective control.

The analysis of the practice of combating serious and especially serious crimes reveals the existence of certain types of covert investigative (search) actions that provide for the possibility of controlling illegal activities (in particular, according to Article 271 of the Criminal Procedure Code of Ukraine – Control over the commission of a crime), as well as infiltrating organized or criminal organizations (Article 272 of the Criminal Procedure Code of Ukraine – Execution of a special task to uncover the criminal activity of an organized group or criminal organization) [1]. These forms of activity, by their nature, approach the limits of what is permissible and, in some cases, may overlap with provocation of a crime, that is, deliberately creating circumstances that imitate illegal behavior for the purpose of forming evidence of a person's guilt.

In turn, it is worth noting that in practice, the issue of determining the boundary between the legitimate operational activities of law enforcement agencies and provocation to commit a crime is a rather difficult task. In our opinion, the lack of clear regulatory regulation of the concept of provocation and the uncertainty of the procedural order for considering complaints is one of the main problems [8].

On the one hand, law enforcement agencies have the right to conduct operational-investigative measures, including controlling the commission of a crime, in order to prevent or document illegal activities. However, when these measures escalate into inciting a person to commit actions they did not intend to carry out, it is already a case of inadmissible provocation, which violates the standards of a fair trial.

In this regard, at the national legislative and judicial practice level, it would be appropriate to introduce clear criteria and mechanisms for identifying provocation, as well as proper verification of relevant complaints within criminal proceedings – taking into account the standards established by the European Court of Human Rights.

In our opinion, purely theoretical consideration of the issue of provocation of a crime is insufficient for a comprehensive analysis of this problem. Therefore, it would be advisable to refer to the practice of the Supreme Court, which plays a key role in forming approaches to distinguishing between the lawful activities of law enforcement agencies and inadmissible provocation.

After analyzing a significant number of rulings by the Supreme Court in cases where the issue of provocation to commit a crime was raised, we have concluded that such behavior on the part of law enforcement agencies most often appears in cases of certain categories of crimes, which are characterized by a high level of latency and the possibility of carrying out covert operational measures.

The most common groups of crimes in which, according to judicial practice, the risk of provocation arises can be divided as follows:

1. The so-called "white-collar" crimes, in particular:

– Fraud (Article 190 of the Criminal Code of Ukraine).

– Misappropriation, embezzlement, or acquisition of property by abuse of official position (Article 191).

– Receipt of improper benefit (Article 368).

– Offering, promising, or giving improper benefits to a public official (Article 369).

– Abuse of influence (Article 369-2).

2. Cases related to the illegal circulation of narcotic substances, in particular:

– Drug trafficking (Article 305).

– Illegal production, storage, transportation, or sale of narcotic substances (Article 307).

– Coercion to use narcotic substances (Article 315).

3. Certain other categories of cases in which instances of provocation are also recorded:

– Illegal deprivation of liberty or kidnapping (Article 146).

– Human trafficking (Article 149).

– Illegal transportation of persons across the state border (Article 332).

These categories of cases have a common feature – the difficulty of detecting and recording the fact of the crime without involving covert investigative (search) actions, which, in turn, creates a potential ground for exceeding authority by law enforcement agencies and the use of inadmissible methods of provocation. Therefore, it is in these cases that a thorough analysis of the admissibility of evidence and the adherence to the standards of a fair trial is particularly relevant.

In this context, it is worth mentioning the Supreme Court's ruling of April 24, 2018, in case No. 462/5338/14-k, where the violation of Part 1 of Article 368 of the Criminal Code of Ukraine was examined.

In this case, the Supreme Court emphasized that the prosecutor's statement alone, claiming that the materials of the pretrial investigation were reviewed and did not contain signs of provocation, is insufficient. The court considering the case on its merits is required to independently examine the materials of the proceedings and provide its own reasoned assessment regarding the presence or absence of provocation.

The Supreme Court's conclusion was as follows: "As can be seen from the case materials, in their appellate complaints, the convicted person and defense attorney Y...n. among other arguments, also claimed that the crime was deliberately provoked by law enforcement agencies and the inadmissibility of evidence obtained through covert investigative actions, which were relied upon by the district court in the verdict. These arguments were not properly examined by the appellate court, and no reasoned response to them was provided in the court's decision.

In particular, in refuting the defense's arguments regarding provocation, the appellate court merely stated that these circumstances were checked by the prosecutor, as indicated in the text of the prosecutor's decision dated July 1, 2014, about conducting a special investigative experiment, which shows that a review of the pre-trial investigation materials was conducted and no signs of crime provocation were found by him. However, the correctness of these conclusions by the prosecutor was not checked by the appellate court, and no justification for their confirmation was provided in the ruling" [9].

The next case, the Supreme Court's ruling of July 11, 2018, in case No. 336/4522/15-k, is not as significant in the context of our research, but the separate opinion of Judge A.P. Bushchenko struck us as worth attention.

In particular, the separate opinion emphasizes that covert investigative (search) actions are only possible when there is a well-founded suspicion of a person committing criminal activity. Furthermore, it highlights the importance of a thorough analysis of the behavior of the undercover agent, particularly evaluating its passive nature, which is crucial to ensuring the legality and admissibility of the gathered evidence [10].

