# On the implementation of article 20 of the United Nations Convention against corruption into the criminal legislation of the Republic of Kazakhstan

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**Abstract.** This article explores the essence of and issues in the implementation of international legal norms into Kazakh legislation. The author conducts a comparison of the way the norms on illicit enrichment are interpreted in the legislation of particular foreign countries, which makes it possible to reveal weaknesses in Kazakh criminal law. Based on the study conducted, the author puts forth suggestions on criminalizing the article and bringing it in line with the norms of the UN Convention against Corruption (the United Nations Convention), which is dedicated to illicit enrichment, as well as ways of improving the effectiveness of the mechanism of implementing the norms of international criminal law into national criminal legislation.

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## Introduction

The concept of legal policy for the period of 2010 to 2020, in terms of streamlining criminal policy, has defined the importance of bringing criminal law in line with international agreements ratified by Kazakhstan [1]. The development and streamlining of the ideas of protection of the rights and freedoms of man in criminal legislation is best effected through the implementation of international legal norms into Kazakh legislation.

We all know that the only source of criminal legislation in the Republic of Kazakhstan is the Criminal Code. For instating new provisions relating to criminalization and criminalization and making changes in the work of criminal-legal institutes, it is necessary to undergo the procedure for making changes and additions to the Criminal Code.

According to A.K. Knyazkina, the nature of interstate agreements in the area of criminal law is so that they cannot be put in practice without implementing provisions associated with them into the Criminal Code first, since, at a minimum, the norms of such agreements do not have sanctions. Therefore, fulfilling international obligations is possible only through incorporating conventional provisions into the law [2].

This procedure becomes more topical from the standpoint of the state's anticorruption policy. According to data from an international organization engaged in the study of the levels of corruption across the world, Transparency International, the level of corruption in Kazakhstan is growing at an exponential rate – as of year-end 2013, the Republic of Kazakhstan ranked 140th among 170 countries, 2012 - 130th, and 2011 – 122th [3]. A report from the Commission to the European Parliament states that corruption inflicts serious damage to the economy and society as a whole. Many countries across the world suffer from deep-rooted corruption, which impedes economic development, undermines democracy, and inflicts damage to social justice and the rule of law [4].

It follows from the above that entering international agreement provisions into national legislation is of utmost significance in putting the objectives of criminal policy in practice. But the practice of bringing into line and fulfilling other obligations leaves much to be desired.

## Main part

Susan Rose-Ackerman, a researcher in the area of international anticorruption partnership, notes that "to this day there have been made numerous efforts to control corruption through international agreements and civil society initiatives" [5].

Indeed, international documents are crucial to counteracting crime, all the more so corruption-related. Since, manifesting itself in various forms, corruption inflicts substantial damage to every state. The embodiment in one Convention of measures worked out inclusive of necessity, scientific validity, and prevision of effective results and application of its norms in national legislation will lead to hard driving counteraction to this negative phenomenon.

In this regard, Indian scientist S. Raj Kumar notes that the right to creating a society free from corruption is, in essence, one of the primary rights and freedoms of man, since the right to life, dignity, equality, and other values depend considerably on this right [6].

The Republic of Kazakhstan ratified the UN Convention against Corruption in 2008. As one of the recommendations, criminal liability for illicit enrichment was instituted, which, according to the Convention, is construed as a considerable increase in the assets of a public government official, which exceed his/her lawful earnings – an increase he/she cannot account for in a reasonable way [7].

The deed is explained in quite plain terms by senior employee of the World Bank Richard Miron, who is in charge of the analysis of the movement of stolen assets. In his view, when it comes to illicit enrichment, law enforcement authorities do not need to produce evidence of corrupt conduct – it just suffices to have a case where the person is unable to justify his/her sources of income. Then the government official has to present proof of a legitimate source for the mysteriously found wealth, and if he/she cannot account for it in good faith there will be criminal-legal consequences [8].

