

Crime Provocation under the Criminal Law of Neighboring Countries (on the Example of Provocation of Bribery)

Eleonora Iurevna Badaliant¹ and Elena V. Mitskaya²

¹*Department of Criminal Law and Criminology, Ryazan Branch of the Kikot Moscow University of the Ministry of Internal Affairs of the Russian Federation, Ryazan, Russian Federation*

²*Department of Criminal Law and Criminal Procedure of M. Auezov South Kazakhstan University, Shymkent, Republic of Kazakhstan*

Keywords: Criminal law, provocation, crime, bribery, foreign countries.

Abstract: The article addresses current issues related to the problem of criminal responsibility for provocation of bribery, analyzes the experience of the neighboring countries in this area, and identifies the main approaches of states to the criminalization of provocation of bribery. The aim of the article is to study the institute of provocation in the criminal law of the neighboring countries; tasks are to consider the activities carried out within the framework of law enforcement intelligence operations as a crime provocation. The significance of the study is justified by the author taking into account the experience of a number of neighboring countries – the need to improve article 304 of the Criminal Code and the determination of criminal responsibility for crime provocations, including provocation of bribery.

1 INTRODUCTION

Modern domestic researchers expose the issue of provocations in the activities of law enforcement agencies of Russia and foreign countries to a fairly active scientific analysis. At the beginning of the XXI century, there was a number of thesis researches, where particular attention was paid to the conceptual approaches of foreign countries to the legal assessment of provocations. As an example of such researches are works by S.A. Babych (2006), S.N. Radachinsky (2011), S.A. Sandakovsky (2010), etc. Despite the indisputable value of all previously presented scientific research in the field of criminal law aspects of crime provocation, we must admit that currently there is no separate scientific study devoted to the analysis of the modern experience of foreign countries in the regulation of criminal responsibility for provocative activities. The above confirms the relevance of the topic of this publication, which aims at encouraging the modern scientific community to a more in-depth study of the criminal legislation of foreign countries in general, and of the neighboring countries in particular.

2 MATERIALS AND METHODS

Materials for the study were the criminal legislation of several CIS states. In addition, scientific literature of both Russian and foreign authors was used. The methodological basis of this analysis is represented by the universal dialectical method of scientific cognition. General and private scientific methods were applied in a complex manner, among which the most actively used is a comparative legal method of research.

3 RESULTS AND DISCUSSION

The development of domestic legislation aimed at the effective regulation of various areas of social relations largely depends on the knowledge and objective assessment of not only the history of domestic experience of legal regulation, but also the experience of foreign countries in a particular area. The criminal-legal sphere is not an exception in this sense. Modern states equally define many socially dangerous acts as criminal, establishing criminal responsibility for their commitment (murder, terrorist acts, rape, theft, etc.). At the same time, a number of acts do not have such an unambiguous assessment

(Husak, 2020). Rather different and sometimes opposite approaches are demonstrated by countries with regard to provocation to commit crimes (Katz, 2013), including provocation of bribery. First of all, we should note that provocation of bribery is recognized in Russia as a criminal act and is qualified under Article 304 of the Criminal Code of the Russian Federation.

Certain neighboring countries are largely similar in their approaches to the definition of bribery as a criminal offence, which can be explained by the existence of a long historical period of common legal space. At the same time, the national approach of each state has its own differences, which are expressed, according to A.E. Ayusinov, "in the following features: the name of the article, its location in the criminal law, the types and amounts of penalty, etc." (A. Ayusinov, 2015). The comparison of Article 304 of the Criminal Code of the Russian Federation and Article 199 of the Criminal Code of Turkmenistan can be a vivid confirmation of this feature. Both norms imply a responsibility for provocation of bribery and refer to crimes against justice, but there are differences in sanctions. The maximum possible penalty under Article 199 of the Criminal Code of Turkmenistan is three years' imprisonment, and under Article 304 of the Criminal Code of the Russian Federation – up to five years' imprisonment.

