

Classification of Mediation in Bribery and the Issue on Foreign State Officials or International Organizations as Subjects of Giving and Taking Bribe

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Abstract. This article deals with legal classification issues of the criminal acts of the false mediator with regard to bribery, as well as considers recommendations of international organizations against the bribery. The author gives a legal analysis of criminal prosecution for giving and taking bribes to/by foreign officials and international organizations.

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1. Introduction

The effective use of criminal law measures against the criminality is among the contemporary global issues, whose solution affects the further development of the world community in the XXI century. In the context of globalization, crime is a challenge to world development. One can affirm with some confidence that today the entire international community is in search of an effective reformation algorithm, highlighting key points and optimal convergence of priorities in crime prevention.

We believe that in general, the state system of crime prevention in the Republic of Kazakhstan has been built. Its success is based primarily upon the strong and firm political will of Nursultan Nazarbayev, the President of the Republic of Kazakhstan.

President Nursultan Nazarbayev, highlighting the mandatory conditions for further development of the country in his message "Strategy of Kazakhstan for 2050: a new policy of successful state", charged to strengthen the combat against corruption, because the corruption is not just the law violation; corruption undermines faith in the effectiveness of the state and is a direct threat to national security.

In this regard, the main course of state's national policy should be focused on measures to prevent corruption offence. Here the priorities are concentrated upon strengthening the preventive work, improvement of legal culture among the population and trust of the citizens in public authorities. Besides, the whole society should make a stand against the corruption. The fate and safety of every citizen of Kazakhstan, as well as the country as a whole, are dependent on success in anti-corruption policy [1].

One can affirm that the right to create a corruption-free society originates and derives from the right of the people to exercise permanent

sovereignty over their natural resources and wealth, that is, from their right to economic self-determination [2].

The most important link in the state's legal policy is a criminal policy, which is being improved by a complex interconnected correction of criminal law, criminally-remedial law, and criminal and penal law, as well as law enforcement [3].

Paragraph 16 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan "On practical application of legislation on liability for bribery", passed on December 22, 1995 under #9, interprets the procedure for classifying the affirmative performance of a person, who got a bribe from the briber in form of money or other valuables, supposedly for transferring to a third person as a bribe, and, without intension to do so, misappropriated it (alleged mediation) [4, 44].

Main part.

Primarily "alleged mediation" includes cases, where a person promises to mediate, takes money or other valuables from the briber, ostensibly to transfer them to official as a bribe, but actually appropriates them. In this context, there may be situations where: 1) the initiative belongs to the "alleged mediator", who assures briber that he is in with the official, and who persuades the giver of bribe to give him material valuables, for transferring them ostensibly to official as a bribe; and 2) bribe giver, being interested in a certain behavior of the official, persuades the "alleged mediator" to convey material valuables in the form of bribe, and the mediator ostensibly agrees.

There is no doubt that the affirmative performance of the person, who was trying to pass the bribe to official through the mediator, should be classified as attempted bribery in both cases. Guilty person not only reveals his intention to give a bribe,

but also performs certain actions, directly aimed at committing a crime, that did not lead to an end for reasons beyond his control. In particular, in the second of the above cases, the person may himself collude with an official concerning bribe, and then handle material valuables to "alleged mediator" just for transferring them to official. This is exactly the way that the jurisprudence treated the affirmative performance of bribe giver for many years until today.

This issue was considered by legislator yet in the resolution of the USSR Supreme Court Plenum "On judicial practice in cases of bribery" of June 24, 1948 [5, 26], where it was pointed out that if a person, inciting bribe giver, gets from him certain valuables to transfer them ostensibly to official as a bribe, but in fact appropriates them, then the affirmative performance of this individual should be classified as incitement to bribery, whereas the affirmative performance of the bribe giver should be qualified as attempted bribery. A similar explanation was given in the Decrees of the USSR Supreme Court of July 31, 1962 [6] and of September 23, 1977 [7].

However, validity of this clarification in respect of the classifying affirmative performance of "alleged mediator" seemed rather questionably to Korobeinikov B.V. and Orlov M.F.. According to them, such an individual has the intent to appropriate a bribe, rather than hand it over to an official. In that case, targeting of this criminal intent is the principal content of the objective aspect of a crime (false pretense), as well as the fact that the object of the offence here is ownership interest, rather than the institutional power; according to above noted authors, all this indicates the presence of deceptive practices [8, 20]. For such situations Papiashvili Sh.G. proposed to formulate a new crime component, namely fraud in bribery [9, 209].