According to professor at the American University Washington College of Law Ethan S. Burger, the Convention must serve as a catalyzer for international, transnational credit, and non-governmental organizations in terms of boosting their efforts and ensuring a fundamental basis for actualizing political and strategic interests and with a view to excluding criticism in relation to particular states [9].

The implementation of this norm into the Criminal Code of the Republic of Kazakhstan would, according to S.M. Rakhmetov and I.S. Borchashvili, make it possible to boost the efficacy of criminal-legal measures for combating crime, identify and bring criminal charges against the most dangerous corruptionists, who in an illicit, mainly criminal, way entered possession of monetary funds or any other property worth large amounts of money. This norm could play a powerful preventive role [10].

At the same time, there are scientists who speak against criminalizing illicit enrichment. Thus, for instance, V. Mikhailov maintains that Article 20 of the UN Convention against Corruption should be put in practice not through recognizing illicit enrichment criminally punishable but through the use of other legal means. The scientist suggests instituting several-fold fines for corruption-related crimes, confiscation of property, keeping track of the government official's expenses in cases when one's expenses do not clearly match one's income [11, 113-119].

The author of this article does not share V. Mikhailov's view, since we are talking about measures for combating corruption-related crimes – that is actions legislatively stipulated in criminal law. And the very nature of corruption is about committing socially dangerous deeds in a surreptitious manner. Note that the object of illicit enrichment is a property concerning which a corrupt deal between a government official and a person interested in a positive outcome of the affair is struck. Therefore, criminalizing illicit enrichment will be another step in putting in practice the principle of the inevitability of punishment.

Others who oppose instituting criminal liability for illicit enrichment hold that will violate the fundamentals of criminal law and the presumption of innocence [12, 200-202]. This position is challenged by B. Borkov, who maintains that in investigating the fact of enrichment, which is apparently illicit, we should build on the negative nature of the attribute "illicitness". In this case, in the scientist's view, one will have to prove not the fact of committing particular law violations which resulted in enrichment but, on the contrary, the absence of legal grounds for a considerable increase in the government official's assets over his/her official income [13, 29].

The author is inclined to agree with B. Borkov, since the Criminal Code of the Republic of Kazakhstan addresses a number of crime components constructed by the "absence of legal grounds" scheme, based on which similar algorithms for the actions of criminal persecution authorities are administered. Thus, for instance, Article 176 of the Criminal Code of the Republic of Kazakhstan mandates criminal liability for the appropriation and embezzlement of someone else's entrusted property, with Item "g" of Part 2 of this article being corruption-related. The most common scenario for committing this type of crime is appropriating property (monetary funds, commodity-material resources) that is entrusted to one in accordance with the agreement entered into with the culprit.

Note that the fact of misappropriation, apart from witness testimony and auditing check-ups, forensic/graphological examination reports, is proved based on the amount of commodity-material funds not put in. If there is a corresponding article on illicit enrichment in place, the actions of the prosecutor will be analogous. The person will get a chance to prove his/her innocence only in the event of incorrect construction of the body of the crime and if statutory-regulatory and other mechanisms for regulating tax reporting are disjointed.

There is no criminal liability for illicit enrichment in the Republic of Kazakhstan, but itself the fact of the illicitness of such actions is superficially mentioned in the Law of the Republic of Kazakhstan "On Combating Corruption" (dated July 2, 1998; No. 267), whereby according to Article 18 in all cases of illicit enrichment by persons authorized to fulfill governmental duties or persons equated to them as a result corruption-related law violations, illicitly

acquired property is subject to appropriation and the cost of illicitly received services is subject to forfeiture to the state.

Based on the purport of this norm, in this case the legislator construes illicit enrichment as all corruption-related law violations resulting in the person's obtaining certain gains.

It should be noted that prior to the procedure of criminalizing a particular deed certain work should be carried out concerning the applicability of the norm in practice and the development of mechanisms and methodology for recording facts of illicit enrichment. For these purposes, there are plans to make legislative changes with regard to the mandatory reporting of one's income and expenses by government officials.

