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# History of development of criminal responsibility for commercial bribery

The article is devoted to the history of the formation of Kazakhstan legislation on criminal liability for commercial bribery. In connection with the emergence of enterprises and organizations with non-state forms of ownership, the question arose of protecting their interests and, therefore, the criminal responsibility of persons performing managerial functions in them, as well as delimiting their responsibility from those responsible for official crimes, including bribery. Bribery of executives or employees of commercial banks, large economic entities with a monopoly position in the market and based on private property, began to pose a serious danger to the normal functioning of market relations in the economy. The ongoing economic reforms demanded a new criminal law regulation of social relations that characterize commercial bribery to commercial and other organizations. Based on the generalization of the theory of criminal law, it was concluded that when committing acts included in Chapter 9 of the Criminal Code of RK, the harm is caused to the interests of a commercial or non-profit organization, and not to the service. In this regard, it was proposed to change the title of Chapter 9 of the Criminal Code of the Republic of Kazakhstan.

*Keywords:* commercial bribery, criminal responsibility, official, commercial and other organizations, interests of the service.

## *Introduction*

For more than 30 years in Kazakhstan, if we take 1986 as the starting point, the beginning of «restructuring», the state has been pursuing a policy of denationalizing the economic sphere, transferring state enterprises into the hands of new owners, namely entrepreneurs, shareholders, LLP [1], etc., supporting the newly created commercial and non-profit organizations [2]. During this period, a large role in the economy began to occupy commercial enterprises, banks, firms, organizations, individual entrepreneurs [3]. The beginning of this process in the post-Soviet space was laid by the Law «On Cooperation in the USSR», which was adopted on May 26, 1988 [4]. The next transformation of a planned economy into a market economy was continued by the Law «On Property in the USSR», adopted on March 6, 1990, which established the existence of property of citizens, collective and state property in the former Soviet Union (Part 1 of Article 4 of the Law). In Part 1 of Article 3 of this Law established that the property may be the land, its subsoil, water, flora and fauna, buildings, structures, equipment, objects of material and spiritual culture, money, securities and another property [5]. In essence, this meant the recognition of the existence of «private property» in the USSR, although this concept was not used in the designated Law.

## *Methods and Materials*

The methodological basis of this study is the dialectical method as the basis for the knowledge of social and criminological phenomena of reality in their development. Considering the interdisciplinary nature of the

problem being studied, the article also used private scientific research methods (formal-logical, comparative-legal, statistical, historical-legal methods of scientific knowledge).

Historical and legal research was based on working directly with the texts of laws and consisted in the analysis of the specifics of the regulation of corpus delicti in the regulatory acts in force in Kazakhstan.

The used statistical method revealed the existing relationships between changes in legislation and the state of investigative judicial practice.

Other sources of information were also used that contain criminological and forensic information (the Unified Automated Information and Analytical System of the Judiciary of the Republic of Kazakhstan, the Judicial Study Service and the Taldau Forum).

*Discussion*

The situation has changed a lot in Kazakhstan transition to a market economy. At the end of the 1980s, cooperative societies began to emerge, and the question arose immediately: can they be considered public organizations, and their leaders as officials? The Plenum of the Supreme Court of the USSR, in a resolution of March 30, 1990, «On Judicial Practice in Cases of Abuse of Authority or Official Position, Excess of Authority or Official Authority, Negligence and Official Forgery» on this issue gave a positive answer [6; 16]. In other words, cooperatives were not public organizations, i.e. the Supreme Court of the USSR broadly interpreted the law «On Property in the USSR».

The existence and activities in the Republic of Kazakhstan of non-state enterprises were reinforced by the adoption of the Laws of the Republic of Kazakhstan: «On Production Cooperative» dated October 5, 1995 [7] and «On Public Associations» dated May 31, 1996 [8], bodies and officials in the activities of public associations, except as specified by law.

