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Criminal Liability for Provoking Bribery

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Abstract

In modern conditions of development of public relations complication of activity of law enforcement agencies is observed. This is due to new challenges in the law enforcement system, including the fight against high levels of the organization and the criminal professionalism of corrupt individuals. Because of this, it is challenging for operational units to identify specific facts of illegal actions with the help of operational and investigative measures. At the same time, the fight against crime by establishing high quantitative indicators of disclosure remains one of the principles of law enforcement in Ukraine, including sometimes deviating from those means established by law. Therefore, the problem of provoking bribery is relevant for scholars of the legislator and law enforcement. The object of the study is criminal liability for provoking bribery. The research methodology consists of such methods as the dialectical method, analytical method, historical method, method of analysis of legal documents, articles, and monographs, method of generalization, comparison, synthesis, and modeling method. The authors identified the features of such liability to clarify the problematic issues of qualification of provoking bribery, and to distinguish the distinctive features of prosecution from other types of crimes.

Keywords: criminal liability; provocation of bribery; public relations; illicit gain; provoked person.

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Responsabilidad penal por provocar soborno

Resumen

En las condiciones modernas del desarrollo de las relaciones públicas se observa la dificultad de la actividad de los organismos encargados de hacer cumplir la ley. Esto se debe a los nuevos desafíos en el sistema de aplicación de la ley, incluida la lucha contra los altos niveles de la organización y el profesionalismo criminal de las personas corruptas. Al mismo tiempo, la lucha contra la delincuencia mediante el establecimiento de altos indicadores cuantitativos de divulgación sigue siendo uno de los principios de la aplicación de la ley en Ucrania. Por lo tanto, el problema de provocar el soborno es relevante para los estudiosos del legislador y las fuerzas del orden. El objeto del estudio es analizar la responsabilidad penal por provocar el soborno. La metodología de investigación consiste en métodos tales como el dialéctico, analítico, histórico, análisis de documentos legales, artículos y monografías, método de generalización, comparación, síntesis y método de modelado. Como resultado del estudio de la responsabilidad penal por provocar el soborno, fue posible identificar una serie de características de dicha responsabilidad, aclarar las cuestiones problemáticas de calificación de este delito y distinguir las características distintivas del enjuiciamiento de otros tipos de delitos.

Palabras clave: responsabilidad penal; provocación de sobornos; relaciones públicas; ganancia ilícita; persona provocada.

Introduction

One of the key directions of the legal policy of our state is the prevention and counteraction of corruption. The solution to this problem depends on how effectively and successfully the law enforcement system will work. Given this, it is urgent to pay attention to the study of criminal liability for provoking bribery.

In general, bribery is already a traditional concept for criminal science, in which it was positioned either as a way to incite to commit a crime or as a way of committing an act under the Special Part of the Criminal Code of Ukraine (Law 2341-III, 2001), no agreement was reached on an understanding of the nature of bribery offenses.

Thus, the Criminal Code of Ukraine (Law 2341-III, 2001) reflects a legal norm that establishes liability for provoking bribery – Article 370 of the Criminal Code of Ukraine. In the original version of 2001, it was called “Bribery Provocation”, but later underwent many changes. Thus, in 2011, after the criminalization of the concept of “commercial bribery”, the article

was entitled “Provocation of bribery and commercial bribery.” And it was then that a new concept was introduced – “illegal gain”. In 2013, since national legislation was brought in line with the standards of the Criminal Convention on Corruption (United Nations, 1999), the legislator changed the title of the article to “Provocation of bribery”, and even then the concept of “bribery” was expanded. It began to apply to all types of bribery, including bribery of an employee of an enterprise, institution, or organization. The provocation of bribery was also attributed to corruption crimes. Therefore, over time and the intensive legislative activity of the national legislator, the meaning of such a concept as bribery has significantly expanded.

Now bribery has begun to be considered not only as a unilateral criminal act, but also as an independent criminal offense, the perpetrators of which are both the subject and the addressee of bribery, and, at the same time, there is corruption bribery, the specific features of which are the subject, means, and criminal consequences of the commission.

Given the above, it is important to analyze and investigate criminal liability for provoking bribery, pay attention to problematic issues of regulation of this crime, summarize problematic issues in a criminal prosecution for this crime and compare the legislation of Ukraine and foreign countries in this area.