In other situations, the intent to bribe occurs in bribe giver regardless of the "alleged mediator's" conduct. The latter does not persuade a citizen to give a bribe, but just conceding his request, allegedly agrees to pass valuables to official in the form of bribe, though appropriates them. In the legal literature such affirmative performance are usually considered as fraud that seems to be correct. Though, there is another point of view - to classify the affirmative performance of such a person as aiding and abetting bribery.

The USSR Supreme Court Plenum in its legal resolution of September 23, 1977 clarified the latter viewpoint: "If a person takes money or other valuables from the bribe giver, ostensibly intending to transfer them to official as a bribe, and in fact not intending to do so, appropriates them, then his action,

depending on the circumstances of the case, should be classified as an incitement to bribery or aiding and abetting, and as attempted bribery with regard to bribe giver" (Paragraph 8). [10, 26].

Such consideration of the problem posed is theoretically groundlessly and practically unacceptable. According to Pinaev A.A. (a supporter of such a judgment), in concerned case aiding and abetting is expressed in the form of obstacles removal, creating conditions, providing briber with the opportunity to commit the crime. At that, "alleged mediator" recognizes that acts as accomplice in bribery, contributes to the commission of performer's action, anticipates that his affirmative performance create conditions for attempted bribery, and wishes to take part in this endeavor" [11, 26].

Nevertheless, the affirmative performance of "alleged mediator", who agreed to transfer a bribe and whose purpose was to take possession of values cannot be recognized as "creation of conditions, providing the briber the opportunity to commit the crime" by "removing obstacles on the way of the briber". According to the law, an accomplice is a person, who assisted in the commission of the crime. Though these are the affirmative performance of "alleged mediator", who appropriated the bribe, the crime did not take place. So, what kind of aiding and facilitating the commission of a crime we are talking about! In this situation, there are neither objective, nor subjective signs of complicity. Such a person does not have the intention to participate jointly in giving bribe and does not contribute to the commission of this crime; just on the contrary, appropriating valuables, this person objectively terminates crime. Criminal intent of guilty person is directed solely at appropriation of property, though not on the joint participation in the infringement of the public service interests and a malfunction of the management apparatus that is the subject at bribery.

Influenced by criticism, Plenum of the USSR Supreme Court revised its concept of "alleged mediator", offering in Paragraph 18 of the Decree, dated March 30, 1990 "On judicial practice in cases of bribery", the following provision: "If a person takes money or other valuables from a briber, ostensibly intending to transfer them to official as a bribe, and without intending to do so actually, appropriates them, then his affirmative performance should be classified as fraud. When he persuades a briber to give bribe in order to appropriate these valuables, then performance of the perpetrator, in addition to fraud, should further be classified as incitement to bribery. Briber's performance in such cases is classified as attempted bribery. At that, no matter whether a particular officer, to whom the bribe was intended, was noted". It is this provision that is

used currently in judicial practice, when classifying performance of "alleged mediator" [11]. However, according to Zdravomyslov B.V., "alleged mediator" should not be responsible for incitement to completion of bribery. Giving a bribe was not rendered, including the fault of "alleged mediator", appropriated the bribe. Briber is responsible for attempted bribery; therefore the performance of "alleged mediator" in this case should be classified as an incitement to attempted bribery [12, 72]. At the same time we cannot agree with Zdravomyslov B.V., who believed that in a situation, where false mediator induces another person to bribe and then appropriates valuables, there is no need to impute to false mediator fraud component. The author leaves out of account the fact that here the person performs property crime as well, which should be reflected in the proper classification.

If performance of "alleged mediator" provides the fraud component, this does not mean that the person, who tried to pass a bribe through the "alleged mediator", shall be exempted from criminal liability as a dupe, and valuables shall be returned to him as a victim of fraud. Regardless of intentions of "alleged mediator", according to criminal intent of the briber, valuables were the subject of a bribe, and thus are to be forfeited to the state in accordance with the Paragraph 19 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan "On practical application of legislation on liability for bribery" [4, 45].

