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Legislative Regulation and Practice of Imposition of Punishment in the Form of Fine and Forfeiture for the Corruption-Related Crimes in the Republic of Kazakhstan

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Abstract
For corruption offenses in the Republic of Kazakhstan administrative and criminal responsibility is stipulated. Criminal responsibility is the strictest legal mean of responding to the manifestations of corruption. Kazakhstan undertakes system legal, organizational and institutional measures of anti-corruption management. At the same time the aim of improving the efficiency of the anti-corruption policy requires active involvement in it of the civil society institutions. The practitioners positively estimate the innovation of multiple fines and only approve the transition of forfeiture of the property obtained by illegal means. So, the methods of the definition of illegal origin of the property should be developed. In these issues the experience of the foreign countries may be useful for Kazakhstan.

Keywords: corruption, anti-corruption legislation, criminal responsibility, Criminal Code, civil society institutions.

JEL Classification: G18, K14, K23, K42.

1. Introduction

Anti-corruption legislation of the Republic of Kazakhstan has a short history. It is connected with the fact that in the Soviet period of development of Kazakhstan the official authorities denied the existence of such socially reviled phenomenon as corruption. In the modern Kazakhstan the harm and negative consequences of corruption are openly discussed. In the program documents it is noted that invading

various spheres of economics and social life corruption adversely affects the sustainable social and economic development of the country (The Industry Program on Ant-Corruption Management...). The Anti-Corruption Strategy of the Republic of Kazakhstan for the period of 2015–2025, which is currently being implemented, is aimed at involvement of the whole society into the anti-corruption movement through creation of the atmosphere of intolerance towards any manifestations of corruption and decrease in the corruption level in Kazakhstan (Anti-Corruption Strategy of the Republic of Kazakhstan for the period of 2015–2025...).

In the complex of the legal mechanisms of corruption management the central place is taken by the special Law dated 18 November 2015 'On Corruption Management' (Law of the Republic of Kazakhstan dated 18 November 2015). Compared with the former Law 'On the Fight against Corruption' of 1998 the new law is focused on prevention of corruption, detection and elimination of the factors determining corruption offenses.

For corruption offenses in the Republic of Kazakhstan administrative and criminal responsibility is stipulated. Criminal responsibility is the strictest legal mean of responding to the manifestations of corruption.

There are the following main tendencies in development of anti-corruption criminal legislation of the Republic of Kazakhstan in the period of its sovereignty: expanding the circle of the subjects of corruption-related crimes; enhancing liability; elaborating and expanding the list of corruption actions; differentiation of criminal liability considering the kind of the subjects of corruption-related crimes.

Anti-corruption standards of the new Criminal Code of the Republic of Kazakhstan of 2014 fit well in the above mentioned tendency. Alongside with that, in the Criminal Code of 2014 enhancing the corruptionists' responsibility is mainly provided through property punishment.

2. Advantages of Fines

Any criminal punishment is accompanied with certain limitations of rights. According to the character of rights limitation the punishments are divided into property and non-property punishments. Traditional fine and forfeiture are the property punishments.

It is generally recognized that property punishments are the most effective in the cases of application to criminally punishable actions which are lucratively inclined. Corruption-related crimes belong to the category of lucratively inclined crimes. So, in the regulatory definition of corruption there is the main goal "of obtaining and acceptance of (property and non-property) benefits and advantages for the person or the third parties directly or indirectly."

The Criminal Code of the Republic of Kazakhstan of 2014 created the preconditions for a wider application of property punishments in the form of fine and forfeiture including for corruption-related crimes. So, in chapter of the Criminal Code named 'Corruption and any Other Crimes against the Interests of the Civil Service and the Government' all the articles on the corruption-related crimes stipulate the main punishment in the form of fine and the supplementary in the form of forfeiture.

One should search the objective factors provoking expansion of the application sphere of the property punishments in the social conditions of the public life. Multiple increase in the role of human material wants and interests in the conditions of market economy is the social precondition of wider application of property punishments. Another important circumstance in favor of property punishment is its efficiency, for example, among the imposed to fine there is a very law level of recidive.

The punitive content of property punishment in the form of fine stipulates the collection of monetary funds in profit of state (article 41 of the CC), while forfeiture provides confiscation and appropriation by the state of some convict's property (article 48 of the CC). Both, in the first and in the second case the property rights and interests of the convict are infringed upon. In this regard V. K. Duyunov writes that fine is aimed at the limitation of financial interests of the convict, while forfeiture of property at compulsory limitation of property right (Duyunov 2000, 75).