Despite the need for criminalizing illicit enrichment, the draft of the new edition of the Criminal Code as of October 1, 2013 does not contain this norm.

While there is no criminal-legal norm on illicit enrichment in the Criminal Code of the Republic of Kazakhstan, illicit enrichment is punishable by law in such countries as Algeria, Angola, Argentina, Bangladesh, Bhutan, Bolivia, Botswana, Brunei, Egypt, India, China, Cuba, Costa Rica, Mongolia, Malaysia, Mexico, Ukraine, Ecuador, and Ethiopia [14].

Article 395 of the Criminal Code of China construes illicit enrichment in the following way: "In the event any government official whose wealth and expenses exceed considerably his/her lawful income and he/she is unable to prove the lawfulness of its origins, the part that exceeds his/her lawful income shall be regarded as illicit income and he/she can be sentenced to imprisonment for no more than five years or house arrest, and the part of his/her wealth that exceeds his/her lawful income shall be appropriated" [14].

The Criminal Code of Argentina contains a norm on illicit enrichment. Note that the norm holds for not only government officials but all citizens. The disposition of Part 2 of Article 286 of the Criminal Code of Argentina has the following form:

"2. Any person who is unable to justify the origins of any conspicuous enrichment for oneself or a third person, which occurred during one's term in a government position or employment for hire and within two years following the cessation of one's work activity, shall be punished by a fine in the amount of 50 to 100 percent of the cost of enrichment and disqualified for life (in the criminal legislation of the Republic of Kazakhstan, this type of punishment is similar to stripping one of the right to hold a certain position or engage in certain activity). Enrichment will be considered illicit not only if the expense side of one's budget was increased with money, things, or goods but when one used the illicit gains to pay off one's debts and repay one's obligations" [14].

When it comes to the countries of the CIS (the Commonwealth of Independent States), there is a corresponding article, 368-2, in the Criminal Code of Ukraine that mandates criminal liability for illicit enrichment in the following form:

"1. The obtaining by an official of illegal gains in large amounts or transfer of such gains to one's close relatives with no bribe-taking (illicit enrichment) is punishable by a fine in the amount of five hundred to a thousand minimum untaxed incomes of citizens or restraint of freedom for up to two years, with the person getting stripped of the right to hold certain offices or engage in certain activity for up to three years" [15].

An attempt to criminalize illicit enrichment was made by a group of deputies in the State Duma of the Russian Federation (A.D. Kulikov, S.P. Obukhov, N.A. Ostanina, V.F. Rashkin), who suggested bringing up for consideration the draft of the Federal Law "On Making Changes and Amendments to the Criminal Code of the Russian Federation" in the following form:

"Illicit enrichment, that is the acquisition by an official of a property whose worth exceeds considerably his/her lawful income and whose origins he/she cannot account for in a reasonable way" [16].

**Conclusion**

We can mark out the following attributes based on the provisions of the norms of the UN Convention against Corruption and the interpretation of illicit enrichment by legislators in foreign countries:

1) The deed is expressed by actions related to acquiring the right of ownership of a property;

2) Such actions are associated with one's official activities, through which the official "enriches" oneself;

3) The commitment of crime by an official subject of corruption-related crimes (an official, a person authorized to fulfill governmental duties, etc.);

4) The disguisedness of the fact of appropriating property in one's favor, which is mainly expressed in the formal possession of these rights by one's close relatives or other affiliated persons;

5) A considerable prevalence of the official's expenses over his/her income, with the official unable to account for the difference obtained. In this regard, there can be situations when bogus deals are struck, such as drawing up formal agreements for transfer by gift or the provision in the course of pretrial proceedings of corresponding testimony that pseudo-benefactors are going to confirm. In order to prevent a situation like this, it

makes sense to enter into certain legislative acts regulating the legal status of government officials' provisions on a ban on entering into agreements on the gratuitous transfer of property by gift.

