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SOME ISSUES OF THE MENS REA OF THE PROVOCATION OF A CRIME IN THE CRIMINAL LAW OF GEORGIA

Summary. *The article will consider the issues of the mens rea of the provocation of a crime. In particular, in what form of intent it is possible to commit a provocation of a crime, what subjective attitude a provocateur may have to a provoked offense, and also to what extent a provoked offense can be imputed to a provocateur and in what form of mens rea (intention or negligence) he/she can act on in relation to the provoked offense. How at such a moment should the actions of a provocateur be qualified - as cumulative crimes or only as a provocation of a crime? This question is especially interesting in the case of direct intent on the part of the provocateur to complete the provoked offense. If an action can be regarded as cumulative crimes, then in this case the provocateur acts as a principal or accomplice? These issues are debatable in the theory of criminal law of Georgia, so it will be interesting to dwell on them.*

Key words: *provocation of a crime, persuasion, incitement, intent, negligence, purpose, cumulative crimes.*

Statement of the problem. According to Article 145 of the Criminal Code of Georgia [1], inducing another person to commit a crime for the purpose of his/her criminal prosecution shall be considered a provocation of a crime. This

legal definition of criminal provocation shows that provocation is an intentional tort, which means that it can only be committed intentionally and only with direct intent. But there are disagreements in the criminal law literature as to the extent to which it is possible for a provocateur to have direct intent to provoke an offense and how his/her action at this time must be assessed as provocation of a crime, complicity in a provoked offense or cumulative crimes. **The purpose of this article is** to consider and analyse the existing opinions on this issue, as well as to offer the author's view on solving this problem.

Resent researches and publications. Professors I. Dvalidze, T. Ebralidze, G. Abesadze, O. Gamkrelidze, P. Guruli, N. Todua, B. Jishkariani and others are working on this issue in Georgia, whose research has made a significant contribution to the study and better understanding of the problem of provocation of a crime. But to date, many issues remain the subject of discussion, and for their better understanding, additional research is required.

The main material. The subjective corpus delicti, as recognized in the theory of criminal law, presupposes an internal, mental attitude of a person to the unlawful act committed by him/her. In the subjective composition of actions, first of all, we check the presence or absence of one or another type of intention [2, p. 127]. It is unanimously recognized in the Georgian criminal law literature that the provocation of a crime, as a delict based on intent, can only be committed with direct intent [3, p. 81; 4, p. 223.] In the theory of criminal law, the question of what intent a provocateur may have in relation to a provoked offense causes controversy. According to one opinion, if a provocateur wants to commit a provoked offense (and even more to complete it), i.e. to violate the same legal good together with the provoked person, and also to bring the provoked person to criminal responsibility, then he/she must be punished for complicity in a crime, because it is impossible to deal with both provocation and complicity at the same

time [5, p. 339]. According to another opinion, a provocateur of a crime may have both direct and indirect intent to bring the provoked offense to an end [6, p. 79].

To bring more clarity to this issue, it is necessary to pay attention to several circumstances. Theoretically, it may not be considered correct to exclude that a provocateur can act both with direct and indirect intent to complete the provoked offense. The indirect intent to complete the provoked offense is easily possible because the provocateur has no guarantee that the provoked person will be stopped before he/she completes the crime.

When a provocateur incites another to commit a crime, for example, to steal, harm someone else's health, murder, etc., then perhaps the provocateur easily assumes that the provoked person can complete the crime, because he/she has no command of the situation and cannot control it, i.e. he/she cannot control the behaviour of the provoked person, who is not able to prevent the provocateur's action from going beyond the attempt stage. As for the provocateur's desire to stop the provoked offense, objectively this is also possible. It is possible that the provocateur at the same time wants the provoked person to encroach on the lawful good, that is, to stop the provoked crime and bring the provoked person to criminal responsibility. It's actually easy to imagine. For example, "A" persuaded one of his neighbours to rob the apartment of another neighbour, and "A" was guided by the desire to take revenge on both neighbours. He persuaded one of the neighbours, who had a criminal past, to steal in order to arrest him and bring him to justice, and regarding another neighbour, who lived much better than him, "A" wanted to cause material damage by stealing from this neighbour. In this case, "A" is guided both by the purpose of provoking a crime, i.e. bringing another person to criminal responsibility, and the purpose of completing the provoked offense, i.e. stealing a neighbour's apartment and causing material damage to him/her. As you can see, when considering the actual circumstances, a situation is possible when the

