

About certain aspects of the confiscation subject in the criminal law of the Republic of Kazakhstan

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Abstract. The article deals with the problems of definition of the confiscation of property as an additional punishment type, which is an important tool of the struggle against corruption and economic offences. The author proposes to leave the existing edition of the property confiscation article without changes with the purpose of implementation of the standards of the United Nations' Anti-Corruption Convention and with account for the experience of other countries.

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Introduction

The Address of the President of the Republic of Kazakhstan Nursultan Nazarbaev to the people of Kazakhstan "Kazakhstan's Path - 2050: the United Goal, the United Interests, the United Future" determines continuation of the formation and implementation of the new anti-corruption strategy as one of the most important tasks in order to enter the list of the 30 most developed countries [1].

Improvement of effective criminal law is one of the vectors of this strategy and its progressive development is regulated by the Concept of Legal Policy for 2010-2020. Thus, extension of the sphere of application of criminal punishments that do not incur imprisonment, as well as removal of imprisonment from certain punishments and reduction of the maximum term of imprisonment were determined by the Concept as the main directions in the improvement of the criminal law [2].

This idea was reflected in the Branch Program of Anti-Corruption Enforcement in the Republic of Kazakhstan for 2011 - 2015 approved on 31.03.2011, which fixes the necessity to adopt certain legislative acts targeting escalation of punishment of officials for corruption offences by way of increasing penal sanctions and introduction of confiscation of property [3]. Therefore, the reform of the criminal law in part of improvement of the system of punishment for corruption offences is one of the topical problems in view of adoption of the new edition of the Criminal Code of the Republic of Kazakhstan.

Contents

The *confiscation* term originates from the Latin word *confiscatio*, which literally means appropriation of something in favor of treasury [4]. Confiscation is seizure of private property by the government or its representatives without any

compensation to the owner as the property is illegal or has been used with criminal purpose. The government can confiscate property by virtue of various grounds, but if the confiscation is wrongful, the owner can lodge a lawsuit for returning his property [5].

According to Paragraph g of Article 2 of the Anti-Corruption Convention of the United Nations Organization, *confiscation* means finite deprivation of property under a court decision or a decision of any other competent body [6].

The Kazakhstan criminal law applies the institution of property confiscation only for offences committed with a mercenary motive as an additional punishment to the main one.

Confiscation is used in 23 sanctions for economic offences (which makes 32% of the total number). In the sanctions for corruption offences, which number 44 crime components, property confiscation is stipulated in 11 sanctions (confiscation as optional additional punishment is used in 1 sanction), which makes 25% of the total number.

This relatively low share of confiscation for these categories has determined the low level of compensation of damage inflicted on the complainant, the total of which includes the cost of the arrested property, which is the subject of confiscation. This means that because of low popularity of this type of punishment, the principle of social justice is virtually not implemented.

If we consider the statistic data, we can see that in 2013, out of 7,165 economic offences with the total damage amounting to 220,926,672,060 tenge (the total damage inflicted on the government was equal to 211,878,606,203 tenge, on legal entities – 5,906,804,198 tenge, on individuals – 3,141,261,659 tenge), and only 57,444,771,565 tenge or 26% of the total amount of damage was voluntarily paid or

appropriated. We can see that compensation of damages is at a very low level, and one of the reasons for that includes the specified above defects of the criminal legislation in our country.

In the new edition of the Criminal Code, which is supposed to contain new criminal law anti-crime mechanisms, not only the Special Part was amended, but also the *confiscation* concept was altered.

Article 49 of the draft Criminal Code as on 01.10.2013 determines property confiscation as forced non-repayable seizure and appropriation by the state of all or part of property owned by a convict except for property obtained legally [7].

Thus, in the new edition of the Criminal Code of the Republic of Kazakhstan, the *property confiscation* term is different from the effective one to a certain degree. Where the effective criminal law stipulates that all or part of the property of a convict is subject for confiscation, in case the new edition of the Criminal Code is adopted, only the illegally obtained property will be subject for confiscation.

This provision narrowing the confiscation subject is unreasonable due to the following provisions.

1. According to Article 31 of the Anti-Corruption Convention of the United Nations Organization, the confiscation subjects are, first of all, income from crimes as they are acknowledged by the Convention, or property, the cost of which is relevant to the amount of such income. Secondly, these are property, equipment, or other means used or meant for usage for committing offences as they are acknowledged by the Convention. Hence, we conclude that the property can be confiscated disregarding how it has been obtained – legally or illegally [6].

According to Article 4 of the Constitution of the Republic of Kazakhstan, international treaties ratified by the country are a part of the effective law and have priority before its laws [8]. I.e. ratification of the Convention imposes obligations on the Republic of Kazakhstan to adapt the national legislation to comply with the standards and recommendations stated by this Convention.

2. If we consider the experience of other countries in this sphere, which may be useful in terms of adaption and correction of the effective legislation in expectation of adoption of the new Criminal Code, we can trace the following.

