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THE DOCTRINE OF OFFENSE ENTRAPMENT IN EUROPEAN CRIMINAL LAW AND IN THE DRAFT CRIMINAL CODE OF UKRAINE: COMPARATIVE OBSERVATIONS

Олександр Дудоров, Дмитро Каменський. ДОКТРИНА ПРОВОКАЦІЇ КРИМІНАЛЬНОГО ПРАВОПОРУШЕННЯ В ЄВРОПЕЙСЬКОМУ КРИМІНАЛЬНОМУ ПРАВІ ТА ПРОЄКТІ КРИМІНАЛЬНОГО КОДЕКСУ УКРАЇНИ: КОМПАРАТИВІСТСЬКІ СПОСТЕРЕЖЕННЯ. У науковій статті здійснено аналіз положень проєкту нового Кримінального кодексу України стосовно провокаційної поведінки та її правових наслідків. Зроблено наголос на з'ясуванні того, наскільки розробниками досліджуваного документа взяті до уваги здобутки кримінально-правової доктрини, правові позиції ЄСПЛ і законодавство України про негласні слідчі (розшукові) дії та інші негласні заходи, а також чи сприятиме втілене у проєкті унормування зазначеної поведінки вирішенню правозастосовних проблем. Визначено напрями, за якими доцільно продовжити роботу з удосконалення відповідних положень кримінального права.

Також у роботі в порівняльно-правовому режимі висвітлено здобутки та недоліки кримінально-правових систем окремих європейських держав у частині офіційної та правозастосовної регламентації інституту провокації злочину. Зокрема, встановлено, що кожна держава, яка визнала на рівні національного кримінального законодавства недопустимість провокації злочину, також розробила та застосовує на практиці низку критеріїв, які необхідно враховувати при вирішенні питання про межі допустимості провокації. Ці критерії повинні включати: обґрунтовану попередньо існуючу підозру щодо спровокованої особи, інтенсивність та мету зовнішнього впливу на таку особу, готовність (схильність) підбурюваної особи до вчинення протиправного діяння. Виявлено спільність більшості із згаданих критеріїв у праві та правозастосовній практиці досліджених у статті держав, чому сприяє уніфікована практика ЄСПЛ у частині юридичного змісту та критеріїв недопустимості провокації.

Констатовано, що офіційне визначення та юридичні підстави кримінальної відповідальності за провокацію кримінального правопорушення взагалі та корупційного зокрема закріплені у кримінальних законах лише деяких зарубіжних країн. Водночас кримінальному законодавству чималої кількості європейських держав – представниць континентальної системи права офіційна дефініція провокації невідома, що відповідним чином позначається на практиці правозастосування. Констатовано, що прогресивна практика ЄСПЛ активно впливає на розвиток інституту провокації в державах, які визнали юрисдикцію цього Суду. І навпаки: виявлено, що в законодавстві окремих європейських держав, у т.ч. пострадянських та постсоціалістичних, у тій чи іншій формі збережено законодавчу модель відповідальності або лише за провокацію корупційного злочину, або за провокацію будь-якого протиправного діяння.

Ключові слова: провокація злочину, підбурювання до злочину, негласні слідчі (розшукові) дії, контроль за вчиненням злочину, європейське кримінальне право, проєкт нового Кримінального кодексу України, порівняльно-правовий метод.

Relevance of the study. Legal issues related to crime provocation (or entrapment) are sensitive, inseparable from the moral and ethical principles of society and is in the worldview, providing an ongoing search for an answer to the eternal question: does a noble goal justify any

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means used to achieve it? This is a kind of stumbling question, which has bothered lawyers (and not only them) for many years.

Despite the negative attitude of the European Court of Human Rights (hereinafter – ECtHR) to provocative behavior of law enforcement officers, which means inciting persons to commit crimes, the issue admissibility of provocation as a method of counteracting corruption offenses in particular rises from time to time both in politics and in professional environment. This is partly due to the idea of the involvement of civil society institutions in anti-corruption activities as a factor in increasing effectiveness of such activities.