The following excerpt from the separate opinion is worth noting: "... The European Court of Human Rights (ECHR) stated that when the defense raises the issue of provocation, it is necessary to determine whether the crime would have been committed without the involvement of the authorities. Incitement occurs when relevant agents–whether law enforcement officers or individuals acting under their instructions–not only limit themselves to investigating criminal activity in a predominantly passive manner but exert such influence on the person as to encourage them to commit a crime that otherwise would not have been committed, with the goal of enabling the detection of the crime, obtaining evidence, and bringing charges..." [10].

Judge A.P. Bushchenko also pays special attention to determining the moment when the covert operation began, as this is crucial for determining whether the agents merely joined an already existing criminal activity or if they were the ones who initiated it. This circumstance is decisive for the legal assessment of the admissibility of the methods used and the evidence gathered.

"…Equally important is the fact that the prosecution did not present to the court any–emphasizing, ANY–evidence obtained as a result of close surveillance of the convicted person for more than a month, which would confirm the statement of INDIVIDUAL_2 from March 12, 2015, or indicate other criminal behavior or intentions of the convicted person" [10].

We also fully support the following opinion: "I do not believe that in the context of the events of April 17, 2015, this 'hint' meant anything other than an offer of a bribe. It is unlikely that one could expect a bribe offer to sound like: 'I propose that you receive an improper benefit from me for committing illegal actions in my favor, that is, committing a crime as defined by Article 368 of the Criminal Code'" [10].

The above fragment of the separate opinion illustrates that the formulation of an offer of an improper benefit often has a veiled nature, which, in turn, significantly complicates the distinction between the actual commission of a crime and unacceptable provocation by law enforcement.

A notable example in this context is also found in the Supreme Court's ruling of March 12, 2020, in case No. 591/4171/17, which states that a sign of provocation may be the absence of a response from law enforcement after the first episode of illegal behavior, as well as actual tolerance of the continuation of criminal activity, which is conducted under their control [11].

At the same time, in the Supreme Court's ruling of August 24, 2023, in case No. 601/1704/19, an important aspect is emphasized. The prosecutor, citing the European Court of Human Rights' decision in the case "Berlizov v. Ukraine," points out that references to provocation are possible only if the defendant admits to committing the alleged acts but claims they were provoked by law enforcement officers [12].

The consequences of establishing the fact of provocation of a crime are quite clear from the perspective of criminal procedure. If it is proven that the evidence in a criminal case was obtained as a result of provocation, such evidence is considered inadmissible and automatically loses its evidentiary value. This, in turn, may serve as grounds for a verdict of acquittal or a review of the assessment of the defendant's guilt.

REFERENCES

1. Кримінальний процесуальний кодекс України. Офіційний вебпортал парламенту України. URL: https://zakon.rada.gov.ua/laws/show/4651-17#Text (дата звернення: 06.05.2025).
2. Коваль А. Забезпечення прав людини при провадженні негласних слідчих (розшукових) дій : монографія. Миколаїв : МОН України Чорном. нац. ун-т ім. Петра Могили, 2019. 264 с. (дата звернення: 06.05.2025).
3. Окрема думка судді Вищого антикорупційного суду ОСОБА_1 до вироку від 18 вересня 2024 року у справі № 991/1388/20 (провадження № 1-кп/991/26/20) Вищого антикорупційного суду від 18.09.2024 у справі № 991/1388/20. URL: https://reyestr.court.gov.ua/Review/122018927 (дата звернення: 06.05.2025).
4. Teixeira de Castro v Portugal, ECHR (1998) | Human Rights and Drugs. *Home | Human Rights and Drugs*. URL: https://www.hr-dp.org/contents/587 (дата звернення: 06.05.2025).
5. Case of Ramanauskas v. Lithuanian – Application no_74420/01 (2008) – European Foundation of Human Rights. *European Foundation of Human Rights.* URL: https://en.efhr.eu/2010/02/11/case-ramanauskas-v-lithuania-application-no_7442001-2008/ (дата звернення: 06.05.2025).
6. Mills v. Ireland. HUDOC – European Court of Human Rights. URL: https://hudoc.echr.coe.int/eng#%7B"itemid":["001-178562"]%7D (date of access: 12.05.2025).
7. Ramanauskas v. Lithuania (No. 2). HUDOC – European Court of Human Rights. URL: https://hudoc.echr.coe.int/fre#%7B"itemid":["001-180850"]%7D (date of access: 12.05.2025).
8. Марочкін О. Наслідки провокації злочину при проведенні негласних слідчих (розшукових) дій для доказування у сфері правоохоронної діяльності: судова практика. *Юридичний науковий електронний журнал*. 2024. № 7. С. 440–445 (дата звернення: 06.05.2025).
9. Постанова Верховного Суду від 24.04.2018 у справі № 462/5338/14-к. URL: https://reyestr.court.gov.ua/Review/74440190 (дата звернення: 06.05.2025).
10. Постанова Верховного Суду від 11.07.2018 у справі № 336/4522/15-к. URL: https://reyestr.court.gov.ua/Review/75345784 (дата звернення: 06.05.2025).
11. Постанова Верховного Суду від 20.03.2020 у справі № 591/4171/17. URL: https://reyestr.court.gov.ua/Review/88265287.
12. Постанова Верховного Суду від 24.08.2023 у справі № 601/1704/19. URL: https://reyestr.court.gov.ua/Review/113091810 (дата звернення: 06.05.2025).