3. Legislative Regulation of Fine and Forfeiture

Despite the fact that fine for criminal legislation of Kazakhstan is a traditional measure of punishment, in the Criminal Code of 2014 it was amended the following way: a) from the category of supplementary punishment measures fine is transferred to the main one; b) a new variety of fine is incorporated, which is multiple to the sum or value of the bribe (hereinafter – multiple fine).

In the world practice there are various ways of counting the amount of fine. In the applicable criminal legislation of Kazakhstan the amount of fine is equal to a certain number of conventional units. Monthly calculation index is taken for such unit, which is defined by the government of the state per each calendar year. At counting the amount of fine the monthly calculation index at the moment of the crime commission is taken as the basis.

The multiple fine is stipulated only for such corruption-related crimes as bribetaking (Art. 366 of the CC), bribery (Art. 367) and mediation in bribery (Art. 368 of the CC). Introduction of multiple fine for bribery, first, is aimed at implementation of such direction of criminal policy as expansion of the application sphere of criminal punishment not connected with imprisonment. Second, the state accepted that in the conditions of market economy in the fight against bribery the most resultative are the measures of punishment making the crime commission economically inreasonable.

The Criminal Code of the Republic of Kazakhstan of 2014 greatly revised the punitive content of punishment in the form of forfeiture. Our country has transferred from the practice of appropriation by the state of the whole of partial property of the convicts to the forfeiture only of the property that was used for commission of the crime or was obtained as a result of the commission of the crime. Thus, the state took another step to ensure immunity of private property and creation of favourable conditions for efficient implementation of the property right.

The initial edition of the article on forfeiture in the Criminal Code of 2014 dealt with the appropriation by the state of the property obtained by illegal means or bought at the expense of the monetary funds obtained by illegal means. At this, enter of the article into the legal force was postponed to 1 January 2018. Later the legislator narrowed the circle of the property for confiscation – the property obtained by illegal means or at the expense of the monetary funds obtained by illegal means as well as the property being the instrument of crime. In this edition the standard of the forfeiture entered into legal force on 1 January 2016.

If the notion of the property obtained by illegal means covers the property obtained as a result of any illegal action (tax, administrative, criminal), then the property obtained by criminal means only covers the property obtained as a result of commission of a criminally punishable action.

Notably, the state stipulates the possibility of confiscation of not only the benefit of the criminal activities, but also the income from such benefit (Lopashenko 2009, 180). In accordance with point 2 of part 2, Article 48 of the CC, the property obtained as a result of a crime as well as the income from the benefit of this property are the subjects of forfeiture.

Thus, the applicable criminal legislation of the Republic of Kazakhstan finely refused from the practice of forfeiture of any property being the property of the convict. It is noteworthy that the new direction in the legislative regulation of the forfeiture has been formed under the circumstances of the international policy of Kazakhstan. Among the international legal acts influencing the legal status of the forfeiture in the national legislation one should highlight the following: The United Nations Convention against Corruption of 2003 (On the ratification the United Nations Convention against Corruption...); the International Convention for the Suppression of the Financing of Terrorism of 1999 (On accession of the Republic of Kazakhstan to the International Convention...); the United Nations Convention against Transnational Organized Crime of 2000 (On the ratification the United Nations Convention against Transnational Organized Crime); the Convention of Council of Europe of 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (On the ratification the Convention on Laundering, Search, Seizure...). They all have been ratified by Kazakhstan.

4. The Practice of Imposing Fine and Forfeiture for Corruption-Related Crimes

Unfortunately, in the law enforcement practice of Kazakhstan fine is not among the most applicable forms of punishment. For example, in 2012 fines were imposed to 354 convicts (1.6 %), in 2013 – to 657 convicts (2.7 %), and in 2014 – to 872 convicts (3.5 %). In spite of the small ratio in the general structure of punishment, one may observe positive tendencies in the fine imposing dynamics: in 2014 in comparison with 2012 the ratio of fine in the general structure of punishment increased by more than two times.