1. Theoretical framework

Criminal liability for provocation of bribery was investigated by the following scientists: Aldanova (2017) Alyoshina (2007), Bantishev and Kuzmin (2008), Batrachenko (2016), Grudzur (2010), Veretyannikov (2013), Drozdov (2016), Dudorov (2016), Egorova (1997), Zagodirenko (2013), Kartavtsev, Tomchuk, and Prytula (2020), Komar (2020), Tatsii *et al.* (2015), Melnyk and Khavroniuk (2008), Yaremenko and Slipushko (1998), Perelygina and Mirko (2018), Radachinsky (1999), Ryzhova (2004), Savchenko (2007), Us (2015), Stern (2017).

Thus, Aldanova (2017) reviewed the case-law of the European Court of Human Rights on the provocation of bribery and drew attention to how the European Court of Human Rights interprets the provocation of bribery. Thus, the researcher draws attention to the fact that according to the position of the European Court of Human Rights, the existence of state interest cannot be used as a justification for the use of evidence obtained as a result of police provocation, whereas the use of such evidence exposes the accused to the risk of being permanently deprived of a fair trial from the outset; domestic law should not allow the use of evidence obtained as a result of incitement by public agents. This position should be agreed, because if the police provocation is justified, then such legislation does not

comply with the principle of “fair trial”. Besides, the author’s opinion that the European Court has developed a concept of provocation which violates Article 6 § 1 of the Convention and is different from the use of lawful operational methods of the preliminary investigation is noteworthy. The paragraph states that, while the use of special methods of investigation, in particular covert, cannot in itself infringe the right to a fair trial, the danger of police provocation as a result of such measures implies that their use should be limited to a clear framework.

Alyoshina (2007) and Dudorov (2016) conducted a criminal law investigation into the provocation of bribery, considered the positions of various scholars, and drew attention to the international experience in regulating this issue. Thus, Alyoshina (2007) understands the provocation of a crime as a person knowingly creating a situation that causes another person to commit a crime, or complicity in such a crime to expose, blackmail, or cause other material or non-material damage to such a person.

Bantishev and Kuzmin (2008) investigated the provocation of bribes as a special kind of complicity in the crime. Thus, the scholar analyzed the provisions of the Polish legislator and, by analogy with the neighboring country, decided that the provocation of bribery is a form of complicity in the crime. Therefore, the author proposes to consider this type of criminal activity as a special type of incitement (in the context of the use of the institution of complicity in crimes of giving or receiving bribes) when addressing issues related to the qualification of actions of officials linked to bribery provocation. Moreover, the provisions of the institution of complicity should be applied only in case of commission of this crime by a group of officials, dividing them according to role participation by types of accomplices and perpetrators, organizers, instigators, and accomplices. This position deserves attention, and therefore the issue of distinguishing between incitement and complicity is examined separately in the article.

Batrachenko (2016) conducted a comparative legal analysis of criminal liability for provoking bribery of the legislation of Ukraine and foreign countries, which was taken as a basis for the study of international regulation of this crime in the international arena. Thus, the author pointed out that crimes related to illicit gain are the most dangerous among crimes in the sphere of official activity. Their social threat is revealed in the fact that they undermine the authority of the state, harm the democratic development of society, significantly restrict the rights and freedoms of man and citizen, violate the principle of equality before the law, hinder the reform of the criminal justice system, and hinder market relations in Ukraine. Examining the provisions of the criminal law of foreign countries on the responsibility for provoking bribery, the author notes that the concept of “provocation” is enshrined in the criminal law of only some foreign countries and is interpreted differently. Provocation is defined as a public incitement to

commit a crime, and as a kind of complicity; as a synonym for the concept of “extortion” in receiving bribes; as a method of combating crime; as a circumstance that excludes the criminality of the act, etc.

However, some approaches to the legal assessment of provocation, such as its differentiation into lawful and unlawful and recognition of the latter as a circumstance that excludes the criminality of the act (US criminal law) and attribution of provocation to the institution of complicity (Penal Code of the Republic of Poland (1997)) or establishing responsibility for provocation norm of the Special Part of the Criminal Code (Law of Georgia No. 2287, 1999), are appropriate and could be taken into account in domestic law. Unlike the Criminal Code of Ukraine, where the subject of the crime (Article 370 of the Criminal Code of Ukraine (Law 2341-III, 2001)) is exclusively an official, the subject of provocation of bribery under the criminal law of foreign countries is the general subject of the crime. Besides, the purpose of this crime is somewhat different, which according to the domestic Criminal Code is understood as exposing the person who gave or received a bribe, and therefore is not reduced to the artificial creation of evidence of a crime (bribery), or blackmail, or harm who gave or received a bribe. On this, the author came to the fair conclusion that the experience of legislators of foreign countries can be quite useful for developing optimal approaches to improve the content of Art. 370 of the Criminal Code of Ukraine. In particular, this applies to the development of theoretical provisions for determining the object of bribery provocation and proposals for recognizing the general subject of the crime as the subject of bribery provocation.