provocateur has a direct or indirect intention to complete the provoked offense. But the main consideration here is not what intentions the provocateur actually has in relation to the provoked offense, but how to evaluate (qualify) his/her actions in this case. Is "A" a provocateur, an instigator of a crime (an accomplice), or should his/her action be regarded as a combination of crimes, both provocation of a crime and complicity in a crime? The correct answer to this question might be as follows. When the provocateur acts with the indirect intention of completing the provoked tort, then the provoked tort must not be imputed to the provocateur because he/she does not want to interfere with the legitimate good. And if the provoked person may complete the crime as mentioned above, the provocateur could know and even admit such possibility, but his/her purpose is to pursue the provocateur, and not to harm the subject of the provoked offense. O. Gamkrelidze is correct in his saying that when the goals of an instigator (persuader) and a perpetrator do not coincide, then we have no complicity and each of them is an independent perpetrator of injustice (illegal act) [7, p. 179]. From here it is concluded that when the goal of the provocateur and the provoked is to encroach on a different legitimate good (object), there can be no question of complicity, that is, the actions of the provocateur and the provoked represent different injustices.

As for the presence of direct intent to complete a provoked offense, when a provocateur wants the result of a provoked offense to occur, then in this case his/her action must be regarded as incitement, complicity in a provoked offense, and not as a provocation of a crime. P. Guruli's reasoning on this issue is contradictory, when he claims that, despite the presence of direct intent on the part of the provocateur to commit a provoked offense, the provocateur and provoked person commit different injustices, which is determined by the difference between their goals and objects of encroachment [6, p. 78, 80]. In this matter, G. Abesadze's reasoning is more likely to be shared that there can be no sign of

identity between the actions of the principal and the provocateur [8, p. 42]. When a provocateur wants to stop the provoked offense and achieve a result, that is, when the provoked and provocateur want to encroach on the same legitimate good, then why is the goal of the provoked person and provocateur in this part not the same? If the goal and intention coincide, then why do the actions of the provocateur and the provoked not create a single injustice and complicity in the crime? In this case, the correct approach would be for the provocateur to act with the direct intention of completing the instigated offence, i.e. the goal of the principal and the persuader (instigator) is the violation of the same legal good, this means the implementation of one injustice, which is complicity in a crime and nothing more. And the purpose of the provocation, i.e. the desire to bring a (provoked) person to criminal responsibility at such a moment is secondary, it cannot be a counterbalance to complicity in a crime and cannot be equal to it. In this case, it is covered up, absorbed by complicity in a crime, and such an additional goal cannot establish the provocation of a crime as a *delictum sui generis*.

Regarding the negligent attitude to the commission of a provoked offense, the criminal legislation of Georgia expresses the opinion that in this case a provocateur must be held responsible for the cumulative crimes. The following example is given as an illustration: "A" is hostile to "B". He knows that "B" has to settle old accounts with "C" and encourages "B" to kill "C". His goal is to expose "B" for attempted murder and put him in jail. After persuading him to commit a crime, "A" gave "B" a gun, which he loaded with useless bullets. "A" hopes "B" trusts him and won't check the gun. His guess was wrong. "B" checked the gun and, seeing that it did not shoot, replaced the useless cartridges and killed "C" [9, p. 236]. This example shows that the provocateur does not want a fatal outcome, is not indifferent and deliberately does not allow it. He gives the provoked person a pistol with useless bullets so that he cannot harm a legitimate good. Based on these

actual circumstances, we can only talk about the negligent attitude of the provocateur to the provoked offense, since he/she hopes or even is sure that there will be no result. To what extent, in this case, the result of the provoked offense can be imputed to a provocateur, and his/her action, together with the provocation, be regarded as a crime of negligence? To answer this question, it is necessary to determine whether the provocateur carries out the objective corpus delicti through negligence. This issue requires a differentiated approach. Based on the above example, we can consider the actions of "A" as a crime of negligence, since "A" not only persuaded "B" to killing "C", but he/she also handed "B" a gun, i.e. committed another act that violates the norm of prudence. Namely, "A" did not take into account that "B" could test the gun and find that it was loaded with unsuitable bullets, which "B" did by replacing the bullets and killed "C". Therefore, in this case, "A" committed an objective corpus delicti through negligence, an objective violation of the norm of diligence, manifested in the transfer of the gun loaded with inappropriate bullets. There is also a subjective component of the crime of negligence, since "A", as a person of average mental capacity, in the event of due diligence, could consider that "B" could check the weapon and replace the useless bullets. His hope that "B" would trust him and did not check the gun was not justified. Thus, at such a moment, the action of a provocateur can be qualified as cumulative crimes, such as provocation of a crime and careless murder of a person. But it is not always possible to make such an assessment. If we change the above example and imagine that "A" convinced "B" of killing "C" in order to bring him to criminal responsibility. "A" hoped (he was even sure) that the police would catch up with "B" and arrest him at the stage of the assassination attempt, but the police were late and "B" killed "C". In this case, it is difficult to justify carelessness in the action of "A" with regard of the death of "C", because he objectively did not commit any other action than persuading "B",

so there can be no objective violation of the rule of prudence here. Thus, in this case it will not be correct to evaluate the action of "A" as the cumulative crimes. From this it should be concluded that the presence of a negligent attitude to completing a provoked crime does not give us the opportunity to always evaluate the action of a provocateur in terms of the cumulative crimes and attribute it to the result of a provoked crime.