Provocation to commit a criminal offense by law enforcement officers is a direct violation of paragraph 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights, ECHR), which guarantees the right to a fair trial. Under Ukrainian law, ECtHR decisions are a source of law and are applicable to legal relations arising in judicial practice. This circumstance determines the urgency of recourse to the relevant practice of the ECtHR and, more broadly, to the foreign experience of criminal law assessment of manifestations of provocative behavior in the activities of law enforcement agencies.

Currently criminal cases of provoking corruption offenses are rarely initiated in the national judicial practice, and they reach the stage of sentencing even less often. For example, in 2018, the number of recorded crimes and the number of persons who were suspected of committing a crime under Art. 370 of the Criminal Code of Ukraine, have increased and amounted to 52 and 2, respectively; in 2019, the statistics were similar. According to the Report on Persons Prosecuted in 2020, prepared by the State Judicial Administration of Ukraine, no person has been convicted under Art. 370 of the Criminal Code during that period of time [1]. Despite the frequent cases of provocation of bribery in the activities of law enforcement agencies, as evidenced by domestic law enforcement practice, inclusion of the ban in the dissertation of the so called «dead» provisions of the Criminal Code negatively affects the real picture of crime, including its operational search unit and overall the criminal justice system in Ukraine.

This presupposes the importance of comprehensive scientific study of problematic issues related to the grounds of criminal liability for provoking bribery, which will unify, at least in part, doctrinal and law enforcement approaches to understanding the phenomenon of provocative behavior in criminal law, and will contribute, including taking into account the comparative legal analysis, the development of sound author's proposals aimed at improving the current model of criminal law protection of the procedure for carrying out official activities from provocative encroachments.

Recent publications review. Various criminal law aspects of provocative behavior have been fruitfully studied by such Ukrainian criminal law scholars such as O. Alyoshin, P. Andrushko, M. Armanov, O. Bantyshev, T. Batrachenko, V. Veretyannikov, V. Hlushkov, Yu. Hrodetsky, O. Hrudzur, O. Zaitsev, K. Karelov, O. Kvasha, V. Kirichko, M. Melnyk, I. Mitrofanov, V. Navrotska, V. Navrotsky, R. Orlovskyy, M. Panov, Ye. Pysmenskyy, M. Pohoretskyy, A. Savchenko, O. Svetlov, A. Stryzhevskaya, V. Tyutyuhin, O. Us, H. Usaty, P. Fris, M. Khavronyuk, N. Yarmysh and some others. The authors of this research paper have also addressed specific issues, finding out, among other things, the legal nature of the provocation of bribery and provocation of crime in general and the criteria for distinguishing it from lawful measures aimed at exposing corruption crimes, as well as formulating an opinion on the expediency of introducing the article on liability for provoking a crime as a universal criminal remedy to provocative behavior of law enforcement officers within the section of the Criminal Code of Ukraine «Crimes against Justice».

In European criminal law, the phenomenon of provocation of criminal offenses has been studied in particular by F. Herlitz, J. Hubert, J. Kucher, M. Schaeffer, P. Wieser, D. Hill, S. McLeod, A. Thani, L. Levanon, P. Marutsky, I. Roxin.

Results of the research of the mentioned Ukrainian and foreign criminologists have been used in a comparative mode during the writing of this research paper. Conclusions formulated by the mentioned domestic and European authors form a scientific foundation for solving some complex issues related to criminal liability for provoking bribery from the standpoint of comparative analysis. At the same time, acquaintance with the relevant doctrinal developments indicates the lack of a single conceptual approach to understanding the content, limits of legality and legal features of provocative behavior aimed at artificially creating an illegal act.

The research paper's objective is to determine, within comparative method framework, legal grounds and implications of the doctrine of offense entrapment in criminal laws of several European nations as well as in the draft Criminal Code of Ukraine.

Discussion. We should start with reference to the fact that the website of the Working Group, which is currently developing a draft of the new Criminal Code of Ukraine (version as of November 14, 2021) and which has formulated a collective position on the inadmissibility of provocative behavior (in particular by law enforcement), there is one that embodies, so to speak, an alternative point of view, in an article published in 1998 by one of the members of the Working Group V. Navrotsky with the eloquent title «Provocation of bribery as a possible way to fight corruption» [2]. Also anti-corruption related documents periodically mention such a tangent to the provocation of crime and a controversial legal instrument as a test of integrity.