In return, Solopanova Yu.D. considers that the affirmative performance of the briber, not reaching the goal against bribe giver's will due to fault in a genuine intention of a mediator, who has excited his determination, must be judged as exercise in futility, which objectively cannot cause harm to a legally protected object. Therefore it is sufficient to deprive briber of the transferred property [13, 47].

However Vishinskiy A.Ya. adhered to a slightly different point of view. He believed that dupe cannot be responsible for the attempted bribery, because the state does not combat against an evil mind as such, but just with its selfish manifestation, directed against the national interest [14, 554].

Implementation of Article 14 of the UN Convention against corruption, involved the mechanisms for prevention of criminal money laundering, is one of the most complicated challenges [15].

Problems are caused not only by latency of such offenses, but also the fact that their anti-criminal measures often act in contradiction with the presumption of innocence and the procedural guarantees of the rights, established in the Constitutions and legislations of almost all countries.

UN Convention invites member-states to follow the relevant initiatives of regional and interregional multilateral organizations against money-laundering. As is known, the Financial Action Task Force (FATF) on money laundering, spearheaded by an initiative of the "Big Seven", adopted a program on combating against criminal money laundering, which is implemented both on national and regional levels. Provisions regarding the combat against money laundering are included in the legislation of the most of the countries in the world. For the first time, legislation on money laundering has been developed in the United States [16]. It served a pattern for the subsequent preparation of the relevant acts in many European countries.

For many countries, the implementation of Article 20 of the UN Convention against Corruption and unjust enrichment [15] is quite complicated as well. According to this article, each member-state shall adopt legislative and other acts on recognition as a criminal offense the significant increase in the assets of a public official in excess of his/her legitimate income that cannot be explained reasonably (unjust enrichment).

This provision may conflict with constitutional provisions of many states that perpetuate the presumption of innocence and right of the accused not to testify against themselves and their spouse and other close relatives.

The legislation and law enforcement practice in this area are subject to constant improvement. Various options for improving declaration forms of both income and expenditure of officials are being worked out as well.

Duty to declare expenditure is established by law in many countries. Need for such a declaration is confirmed on the legislative and sublegislative levels by acts on parliament, the civil service, taxes, financial control, codes of conduct for the various categories of officials, and legislation on the combat against corruption. Such acts came in operation in the USA, UK, Belgium, Italy, Canada, China, Singapore, and many other countries.

The following issues still remain problematic not only in Kazakhstan, but in other states:

- definition of declaration objects;
- definition of persons obliged to declare expenditures;
- monitoring the provision of information on expenditures.

Though, the major problem, peculiar to Kazakhstan and some other countries, is the lack of the necessary infrastructure to ensure a constant control over officials' expenditure. A significant portion of expenditure is paid in cash without

monitoring by banks and other credit organizations, as well as authorized state agencies. To resolve this problem, it is necessary to reduce financing channels and opportunities of cash turnover, improve the mechanism of information exchange, and expand responsibilities of credit institutions, as well as other organizations and individuals to provide information on known facts, falling within the scope of Article 20 of the UN Convention.

Article 26 of the Convention against corruption foresees the introduction of criminal liability of legal entities. This institution exists in the legislation of many countries: Australia, England, Belgium, Denmark, Hungary, Ireland, Israel, Canada, China, the USA, France, Poland, and some other countries [17].

In other countries (particularly, in Russia, Kazakhstan, Germany, and Spain) the implementation of noted provision of the Convention shall come into conflict with existing national legislation and the traditional criminal legal doctrines of fault-based liability.

As is known, a necessary condition of criminal responsibility is a guilty mind, which is understood as the mental attitude of a person to his deed. According to the traditional criminal law doctrine, the concept of guilty mind is not applicable to the legal entity; therefore in those countries, where the law permits criminal liability of a legal entity, it is assumed that its guilt is embodied in culpable conduct of its leaders or representatives. In England, this presumption is called "The principle of identity (identification)" [18].

To introduce criminal liability of legal entities in Kazakhstan, it is necessary not only to break the embedded stereotypes, but to change the concept of criminal law. The issue on defining individuals (director, accountant, or founder), whose affirmative performance will condition the involvement of the legal entity to corruption offenses, needs to be addressed as well. When introducing such legal rules, one should take into consideration that their use can cause damage to both shareholders and interest holders, who have not committed crimes.