All this meant the realization in the economic field of one of the most important prerequisites of a democratic state — the establishment of the principle of equality of all forms of ownership, of all business entities. However, in the conditions of freedom of economic relations, a new problem arose — the abuse of rights by various subjects of economic activity.

On December 23, 1995, the Law of the Republic of Kazakhstan «On Privatization» [9] (now invalidated) was adopted, on the basis of which most state enterprises and organizations were bought by representatives of various types of business (small, medium, large), the so-called entrepreneurs. For a short time, the adoption of board decisions on a number of important economic and social issues has become a necessary element in the functioning of the non-state sector, due to the formation of the non-state sector of the economy, including through the transition of state enterprises into «private hands».

On July 21, 1999, the Law «On Rural Consumer Cooperatives in the Republic of Kazakhstan» No. 450-1 was adopted, and later on May 8, 2001, the Law of the Republic of Kazakhstan «On Consumer Cooperatives» No. 197 was adopted. In this connection, in Kazakhstan began to appear commercial and non-profit organizations: private firms of various kinds, commercial banks, etc. Their leaders often committed abuses, received from counter-parties and other persons unlawful remuneration for committing official actions, etc., for which they were brought to criminal responsibility under articles about official misconduct, i.e. recognized by officials. They really possessed two signs: they constantly performed administrative functions, but at that time they did not have a third sign, since the organizations they headed could not be attributed to either state or public.

At that time, there was a clear lack of criminal law, which could be completed in several ways. The first of them is to recognize employees performing managerial functions in non-governmental organizations as officials, i.e. equate them to those who performed the same functions in state bodies. A similar solution was proposed in one of the draft anti-corruption laws. It attracts with its simplicity, but it was hardly correct from a social point of view: illegal actions of state officials represent a greater public danger than the actions of managers of non-governmental organizations. In this regard, the responsibility of those and others should not be the same [6; 18].

Russian lawyer, doctor of legal sciences A.S. Gorelik in this regard, notes that during the transition to a market economy, new organizations appeared, primarily commercial ones. Many socially dangerous acts of their managers were outside the sphere of criminal law regulation. In addition, it would be fundamentally wrong to equate the responsibility of officials of the authorities and heads of non-state (the same public) organizations [10; 10].

It should be noted that the social-economic crisis that occurred in Kazakhstan in the early 90s of the twentieth century, the lack of a significant number of industrial food products caused a widespread «illegal

remuneration» in the system of distribution relations. Under these conditions the system of commercial relations was developed, which was initially focused only on mediation between a manufacturer or supplier and a buyer. The majority of commercial structures, taking into account the gaps in the legal regulation in the sphere of economic relations existing at that time, concluded deals that yielded multiple unrecorded profits.

To ensure the effective social-economic development of the country, the establishment of a system of management decision-making in the non-state sector of the economy is undoubtedly of positive significance. Nevertheless, the practice of forming managerial relations in the field of commercial and other organizations that are not government bodies and institutions, has shown numerous examples of various kinds of official abuse, including by «bribing» on the part of the leaders of these organizations and institutions. It can be said that in connection with the transition of state organizations into «private hands», various property benefits began to «stick» to these hands for solving issues that fall within the competence of managers of commercial and other organizations. Figuratively speaking, as noted B.S. Burov, the donations for resolving issues under their jurisdiction were transferred to other offices (although, usually, the people who carried the offerings remained the same — only the sign on the building changed, and with it the status of decision-makers, now, joint-stock companies, banks) [11].

Based on the foregoing, the state, through its legislative bodies, should decide on the degree of public danger of such a new phenomenon as «bribing» of persons performing managerial functions in a commercial or another organization, the need for its criminalization, and proceeding from this — on methods and means of dealing with it.

Among the most important factors determining the objective need of a society for introducing into the criminal legislation, a rule providing for responsibility for commercial bribery, one can indicate, first of all, its public danger, its degree of prevalence and the impossibility of successfully combating it with less repressive measures [12].