Critical analyses of the key elements of proposed article on provocation within the Draft Criminal Code enables us to express several important observations.

1. Definition of the concept of provocation of a crime provided in Part 1 of Art. 2.5.3 of the draft needs to be improved taking into account that: a) when provoking a crime, such influence on a person is not excluded, which is not covered by the criminal law concept of incitement to crime; b) the purpose of the provocation of the crime, as offered by developers, will not allow the project to cover provocative behavior of law enforcement officials with the appropriate definition. Improved Part 3 of Art. 2.5.3 of the project should take into account the fact that behavior of the provocateur can be regarded as the actions not only of instigator but also of crime organizer [3].

2. Article 2.4.5 of the draft «Voluntary waiver of an uncompleted crime committed in complicity» should be supplemented by a separate part, which would reflect specifics of the voluntary refusal of the provocateur.

3. When improving section 7.4 of the project «Crimes against Justice», it is necessary to return to the question of the expediency of including an article on provocation of a crime in this section, intended for law enforcement officials.

4. When finalizing Part 2 of Art. 2.5.3 of the dedicated to tangent to provocation of a crime by lawful behavior of law enforcement agents related to detection of crimes, it is proposed: a) provision on giving a person the opportunity to commit a crime under the control of law enforcement officials should be replaced by a generalized wording, which will cover activities that constitute the content of various forms of control over the commission of a crime as covert investigative actions; b) to include in this norm of the draft Criminal Code a reference to operative-search measures carried out before criminal proceedings and regulated not by the Criminal Procedure Code of Ukraine, but by operative-search legislation as well. In case of relying to the «alternative» proposal to consolidate control over the commission of a crime as a new circumstance, which excludes the illegality of the act, Part 2 will require exclusion from Art. 2.5.3 of the project.

Since the issue of determining the limits of legality of the behavior of law enforcement officers and their agents related to the provocation of the crime is inextricably linked with normative-legal regulation of covert investigative actions and other covert measures, finalization of the project in terms of addressing issues related to the provocation of the crime, requires involvement of specialists in criminal procedure rights and operative-search measures.

5. Non-application of criminal remedies proposed by the project to the subject, which due to provocation by an official of the law enforcement body has violated criminal law prohibition on encroachment on the state, unreasonably corresponds to the issue of error (both legal and factual). As an option of describing harm to the interests of law enforcement in such a situation can be recognized as a circumstance that excludes the illegality of the act. The range of encroachments, the commission of which as a result of provocation by law enforcement officers will exclude the use of criminal legal means, needs to be further clarified.

Overall, such observations could serve as doctrinal roadmap when improving official texts of relevant Criminal Code provisions.

The second part of this research paper, as mentioned in its title, will cover various aspects of provocation (entrapment) in several European nations.

1. *Czech Republic.* Former Czech Prosecutor General Maria Benešova has previously suggested one of the oldest ways to fight corruption, namely provocation. As she has explained, it is quite simple: an agent comes to the official, offers a bribe for certain public services, the official puts the bribe in his pocket, which actually seals his verdict, as he was caught at the crime scene. The proposal to use provocations to stop bribery is in the draft stage,

however, some details have already been made public by the Attorney General. In particular, officials who have been convicted of bribery as a result of a fabricated provocation will not face imprisonment, but only immediate dismissal. The question of who will carry out such operations and what exactly can serve as proof of the crime has not yet been decided. So far, such a prosecutorial initiative has not been implemented in practice [4].

2. *Latvia*. In this country, the question of the criminal law significance of provocation has become, as in some other European countries, including Germany, the subject of critical analysis on the issue of compliance with the Constitution. Thus, in its decision of May 8, 2000, the Constitutional Court of the Republic of Latvia stated that such legal regulation of application (by subjects of operative-search measures) of the model imitating criminal activity which would keep for special services of the state possibility to incite, provoke the person cannot be established. Provocation of crimes and other abuses through the application of such a model label it, in the opinion of the Constitutional Court, as unconstitutional, and the information obtained as a result of its application is not recognized as evidence, it does not acquire criminal procedural significance [5, p. 98].