Grudzur (2010) considered the objective side of bribery provocation and what it is caused by, as well as suggested further ways to study this issue in his work. Thus, the author came to the following conclusions. In particular, these are the conclusions that the provocation of a bribe from the objective point of view consists in the creation of a circumstance that determines the giving or receiving of a bribe. In turn, the creation of such a circumstance can be done not only by action but also by inaction. The circumstance itself is defined as a phenomenon, event, fact, feature of reality, which determines (is the reason) the formation of the provoked person’s intent to give or receive a bribe. Quite similar in meaning, in this context, is the concept of “condition”, which is used in the disposition of Part 1 of Art. 370 of the Criminal Code of Ukraine and, in fact, means the same as the concept of “circumstance”. Therefore, the use of the word “conditions” in the text of this rule seems superfluous. Provocation of a bribe is a crime with a formal composition and is considered to be over from the moment of creation of the circumstance, which determines the giving or receiving of a bribe. In this case, it does not matter whether the bribery itself was committed or received.

Veretyannikov (2013), Egorova (1997), and Radachinsky (1999) analyzed some aspects of the expediency of criminal liability for provoking bribery or commercial bribery. Thus, criminal liability under Art. 370 of the Criminal Code of Ukraine is due to the need for a legal mechanism to protect the legitimate rights and interests of citizens, as well as the separation of legal actions of officials, including law enforcement agencies, in the fight against corruption from criminal acts. According to the author, and in our opinion, this mechanism should promote the implementation of lawful actions rather than expanding the list of criminally punishable illegal acts for officials. Moreover, Drozdov (2016) drew attention to topical issues of protection against provocation (incitement) of a person to commit a crime in the light of the case-law of the European Court of Human Rights in his work. The author concluded that the institution of provocation (incitement) of a person to commit a crime is by nature cross-sectoral. The author also rightly points out that among the main problems in recent years in practice the issue of the need to prove in criminal proceedings the fact of the reality of those legal relations, in connection with which it was proposed, demanded, received illegal benefits. As a result, there was a need to ascertain how the fact of failure to prove such circumstances affected the existence of a *corpus delicti* in the actions of the person who had obtained the unlawful benefit (in the absence of signs of provocation on the part of the applicant). Also, given the latency of corruption crimes, it is necessary to determine the nature of the actions of the prosecutor and other law enforcement agencies aimed at detecting them, taking into account the decisions of the ECtHR on the “need to investigate passively.” Research Drozdov served as a basic study to analyze the practice of the ECtHR in this work.

Zagodirenko (2013) conducted a criminal law analysis to improve the current legislation on crime provocation. Thus, the researcher drew attention to the proposed bills and proposed additions to them, which will qualitatively change the regulation of bribery provocation.

Kartavtsev, Tomchuk, Prytula carried out a criminal analysis of bribery under the laws of Ukraine and foreign countries. As a result of the study, it was concluded that only in the Criminal Code of the Republic of Bulgaria (Law 26/1968, 1986) and the Criminal Code of the Republic of Tajikistan (Law 574, 1998) provocation of bribery belongs to crimes against state power and the interests of civil service, while in others – to crimes against justice. Concerning the subject of this crime, in all the codes we study, it can be any natural sane person who has reached the age of criminal responsibility, and not just an official, as specified in national law. The objective signs of provocation of bribery in the Criminal Code of foreign countries are quite similar to each other and, in fact, provide for punishment for staging a bribe. The authors also believe that the provocation of bribery should be attributed to crimes against justice, linking it with the process of proving (i.e. identifying and consolidating evidence) of receiving or giving bribes,

and, therefore, the direct object of provocation of bribery should be defined as public relations time of detection and consolidation of evidence of the bribery. The hypothesis stated in the position of the authors is further investigated in our article and receives further substantiation.

