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The right to not testify against itself in practice of the European court of human rights

In article are analyzed the most important decisions of the European court of the human rights, the concerning rights not to testify against themselves. Evolution of case practice of Court shows that there are some concepts of this right, and the Court not always consistently adheres to one of them. The main problem is exact determination of nature of the right not to testify against itself in relation to widespread cases of coercion to a cooperation with the investigation, for example – to issue of documents and receiving expert samples. Attempts of the European Court to carry out accurate distinction between oral indications and other proofs look unconvincingly. In particular, the criterion of "objectivity" applied by Court not always allows to define precisely limits of action and the content of the estimated right of the applicant. Some decisions contain inconsistent legal positions that causes need of further efforts on the solution of this problem.

Key words: The European court, the witness privileges self-incriminating indications, the right to protection, fair judicial proceedings.

Мақалада тұлғаның өзіне қарсы куәлік етпеу құқығына қатысты адам құқығы бойынша еуропалық соттың ең маңызды шешімдеріне талдау жүргізіледі. Аталған соттың прецеденттік тәжірибесінің дамуы, осы құқықтың бірнеше концепциясы бар екенін және де Сот олардың біреуіне ғана ұстаным жасамайтындығын көрсетеді. Тергеу органдарымен ынтымақтастық жүргізу кең таралған жағдайларымен, мысалы, құжаттар беру мен сараптамалық үлгілерді алу, байланысты тұлғаның өзіне қарсы куәлік етпеу құқығының мазмұнын нақты белгілеу негізгі мәселе болып табылады. Ауызша хабарлаған мәлімдемелер мен басқа да айғақтардың арасын ажырату бойынша Еуропалық соттың әрекеті дәлел болып тұр. Сот қолданысындағы «ақиқаттылық» критерийі көп жағдайда арызданушының осы құқығының мазмұны мен әрекет ету мерзімін нақты білуді қамтамасыз етпейді. Соттың кейбір шешімдерінде қарама-қайшы құқықтық ұстанымдар болғандықтан, осы мәселені шешу бойынша қосымша жұмыс талап етіледі.

Түйін сөздер: еуропалық сот, куәгерлік артықшылықтар, өзін-өзі айыптау айғақтары, қорғалу құқығы, әділетті сот ісін жүргізу.

В статье анализируются наиболее важные решения Европейского суда по правам человека, касающиеся права не свидетельствовать против себя. Эволюция прецедентной практики суда показывает, что существуют несколько концепций данного права, и суд не всегда последовательно придерживается одной из них. Основной проблемой является точное определение характера права не свидетельствовать против себя применительно к распространенным случаям принуждения к сотрудничеству со следствием, например, выдаче документов и получению экспертных образцов. Попытки Европейского суда провести четкое различие между устными показаниями и другими доказательствами выглядят неубедительно. В частности, применяемый судом критерий «объективности» не всегда позволяет точно определить пределы действия и содержание предполагаемого права заявителя. Некоторые решения содержат противоречивые правовые позиции, что обусловливает необходимость дальнейших усилий по решению этой проблемы.

Ключевые слова: Европейский суд, свидетельские привилегии, самоинкриминирующие показания, право на защиту, справедливое судебное разбирательство.

Introduction

The right against self-incrimination.is one of the cornerstones of modern criminal proceedings, which has a pronounced adversarial nature. It is difficult to imagine a fair trial in which the accused would be forced to give self-incriminating evidence. In this regard, it is logical that this right is a part of the international human rights model. Thus, article 14 of the 1966 Covenant on civil and political rights expressly provides that every accused person has the right not to be compelled to testify against himself/

herself or to confess guilt. The European Court of human rights has consistently emphasized in its decisions that the right against self-incrimination is an essential element of the right to a fair trial, although it is not mentioned in the 1950 European Convention (article 6 of the Convention).

"The meaning of these rights is to protect the accused from malicious coercion by the authorities, which helps to avoid miscarriages of justice and to achieve the objectives set out in article 6... In particular, this right helps to ensure that the prosecution does not resort to evidence obtained against the will of the accused by coercion or pressure" (Nuala Mole, Catharina Harby 2006: 45).

However, as the case-law of the ECHR shows, the implementation of this right is fraught with a number of difficulties that are amplified in connection with the diversity of modern criminal activity and the development of technical means of proof. The analysis of a number of judgments issued by the European court of Justice allows, at least, identifying the most problematic aspects of the right against self-incrimination.

Material and Methodology

On the research there were used theoretical and comparative analysis of different cases concerning the question of right against self-incrimination like Funke v. France, John Murray v. United Kingdom, Saunders v. United Kingdom, Serves v. France, Heaney and McGuinness v. Ireland case and so on.