P.S. Dagel points out that it is also important to identify these factors because the need for the criminal law method is limited: amenable to proof. Otherwise, the violation of the criminal law prohibition cannot be established, and the criminal sanction is implemented; ... the criminal law method should be applied only when the unlawful conduct can be prevented by criminal law means, otherwise the criminal law prohibition cannot be enforced» [13; 67]. Thus, it is necessary to identify the causes of the spread of «bribery» among representatives of commercial and other organizations, to establish how possible it is to influence state punitive measures on this unlawful phenomenon.

Exploring the mechanism of criminalization in the aspect of its driving forces, it is necessary to remember that we are dealing with a process that is carried out deliberately, that the basis for the adoption of a new criminal law rule is certain legal ideas, that is, reflections of social needs in the consciousness of people. People strive to comprehend and reflect in the law a social necessity, the only way of empirical knowledge of which is social fact, that is, isolated events in which necessity is mediated and supplemented by chance. They are these single events or groups of events that act as moments initiating legislative activity that attracts the attention of the public and the legislator [14].

In our opinion, among the grounds for introducing into the criminal legislation the norm providing for liability for commercial bribery can be identified as a public danger and its relative prevalence. The public danger of commercial bribery lies not only in causing material damage, but also in undermining the country's economic security, in destroying the non-state sector of the economy that forms its development. In a market economy, even one person who has the right of disposal in any area of the private sector can cause damage not only to huge amounts of money, but also to a significant number of law-abiding citizens.

In legal literature, it was noted that corporate executives in some cases preferred not to publicize the facts of abuse by their employees, so as not to scare away potential investors [15; 43].

Recently, the dynamics of the development of such a socially dangerous act as «bribing» of persons operating in the non-state sector of the economy has been traced. For several years from the beginning of the denationalization of the economy of Kazakhstan and the emergence of the first non-governmental organizations, enterprises and institutions, the leading officials of these non-state structures remained unpunished, because the Criminal Code of the Kazakh SSR of 1959 in force in that period operated on the concept of «official», which is a representative of state bodies.

For example, Article 153-3 of the Criminal Code of the Kazakh SSR of 1959 provided for liability for commercial bribery, the content of which was: the illegal transfer (receipt) of material remuneration or the provision of property services to an official not specified in Article 146 of the Criminal Code of the Kazakh SSR for his use of his official position in the interests of the bribe taker.

It is not difficult to imagine what negative social consequences this could lead to, given the rapid growth in the late 1980s and early 1990s. The twentieth century of non-state commercial and non-profit enterprises and organizations and their operations with gigantic (including budget) sums. In any case, one cannot fail to say that, in the period under review, one after another, branches of various commercial banks began to «fly into the pipe», with amazing «carelessness» they distributed credit on the basis of «unlimited, free of charge and irrevocability» to various LLP, LLC huge sums of money (both their depositors and the state, which provided assistance to «young entrepreneurs»). The aforementioned «indiscretion» was almost always and everywhere caused not by the inexperience of beginning merchants, but by their actions connected with illegal «bribery» [11].

As representatives of small businesses say, the facts of extortion of material benefits from the leaders of more powerful companies are relatively frequent. The question is not so much what you need or not to «give reward», the question is how much you need to «give» in order not to go broken, to keep commercial relations afloat, to have a proper rating among commercial enterprises.

Similar situations developed in privatized enterprises, with the state allocated loans for the development of production, the managers handed over to the dubious one-day firms established at the factories, which then also quickly disappeared as they were formed. The legislator inadmissibly for a long time did not take any decisions on this issue. As a result, the investigating authorities, in the absence of any clarification on the qualifications of the actions of employees of commercial and other non-profit organizations, seemingly containing the composition of an official misconduct, themselves, decided whether or not to initiate criminal proceedings. Those cases that came to court ended in the absence of corpus delicti — due to the non-recognition of employees of commercial and other organizations as «officials».