Komar (2020) researched the concepts and types of bribery under the criminal law of Ukraine. Thus, the researcher analyzed the criminal law on bribery in historical retrospect shows that it has traditionally been used by domestic legislators as a way to incite to commit a crime, and later as a way to commit an act under the Special Part of the Criminal Code of Ukraine. At the same time, receiving a material reward by the addressee of the bribe was not recognized as a crime, and giving him such a reward after committing certain actions could not be considered as a bribe. Comparative-legal analysis of bribery under the criminal law of Ukraine and some foreign countries of the author allowed us to conclude that the concept of bribery in the codes of foreign countries is understood more broadly and covers both the provision and receipt of certain benefits. Although this approach is not generally accepted even in the European Union, it has been introduced by the national legislator. This step has significantly exacerbated the problem of distinguishing between different types of bribery, as according to national traditions, the actions of its addressee in inciting or obstructing the acceptance of the proposal are still not recognized as a crime. As the researcher rightly points out, the solution to this problem is possible by scientifically substantiated classification of bribery provided by the Criminal Code of Ukraine, which will avoid attempts to unify this concept and attempts to use the signs of corruption bribery, which are quite common in modern Ukrainian criminal legal doctrine, in characterizing incitement or inclination to actions that are not criminal.

Perelygina and Mirko (2018) analyzed some aspects of criminal liability for provoking bribery in their work. The researchers decided to pay attention to the qualitative differences between bribery provocation and other crimes and the peculiarities of prosecution for these crimes. The researchers decided to pay attention to the qualitative differences between bribery provocation and other crimes and the peculiarities of prosecution for these crimes. Also, researchers drew attention to the fact that there are features of provocation of bribery in the actions of a person who, following Art. 272 of the Criminal Procedure Code of Ukraine, taking into account the provisions of Art. 43 of the Criminal Code of Ukraine (Law 2341-III, 2001) performed a special task to disclose the criminal activities of an organized group or criminal organization, both through certain regulatory requirements for such covert investigative (search) action and in connection with the tactical features of its implementation. Indeed, in this case, a necessary criterion for correctly determining the grounds and limits of criminal liability for provoking bribery is to establish clear definitions for the application of the law on criminal liability, which would be deprived of the possibility for their

double interpretation and in general contribute to the establishment at the legislative level of the principle of legal certainty as one of the elements of the rule of law.

Ryzhova (2004) studied the improvement of criminal law, which provides for liability for provoking a bribe or commercial bribery or commercial bribery and supplementing the legislation of the Russian Federation with the relevant provisions.

Savchenko (2007) conducted a comprehensive criminal law study of the criminal law of Ukraine and the federal law of the United States. In his work, the author stressed that US criminal law contains many rules that can be adequately compared with the relevant rules of Ukrainian law and appear to be effective and efficient in combating crime, and therefore need to be studied and implemented in the national legal system. In conclusion, the author noted that the criminal law of Ukraine should be reformed following the strategy of European and Euro-Atlantic integration, taking into account the best international and foreign standards, therefore the model of comparison of the Ukrainian and American criminal legislation offered by the dissertation can be taken as a basis at carrying out further comparative legal researches. Under modern conditions, without recourse to positive foreign (including American) experience, it is impossible to develop and improve their criminal law, implement the provisions of international conventions, exchange legal information and scientific ideas, to build the national legal system and bring it closer to the legal systems of developed countries. We unequivocally agree with this position of the author.

Us (2015) examined the composition of the crime of provocation of bribery and investigated the problematic issues of qualification of this crime. The author concluded that the provocation of bribery is a special kind of incitement to crime. That is why the act of the provocateur of bribery must correspond to the signs of the act of instigator of the crime. Besides, to provoke bribery, it is necessary to establish the use of the subject (official of both public and private law) in the commission of an act of his official position or official authority. Qualifying feature provided for in Part 2 of Art. 370 of the Criminal Code of Ukraine, requires terminological coordination with other provisions of the Criminal Code of Ukraine and appropriate definition or explanation (interpretation) at the legislative or law enforcement levels.

Stern (2017) explains in detail the issue of responsibility for provoking a crime in Ukraine and as a result of the analysis came to the following opinions. The author does not agree with the statement that it is impossible to single out as a separate criminal act provocation of crime, because provocation of crime contains a characteristic feature that distinguishes this institution from the institution of incitement to crime – a special purpose of the provocateur, which is to expose the victim, blackmail or other material or

non-material damage to such a person. Therefore, the author believes that provocation is a broader concept than an incitement to agree with. Another distinctive feature of provocation is the implementation of certain active actions in a situation where there were no sufficient grounds to believe that the crime would have been committed without provocative actions. Since Part 4 of Art. 27 of the Criminal Code of Ukraine, which defines the actions of the instigator, does not fully characterize the actions of the provocateur, given foreign experience in solving the problem, according to the author, with which we agree, the legislator should consider supplementing Section VI of the General Part of the Criminal Code of Ukraine “Complicity in crime” Article “Provocation of a crime” in the following wording: the provocation of a crime is the deliberate creation by a person of a situation that causes another person to commit a crime or complicity in it, to expose, blackmail or cause other material or non-material damage to such person.