Due to the surreptitious nature of committing corruption-related crimes, there is an opportunity, through criminalizing illicit enrichment, to counteract the use of property acquired illicitly by officials. Based on what has been said, the author suggests instituting criminal liability for illicit enrichment in the Criminal Code of the Republic of Kazakhstan in the following form:

"Article 310-2. Illicit enrichment

1. The illicit acquisition by a person authorized to fulfill governmental duties or someone equated to him/her of property, the right to property, or any gains of a property-related nature, and equally the acquisition of property by and transfer of property or other goods to close relatives, while being unable to prove the lawfulness of their origins.

2. The same deed committed by an official.

3. The same deed committed by a person holding a top government position".

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**References**

1. Decree of the President of the Republic of Kazakhstan "Concept of the Legal Policy of the Republic of Kazakhstan for the period of 2010 to 2020" dated 24.08.2009, Volume 858.
2. Knyazkina, A.K., 2012. Implementation of Norms of International Agreements into Criminal Legislation: A Short Analysis. In the Proceedings of the Criminal Law: A Strategy for Development in the 21st Century Conference, M.V. Lomonosov Moscow State University, pp: 443-444.
3. Corruption By Country. Territory. Date Views 5.02.2014 www.transparency.org/country.
4. Report From The Commission To The Council And The European Parliament. Date Views 6.02.2014 www.ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human trafficking/corruption/docs/acr_2014_en.pdf.
5. Rose-Ackerman, S., 2010. Corruption: Greed, Culture, and the State. The Yale Law Journal, 125. Date Views 6.02.2014 www.yalelawjournal.org/the-yale-law-journal-pocket-part/international-law/corruption:-greed,-culture,-and-the-state/.
6. Raj K. S., 2002. Corruption and Human Rights. India's National Magazine, Hindu Online, 19(1) www.flonnet.com/fl1919/19190780.
7. "United Nations Convention against Corruption" dated 31.10.2003. Volume # A/RES/58/4
8. Illicit Enrichment Uncovered. And Discovering the Best Ways to Fight It. Date Views 03.02.2014 www.blogs.worldbank.org/psd/illicit-enrichment-uncovered-and-discovering-the-best-ways-to-fight-it.
9. Convention against Corruption: Decisive Action or Mere Symbolism. Date Views 03.02.2014 www.sartraccc.ru/i.php?filename=Pub/burger(25-07-06).htm&oper=read_file.
10. Rakhmetov, S.M. and I.S. Borchashvili, 2012. Criminal-Legal Measures for Combating Corruption. Astana: ArtPrint XXI, pp: 47.
11. Mikhailov, V., 2012. Article 20 of the UN Convention against Corruption on Responsibility for Illicit Enrichment and Possible Dimensions of Reflecting Its Idea in the Legal System of the Russian Federation. Ugolovnoye Pravo, 2: 113-119.
12. Bogush, G.I., 2006. The United Nations Convention against Corruption. Vestnik Moskovskogo Universiteta, 11: 32-34.
13. Borkov, V., 2007. Issues in Criminalizing Corruption-related Enrichment in Russia. Ugolovnoye Pravo, 2: 27-31.
14. Muzila, L., M. Morales, M. Mathias, and T. Berger, 2012. On the Take: Criminalizing Illicit Enrichment to Fight Corruption. Washington DC: World Bank, pp: 62-75.
15. Article 368-2. Illicit Enrichment. Date Views 03.02.2014 www.kokhan.dp.ua/index.php/statya-368-2-nezakonnoe obogashchenie.html.
16. Criminal liability for Illicit Enrichment by Government Officials has been Instituted. Date Views 06.02.2014 www.zazakon.ru/news/2011/ustanavlivaetsya_ugolovnaya_otvetstvennost_za_nezakonnoe_obogashenie_dolzhnostnyh_lic/.

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