In the article there were researched mostly judgments of court trial on above mentioned issue. Moreover there were used works of professionals on article 6 of European Convention on Human Rights concerning right against self-incrimination. They are Nuala Mole and Catharina Harby's research and Manova N.S.'s monograph on problems of ensuring the rights of participants in criminal proceedings.

Results and Discussion

For the first time, the Court was faced with the need to determine the nature and limits of the right in the case of "Funke v. France" (See the Funke v. France Judgment of the European Court of human right, 25 February 1993: https://hudoc.echr.coe.int/tur#{%22itemid%22:[%22001-57809%22]}).

The Complainant was fined by the French authorities for refusing to provide them with the Bank statements of some foreign Bank accounts, which were required by the charges against him for violating customs regulations. Without going into theory, the European Court then concluded that the attempt to compel the applicant to provide evidence of the offences of which he was suspected violated his right not to testify or to witness against himself. It is noteworthy that the Court interpreted this right much more broadly than in the traditional sense: Funke was punished not for refusing to give verbal testimony, but for refusing to give documents allegedly available to him to the investigation (See the J. B. v. Switzerland Judgment of the European Court of human right, 3 May 2001: https://www.legal-tools.org/doc/5d0ffd/pdf/).

In the case of "John Murray v. United Kingdom" (See the John Murray v. the United Kingdom Judgment of the European Court of human right, 8 February 1996: http://freecases.eu/Doc/CourtAct/4545634) the Complainant complained that the British law allowed the prosecution and the court to find unfavourable circumstances for the accused on the basis of his refusal to testify. While confirming that the privilege against self-incrimination and the right to remain silent are generally accepted international standards, however the European court of Justice pointed out that the right not to testify against oneself was not absolute. The court considered that the state had the right to make certain conclusions from the silence of the accused if the situation clearly requires an explanation. Although a person's conviction cannot be based solely or crucially on his or her refusal to give self-incriminating evidence, national courts may interpret the defendant's silence to the detriment of his or her interests. In the opinion of the ECHR, this degree of coercion is compatible with the idea of a fair trial enshrined in the Convention.

It should be noted that the main difference between the Murray case and the Funke case was the degree of coercion to testify: the refusal of Funke to assist the investigation was qualified as an independent finished offence, while for Murray it turned out only unfavourable conclusions of the British court about the actual circumstances of the case.

The nature of the right against self-incrimination was further elaborated by the European Court in its decision in the case of "Saunders v. United Kingdom" (See the Saunders v. the United Kingdom Judgment of the European Court of human right, 17 December1996: http://www.refworld.org/cases,ECHR,3ae6b68010.html). In accordance with the Law "On companies" of 1985, officials of economic entities of the UK had to assist the inspectors of the Ministry of trade in their investigations. The refusal to provide such assistance (for example, refusal to testify or to issue documents) threatened with a fine and imprisonment. The Complainant, who was interrogated by the inspectors in the presence of his lawyers nine times, was subsequently convicted on

the basis of his own testimony, which he gave under threat of punishment.

Faced with the respondent-state's active argument (the British authorities insisted that the absolute of the right against self-incrimination would make it impossible to effectively combat economic crime), the ECHR explained that the right not to testify against oneself is essentially about respecting the will of the accused not to testify. It does not apply to the use in criminal proceedings of materials that may be forcibly obtained from the accused, but exist independently of his or her will, such as exhaled air, blood or urine samples. In assessing the circumstances of the case, the Court found that the degree of coercion faced by Saunders was incompatible with the standards of a fair trial and found a violation of article 6 of the Convention. In the case of Saunders V. United Kingdom, the court's decision clarifies this privilege: "the right not to testify against oneself is first and foremost the right of the accused to remain silent. ...this right does not apply to the use in criminal proceedings of materials that can be obtained from the accused, regardless of his will by force, such as inter alia: the seizure of documents by order, obtaining blood samples, urine and skin for DNA analysis". Therefore, to receive samples from the accused (suspect) can be forced, the main thing — to observe in this procedure respect for these persons (Манова Н.С., 2016: 201).

It should be noted here that The court's attempt to determine the limits of the right against self-incrimination was unconvincing: thus, the criteria formulated by the Court actually called into question the decision in the case of Funke v. France, where the refusal to issue documents to the investigation (which existed regardless of the will of the accused) was recognized as lawful.