The provocateur is subject to criminal liability under the relevant part of the article of the General Part of this Code and the article (part of the article) of the Special Part of this Code, which provides for a crime committed by the perpetrator. Also, the author believes that it would be appropriate to supplement Section XVIII of the Special Part “Crimes against Justice” with a special article, which would provide for liability for provocation of crime by law enforcement officials and contain the following content: Provocation of a crime by a law enforcement officer: an official of law enforcement agencies of the situation that causes another person to commit a crime or complicity in it, in order to bring such a person to justice; 2. The same actions, if they caused serious consequences.

For a better understanding of the theoretical foundations and significance of bribery, the book “Criminal Law of Ukraine” edited by Tatsii *et al.* (2015), scientific and practical commentary on the Criminal Code of Ukraine edited by Melnyk and Khavroniuk (2008) and a new explanatory dictionary of the Ukrainian language (Yaremenko and Slipushko, 1998).

Besides, during the study of the object of this article, the analytical article describing several decisions of the ECtHR to provoke a crime was analyzed (Kyiv Region Bar Council, 2017).

Also, when writing the article, the statistical information of the General Prosecutor’s Office of Ukraine on registered criminal offenses based on the results of their pre-trial investigation for 2018-2020 was analyzed.

Given the above works, we can conclude that criminal liability for provoking bribery has been studied among Ukrainian and foreign scholars, but there is no single comprehensive study on this issue. Therefore, it is necessary to conduct research on this topic.

2. Methodology

Using the dialectical method, the criminal liability for provoking bribery at different times and in different conditions was analyzed. Thus, attention was drawn to the fact that after the introduction of anti-corruption policy at the state level in Ukraine, considerable attention is paid to the detection, effective investigation, and timely prosecution for bribery provocation.

Moreover, the analytical method helped to highlight their main provisions. This method was used to analyze the statistics of law enforcement and judicial authorities on prosecution for bribery provocation, the provisions of the Criminal Code of Ukraine, National Anti-Corruption Programs, Supreme Court judgements. Thanks to this method, it was possible to comprehensively study the work of many researchers and highlight the main features of criminal liability for provoking bribery in different countries and the views of domestic and foreign scholars on this issue.

Further, the historical method allowed to study the problem comprehensively and to pay attention to how different historical conditions influenced the interpretation of the crime “bribery provocation”.

The generalization method advised to unite the provisions of foreign laws (Bulgaria, Tajikistan, Belarus, Armenia, the Russian Federation). This helped to study the foreign experience and summarize how those prosecuted for provoking bribery.

What is more, the method of comparison helped to distinguish criminal liability in Ukraine and in the world, which allowed carrying out a comprehensive analysis of the research question.

Finally, the application of the modeling method was useful for design how Ukraine’s policy on prosecuting bribery provocation will be implemented in the future so that it meets the requirements of the time and social development.

3. Results and discussion

a) International experience in regulating the issue of bribery provocation

It’s known, that law, as a system of mandatory rules of conduct introduced or sanctioned by the state, is the most effective regulator of public relations. No other social norms, such as traditions, customs, norms of morality, etc., are able to regulate and ensure the protection of various social relations as the rules of law do (Tkalych *et al.*, 2020).

The legislation of foreign countries, in most of them, such an act as intentional incitement to commit a crime is not recognized as criminally punishable. But criminal liability for provoking bribery is provided for in the Criminal Codes of the Kyrgyz Republic (Law 19, 1997), the Republic of Belarus (Law 420, 1999), the Republic of Bulgaria (Law 26/1968, 1968), the Republic of Armenia (Law ZR-7, 2003), the Republic of Kazakhstan (Law 226-V, 2014), the Republic of Tajikistan (Law 574, 1998) and the Russian Federation (Law 63-F3, 1996), and, eventually, not all have the same meaning.

It is important to consider the international experience in more detail.