A significant and for many sudden change in the economic, social and political situation occurred in the country in the early 90s of the twentieth century and the ensuing economic decline and political instability. The political situation of that period was characterized by opposition from the executive and legislative branches of government. The political risk of long-term investments that is constantly perceived in such conditions, the hardest economic circumstances (inflation, the lack of clear legal regulatory mechanisms) have shaped a certain type of economic thinking and behavior for many economic actors, designed to receive illegal profits in the possible shortest time. One of the ways to implement this kind of goals was the «bribing» of employees of commercial and other organizations. The financial crisis in Kazakhstan at that time, accompanied by the resignation of the Government, certainly did not help the representatives of commercial and other organizations strengthen their belief in the sustainability of our state's policy regarding the non-state sector of the economy to a new redistribution of property. All this caused a desire to get capital as quickly as possible and take it abroad.

There was a certain demand for illegal banking operations. And demand, as is known, generates supply. Bank employees took bribes (illegal remuneration for opening settlement accounts, for issuing preferential loans, for speeding up payment documents, for cashing large sums of money to commercial structures, for skipping payment orders without attachment of documents justifying financial transactions.

So, for example, if you receive a loan from a bank for a «bribe», when both a businessman and a banker realize that this loan will never be returned, it didn't make sense to deposit the received money for storage in another bank — money from it could also «leave» to the left», and the bank, thus, declared itself bankrupt. The weakness, lack of formation of civil society as a whole and civilized relations in the non-state economy sector — and, as a result of this, numerous negative phenomena, required appropriate legislative regulation and state control. The lack of freedom in economic relations in Kazakhstan over a long period of time also affected the low level of legal culture of employees of commercial and other organizations, much was brought from the working methods of the old Soviet apparatus, where «bribery» was widespread.

The lack of state opposition to the facts of commercial bribery in other branches of law — civil, administrative, labor, given the great public danger of «bribing» and causing harm not only to the interests of commercial structures, but also to state interests in the economic sphere, could not but raise the issue of struggle with a similar phenomenon by criminal law means. Moreover, the activities of persons carrying out commercial bribery outwardly looked quite decent.

The requirement of internal logical inconsistency of the system of criminal law norms is as follows. The Criminal Code of the Kazakh SSR, which had been in force until 1998, declared in Article 1, one of its tasks is to protect all forms of property from criminal encroachments, in fact, did not ensure its implementation, since it lacked the rules governing liability for harming the activities of representatives of commercial and other organizations.

This situation did not comply with the principle of «recognition and protection of private, state and other forms of ownership» enshrined in Article 6 of the Constitution of the Republic of Kazakhstan in 1995 (as amended and added), etc. non-state.

Describing the social-economic and political prerequisites for constructing a norm on criminal responsibility for commercial bribery, it is impossible not to overlook the role of science in understanding the social and legal nature of this phenomenon. Suffice it to say that throughout the 90s of the 20th century, until the adoption of the Criminal Code of the Republic of Kazakhstan in 1997, there was an active discussion in the legal press about the need to formulate criminal law bans for abuses by representatives of commercial and other organizations also establishing the subject of crimes in the non-state sector of the economy.

The Criminal Code of the Republic of Kazakhstan in 1997 radically changed the regulation of responsibility for official crimes in the Criminal Code of the Kazakh SSR. Rejecting the very term and recognizing the fundamental difference between crimes of persons involved in the administration of state functions and persons performing managerial functions in commercial and other organizations not related to state bodies of power and administration, the legislator already in the headings of Chapter 8 of the Criminal Code of the Republic of Kazakhstan «Crimes against the interests of the service in commercial and other organizations» (Criminal Code of the Republic of Kazakhstan 2014 Chapter 9 «Criminal offenses against the interests of the service in commercial and other organizations») and Chapter 13 «Corruption and other crimes against the interests of the civil service and public administration» (2014 Criminal Code of the Republic of Kazakhstan; Chapter 15 «Corruption and other offenses against the interests of the civil service and public administration») [16], which describes the elements of these crimes, reflected their specific features associated primarily with the object of encroachment.