When studying the criminal law of France, we can see that confiscation is regulated by Article 131-21 of the Criminal Code of France, which reads that confiscation is applied to an item, which has served or has been meant to be used for commitment of a criminal deed, or an item, which was obtained in

the result of the criminal deed, except for items subject to be returned. Beside this, it can be applied to any movables as determined by the law or the regulation, which stipulates punishment for a criminal deed [9].

Articles 59 and 60 of the Criminal Code of the People's Republic of China deal with property confiscation. According to these articles, confiscation assumes seizure of all or part of property owned by the convict. At the same time, the law requires the minimum level of subsistence to be left for the convict and his dependent family members at confiscation of all property [10].

According to the 1989 anti-corruption law of Singapore, a court is entitled to confiscate the property and monetary assets, the origin of which the person suspected in corruption cannot reasonably explain. In case of the defendant's death, a court is entitled to decide on confiscation of his property [11].

Thus, we can conclude that the criminal law of foreign countries contains provisions on property confiscation in various forms depending on the specific features of the legislation of those countries, but it defines 3 forms of property as the confiscation object.

3. We also need to consider the criminal law of the Commonwealth of Independent States, being former participants of the USSR with a single legal base.

Initially, the confiscation institution was introduced by the provisions of the Model Criminal Code adopted on 17.02.1996 as an advisory document for the countries of the Commonwealth of Independent States with the purpose of introducing a homogeneous anti-crime criminal law measures. This document targeted the countries of the post-Soviet space, as they had a single and rather long history of development of the criminal law. Based on the Model Code, the basic elements of the structure and the content of criminal codes of the CIS countries including Kazakhstan were developed. One of such main institutions is the property confiscation. According to Article 57 of the Model Criminal Code, property confiscation is forced non-repayable seizure and appropriation by the government in its favor of all or part of property owned by a convict [12].

All the CIS countries cooperate with each other to a certain extent and render legal support according to Conventions (the Minsk, Kishinev, and other Conventions). Their relations would be smoother running and efficient if the criminal and criminal procedure legislation of the said countries would be unified. For example, if a person commits an offence in the territory of Kazakhstan and the

vehicles used as the tools of the offence commitment were moved to the territory of another country, in which the instrumentalities are not subject to confiscation, it will be impossible to return the property and impose certain restriction with respect to it, because, as it was mentioned above, these items are not objects of confiscation in the other state. Therefore, in order to make the confiscation mechanisms efficient, the legislation systems of the countries need to be harmonized within a single space. This was the purpose of establishment of the Model Code, the main principles of which should be followed by the CIS countries. Study of the criminal laws of the CIS countries showed that almost all criminal codes of these countries included the confiscation provision from the Model Code. I.e. adoption of the new Criminal Code in the edition as of 01.10.2013 with the altered confiscation object can incur difficulties in the international cooperation in investigation of criminal cases.

Summary

Thus, the confiscation institution in the effective criminal legislation meets all requirements and is one of mechanisms of implementation of the principles of criminal law. Particularly, the issue of the confiscation object is substantiated with the following provisions:

1. The necessity of implementation of the provisions of the United Nations Organization's Anti-corruption Convention;
2. The necessity to integrate Kazakhstan in the single legislative space of the CIS countries, which also determined similar objects as the object of confiscation;
3. The positive experience of foreign countries, which are the leaders in the struggle against corruption (France, Singapore, and the People's Republic of China).

Based on the above, we suggest the new edition of Article 49 of the Criminal Code amended as follows:

“Article 49. Property confiscation.

1. Property confiscation is forced non-repayable seizure and appropriation by the government of all or part of the property of a convict, as well as the property, which is a tool or a means of the offence commitment, in favor of the state.

In case of commitment of corruption offences and commitment of offences by an organized crime group, criminal conspiracy (criminal organization), transnational organized group, transnational criminal conspiracy (transnational criminal organization), or a settled armed group (gang), confiscation, along with the property of the

convict, shall be applied to the property obtained in a criminal manner or purchased for monetary assets obtained in a criminal manner and transferred by the convict to the ownership of other persons.

2. The following property is subject for confiscation:

1) money, values, and other property obtained in the result of commitment of a criminal offence as well as any income from this property except for the property and incomes from the property, which are subject to return to the legal owner;

2) money, values, and other property, into which the property obtained in the result of commitment of a criminal offence as well as any income from this property have been partially or completely made over or transformed;

2) money, values, and other property used for or meant for financing or other support of extremist or terrorist activity or a criminal group;

3. Provided at the time the court takes the decision on confiscation of a certain item being part of the property specified in Paragraphs 1 and 2 of this Article its confiscation is impossible as a result of its utilization, sale, or due to other reasons, the court may decide on confiscation of a sum of money equivalent to the cost of this item.

4. In cases stipulated in Section 15 of the Criminal Procedure Code of the Republic of Kazakhstan, property confiscation may be imposed as a measure of criminal effect”.

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