1. Belarus. Article 396 of Chapter 34 “Crimes against Justice” of the Penal Code of the Republic of Belarus (Law 420, 1999) provides liability not for provoking bribery, but for staging a bribe, illegal reward or commercial bribery, namely provides liability for “transfer to an official, public official or other state organization is not an official, or an employee of a sole proprietor or a legal entity of money, securities, other property or the provision of property services to artificially create evidence of a crime or blackmail.”
2. Bulgaria. Article 307 of Chapter 8 of Section IV of the Criminal Code of the Republic of Bulgaria (Law 26/1968, 1968) stipulates, “A person who with premeditation creates a situation or conditions conducive to the offering, giving or receiving of a bribe for the purpose of causing harm to a person who gives or receives the bribe, shall be punished for provocation to give or take bribe by imprisonment for up to three years.”
3. Republic of Tajikistan. Chapter XIII “Crimes against State Power” Part 30 “Crimes against State Power, the Interests of the Civil Service” of the Criminal Code of the Republic of Tajikistan (Law 574, 1998) contains Article 321 “Provocation of Bribery”, which establishes liability for attempting to transfer to an official, official of a foreign state or official of an international organization without their consent money, securities, other property or the provision of property services to him to create artificial evidence of bribery. In turn, the Criminal Code of the Republic of Tajikistan (Law 574, 1998) links the provocation of bribery with crimes against state power and the interests of the civil service, which also include giving and receiving bribes. “The object of bribery provocation is public relations of the order of payment of officials and public relations that arise during the detection and consolidation of evidence of bribery.”
4. Russian Federation. Chapter 31 “Crimes against Justice” of the Criminal Code of the Russian Federation (Law 63-F3, 1996) contains Article 304 “Provocation of a Bribe, or Commercial

- Graft”, which provides for liability for “ Provocation of a bribe or commercial graft, that is, attempts to transfer money, securities, or other assets, or to render property-related services to a functionary or a person fulfilling managerial functions in profit-making and other organisations, for the purpose of artificially manufacturing evidence of a crime of blackmail.”
5. The Republic of Kazakhstan. Article 253 “Commercial bribery” of Chapter 9 “Criminal offenses against the interests of service in commercial and other organizations” of the Criminal Code of the Republic of Kazakhstan (Law 226-V, 2014) provides for liability for “illegal transfer of money, securities or other property to the person, exercising management functions in commercial or other organization, as well as illegal rendering of services of property nature for the use by him (her) of his (her) official position, as well as for general protection or connivance in the service in the interests of person, performing the bribe”.
 6. The Kyrgyz Republic. Article 224 “Commercial bribery” of Chapter 34 “Crimes against the interests of service in commercial and other organizations” of Chapter VII “Crimes against property and economic activity” of the Criminal Code of the Kyrgyz Republic (Law 19, 1997) provides for liability for “ illegal transfer of money, securities, or any other assets to a person who discharges the managerial functions in a commercial organization, and likewise the unlawful rendering of property-related services to him for the commission of actions (inaction) in the interests of the giver, in connection with the official position held by this person”.
 7. The Republic of Armenia. The Criminal Code of the Republic of Armenia (Law ZR-7, 2003) establishes criminal liability in Art. 350 “Entrapment for bribe or commercial bribe “, which belongs to the Section “Crimes against Justice” (Chapter 35). By provoking a bribe or commercial bribery, the Armenian legislator understands an attempt to impose on them money, securities, other property or property services. The penalty for such actions is a fine in the amount of 300-500 minimal salaries, or imprisonment for up to 5 years, with or without deprivation of the right to hold certain posts or practice certain activities for up to 3 years.
 8. Georgia. Criminal Code of Georgia (Law of Georgia No. 2287, 1999) in Art. 145 “Provocation of a crime” defines this concept as the incitement of a person to commit a crime to bring him to justice. Specifically, the criminal liability for provocation of a crime in the mentioned code is covered by ch. XXIII “Crimes against human rights and freedoms”, and the punishment for provocation is provided in the form of restriction of liberty for up to three years, arrest for up to six months, or imprisonment for up to four years.