Subsequently, the European court of Justice, in Serves v. France (See the Serves v. France Judgment of the European Court of human right, 20 October1997.: http://europeancourt.ru/uploads/ECHR_Serves_v_France_20_10_1997.pdf), affirmed that the right of any accused to remain silent and not to contribute to his or her own conviction is an internationally recognized norm at the core of the notion of a fair trial. However, the Court did not find a violation of the Convention in the actions of the French authorities, which fined the applicant for refusing to take the witness oath. The problem was that Serves was called as a witness in a case in which he was originally a suspect and later found guilty. It could be assumed that his refusal to take the oath was motivated by a reasonable fear of giving incriminating evidence. However, the ECHR considered that the penalty imposed on the Complainant was a means to ensure the truth of the testimony but not to force him to give it. Therefore, the Court came to the conclusion that Serves was fined even before there was a risk of self-incriminating testimony. Attention is drawn to the apparent ambiguity of this decision, since the Court actually ignored the fact that Serves refused to take the oath in the context of the implementation of its right against self-incrimination. It is difficult to imagine that the public interest in the truthfulness of testimony outweighs the right of a person not to contribute to his conviction. Otherwise, any suspect could first be called for questioning as a witness and, taking advantage of his lack of privilege, could be given all the necessary information. Based on the above, and based on the practice of the European Court of human rights, it can be concluded that the right to a fair trial, and within its framework the right not to testify against themselves, are absolute rights. And to determine the outcome of the case only on the basis that the situation is not serious enough, although the framework of "seriousness" in any document is not legally fixed, and also to put public order above basic human rights is not allowed (Манова Н.С., 2016: 201).

In the Heaney and McGuinness v. Ireland case (See the Heaney and McGuinness v. Ireland Judgment of the European Court of human right, 21 December 2000: https://www.legal-tools.org/doc/1e4f2f/pdf/), the applicants were sentenced to imprisonment for refusing to provide information about their movements to the investigation. This obligation was imposed on them by a special law regulating the authority of the police in the investigation of terrorist crimes. Although the Court reiterated that the right to remain silent and the right against self-incrimination were not absolute, it considered that the degree of coercion applied to the applicants in the present case had in fact destroyed the very essence of the privilege. Thus, the procedural rights of the individual were again placed above the public interest, even arising from the need to counter terrorism.

However, in the case of "Weh v. Austria" (See the Weh v. Austria Judgment of the European Court of human right, 8 April 2004: http://hudoc.echr.coe.int/app/conversion/docx/pdf?library=ECHR&id=00161701&filename=CASE%20OF%20WEH%20v.%20AUSTRIA.pdf&logEvent=False), the European Court has again rendered, in our view, a half decision which significantly limits the right against self-incrimination. The applicant was fined

for providing false information about the person who was driving his car on a certain day. Noting that the criminal case under investigation by the Austrian authorities had been initiated against unidentified persons, the European Court found that the information required of the applicant had not in itself been incriminating. Consequently, in the Court's view, the link between the criminal investigation of unidentified persons in violation of transport regulations and the proceedings against the applicant was not sufficiently direct and obvious. Thus, the ECHR confirmed its legal position that the privilege of not giving self-incriminating evidence exists only in the context of the already existing criminal proceedings against the person concerned

In this decision striking too formal approach of the ECHR (demonstrated previously in the "Serves v. France"), who did not want to admit a simple fact: in both cases, the true explanation of the applicants actually led to their conviction as persons who have committed offences. Therefore, their legal status at the time of receiving information from them was not, in our opinion, of decisive importance.

In this sense is significant the Shannon v. United Kingdom case (See the Shannon v. the United Kingdom Judgment of the European Court of human right, 4 October 2005: http://swarb.co.uk/shannon-v-the-united-kingdom-echr-4-oct-2005/), in which the Complainant challenged the fine imposed on him for refusing to appear for questioning to the investigator. The decisive factor, in the opinion of the European Court, was by the time Shannon was called for questioning he was already accused of committing the crime under investigation, which means that he had the right not to testify. The court recorded a violation of article 6 of the Convention in the actions of the British authorities even though Shannon was fully acquitted on the main charge (theft and forgery of financial documents). In the Court's view, the fact that a fine was imposed on a suspect who refused to testify was incompatible with the right to a fair trial. Again, we note that the difference between Shannon and Weh was purely formal (no charges were brought against Weh), while the evidence required of them was equally self-incriminating.

A very interesting aspect of the right against self-incrimination arose in the case of «Jalloh v. Germany" (See the Jalloh v. Germany Judgment of the European Court of human right, 11 July 2006. Retrieved from: http://www.hr-dp.org/contents/534). The applicant who swallowed the drugs was forcibly injected with an emetic by which the required physical evidence was obtained. The court agreed that the drugs which were in the body of the applicant existed independently of the will of the suspect and, in principle, could be used as a means of proof (by analogy with samples of saliva, blood, hair, etc.). However, the ECHR pointed to two fundamental, in his view, differences. First, a bag of narcotic drugs was obtained as physical evidence against the applicant's will, while other elements of the human body are removed for the purpose of examination (that is, not as physical evidence, but as materials for the study). Secondly, the ECHR noted a completely different degree of coercion and, accordingly, interference in the physical integrity of a person in cases where it is necessary to take a skin sample (blood, saliva) and when it is necessary to extract from it a swallowed object. Finally, the essential point was that the procedure for administering an emetic violated article 3 of the Convention. In view of these circumstances, as well as assessing the degree of public interest in the investigation of the crime, the ECHR concluded that the right of Jalloh not to testify against himself was violated.