According to N. Gacheri-Kamunde, most of the international anti-corruption instruments are based substantially on five special basic principles: prevention, criminalization, international cooperation, asset recovery, and the establishment of effective control procedures [19]. These special anti-corruption principles are increasingly embodied in the national legislation of the state. Today, the strongest trend is probably going to criminalization of bribery of foreign public officials and strengthening reporting documentation, such as developed by led OECD countries [2].

Provision of the Paragraph 4 of the note to Article 311 of the Criminal Code of the Republic of Kazakhstan states that with respect to bribery, officials include officers referred to in the notes to Article 307 of the Criminal Code, as well as officials of foreign states or international organizations.

Here we face to a number of questions. Do foreign officials take arbitrary decrees within the Kazakh state and the legal system; if so, in which cases? According to the legislation, governing the regulations for joining governmental service, foreign citizens and stateless persons cannot be the subject of public service; they have nothing to do with Kazakhstan. Then why not to leave the prerogatives of criminal liability of foreign officials to states on behalf of which foreign officials exercise their powers? Is the situation with corruption in Kazakhstan so trouble-free, that the country has decided to direct its efforts to "assist" foreign countries in the field of eradication of this objective evil? It is clear that the issues, raised here, are purely rhetorical, since it is impossible to answer them rationally. This makes the spirit of the relevant criminal law provisions even more mysterious.

Certainly, one can assume that the emergence of this idea is associated with the desire of Kazakhstan to integrate in the future into the international economic organizations, in particular, the Organization for Economic Cooperation and Development (OECD). Therefore, even now Kazakhstan seeks to implement various acts of OECD and other organizations into its national legislation. Based on above provision, we do not exclude that the legislator has drawn attention to the so-called OECD Convention [20], fully entitled as: "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" [21] that came into effect on February 15, 1999.

Indeed, this Convention obliges ratifying states to combat "corruption of foreign public officials". But if one reads carefully the text of the Convention, it becomes clear that it does not say a word about the so-called passive corruption that is peculiarly, regarding the responsibility of foreign public officials. It speaks about something else, more specifically, the need to combat so-called active corruption, that is, any attempts to bribe foreign officials and other forms of bribery. In this situation, it is completely unclear why one has to "clarify" the list of foreign officials to be liable under the criminal legislation of Kazakhstan. The OECD Anti-Bribery Convention does not require them to do this. If the legislator suggests to follow the provisions of this Convention, recommended as an international "standard" even for those countries, which are not

OECD members, then the legislator is required to undertake another juristic act – to provide criminal liability to Kazakh citizens, as well as other persons, operating on the territory of Kazakhstan, not only for various forms of bribery committed against Kazakh officials, but also for the same affirmative performance, committed with respect to foreign officials. In other words, if the Kazakh businessman attempts to bribe or provide a service to a foreign official purposely for promotion of his goods on the market of the respective foreign country, he should be held criminally liable for not only the law of this native state (the classical approach), but also for the criminal law of Kazakhstan, regardless the fact whether his action is objectively beneficial or harmful for Kazakh economy (emergent approach, recommended by OECD) [22].

Many international organizations are consistently investing resources in the combat against corruption. These organizations include certain bodies of the UN, the European Union, and the International Bank for Reconstruction and Development, also known as the World Bank Group. Some of non-governmental organizations, such as Transparency International and the International Chamber of Commerce, are also involved in this activity [2]. Suzanne Rose Ackerman, as the majority of researchers on the problems of international anti-corruption cooperation, soundly notes that "so far, there have been many efforts to control the corruption through international treaties and civil society initiatives" [23].

Conclusions.

Thus, whatever are the intentions of the authorities in the international economic sphere, there are neither theoretical nor international legal grounds for "revision" of the "concept on official body with a view to clarify the list of foreign officials, who may be persons of specific corruption offences". Persons of "specific corruption offenses" in this case should be individuals, entitled to liability under the Criminal Code of the Republic of Kazakhstan in the context of the classical provisions concerning the criminal law application through time and space, whereas the concept of "official" can be specified only in the sense of the criminalization of various forms of bribery in connection with not only Kazakhstan, but also foreign officials (active corruption).

Thus, responsibility for criminal liability of peculiarly foreign officials (passive corruption) should be imposed on the authorities of their native states.

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