9. The Kingdom of Spain. Article 18 of the Criminal Code of the Kingdom of Spain (Organic act 10/1995, 1995) defines provocation as inciting a crime in the face of a mass gathering or directly inciting a person to commit a crime under the influence of the press, radio, or a similar means of promoting information. That is, provocation under the Criminal Code of the Kingdom of Spain is seen as inciting a significant number of people. However, such incitement to commit a crime is not connected at all to further expose the person who is provoked (incited) to commit a crime.
10. The Republic of Lithuania. Part 1 of Art. 225 of the Criminal Code of the Republic of Lithuania (Law VIII-1968/2000, 2000) establishes the liability of civil servants or persons equated to them who for their benefit or the benefit of others directly or through intermediaries accepted, promised or agreed to receive bribes, demanded or provoked bribery for lawful acts or omissions in the performance of official duties. Based on this, it can be assumed that the provocation covers the actions of civil servants and persons equated to them, aimed at creating conditions under which a person is forced to give a bribe. The provocation under the criminal law of the Republic of Lithuania is not related to the purpose of exposing the provoked person, so its content is fundamentally different from the content of the provocation of bribery under domestic law.

It should be noted that most foreign legislators (for example, Australia, the Republic of Austria, the Republic of Azerbaijan, the Republic of Argentina, the Republic of Estonia, the State of Israel, the People's Republic of China, the Kingdom of the Netherlands, the Kingdom of Sweden, Latvia, the Republic of The Republics of Uzbekistan, the Republic of Turkey, the Federal Republic of Germany, the Swiss Confederation, Israel, Japan) do not distinguish the concept of "provocation" at all and do not establish responsibility for provoking bribery.

According to statistics, in Ukraine, there are currently no convictions in criminal proceedings under Art. 370 of the Criminal Code of Ukraine, and there is a small number of registered offenses. For example, in 2018 – 26 cases, in 2019 – 22 cases, in 2020 – 2 cases (Statistical information of the Prosecutor General's Office of Ukraine on registered criminal offenses based on the results of their pre-trial investigation for 2018-2020, 2020). Nevertheless, this is not a reason to decriminalize this crime.

b) General provisions on criminal liability for provocation of bribery under the Criminal Code of Ukraine

Following Part 1 of Art. 370 of the Criminal Code of Ukraine under the provocation of bribery means "actions of an official to incite a person to

offer, promise or provide an improper benefit or accept an offer, promise or receive such benefit, to then expose the person who offered, promised, improperly benefited or accepted the offer, promise whether he/she received such a benefit.”

Such actions are punishable by restriction of liberty for up to five years or imprisonment for a term of two to five years with a fine of two hundred and fifty to five hundred non-taxable minimum incomes (hereinafter – n.t.m.i.), and for the commission of a crime by a law enforcement officer – from three to seven years in prison with a fine of five hundred to seven hundred and fifty n.t.m.i.

At the same time, if analyzed in retrospect, the criminal liability for provoking bribery has become more severe. So, according to the Criminal Code of 1960, namely article 171 of the Criminal Code of Ukraine punishment for such actions was provided in the form of imprisonment for a period of up to two years.

At present, it is unclear the interpretation of incitement in this article, because given Part 4 of Art. 27 of the Criminal Code of Ukraine, it should be understood as persuasion, bribery, threat, coercion, other inclination to commit a criminal offense. It is unlikely that provocation of bribery is possible by threat, bribery, and coercion.

If we analyze the case-law of the European Court of Human Rights, it is worth noting that there is a very fine line between provoking bribery and lawful actions of law enforcement agencies. Thus, the ECtHR states that it is not a violation and is not prohibited by the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, 1950) to use secret agents in their activities if justified by a crime.

The ECtHR determines that the actions of a law enforcement agency are lawful and legal if the law enforcement authority is involved in the work when there is information that the illegal activity is already taking place, and it wants to stop it and detain the person concerned. At the same time, the European Court notes that all procedures must be clear and transparent, and the investigation itself must be conducted passively. That is, no simulation of the situation is created because it must be a passive action.

However, at this time, from the point of view of many scholars, the question of the need to amend Art. 370 of the Criminal Code of Ukraine, namely in terms of determining the subject of the crime not only an official but also other persons who have reached the age of criminal responsibility. Supporting this position, it should be noted that at present, in case of provocation of bribery by a non-official, liability is provided for such actions under the article of the Special Part of the Criminal Code of Ukraine, which provides for punishment for the provoked crime.

Therefore, the terms used in the text of the law on criminal liability should have the same meaning, especially when such a concept becomes legal, and on the other - the legislator establishes several features that are unique to corrupt bribery, which makes it impossible to consider it as universal concept. Unfortunately, in modern Ukrainian criminal-legal science, these circumstances are mostly ignored. Bribery is still seen either as a way of committing a crime or, conversely, signs of corrupt bribery are used to describe acts of a non-corrupt nature, which may well disorient law enforcement practice.

c) Features of criminal prosecution for provoking bribery

Prosecution for provoking bribery has its own peculiarities. Consider them in more detail.

