The Concept of Interrelation of Giving and Taking a Bribe

Mychailenko D.G.
Candidate of Juridical Sciences, associate professor
of the Department of Criminal Law
at National University "Odessa Law Academy"

In juridical literature, great attention is paid to the criminal study of bribery, i.e. to giving a bribe (article 369 of the Criminal Code of Ukraine) and taking one (article 368 of the Criminal Code). Nevertheless, in most works on this subject matter, only the features of corpus delicti of giving and taking a bribe are analyzed. Meanwhile, the authors try to solve the debatable aspects only in the context of study of corpus delicti of these crimes, often not trying to study the bases of these offenses. In the meantime, it seems that before characterizing the criteria of bribery, one should first define the essence of interrelation of the acts included in its content (i.e. its legal nature). The solution of the above-mentioned problem has a fundamental meaning and should serve as a basis for the further analysis of features of bribery and for working out the rules of its qualification. The neglect of the social nature of a phenomenon in its criminal study has negative effects on the results of such study, not giving a possibility to reveal its specific characteristics. This causes a deficiency and low validity of conclusions. The legal definition of the elements of corpus delicti has social preconditions and is a result of the legislator's definition of a crime as a social fact. This allows us to make a conclusion that the correct cognition of a nature of a studied phenomenon (in this case, bribery) will let us escape confusions in law enforcement, deepen the understanding of the criteria of giving and receiving of a bribe, and will contribute to the elaboration of scientifically valid rules of qualification of this phenomenon.

However, it must be stated that, notwithstanding the certain importance and complexity of this issue, it is not paid enough attention to it in juridical literature. Therefore, the topic of this research, i.e. the development of the concept of correlation of giving and taking a bribe, is quite a problem of today.

The most fundamental and specific positions on this issue come to the following three points of view. One group of authors states that taking and giving a bribe are independent crimes which don't interrelate (B.V. Zdravomyslov, V.F. Kyrychenko, V.E. Mel'nykova, N.A. Struchkov, M.D. Shargorodskyi, M.P. Karpushyn, P.S. Dmytriev). It is particularly pointed out that giving and taking bribes have different actus reus, characteristics of subjects of these crimes, the interests, motives and aims of their actions [3, p.124; 9, p.4-5]. These crimes are formulated in different articles of the Criminal Code. In cases when an official doesn't accept a bribe, they don't bear responsibility for it, while a bribegiver will account for the attempt of giving a bribe [5, p. 59]. Giving a bribe, in contrast to taking one, impinges on another object, the order of governance. Giving a bribe, among other factors, is always remote in time from receiving one. The time difference between giving and receiving a bribe is clearly seen in case when a bribe is given via a middleman. Giving a bribe always takes place before receiving one [4, p.7]. After all, the very legislator considers these actions as independent crimes [6].

It is hard to agree with this opinion. The statement that giving a bribe is remote from taking a bribe in time is unclear, since the first act, just like the second one, finishes at the same moment. This statement was poignantly characterized my N.P. Kucheriaviy as perfunctory and mechanical [7, p.41]. Indeed, the separation of giving a bribe into an individual article in the Criminal Code doesn't afford ground for recognizing it as an independent crime independent from taking a bribe. Firstly, the disposition of article 269 of the Criminal Code doesn't have any features which would characterize this act, as they are contained in the disposition of article 368, that is to say, these norms have a single disposition. Secondly, giving a bribe without taking one can never be finished, and vice versa. In addition, the thesis about the nonidentity of the objects of infringement is an utter fallacy, while the differences in the subjective features seem to exist only at the first glance, as the analysis of guilt of a bribegiver and bribetaker points out their close subjective connection [10].