Courts in each criminal case, in which this model has been implemented, must establish whether there was a provocation, incitement to commit a crime. When such abuse is established, the information gathered is not considered evidence in the case. Such approach resembles the mode of inadmissibility of evidence, gathered within operative-search measures but with the usage of entrapment techniques, as explicitly forbidden by part 3 of Article 271 of the Criminal Procedure Code of Ukraine.

3. *Germany*. According to the German criminologist K. Ludersen, protecting persons prone to criminal offenses from the final fall is an abuse, which is incompatible with respect for human dignity and is contrary to the social objectives of the state [6, p. 220].

Currently, German criminal law does not specify which types of behavior constitute provocation, much less guide the law enforcer to the limit of legality / illegality of provocation. Accordingly, some guidelines on the conditions of legality of the provocation are enshrined in relevant provisions of the criminal procedure legislation of Germany. Indeed, Art. Articles 110a, 110b and 110c of the German Code of Criminal Procedure (Strafprozeßordnung) regulate procedural status and powers of undercover police agents during the investigation of certain categories of crimes. Although corruption offenses are not directly mentioned in the relevant list of acts, at the same time they may be covered by the notion of a crime committed on a commercial or regular (repeated) basis (Article 110a (1)) [7].

In general, provocation in Germany does not mean inclination of a law-abiding citizen to commit a crime, but rather the aspiration to force a person who is already preparing to commit a crime to act under unfavorable conditions and thus facilitate the task of apprehending and exposing the offender. German lawyers assume that the agent is not punished for provocative actions, because he directs his efforts not to the final result of the crime, but only to try to commit it by another person and to prevent more dangerous consequences [8, p. 168].

Thus, it is worth noting the thesis that modern German criminal law insists on the legality of the method of provocation. According to German lawyers, this approach is due primarily to the content of Art. 20 (3) of the Basic Law of Germany, which enshrines the principle of the rule of law (Rechtsstaatsprinzip) in the state, which, in turn, requires effective criminal prosecution by authorized bodies, but with strict observance of the constitutional principles of criminal procedure.

Interestingly enough, German courts recognize provocation as a possible violation of Article 6 of the ECHR, but at the same time oppose the complete ban on provocative activities in law enforcement practice [9].

German commentators write that the case law of the ECtHR was a catalyst for changing the approaches of the German Court of Cassation in terms of interpreting the elements and limits of provocative behavior. In particular, the courts of Germany now also distinguish between permissible and inadmissible manifestations of provocation, which, accordingly, have different legal consequences. Thus, provocation is allowed if the accused has previously been prosecuted (or at least suspected) for illegal acts similar to the one to which the provocation is applied. In turn, the Federal Constitutional Court of Germany (German: Bundesverfassungsgericht) draws the line between permissible and inadmissible provocation by determining the optimal balance for the rule of law between a person's right to a fair trial (Article 6 of the ECHR) and the public interest in ensuring an effective investigation and punishment of crimes [10, p. 498].

It is an interesting fact that judicial authorities of Germany view provocation as primarily a mitigating circumstance, as the provoked crime is committed under control of law enforcement agencies; therefore, the public danger in the case of such crime is minimized [11, p. 11–12].

At the same time, German legal literature has consistently criticized law enforcement approach in the form of a reduction in the sentence imposed in the event of elements of provocation. Thus, I. Roxin and P. Makrutzky write that manifestations of both permissible and inadmissible provocation may serve as grounds for reducing the sentence by the court. At the same time, establishment by the court of an inadmissible provocation does not lead to special legal consequences for the provoked person: according to the Federal Supreme Court's position, in such case the sentence imposed on the provoked person will simply be significantly less than the punishment for the crime provoked within reasonable limits [12, p. 174; 13, p. 256]. And that is it. It is rather obvious that such approach to the differentiation of the order of sentencing for a provoked crime is difficult to perceive as perfect.

4. *Bulgaria*. According to Art. 307 of the Criminal Code of the Republic of Bulgaria of 1968 (2000 edition, hereinafter – the Criminal Code of Bulgaria) a person who knowingly creates a situation or conditions favorable to offer, give or receive a bribe to harm a person who gives or receives a bribe will be found guilty of provocation of giving or receiving a bribe and will be punishable by imprisonment for up to three years [14]. This provision refers to an illegal act in the form of creating externally controlled conditions for the perpetrator to commit a certain corruption crime.