Speaking about the practice of imposing fines for corruption-related crimes, then from the moment of entering into legal force of the Criminal Code of 2014 it has changed to a great extent. If in accordance with the old criminal legislation the corruption-related crimes were mostly punished with imprisonment, then in 2015 the corruptionists were mostly fined. So, the ratio of imprisonment in 2014 in the structure of punishment imposed for corruption-related crimes was equal to 17.3 percent, while in 2015 this index decreased by 1.06 percent. In the city of Astana in 2015 30 persons were convicted for corruption-related crimes, among them: 19 (63 %) were fined, and 6 (20 %) were imprisoned.

The practice of imposing multiple fines for bribery is inhomogeneous. For 10 months of 2015 within the country 76 percent of the convicted for bribery (196 persons) were imposed multiple fines for an overall amount of 2.8 billion Kazakhstan tenge. 1 billion 101 million 60 thousand tenge of this amount accounts for the former Chairman of the Agency of the Republic of Kazakhstan on Regulation of Natural Monopolies found to be guilty for the attempt of bribe taking on an especially large scale by means of extortion (The Verdict of the Interdistrict Specialized Criminal Court in the city of Astana...). By the way, the fine has been totally paid off.

The judgements on multiple fines are not always executed though. 14 convicted who was not able to pay off the fines timely, were provided with deferral of repayment; 71 enforcement order was drawn on the overdue fines, 3 fines were replaced with imprisonment (As fined for bribery in Kazakhstan).

There are the following reasons of non-execution of multiple fines: lack of large amounts of money among the convicts, the necessity of its collection, deficiency of time for selling movable and immovable property.

We assume that in order to solve the problems connected with execution of multiple fines it is necessary to introduce amendments to the legislation, particularly, to prolongate the period of free will payment of the fines and the period of deferral of repayment. Probably there will be the necessity of decreasing the maximum and minimum amounts of multiple fines.

Forfeiture in the law enforcement practice is only imposed in cases when it is stipulated in the sanction of the article of the CC Special Part as an obligatory supplementary punishment. Since the sanctions of all the articles on the corruption-related crimes stipulate forfeiture, the courts are obliged to impose this supplementary punishment.

Up to 2016 there have been no problems connected with the definition of the property being subject to forfeiture, because all the property has been liable to forfeiture, which has been owned by the convict (except for the property necessary for the convict or for the persons being his or her dependents).

To declare the property obtained by illegal means or bought for the monetary funds obtained by illegal means as the object of forfeiture requires precise detection of origin of the property. Russia that had turned to the practice on forfeiture of property obtained by illegal means as early as in 2003, faced the problem of incapability of law enforcement to fight against corruption and economic crimes (Russian Magazine, 20 April 2010). Due to impossibility of proving the real origin of the property as well as the difficulties with separation of illegally obtained property from the rest of the convict's property, the law enforcement practice only chose to forfeit the property which was in the criminals' hands at the moment of their arrest (e.g., at bribetaking the object of bribe is only forfeited, while at theft of property – only the property that has been stolen).

The analysis of the judicial judgments delivered in 2016 on the corruption-related crimes shows that in Kazakhstan the same practice takes place – only the property is forfeited which has been the object of the crime or the instrument of the crime, as well as the objects deemed to be material evidence in the case.

As a way of solution of the above stated problem the international organizations recommend constituting on 'in rem' institution, stipulating the possibility of forfeiture if the owner of the property cannot prove the legal source of its origin. Placing the burden of proving the origin of the property on the owner is practiced in many countries including the USA, Hong Kong, and Singapore.

The opponents of the 'in rem' institution, first of all, apply to presumption of innocence. Though, the experience of the USA shows that forfeiture of property, the illegal origin of which is not proven, does not hinder from proper implementation of the presumption of innocence principle. The fact is that the 'in rem' procedure covers not any property, but only the one the illegal origin of which is shown in the criminal case file.

We guess that Kazakhstan will sooner or late realize the necessity of introduction of the 'in rem' institution. The UN Convention against Corruption of 2003 and 1988 UN Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances ratificated by Kazakhstan also recommend specifying in the national legislation the possibility of transferring the burden of proving the legal origin of the property to the person committed the crime.

5. Attitude of Practitioners towards Fine and Forfeiture

To find out the opinions of experts on the issues of efficiency evaluation of property punishments in the form of fine and forfeiture as the measures of anti-corruption management we carried out anonymous questioning of 44 representatives of judiciary establishment and 31 investigative officers.

The respondents were offered to rate the main types of punishment according to the degree of their efficiency in the fight against corruption-related crimes. The majority of the respondents put fine on the first position (41 %), imprisonment got the second position (36 %). Though, unfortunately one fifth of the respondents put death penalty on the first position.

