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Aliya M. SERALIYEVA©
Candidate of Juridical Sciences,
Associate Professor,
(Abai Kazakh National Pedagogical University),
Kazakhstan

Yernar BEGALIYEV©
D.Sc. in Law, Professor
(Academy of Law Enforcement Agencies under the General Prosecutor Office of the Republic of Kazakhstan),
Kazakhstan

Aigerim A. ZHIENGALIEVA©
Doctoral student, M.S. (Law), Police Major,
(Almaty Academy of the Ministry of Internal Affairs of the Republic of Kazakhstan named after Makan Esbulatov)
Kazakhstan

THEORETICAL ASPECTS OF PROVOCATION OF A CRIME UNDER THE CRIMINAL LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN

Abstract. This article reflects one of the most difficult problems in modern criminal legislation and society, namely the provocation of crimes. It was the provocations of crimes organized by law enforcement officers or with their participation, as the most dangerous and unacceptable in law enforcement practice, that came to the attention of our study.

To date, a comprehensive study of provocative activity has not been conducted in the doctrine of criminal law. The very concept of provocation remains debatable, there is no common understanding of its signs, victimological aspects of countering provocative activity have not been studied, and the question of the degree of public danger of both this activity as a whole and its individual types has not been resolved.

The problem of assessing the provocation of a crime is complicated by the fact that the theory of criminal law clearly does not sufficiently investigate the question of the essence of the actions of a person provoking the perpetration of a crime. The definition of the nature of the criminal legal norm on the provocation of a bribe directly depends on the decision about the relationship of this act with the institution of complicity, in particular, with incitement to commit a crime.

For completeness of the study, the authors refer to the legislation of the Republic of

© Seraliyeva A., 2022
ORCID iD: https://orcid.org/0000-0002-3786-8757
ID: 57188492400
aliya-mazhitovna@mail.ru

© Begaliyev Ye., 2022
ORCID iD: https://orcid.org/0000-0001-6659-8576
eLibrary ID: 43977648
ernar-begaliev@mail.ru

© Zhiengalieva A., 2022
aigerimzhiengali@mail.kz

Kazakhstan on the provocation of a crime, in which the position of the state is most accurately formulated. In particular, article 412-1, "Provocation of a crime", of the Criminal code of the Republic of Kazakhstan is investigated. The Criminal Code was supplemented by Article 412-1 in accordance with the Law of the Republic of Kazakhstan dated 06.10.20 No. 365-VI. The issue of mitigating the punishment of a person who committed a crime as a result of being provoked, as well as the provoking role of the victim in the crime committed, remains relevant today.

Keywords: *provocation, legal provocation; illegal provocation; provocateur, instigator, incitement; crime, counteraction, criminal liability, operational investigative activity.*

Introduction. Provocation of a crime in modern society is becoming quite common in law enforcement practice. Kazakhstani and Russian scientists such as I. Borchashvili, B. Volzhenkin, V. Ivanov, S. Rakhmetov, I. Rogov, V. Komissarov, M. Fomin, P. Yani, and others made a significant contribution to the study of theoretical problems of understanding the institute of provocation. At the level of dissertation research in the Russian Federation, the topic of provocation was considered by: S. Babych, E. Govorukhina, N. Egorova, O. Mansurov, A. Masterkov, S. Radachinsky, O. Ryzhova, S. Sandakovsky. Thereby, the results data of these scientists laid the scientific basis for understanding the institution of provocation. However, despite the large number of publications devoted to the problems of provocation, many issues continue to remain unexplored in their entirety.

Analysis of recent research and publications. One of the most pressing problems discussed in the theory of criminal law and of great practical importance is the problem of responsibility for the provocation of a crime. Establishing responsibility for provoking crimes is not only an issue of domestic legislation but also a problem of international criminal law. Various international communities are trying to determine the limits of the permissibility when it comes to the provocative methods in the detection of crimes by law enforcement agencies, as well as to develop measures to prevent and suppress the provocation of crimes. This position is reflected in the normative acts of the United Nations.