There is a common position that giving a bribe is a case of complicity in taking one, and such complicity is defined as requisite (B.V. Vilgenkin, A.A. Gygylenko, S.G. Zakutslyi, U.I. Liapunov, V.O.Navrotsky, A.N.Trainin, O.Y. Svetlov and others). Its

supporters notice that an official cannot independently perform taking a bribe, somebody is supposed to give it. [12, p.517]. Each of these acts cannot be committed without the other one [16, p. 459], the presence of both acts is required [14, p.96]. So the bribegiver, including the one acting under coercion (demanding a bribe) is a required accomplice of this crime since they purposefully, together with the official take part in the infringement of the same object. The difference in subjective features is explained by the fact that in complicity, the community of motives, interests, and aims of activity is not required; on the contrary, that is totally admissible. The only important point is the understanding of community and unlawfulness of actions [2, p.193-194]. It is mentioned that giving a bribe is not an independent crime, because it can't be finished without taking a bribe completed [15, p.227].

The reasons given above are absolutely correct, but it seems that they don't prove the thesis that giving a bribe is not an independent crime and is actually the required complicity of taking a bribe. In criminal law, complicity allows the common intentional participation of several subjects of a crime in committing the same intentional crime (article 26 of the Criminal Code). Meanwhile, such a crime can be committed by one person, therefore, without complicity, which only raises the social danger of this crime without changing its legal nature. [7, p.41], not being a constructive element of corpus delicti of such a crime. Also, according to this position, giving a bribe is unreasonably put into dependence (subjugation) with its receiving. Hereby it is omitted that taking a bribe cannot be performed without giving one. In such case, it is not clear who one doesn't speak about the dependant character and subordinacy of taking a bribe. All this proves the interdependence of these two acts. Some authors even parallel bribery with the civil contract, which expresses the parity of a bribegiver and a bribetaker.

The written above shows that the analyzed position cannot properly reflect the legal nature of bribery. However, the following statements should be recognized, which directly result from this position: a) giving and taking a bribe are a single crime – bribery; b) two sides take part in it – a bribegiver and a bribetaker, and each of them can have accomplices; c) each side may have its own object, being directed by the motives other then the motives of a "counterparty".

Thus it seems that the previous author's point of view has a bit of rationality in it, therefore it should not be completely rejected. We'll try to introduce some clarity into it. We believe it is correct to use the term "necessary complicity" for the description of the legal nature of bribery. However, it lies not in the fact that giving a bribe is just a case of complicity of its taking, as it is said by the followers of this standpoint, but in the fact that one person cannot independently commit a complete infringement. Only the criminal activity of each separate accomplice allows the other one to perform a crime. Unlike the "classical complicity", when the actions of accomplices are aimed at causing or ensuring corresponding actions of an actual doer (this variant is insisted on by the representative of the studied point of view), the situation with the required complicity is that each of the persons stand as a doer of their own crime [11, p.240] A bribegiver and a bribetaker will be accomplices of sc. bribery. This statement cannot be interpreted in any other way, particularly, one should not conclude that bribegiver is an accomplice of taking a bribe, and a bribetaker is an accomplice of giving a bribe.

This statement can be deepened by the following group of authors' position on the nature of bribery (N.D. Durmanov, N.G. Kucheriavyi, S.G. Papiashvili, O.B. Sacharov, B.C. Utevslyi and others). According to it, taking and giving a bribe are a single complex two-sided crime (sometimes other terminology is used: the crime of a special kind, a one-in-two process, but the meaning remains the same). It seems that some authors' pointing out that a bribe is an illegal agreement, unlawful contract or, that corruption has elements of "criminal contract" also shows that giving a bribe, just like taking one, are a single phenomenon. The arguments of supporters of the position given above also seem quite cogent. Taking and giving a bribe are the required (constructive) elements of a single process of bribery. The unity of this corpus delicti is expressed in the fact that these acts:
1) infringe the same direct object; 2) are considered to be finished at the same moment and cannot be finished independently; 3) have a single disposition, which affirm the unity of their actus reus;4) are characterized by the unity of intent. The complexity of bribery consists in the fact that its objective part, even though being a single process, consists of two required interrelated elements (i.e. is two-in-one) – giving and taking a bribe. The first one is performed by the bribegiver, the second one – by the bribetaker. The mentioned

elements were for convenience put into two articles of the Criminal Code (368 and 369). The two-sided character of bribery means that it requires the invariable presence of two subjects.