Overestimation by the practitioners of the death penalty efficiency shows that internally they do not accept the state policy aimed at humanization of criminal legislation and the practice of its application.

The majority of the respondents (64%) answering the same question regarding the supplementary punishment considered forfeiture to be the most efficient.

The respondents were asked about the potential of preventative influence of imprisonment and property punishment on corruptionists. 71 percent of the respondents highly appreciated the preventative potential of long-term imprisonment. Nevertheless the percent of those who thinks that it is possible to prevent corruption through harsh property punishment is a bit higher and is equal to 76 percent.

The majority of the respondents (62 %) consider that sanctions for corruption-related crimes are adequate to their social danger. This answer is the evidence of conformists' attitude of the respondents, because the answer to the control question on the possible directions of improving the sanctions for corruption-related crimes showed that the number of practitioners unsatisfied with the adequateness of sanctions was notably higher.

According to the opinion of practitioners the following directions may contribute to increase in efficiency of criminal legislation on corruption-related crimes: expanding the application sphere of the property punishment; harsher punishment.

80.5 percent of respondents have positive attitude towards the innovation of multiple fines. Despite this fact almost all the respondents guess that stipulation of too high fines for corruption-related crimes may cause the following negative consequences: legal avoidance of strict responsibility for the rich; decrease in the efficiency of justice in the criminal cases because of non-execution of the imposed punishment; distribution of various mechanisms of legal income concealment; transfer of the monetary

funds and the other income to the sphere of shadow economy; bribery of the enforcement officers fighting against corruption-related crimes for a certain part of the fines due to the state.

73 percent of the respondents positively estimate the refusal from the general forfeiture and transfer to the forfeiture of the property obtained illegally or bought for the monetary funds obtained by illegal means.

Alongside with that all the survey participants guess that practical application of the forfeiture standard of the RK CC 2014 will be accompanied with certain challenges. The practitioners predict the following challenges: lack of tested methods and mechanisms for detection of origin of the property which is the subject of forfeiture; the necessity of laying the tasks of indication and search of property which is the subject to forfeiture on the investigative officers; the necessity of stipulation in the legislation of possibility to forfeit the property the legal origin of which cannot be proved by the owner (the 'in rem' institution); the necessity of protection of the innocent purchasers of the property obtained by illegal means; the incapability of the law enforcement in the fight against corruption and economic crimes.

Conclusion

1. The recognition of the threats originated from corruption, open evaluation of its state and consequences are the preconditions of adequate anti-corruption policy implementation. Kazakhstan undertakes system legal, organizational and institutional measures of anti-corruption management. At the same time the aim of improving the efficiency of the anti-corruption policy requires active involvement in it of the civil society institutions.
2. Corruption-related crimes are characterized as lucratively inclined. To ensure adequate correlation between the crime and the punishment, the measures of criminal and legal influence imposed for corruption-related crimes, should be accompanied by the limitations of property character. The fine and forfeiture as the types of punishment limiting financial interests and the property right of the convict, are capable of making the commission of corruption-related crimes economically nonviable.
3. The new Criminal Code of the Republic of Kazakhstan of 2014 created the preconditions for wider application of property punishment for corruption-related crimes. In the legal regulation of fine and forfeiture there are the following innovations: multiple fines have been introduced for bribery and the circle of the property being subject to forfeiture has been significantly narrowed.
4. In the practice of fine imposing for corruption-related crimes one may observe positive dynamics: the ratio of fines in the structure of punishment has significantly increased. At the same time certain problems arise with the execution of multiple fines, which requires reconsideration of separate standards of penal legislation.
5. Transfer to forfeiture of illegal income in the practical implementation led to the fact that the corruptionists are only deprived of the property which was either the object of the crime, the instrument of the crime or deemed to be the material evidence in the case. Apparently the established practice does not achieve the goal of efficient legal barrier on the way of unlawful enrichment of corruptionists.
6. The practitioners positively estimate the innovation of multiple fines and only approve the transition of forfeiture of the property obtained by illegal means. Alongside with that they suggest that these innovations require creation of an efficient mechanism of the officials' income and cost declaration, financial monitoring of the monetary procedures and the other property. Besides, the methods of the definition of illegal origin of the property should be developed. In these issues the experience of the foreign countries may be useful for Kazakhstan.

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