The criminal legislation of a number of foreign countries contains norms on provocation, fixing its concept in the Code, regulating the issues of responsibility for provocation of a crime. Up to this time, the concept of provocation remains debatable, there is no common understanding of its signs, and the question of the degree of public danger of such an act and the responsibility of the provocateur and provoked to commit a crime has not been resolved, and moreover, criminological aspects of countering the provocation of crimes have not been studied yet (E. Govorukhina, 2002).

Besides, the Criminal Law of the Republic of Kazakhstan contains the concept of provocation (Article 412-1 of the Criminal Code of the Republic of Kazakhstan) and establishes criminal liability for it only when it comes to the provocation of commercial bribery (Article 417 of the Criminal Code of the Republic of Kazakhstan). But provocation also occurs in other criminal cases that are not defined in the Criminal Code, such as drug trafficking, violation of copyright and related rights, corruption, etc. Undoubtedly, the main reason for the lack of legal norms that allow providing a correct assessment of provocative actions is the unresolved problem of the definition and qualification of provocation of a crime in the science of criminal law. Hence the high level of latency of crimes related to provocation. In this regard, "The deputies of the

Parliaments proposed to establish criminal liability for provocation of a crime by law enforcement officers and a special state body. Within the framework of the proposed Article 412 paragraph 1 of the Criminal Code of the Republic of Kazakhstan, in case of provocations of a crime, criminal liability in the form of imprisonment will be established" (Vaal, 2020).

One of the main priorities of Kazakhstan's state policy is the fight against corruption. The rejection of radical effective measures in the fight against corruption can lead to the fact that from a criminal, economic and social problem, it can develop into a political one and reach the scope of a national disaster that undermines the foundations of the constitutional order of the country.

The democratization of all spheres of society, the building of the legal state, ideological diversity in society, and the strengthening of the fight against crime are the basic priorities for criminal policy in the state. Over the past decades, the state has undergone almost continuous legal reformation of the juridical sphere aimed at strengthening the rule of law, strengthening the fight against crime, and improving the quality of the work of law enforcement agencies. It is known, criminal-legal measures have always occupied the central place in the ongoing state legal policy of the Republic of Kazakhstan, as they are one of the important and effective instruments for influencing criminals and crime in general (Akimzhanov et al., 2021).

Corruption as an extraordinary crime is a form of an unlawful act that is systemic and well organized, involving multiple parties, both officials and individuals, which leads to loss and suffering that extends to society. The most notable factor as the cause of corruption is the chance or opportunity and greed of the corrupt official (Berdaliyeva et al., 2021).

Corrupt activities usually occur in very complex, specific, and confidential types of government activities, which are very difficult for the layman to understand. Corruption is characterized by a high degree of adaptation to various conditions. It is constantly changing and improving, and therefore its main feature is latency. In fact, there lacks any kind of complete or at least representative data on this phenomenon, there is even less information on the guilty persons representing in the court, and only a few of them, and individuals of a less dangerous category, are given a real criminal punishment.

In order to improve their performance, criminal prosecution authorities, sometimes provoke officials to receive a bribe, and citizens to give it. If the provocation is successful, then both are caught in act and then prosecuted (Nam).

In science, provocation means the artificial creation of a situation in which one person inclines another to commit a crime to bring the incited person to criminal liability. Therefore, in relation to the composition of taking a bribe, provocation is the person's active actions aimed at causing the official an intent to receive a bribe, that is, in fact, he/she is incited to receive a bribe.

However, unlike giving a bribe, the goal of a bribe provocateur is completely different: to create artificial evidence of the receipt of a bribe by an official. When provoking a bribe, its acceptance is not imitated but is carried out by an official consciously, only the goal of the bribe-giver remains outside the consciousness of the latter, which is to bring the person provoked to criminal responsibility or blackmail him/her (Marchuk).

The difference between a bribe and provocation and giving a bribe is the absence of the very subject matter of the bribe (crime). It turns out that a fictional scenario, through complex and multi-step combinations involving specific individuals, turns into a real crime. The problem of distinguishing between a bribe and a provocation to give or receive a bribe is relevant, requiring its resolution in scientific and practical aspects. The sooner it is resolved, the greater the number of our fellow citizens who will be legally protected and will not be victims of pseudo-corruption (Nam).