The norm under study is provided for in Section IX of the Special Part («Bribery»), though this section is included in Chapter VIII of the Special Part («Crimes against the activities of state bodies and public organizations»). This indicates not only similarity of Art. 307 of the Criminal Code of Bulgaria and Art. 370 of the Criminal Code of Ukraine, but also similarity of the definition of objects of bribery provocation under these codes.

It also follows from the text of the studied foreign prescription that the subject of the relevant act is general – it covers any person, not just an official. At the same time, the purpose of the illegal act is formulated differently – it is not to expose the provoked «corruptor», as mentioned in the disposition of Art. 307 of the Criminal Code; it is about the purpose (the term «purpose» is used directly in the text of the Bulgarian criminal law provision) of causing harm to the provoked person. It is obvious that the element of purpose formulated in such way is broader in its meaning than just the goal of exposing the «corruptor». After all, for example, the purpose of material or sexual blackmail also seems to be covered by the purpose of causing harm.

As an interesting fact, under Art. 265 of the Criminal Code of 1951 of the former People's Republic of Bulgaria provided for criminal liability of persons who knowingly created the situation or conditions, which cause the offer or receipt of a bribe in order to further expose the person who offered or received a bribe [15]. The corresponding wording of the elements of illegal behavior in content resembled similar prohibitions under the criminal laws of the former Soviet republics, in particular Art. 171 of the domestic Criminal Code of 1960, which dealt with the deliberate creation of an official situation and conditions that lead to the offer or receipt of a bribe, to then expose the person who gave or took a bribe. For his part, S. Radachynsky rightly points out that this Bulgarian ban on provoking bribes coincided with the previous article 119 of the 1926 Criminal Code of the Soviet Russian Federation Republic, which apparently acted as a prototype for the Bulgarian provision. Also interesting, according to the mentioned author, is that Art. 265 of the Criminal Code of Bulgaria of 1951 (by the way, as well as the current Article 307) did not limit the range of victims of provocative actions of the perpetrators, which significantly simplifies the process of investigating bribery provocation by law enforcement agencies [16, p. 154].

In contrast to the rules that provide for criminal liability for provoking bribery in the legislation of other foreign countries, Art. 307 of the Criminal Code of Bulgaria in its content is most similar to Art. 370 of the Criminal Code of Ukraine. The similarity is expressed not only in the definition of the object of the crime, but also in the description of the features of its objective side.

According to the Bulgarian Criminal Code, the purpose of provoking bribery is to cause harm to those who gave or received bribes. At the same time, such formulation of the goal seems vague, abstract. After all, as T. Batrachenko rightly notes, it is possible to harm those who gave or received bribes in any way, including exposing such persons, illegally prosecuting

them, making them addicted, creating artificial evidence of a crime, blackmail, etc. Thus, the range of possible goals of the provocateur in this case is rather wide [5, p. 100].

Conclusions. Several important conclusions have been elaborated in the course of our research.

In the context of drafting the new Criminal Code of Ukraine, the question of whether provocative behavior (especially, but not only by law enforcement officers) requires special legislation, and if so, what should be the normative reflection of elements of such behavior and legal actions committed by both provocateurs and provoked persons. As far as we know, the project has not been studied in depth by criminal law specialists in this part. There is no doubt that broad professional discussion of the project will help to improve its quality and gradually improve with the implementation of the best world practices of public law regulation. At the same time it is necessary to be aware of the fact that formulations of the perspective criminal law which do not fully consider specificity of counteraction to crime in the conditions are not completely thought over the force of the laws of Ukraine «On operational and investigative activities» and the Criminal Procedure Code of Ukraine, may put operational units of law enforcement agencies in an extremely awkward position, may reduce their work to detect crimes (especially latent ones) to zero levels.