Article 396 of the Criminal Code of the Republic of Belarus is almost identical to the Russian criminal law in formulating the disposition of this norm, but there is a significant difference in the concepts used. An attempt to transfer money, securities, other property or the provision of services of a property nature, the provision of other property rights to an official without his consent in order to create artificial evidence of a crime or blackmail is defined in Russia as a provocation of bribery (Article 304 of the Criminal Code), while the same actions under Article 396 of the Criminal Code of the Republic of Belarus are referred to as staging a bribe. There is no need to speak about the difficulties of translation here, since Belarusian and Russian are recognized as official languages on the constitutional level in Belarus (Article 17 of the Constitution of the Republic of Belarus), and the Russian version of the Criminal Code of the Republic of Belarus uses the word "staging" in the title of Article 396. According to S. I. Ozhegov's Explanatory Dictionary, "staging" is defined as "to feign" (Ozhegov, 2015). Given this interpretation, we can say that staging a bribe is a sham representation of the fact that a bribe was received. Such wording does not seem to correspond to the content of the disposition of Article 396 of the

Criminal Code of the Republic of Belarus, as it characterizes not the actions of the offender who provokes a bribe, but the actions of the official who fakes, pretends to receive a bribe. In this regard, it seems that the use of the word "provocation" in the domestic criminal legislation to denote the analyzed criminal act is more optimal, which accurately reflects the essence of the crime, compared with the way the Belarusian legislator did it by including the word "staging" in the title of Article 396 of the Criminal Code of the Republic of Belarus.

In Kyrgyzstan, provocation of bribery is qualified under Article 343 of the Criminal Code of the Kyrgyz Republic. This norm contains clarifications as to what cannot be classified as a criminal provocation of bribery:

- Provocation of bribery, if it is carried out as part of checking an official for corrupt predisposition (see note to Article 343 of the Criminal Code of the Kyrgyz Republic). The prerequisite for such a check is the consent of the official to carry it out;
- According to the note to Article 343 of the Criminal Code of the Kyrgyz Republic, the actions of law enforcement agencies aimed at exposing an official who already had the intention to receive a bribe are not considered as provocation of bribery. This exception largely agrees with the Russian concept of the admissibility of a number of operational measures to expose a person when he/she has already formed the intent to commit an illegal act (Bykov, Zenin, Kudryashov, 2018). According to I. Zharkikh, among the main criteria for distinguishing legitimate law enforcement intelligence operations from the crime provocation, the following should be noted: the presence of legal grounds for conducting law enforcement intelligence operations; the presence of the person's intention to commit a crime, which is formed regardless of the activities of law enforcement officers; the lack of pressure from law enforcement officers, forcing the person to commit a crime (Zharkikh, 2021).

The criminal legislation of Ukraine defines responsibility for provocation of bribery. S.A. Sandakovsky draws attention to the fact that the corpus delicti under Article 370 of the Criminal Code of Ukraine consists of actions provoking not only taking bribe, but also giving bribe (Sandakovsky, 2010). The noted feature is essential, but in our opinion, more attention should be paid to part. 2 of Article 370 of the Criminal Code of Ukraine, which

provides for responsibility for provocation of bribery committed by a law enforcement official.

Each state entrusts law enforcement officers with sufficiently large powers, allowing them to solve the problems of protecting citizens, protecting law and order, and ensuring public safety. Providing law enforcement officers with a special competence, on the one hand, is of utmost importance for the state and society, and on the other hand, causes a large part of the population a special perception of a person being a member of the circle of law enforcement officers (from trust and respect to awe and fear). Benefiting by a law enforcement officer from his "special" position should be appropriately reflected in the current criminal legislation, including in terms of responsibility for provocation of bribery. In this regard, the experience of Ukraine seems to be useful for Russia. In addition, it seems that Article 304 must be amended by part 2, which should stipulate the responsibility of law enforcement officers for the acts referred to in the disposition of part 1 of art. 304 of the Criminal Code of the Russian Federation.

As an explanation of the above, we believe it is important to note that under part 2 of article 304 of the Criminal Code of the Russian Federation, it is proposed to qualify those provocative actions that law enforcement officers carry out on their own initiative and that in no way connected with the investigation of a particular criminal case; with the conduct of operational procedures, which do not contain the corpus delicti of abuse of power. The status of a law enforcement officer itself imposes on a citizen a special responsibility and provocative activities of persons with this status should entail a greater degree of punishment.