The solution to these issues would eliminate the problems associated with provocation in the Kazakh legislation. Thus, the purpose of this study is to form a holistic view of the institution of provocation of a crime in criminal law and measures to prevent it. To achieve this goal, it is necessary to disclose the objectives of the study: to identify the peculiar features, signs, and types of provocation; to consider the problems of using the institution of provocation of a crime in the activities of law enforcement agencies; to formulate proposals to counteract the provocation of a crime.

Research methods include a general dialectical method, method of legal and system analysis, and comparative method.

Formulation of the main material. Continually, in the theory and practice of criminal law, disputes about the concept and meaning of provocation of a crime have not stopped, and every year these problems become more and more urgent. This is primarily due to the lack of unity of opinions and assessments on the issue of determining the criminal and legal significance of provocation of a crime both in the theory of criminal law and in law enforcement.

Considering the various points of view in the literature on provocation:

Under provocation (from Lat. provocatio) is understood as incitement, encouragement of individual groups, organizations to actions that may entail grave consequences, intentional creation of a situation that pushes, compels, or facilitates the commitment by one or another person of actions beneficial (including criminal) to the provocateur (Tikhomirov, 1998).

B. Volzhenkin points out that "the essence of provocation of a crime is that the provocateur himself purposefully arouses the intention of another person to commit a crime in order to then expose or blackmail the person, put him in a dependent position, cause other adverse consequences for him" (Volzhenkin, 2005).

According to S. Radachinsky, provocation of a crime is a deliberate unilateral activity of the perpetrator aimed at modeling such behavior of another person who would have all the external signs of a crime in order to discredit, blackmail, or create artificial evidence of the accusation (Radachinsky, 2011).

V. Dudarenko considers a social danger to be a fundamental sign of provocation of a crime. She identifies a circle of public relations that are harmed by provocation (Dudarenko, 2017).

Based on the analysis of the provisions of Article 412-1 of the Criminal Code of the Republic of Kazakhstan – "Provocation of a crime, that is, illegal actions of an official carrying out operational investigative activities or pre-trial investigation, inciting a person to commit a crime for the purpose of subsequent exposure and criminal prosecution or blackmail" (Criminal Code of the Republic

of Kazakhstan, 2014). Hence, we believe that the concept of provocation should be considered from the positions of provocation, the method of committing a crime in the context of the provisions on the legality and illegality of the necessary defense, and provocation as incitement to commit a crime.

Any provocation contradicts the principle of legality in criminal proceedings (Article 10 of the Code of Criminal Procedure of the Republic of Kazakhstan), and neither the Code of Criminal Procedure of the Republic of Kazakhstan nor the Law of the Republic of Kazakhstan "On Operational Investigative Activities" grant law enforcement agencies and their officials the right to use provocative activities. Regardless of the significance of the goals that the provocateur seeks to achieve, provocative methods are always immoral and inhumane, and their use in the fight against crime can cause harm no less than the harm caused by the crime itself (Metelsky, 2016).

Provocation of a crime is the involvement of another person in the performance of a crime committed with the aim of causing harmful consequences for this person and presupposing a duality of goals pursued by the provocateur. The first goal is to arouse the desire of the provoked person to commit a crime, the second goal is to bring the person to criminal responsibility by exposing him to the commitment of a crime.

Provocation has a lot in common with incitement, one of the types of complicity. But there are also distinctive features. These are the motives and purpose of the desired actions. The instigator by his actions or words pushes a person to illegal actions. He also desires the onset of such consequences and does everything to ensure that they occur. The instigator himself does not participate in the commitment of an offense but is legally responsible under the same article of the Criminal Code of the Republic of Kazakhstan as other accomplices in the disclosure of an illegal act.