Considering the case of «O'Halloran and Francis v. United Kingdom» (See the O'Halloran and Francis v. United Kingdom Judgment of the European Court of human right, 29 June 2007: https://www.legal-tools.org/doc/14d855/pdf/), the Grand chamber of the Court again faced the issue of the refusal of vehicle owners to provide information about the person who was driving their vehicle at the time of breaking the rules. The first claimant, under threat of a fine, admitted that he was driving the car and subsequently unsuccessfully sought to exclude this confession from the evidence. The second applicant initially refused to provide the relevant information, citing his right against self-incrimination, for which he was fined 1,000 pounds. Both argued that the law requiring car owners to cooperate with the authorities under threat of punishment was incompatible with the standards of article 6 of the Convention.

The court reiterated that the right against self-incrimination is not absolute: its scope and content depend on all the circumstances of the case, including the nature and extent of the coercion, the availability of procedural guarantees and the manner in which the evidence is used. Having admitted that in the applicants' case there was a direct statutory compulsion to give evidence, the Court noted that it could result from the specific duties imposed on the citizen to possess a source of increased danger (car). Another aspect that the Court found worthy of attention was the limited nature of the information

required from car owners, which distinguished the case from the Funke v. France case, in which the applicant was required to produce documents that were uncertain. In addition, the car owner could avoid a fine for failure to provide information if he proved that he did not know and could not know about who was driving his car at a particular time. Finally, the Court considered that the identity of the driver was not the only element of the offence (speeding), and the penalty for refusing to testify was relatively small. Taking into account these considerations, the ECHR concluded that the applicants' right not to incriminate themselves was not violated.

It follows from this decision that the ECHR has introduced a new criterion for assessing the legality of coercion to testify – a sphere of social life in which the state ensures law and order. In our view, this makes the situation even more difficult, as the national authorities are free to decide in which cases the accused can be compelled to testify and in which cases it is not possible. It is no accident that some members of the Court pointed to this lack of decision in their dissenting opinions.

Finally, it is necessary to mention two more decisions of the ECHR, which reveal the right against self-incrimination from a slightly different angle. In Allen v. the United Kingdom Judgement (See the Allen v. the United Kingdom Judgment of the European Court of human right, 30 March 2010: http://www.menschenrechte.ac.at/orig/13_4/Allen.pdf), the applicant challenged the use in court of a secret audio recording made by a police informant who had been placed in his cell. In the case of "Bykov v. Russia" (See the Bykov v. Russia Judgment of the European Court of human right, 10 Mach 2009: http://www.statewatch.org/news/2009/mar/echr-russia-surveillance-judgment.pdf) the appellant, accused in organization of assassinations, contested the validity of the secret operation developed by the police. As part of this operation, the perpetrator of the planned crime was provided with a dictaphone and, when he came home to the Complainant, recorded their conversation, fragments of which were subsequently used as evidence of the prosecution. Both Allen and Bykov claimed that they were actually forced to give self-incriminating testimony fraudulently, as recorded conversations were a disguised form of interrogation.

The European court of Justice found a violation of article 6 of the Convention in the actions of the British authorities. In its decision, the Court indicated that the persistent questioning conducted by a specially recruited person by the police, combined with the vulnerability of the prisoner, could be functionally equated with interrogation. Despite the fact that there was no evidence of any coercion against Allen, the Court found that the confessions to the cellmate were not spontaneous and were given under duress. On the contrary, in the Bykov case, the ECHR did not record a violation of the right against self-incrimination. The court noted that, unlike Allen, the applicant was at home and therefore not in a vulnerable position. In addition, the Complainant's interlocutor was his subordinate, which excluded any element of pressure. Finally, the Complainant himself organized the crime and wanted to know the details of the alleged murder. This combination of factors led the European Court to conclude that the Bulls were not forced to testify (See the Heglas v. the Czech Republic Judgment of the European Court of human right, 1 March 2007: https://www.echr.coe.int/Documents/CLIN_2007_03_95_ENG_822344.pdf).

Conclusion

Summarizing, we can say that the practice of the European Court on the issue of the right not to incriminate themselves quite controversial and raises a number of complex issues which do not allow yet to clearly define the nature and content of the right.

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