Some more accurate definitions of the thesis that a bribegiver and a bribetaker are the joint participants of bribery should be given here. The actus reus of bribery consists of two actions, each of them is performed by the party of the crime (a bribegiver or a bribetaker). Therefore, at least two persons simultaneously take part in actus reus of bribery, and neither the bribegiver, nor the bribetaker don't completely perform the actus reus of this crime. Each of them performs only their own part, but as a whole, it occurs only thanks to their mutual activity. V.O. Navrotskyi correctly states that the separation of a joint participant among other accomplices has a theoretical and practical meaning only when they don't perform the actus reus of a crime completely [11, p.233-234].This point of view should be totally agreed with since, based on the assumption of the given understanding, the term "joint participant" can be clearly reflected in the qualification of the real participation of a person in a crime. It is correctly noted in the literature that if a part of actus reus in crimes with a specific subject contains the act which can also be committed by a non-specific subject, the joint participant of such a crime can be a person which doesn't have features of such a subject [1, p.29]. With bribery, the situation is similar. Indeed, one part of actus reus of bribery (taking a bribe) requires the presence of a specific subject (an official), the other one (giving a bribe) can be done by a general subject. Considering this, the sides of bribery will be joint participants of this crime. A bribetaker will be the actual doer of taking a bribe, and the bribegiver respectfully will be the actual doer of giving a bribe, but by no means a bribegiver can be the joint participant of taking a bribe. The mentioned above allows to explain the acknowledged position in the criminal science which states that taking and giving a bribe cannot be finished without one another, as from the point of view of actus reus only the bribe which is given can be taken, and vice versa, only if an official is ready to accept the bribe, it can be given.

Therefore, bribery is a single complex two-sided crime, which consists of two required interrelated elements, giving and taking a bribe, the sides of which act as required joint participants. On the assumption of such nature of this crime, it was even suggested to

join taking a bribe, giving a bribe and agency in bribery into one article called “bribery” [13, c.11]. It was also pointed out that the separation of giving a bribe into a separate corpus delicti is illogical [8, c.141].

The given understanding of the legal nature of bribery not only has academic importance, but also defines the solution of a number of issues of qualification of this act and can further the analysis of other crimes of quasi-contract nature, which is promising for subsequent scientific studies.

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Михайленко Д.Г. Концепція співвідношення давання та одержання хабара.

Проводиться аналіз існуючих уявлень щодо співвідношення давання та одержання хабара. Обґрунтовується, що хабарництво – це єдиний складний двосторонній злочин, який складається з двох необхідних взаємопов'язаних елементів – давання і одержання хабара, сторони якого виступають як необхідні співвиконавці.

Ключові слова: хабарництво, давання хабара, одержання хабара.

Михайленко Д.Г. Концепция соотношения дачи и получения взятки.

Проводится анализ существующих представлений относительно соотношения дачи и получения взятки. Обосновывается, что взяточничество – это единое сложное двустороннее преступление, которое состоит из двух необходимых взаимосвязанных элементов – дачи и получения взятки, стороны которого выступают как необходимые соисполнители.

Ключевые слова: взяточничество, дача взятки, получение взяткиэ

Mychailenko D.G. The Concept of Interrelation of Giving and Taking a Bribe.

In this article the author analyzes the existing images concerning with a parity of a giving and taking the bribe. It is proved that the bribery is a uniform difficult bilateral crime which consists of two necessary interconnected elements: giving and taking the bribe. This two elements are necessity co-authors of the crime.

Key-words: bribery, giving of the bribe, taking of the bribe.