The instigator is not interested in solving the crime. As for the provocation, the motives are secret to the performer. The person who caused the crime to be committed by his actions is not included in the number of accomplices. Here the provocateur's motive is to solve the crime. From here, we come to distinguish two types of provocation: legal, as a method of operational investigative activity aimed at solving a crime, and illegal, which is carried out with the aim of coercing or forcing a person to commit illegal actions that he would not like to commit.

One of the results of this study is seen in the proposal of the following definition of the concept of provocation of a crime – a type of incitement or organization of the commitment of a crime, for the purpose of criminal prosecution of a person or the threat of bringing him to criminal responsibility. Accordingly, from this definition, it follows that the instigator of a crime is a person whose goal is criminal persecution of a person, or the threat of bringing him to criminal responsibility.

Conclusions. Taking into account the novelty and significance of the research results, we consider it appropriate to consider the proposals:

Provocation and incitement as a form of complicity are not identical concepts. The legal nature of the provocation of a crime, including the provocation of a bribe or commercial bribery, is not determined by such kind of

complicity as incitement, but has its own characteristics:

– caused by the intention of the subject to provide a unilateral manifestation of the desired (desirable) behavior model on the part of the provoked person, which has only external signs of a criminal act;

– carried out in the order of unilateral intentional activity, on the part of the guilty person; the provoked individual was not seized by the consciousness at the moment:

– suggests using the provoked "criminal" act of a person not in order to achieve a joint criminal result, but in order to discredit or create artificial evidence of the accusation;

– the purpose of the provocateur's actions is the onset of harmful consequences for the provoked;

– the presence of the provocateur only direct intent, and this intent should be directed not at the type and consequences of the crime committed by the involved, but at the very fact of its commitment.

These conclusions are based on the results of the analysis of scientific approaches to the problem of differentiation between provocation and incitement.

Conflict of Interest and other Ethics Statements

The authors declare no conflict of interest.

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Алія СЕРАЛІЄВА, Єрнар БЕГАЛІЄВ, Айгерім ЖИЄНГАЛІЄВА

ТЕОРЕТИЧНІ АСПЕКТИ ПРОВОКАЦІЇ ЗЛОЧИНУ ЩОДО КРИМІНАЛЬНОГО ЗАКОНОДАВСТВА РЕСПУБЛІКИ КАЗАХСТАН

Анотація. Дана стаття відображає одну з найбільш складних проблем в сучасному кримінальному законодавстві і суспільстві, а саме провокація злочинів. Саме провокації злочинів, організовані співробітниками правоохоронних органів або за їх участю, як найнебезпечніші і неприпустимі в правозастосовчій практиці, потрапили в поле зору нашого дослідження.

До теперішнього часу в доктрині кримінального права комплексне дослідження провокаційної діяльності не проводилося. Як і раніше залишається дискусійним саме поняття провокації, немає єдиного розуміння її ознак, не вивчені віктимологічні аспекти протидії провокаційній діяльності, не вирішено питання про ступінь суспільної небезпеки як даної діяльності в цілому, так і її окремих видів.

Проблема оцінки провокації злочину ускладнюється тим, що в теорії кримінального права явно недостатньо досліджено питання про сутність дій особи, що провокують вчинення злочину. Визначення природи кримінально-правової норми про провокацію хабара прямо залежить від вирішення питання про співвідношення даного діяння з Інститутом співучасті, зокрема, з підбурюванням до скоєння злочину. Для повноти дослідження автори посилається на законодавство Республіки Казахстан про провокацію злочину, в якому найбільш точно сформульована позиція держави. Зокрема, досліджується ст. 412-1 "Провокація злочину" КК РК. Кримінальний кодекс доповнено ст.412-1 відповідно до Закону РК від 06.10.20 р. № 365-VI. Актуальним на сьогоднішній день залишається і питання про пом'якшення покарання особі, яка вчинила злочин внаслідок його провокування, а також про провокуючу роль-потерпілого у вчиненні злочину.

Ключові слова: *провокація, законна провокація, протизаконна провокація, провокатор, підбурювач, підбурювання; злочин, протидія, кримінальна відповідальність, оперативно-розшукова діяльність.*

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