Firstly, the provocation of bribery is often seen as complicity in a crime. In accordance with the position of the Main Legal Department of the Verkhovna Rada of Ukraine on amendments to the Criminal Code of Ukraine article on criminal liability for provocation, which was expressed before the draft Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine to Ensure the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption” (Law 198-VIII, 2015). The essence of the above position was that according to current legislation, a person who incites another person to commit an act that is a crime, including corruption, is an accomplice to such a crime and is liable under the same article of the Code, which provides for a crime committed by the perpetrator. Given the existence in the criminal legislation of Ukraine of responsibility for incitement to crime, the specialists of the Main Legal Department disagreed with the possible “allocation” as a separate criminal act of provocation.

But it is difficult to agree with this position because the provocation of a crime contains a characteristic feature that distinguishes this institution from the institution of incitement to crime – a special purpose of the provocateur, which is to expose the victim, blackmail him or cause other material or non-material damage to such person. Thus, provocation is a broader notion than incitement.

Secondly, provocation is the commission of certain active actions in a situation when there were no sufficient grounds to believe that the crime would have been committed without provocative actions.

Thirdly, the feature is part of the crime under investigation. The immediate object of this crime is public relations, which ensure the sustainable operation of public authorities, local governments, their staff, and legal entities as a public. The subject of the crime under Art. 370 of the Criminal Code of Ukraine (Law 2341-III, 2001), there is an illegal benefit.

The objective side of the provocation of bribery is its manifestation in the act of inciting a person to offer, promise or provide an improper benefit or to accept an offer, promise, or receive such benefit. Ways to provoke bribery include advice, suggestions, requests, coercion, recommendations, threats, etc. This *corpus delicti* is characterized by the presence of guilt in the form of direct intent and purpose aimed at exposing the person who offered, promised, illegally benefited, or accepted the offer, promise to provide or received such benefit from the subjective point of view. The subject of the crime is special – an official of both public and private law, and under Part 2 of this article, the subject of the crime can only be a law enforcement officer. However, special attention should be paid to the qualification of actions of persons who are not officials and commit provocative actions aimed at artificially creating conditions for a person and/or persons to obtain illegal benefits, as well as criminal liability for obtaining illegal benefits by the provoked person. Thus, paragraph 3, item 3 of the Resolution of the Plenum of the Supreme Court of Ukraine “On Judicial Practice in Cases of Bribery” of April 26, 2002, No. 5 states that in case the giving or receiving of a bribe took place in connection with a provocation, it does not exclude the responsibility of those who gave or received it.

Finally, some important issues that are subject to comprehensive investigation in terms of signs of provocation of bribery in the actions of a person who performed a special task to disclose the criminal activities of an organized group or criminal organization, as due to certain regulatory requirements for such covert investigative action, and in connection with the tactical features of its implementation. It seems that in this case, an important criterion for correctly defining the grounds and limits of criminal liability for provoking bribery is to establish clear definitions for law enforcement in the provisions of the law on criminal liability, which would be deprived of opportunities for their double interpretation and in general contribute to the establishment at the legislative level of the principle of legal certainty as one of the elements of the rule of law.

Thus, the investigated crime has its features, which are manifested in the composition of the crime, the peculiarities of its disclosure, and prosecution.

Conclusions

As a result of the study, the criminal liability for provoking bribery was analyzed, namely:

1. Bribery is considered an independent criminal offense, the perpetrators of which are both the subject and the recipient of the bribe.

2. Provoking bribery is often seen as complicity in a crime. But we believe that this position does not deserve attention, because the special purpose of the provocateur is to expose the victim, blackmail him or cause other material or non-material damage to such a person. Therefore, provocation is a broader notion than incitement.
3. Provocation is an active action in a situation where there were no sufficient grounds to believe that the crime would have been committed without provocative actions.
4. The crime of “provocation of bribery” has a special composition and methods of its commission.
5. International experience confirms that foreign states regulate the issue of prosecution for committing crimes of bribery differently. Thus, some states have generally decriminalized such an act, while other post-state states are actively enforcing responsibility for the provocation of bribery.

Regarding further scientific research, it is necessary to pay attention to the possibility of amending the articles of the Criminal Code of Ukraine on the provocation of bribery of a judge, as well as provocation of bribery of an individual, not just an official. It is also necessary to pay attention to what served as a basis for the decriminalization of bribery provocations in foreign countries.

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