On the other hand, relevant experience of rule-making, doctrinal substantiation and law enforcement in the field of counteracting provocative practices in some European countries has been covered in this paper. In particular, we argue that in cases where the state legalizes provocative practices in the activities of law enforcement agencies in order to combat various types of crimes, it (the state) resorts to essentially the same criminal law measures as the actual violators of the Criminal Code. Thus, the provocateur, even if he acts in an official, state-authorized status, must be prosecuted on an equal footing with the provoked offender. Otherwise, the state is allegedly interested in releasing its citizen from fair criminal prosecution, in releasing him from the obligation to adhere to the principle of the rule of law and equality of everybody before the law.

Each state, which has recognized at the level of national criminal law the inadmissibility of provocation of a crime, has developed and applies in practice a number of criteria that must be taken into account when deciding on the limits of admissibility of provocation. These criteria should include, inter alia: reasonable pre-existing suspicion of the provoked person, intensity and purpose of external influence on such a person, willingness (propensity) of the incited person to commit an illegal act. Commonality of most of the mentioned criteria in the law and law enforcement practice of the states studied in the dissertation has been revealed, which is primarily facilitated by the unified practice of the ECtHR in terms of legal content and criteria of inadmissibility of provocation.

References

1. Судова статистика за 2020 рік. URL: https://court.gov.ua/inshe/sudova_statystyka/rik_2020.
2. Навроцький В. Провокація хабара як можливий спосіб боротьби з корупцією. *Вісник Академії правових наук України*. 1998. № 4. С. 157–162.
3. Текст проекту нового Кримінального кодексу України. Контрольний текст станом на 14 листопада 2021 р. URL: <https://newcriminalcode.org.ua/upload/media/2021/11/15/1-kontrolnyj-tekst-proektu-kk-14-11-2021-oznaky.pdf>.
4. Каймаков А. Провокация как способ борьбы с коррупцией. *Radio Prague International*. URL : <https://ruski.radio.cz/provokaciya-kak-sposob-borby-s-korrupciy-8060160>.
5. Батраченко Т.С. Порівняльно-правовий аналіз кримінальної відповідальності за провокацію підкупу за законодавством України та зарубіжних країн. *Правова позиція*. 2016. № 1. С. 96–101.
6. Адашкевич Ю.Н. Организованная преступность-2 ; под ред. А. И. Долговой, С.В. Дьякова. Москва : Криминолог. фссоциация, 1993. 320 с.
7. German Code of Criminal Procedure (Strafprozeßordnung – StPO). URL : https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
8. Гайдук А. П. Зарубежный опыт расследования и раскрытия преступлений в сфере коррупции. *Известия Методического центра профессионального образования и координации научных исследований*. 1996. № 4. С. 168–174.
9. BGHSt 45, 321 – Tatprovokation durch Vertrauensperson. URL : <https://www.servat.unibe.ch/dfr/bs045321.html>.
10. Görlitz F., Hubert J., Kucher J., Scheffer M., Wieser P. «Tatprovokation» – The Legal Issue of Entrapment in Germany and Possible Solutions. *German Law Journal*. 2019. № 4 (20). P. 496–509.
11. Налбандян Р.Г. Провокация преступлений: позиция Европейского суда по правам человека. *Уголовно-исполнительная система: право, экономика, управление*. 2016. № 1. С. 11–13.

12. Roxin I. Die Rechtsfolgen schwerwiegender Rechtsstaatsverstöße in der Strafrechtspflege. München : Verlag V. Florentz, 1988. 300 p.
13. Makutzki P. Verdeckte Ermittlungen im Strafprozeß: rechtswissenschaftliche Analyse; rechtsvergleichende Studie mit dem U.S.-amerikanischen Prozeßrecht. Berlin: Duncker und Humblot, 2000. 351 p.
14. Criminal Code of the Republic of Bulgaria (1968, amended 2017). URL : https://www.legislationline.org/download/id/8395/file/Bulgaria_Criminal_Code_1968_am2017_ENG.pdf.
15. Михайленко П. П. Народная Республика Болгария. Законы Уголовный и Военно-Уголовный кодексы Народной Республики Болгарии [Текст] / пер. с болг. Ш. С. Грингауз, М. И. Якубович. Москва : Издательство иностранной литературы, 1951. 128 с.
16. Радачинский С.Н. Ответственность за провокацию взятки либо коммерческого покупа : дисс. ... канд. юрид. наук : 12.00.08 / Всеросс. НИИ М-ва внутр. дел РФ. Москва, 2002. 188 с.