In the literature of the Georgian criminal law it is rightly noted that the current version of Article 145 of the Criminal Code of Georgia is imperfect. According to one of the opinions expressed on this matter, in order to avoid the inconvenience that the current version of Article 145 creates, it is advisable to add two aggravating circumstances to it, which will consider the responsibility for the provocation of a grave crime and which will consider the responsibility for the provocation of an especially grave crime [5, p. 339]. According to another opinion, it would be appropriate to supplement Article 145 with two aggravating circumstances: the same act, negligently causing the death of a person or other grave consequences, and the same act using one's official position [10, p. 241]. Of these opinions, the second opinion is more acceptable, since it considers the burden of liability not according to the category of crimes, but according to the specific result that may arise from the provoked offence. Weighing responsibility by category of crime cannot really reflect the practical problems that we may encounter when provoking a crime, in particular, in the case of the completion of the provoked delict, the evaluation of the action according to the subjective dependence of the provocateur. It is also important to focus on the special principal and burden him/her with responsibility. Any person can be the principal of a provocation of a crime, but committing it using his/her official position undoubtedly deserves a more severe punishment. But before these changes are

made to the Criminal Law Code of Georgia, it is advisable to resolve the issue of the mens rea of the provocation of a crime, as mentioned above.

Conclusion. Based on the current formulation of Article 145 of the Criminal Code of Georgia, the following approach must be recognized as acceptable on the issue of the subjective composition of the provocation of a crime. When a provocateur acts with the direct intent to complete a provoked offense, then his/her action must be assessed not as a provocation, but as an instigation of the criminal, complicity in a crime, since he/she together with the principal at this time commits a single injustice, because the purpose of encroachment on one and the same legal good creates a single injustice. And the purpose of bringing the principal to criminal responsibility in this case moves to the background and it cannot affect the legal evaluation of the action. If there is an indirect intent to complete a provoked offense, the action of a provocateur must be assessed only as a provocation of a crime, since when the purpose of the provocateur and the provokes person is to encroach on different legal benefits (objects), one cannot speak of complicity, that is, the actions of the provocateur and provoked person represent different injustices. In the case of a negligent attitude, the issue must be dealt with differently. If a provocateur, in addition to the persuasion of a provoked person, committed another action, thereby violating the norm of prudence, which contributed to the completion of the provocative offense, then his/her action can be assessed as the cumulative crimes. But if the provocateur did nothing but persuasion, despite his/her hope that there would be no criminal result, it still occurred. The provocateur's action must be assessed only as provocation of a crime. In such a case, the qualification of cumulative crimes cannot be substantiated due to the absence in its action of the objective corpus delicti due to negligence.

References

1. Criminal Code of Georgia. URL: <https://www.matsne.gov.ge/en/document/view/16426?publication=235> (date of access 24.11.22)
2. Turava M. Criminal Law, Review of General Part, Ninth Edition, Tbilisi, 2013 (in Georgian).
3. Gamkrelidze O. Interpretation of Criminal Code of Georgia, General Part, Tbilisi, 2008 (in Georgian).
4. Jishkariani B., Special Part of Criminal Law, Crime against Person, Tbilisi, 2016 (in Georgian).
5. Criminal Law, Special Part, Book I, Edited by Mamulashvili G., Todua N., Tbilisi, 2019 (in Georgian).
6. Guruli P. The scope of punishable provocation, PhD Dissertation, Tbilisi, 2022 (in Georgian).
7. Gamkrelidze O. The Problem of wrongful act and the bases of punishable complicity in a crime, Tbilisi, 1989 (in Georgian).
8. Abesadze G. Provocation of Crime, PhD Dissertation, Tbilisi, 2010 (in Georgian).
9. Comments of Court Practice. Crime Against Person. Edited by Gamkrelidze O., Tbilisi, 2008 (in Georgian).
10. Dvalide I. Kharanauli L. Tumanishvili G. Tsikarishvili K. Crime Against Human Rights and Freedom in Georgian Criminal Code, Tbilisi, 2019 (in Georgian).