If we compare the sanctions of Part 1 of Article 370 of the Criminal Code of Ukraine and Article 304 of the Criminal Code of the Russian Federation, we can state the coincidence in the determination of the maximum punishment: five years of imprisonment. The maximum possible punishment for provocation of bribery by a law enforcement official, according to the sanction of Part 2 of Article 307 of the Criminal Code of Ukraine is seven years of imprisonment. We consider it possible to determine a similar maximum in the sanction of the proposed Part 2 of Article 304 of the Criminal Code of the Russian Federation.

Certain neighboring countries take a broader approach to the criminal legal assessment of provocation. Unlike Russia, Belarus, Ukraine and a number of other countries, whose criminal legislation contains a separate article regulating responsibility for provocation of bribery, in some countries provocation of any crime is regarded as a criminal

offense. For example, in 2018, Article 145 of the Criminal Code of Georgia was enacted, determining the responsibility for crime provocation, which means inducing another person to commit a crime in order to bring him to criminal responsibility. This offence under Georgian criminal law refers to crimes infringing on human rights and freedoms (Chapter XXIII of the Criminal Code of Georgia). The position of Georgia seems reasonable and to be aimed at protecting a citizen from the illegal actions of others who deliberately provoke a person to commit a socially dangerous criminal act. Georgia's conceptual approach in the considered aspect requires additional scientific research and analysis of law enforcement practice, on the basis of which we can subsequently make a conclusion about the prospects of its use in Russia.

A.R. Avunts notes that crime provocation "is far from being prohibited by the criminal code in all countries under pain of punishment" (Avunts, 2021). For example, in Azerbaijan and Uzbekistan, crime provocation is not a criminal act. Let us pay attention to one point mentioned in Article 37 of the Criminal Code of the Republic of Uzbekistan, stating that the intentional provocation of an assault with the purpose to inflict harm is not a necessary defense. The Supreme Court of the Republic of Uzbekistan explains this provision as follows: "the Courts shall bear in mind that a person who provoked an assault cannot be recognized as being in a state of necessary defense to use it as a pretext for inflicting harm (unleashing a fight, committing reprisals, committing an act of revenge, etc.). Acts committed in such cases should be qualified on general grounds" (paragraph 3 of the Resolution of the Plenum of the Supreme Court of the Republic of Uzbekistan of December 20, 1996, No. 39 "On application by the Courts of the legislation ensuring the right to necessary defense against socially dangerous infringements").

4 CONCLUSIONS

As a result of a brief analysis of the criminal legislation of neighboring countries regarding the determination of responsibility for provocation of bribery, the following groups of approaches can be presented:

- States where provocation of bribery is considered an independent criminal offence, but there may be differences in the wording of the titles and dispositions of the norms, as well as in the presence of qualifying features

(Belarus, Kyrgyzstan, Russia, Turkmenistan, Ukraine, etc.);

- States whose criminal legislation demonstrates a broad approach: provocation of any crime, not just provocation of bribery, is considered as a criminal offence (Georgia);
- States not considering provocation as a criminal offence (Azerbaijan, Uzbekistan).

The multiplicity of approaches shows that there is no general attitude towards this criminal phenomenon in the world practice, but most of the neighboring countries, with few exceptions, agree on the need to determine criminal responsibility for crime provocations, including provocation of bribery.

REFERENCES

- Avunts, A. R., 2021. The criminal law significance of crime provocation in the law of foreign countries. *In Gaps in the Russian legislation*. 3. pp. 291-293.
- Ayusinov, A.E., 2015. Peculiarities of the regulation of criminal responsibility for crime provocation under foreign legislation. *In Bulletin of the Saratov State Law Academy*. 6. pp. 148-153.
- Babych, S.A., 2006. Provocation of bribery or commercial bribery: thesis. p. 215.
- Zharkikh, I., 2021. Urgent questions of delineating law enforcement intelligence operations and crime provocation. *In Criminal Law*. 2. pp. 19-24.
- Ozhegov, S.I., 2015. Explanatory Dictionary of the Russian Language. World and education. p. 1375.
- Radachinsky, S.N., 2011. Crime provocation as a complex institute of criminal law: problems of theory and practice. p. 367.
- Sandakovsky, S.A., 2010. Criminal law assessment of provocation of bribery. p. 187.
- Katz, L., 2013. Entrapment Through the Lens of the Actio Libera in Causa. *In Criminal Law, Philosophy*. 7. pp. 587-595.
- Husak, D., 2020. Criminal Law at the Margins. *In Criminal Law, Philosophy*. 14. pp. 381-393.