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1. Sudova statystyka za 2020 rik. URL : https://court.gov.ua/inshe/sudova_statystyka/rik_2020. [in Ukr.]
2. Navrotskyi, V. (1998). Provokatsiya khabara yak mozhlyvyi sposib borotby z koruptsiyeyu [Bribery provocation as a possible way to fight corruption.]. *Visnyk Akademiyi pravovykh nauk Ukrainy*. № 4, pp. 157–162. [in Ukr.]
3. Tekst proiektu novoho Kryminalnogo kodeksu Ukrainy. Kontrolnyi tekst stanom na 14 lystopada 2021 r. [The text of the draft of the new Criminal Code of Ukraine. Control text as of November 14, 2021] URL: <https://newcriminalcode.org.ua/upload/media/2021/11/15/1-kontrolnyj-tekst-proiektu-kk-14-11-2021-oznaky.pdf>. [in Ukr.]
4. Kaymakov A. Provokatsiya kak sposob borby s korruptsiyey [Provocation as a way to combat corruption]. URL : <https://ruski.radio.cz/provokaciya-kak-sposob-borby-s-korruptsiyey-8060160>. [in Russ.]
5. Batrachenko, T. S. (2016). Porivnialno-pravovyy analiz kryminalnoyi vidpovidalnosti za provokatsiyu pidkupu za zakonodavstvom Ukrainy ta zarubizhnykh krayin [Comparative legal analysis of criminal liability for provoking bribery under the laws of Ukraine and foreign countries]. *Pravova pozytsiia*. № 1, pp. 96–101. [in Ukr.]
6. Adashkevich, Yu. N. (1993). Organizovannaya prestupnost-2 [Organized crime-2]. A. I. Dolgovoy, S. V. Dyakova. Eds. Moscow : Kriminolog. Assotsiatsiya. 320 p. [in Russ.]
7. German Code of Criminal Procedure (Strafprozeßordnung – StPO). URL : https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html.
8. Gayduk, A. P. (1996). Zarubezhniy opyt rassledovaniya i raskryitiya prestupleniy v sfere korruptsii [Foreign experience in the investigation and disclosure of crimes in the field of corruption]. *Izvestiya Metodicheskogo tsentra professionalnogo obrazovaniya i koordinatsii nauchnykh issledovaniy*. № 4, pp. 168–174. [in Russ.]
9. BGHSt 45, 321 – Tatprovokation durch Vertrauensperson [BGHSt 45, 321 – provocation by a person of trust]. URL : <https://www.servat.unibe.ch/dfr/bs045321.html>. [in Germ.]
10. Görlietz, F., Hubert, J., Kucher, J., Scheffer, M. & Wieser, P. (2019). «Tatprovokation» – The Legal Issue of Entrapment in Germany and Possible Solutions. *German Law Journal*. № 4 (20), pp. 496–509.
11. Nalbandyan, R. G. (2016). Provokatsiya prestupleniy: pozitsiya Yevropeyskogo suda po pravam cheloveka [Provocation of crimes: position of the European Court of Human Rights.]. *Ugolovno-ispolnitelnaya sistema: pravo, ekonomika, upravlenie*. № 1, pp. 11–13. [in Russ.]
12. Roxin, I. (1988). Die Rechtsfolgen schwerwiegender Rechtsstaatsverstöße in der Strafrechtspflege [The legal consequences of serious violations of the rule of law in the administration of criminal justice]. München: Verlag V. Florentz. 300 p. [in Germ.]
13. Makutzki, P. (2000). Verdeckte Ermittlungen im Strafprozeß: rechtswissenschaftliche Analyse; rechtsvergleichende Studie mit dem U.S.-amerikanischen Prozeßrecht [Covert investigations in criminal proceedings: legal analysis; Comparative law study with US-American procedural law]. Berlin : Duncker und Humblot. 351 p. [in Germ.]
14. Criminal Code of the Republic of Bulgaria (1968, amended 2017). URL : https://www.legislationline.org/download/id/8395/file/Bulgaria_Criminal_Code_1968_am2017_ENG.pdf.
15. Mikhaylenko, P.P. (1951). Narodnaya Respublika Bolgariya. Zakony i Ugolovnyiy I Voenno-Ugolovnyy kodeksy Narodnoy Respubliki Bolgarii [People’s Republic of Bulgaria. Laws of the Criminal and Military Criminal Codes of the People’s Republic of Bulgaria]. Moscow : Izdatelstvo inostrannoy literatury. 128 p. [in Russ.]
16. Radachinskiy, S. N. (2002). Otvetstvennost za provokatsiyu vzyatki libo kommercheskogo podkupa [Responsibility for provoking a bribe or commercial bribery] : diss. ...a kand. jurid. nauk / Vseross. NII m-va внутр. дел. RF. Moscow, 188 p. [in Russ.]

ABSTRACT

The research paper covers provisions of the draft of the new Criminal Code of Ukraine regarding provocative behavior and its legal consequences. Emphasis is placed on finding out to what extent the developers of the researched document have taken into account the achievements of criminal law doctrine, legal positions of the ECtHR and the legislation of Ukraine on covert investigative (search)

actions and other covert measures, as well as whether the project will normalize law enforcement issues. Directions in which it is expedient to continue work on improvement of the corresponding provisions of criminal law have been defined. Also, the work within comparative legal regime highlights both achievements and shortcomings of the criminal law systems of individual European countries in terms of official and law enforcement regulations of the institution of crime provocation. In particular, it has been established that each state which has recognized the inadmissibility of provoking a crime at the level of national criminal law has also developed and applied in practice a number of criteria that must be taken into account when deciding on the limits of admissibility of provocation.

Keywords: *provocation of a crime, incitement to a crime, covert investigative (search) actions, control over commission of a crime, European criminal law, draft of the new Criminal Code of Ukraine, comparative legal method.*

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SCIENTIFIC DEBATES ON THE PREVENTIVE ACTIVITIES OF AUTHORIZED PERSONS AS PART OF THE METHODOLOGY FOR INVESTIGATING CRIMINAL OFFENCES AGAINST MORALITY

Микола ЄФІМОВ, Єрбол ОМАРОВ. НАУКОВІ ДИСПУТИ СТОСОВНО ПРОФІЛАКТИЧНОЇ ДІЯЛЬНОСТІ УПОВНОВАЖЕНИХ ОСІБ ЯК ЕЛЕМЕНТУ МЕТОДИКИ РОЗСЛІДУВАННЯ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ ПРОТИ МОРАЛЬНОСТІ. Наукова стаття присвячена дослідженню окремих питань методики розслідування кримінальних правопорушень проти моральності. Автори акцентують увагу на обов'язковому включенні до вказаної структури такого елемента як профілактична діяльність уповноважених осіб.

Зазначається, що профілактична функція повинна виконуватися незалежно від служби, де працює той чи інший правоохоронець, та від його посади. Акцентується увага на тому, що раніше Кримінально-процесуальний кодекс України, прямо зобов'язував слідчого здійснювати низку заходів щодо усунення причин та умов вчинення протиправних дій. На жаль, на даний момент такої норми немає. Автори вказують, що, на їх думку, уповноважені особи, які здійснюють досудове розслідування (слідчий, дізнавач, прокурор) повинні знаходити можливості, щоб зробити хоча б мінімум для попередження зазначеної категорії кримінальних правопорушень. Адже позиції моральності є базисом як для правового забезпечення держави, так і в цілому нормального функціонування суспільства.

Вказується на те, що критеріями ефективності кримінально-правових норм досліджуваних діянь є правильне визначення соціальної потреби, яка проходить різні рівні у результаті аналізу ефективності низки норм про відповідальність. Так, це може бути від випадкових поодиноких фактів вчинення кримінальних правопорушень до об'єктивної необхідності, а також адекватне розуміння соціальної потреби правильного визначення природи суспільних відносин, що підлягають кримінально-правовій охороні.

Визначено найбільш характерні заходи профілактики досліджуваної категорії протиправних дій підрозділами Національної поліції України, зокрема: здійснення виховного

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