It can be noted that this issue was successfully resolved in the Criminal Code of the Republic of Kazakhstan. With the introduction of the Criminal Code of the Republic of Kazakhstan, a strange and ambiguous situation was abolished, when previously heads of commercial and non-profit organizations whose activities entailed a substantial violation of the rights and legitimate interests of citizens protected by law, could not be brought to criminal responsibility for various types of abuse of official authority and non-profit organizations.

The scientific study of this problem allowed the legislator in the Criminal Code of the Republic of Kazakhstan to significantly change the understanding of the subject of «persons performing managerial functions in commercial and other organizations» and «officials». Illegal receipt of illegal material remuneration made it possible for law enforcement agencies to prosecute perpetrators of acts similar to receiving a bribe (Article 367 of the Criminal Code of the Republic of Kazakhstan) and giving a bribe (Article 366 of the UR of the Republic of Kazakhstan), but organizations — for commercial bribery, under Article 253 of the Criminal Code of the Republic of Kazakhstan.

A similar provision is enshrined in the Criminal Code of the Russian Federation, in which two groups of crimes of managers (Chapter 23 and Chapter 30 of the Criminal Code) are formed in state or municipal bodies and non-state organizations. The difference in the criminal legal assessment of these acts, obviously, stems from the fact that the relevant structures belong to state or non-state organizations. At the same time, it should be noted that in some norms responsibility is established not only for managers, but also for ordinary employees (for example, for official forgery, for granting the authority of an official, etc.). The interests of the public service for these categories of persons remain the same, despite the changes in the status of these individuals [15; 39].

In our opinion, the delimitation of «crimes against the interests of public service» on the one hand, and «crimes against the interests of service in commercial and other organizations» on the other, is necessary for the law enforcer. One cannot agree with the proposal to unite these chapters or even to create a single chapter of the Special Part of the Criminal Code — «Crimes against the interests of the service».

*Conclusions*

As a question, I would like to note the following. In our opinion, the legislator has not quite successfully designated the name of Chapter 9 of the Criminal Code of the Republic of Kazakhstan as «Criminal offenses against the interests of service in commercial and other organizations». For example, the «interests of the civil service» are reflected in the content of offenses enshrined in Chapter 15 of the Criminal Code of the Republic of Kazakhstan, which is called «Corruption and other offenses against the interests of the civil service and public administration» Code of the Republic of Kazakhstan — «Military offenses».

Justifying its position, we note, firstly, that based on the content of the offenses included in Chapter 9 of the Criminal Code of the Republic of Kazakhstan, this is not a service, but an activity carried out in a commercial or non-profit organization. Secondly, the content of the criminal law itself, enshrined in Chapter 9 of the Penal Code of the Republic of Kazakhstan, indicates that in Article 250 of the Penal Code of the Republic of Kazakhstan, a person who performs managerial functions in a commercial or another organization abuses its authority against the legitimate interests of this organization; in Article 251 of the Criminal Code of the Republic of Kazakhstan — a private notary or an auditor working as part of an auditing organization or the head of an auditing organization abuses its powers contrary to the objectives of its activities; in Article 252 of the Criminal Code of the Republic of Kazakhstan — the head or employee of the private security service exceeds the authority granted to them in accordance with the license, contrary to the objectives of its activities; in part 4 of Article 253 of the Criminal Code of the Republic of Kazakhstan — a person performing managerial functions in a commercial or other organization receives illegal material remuneration, as well as uses property services, and in part 1 of this norm, the subject of this crime is a private person who transfers illegal material reward, illegally provides such person with property services; and only in Article 254 of the Criminal Code of the Republic of Kazakhstan — a person performing managerial functions in a commercial or another organization does not fulfill or improperly performs his duties due to unfair or negligent attitude to the service. What kind of «service» in commercial or non-profit organization is referred to in Article 254 of the Criminal Code — is it not clear? In the legal literature on this subject there are no explanations and legislative explanations on this issue so far.

Thus, the foregoing allows us to assert that the heading of Chapter 9 of the Criminal Code of the Republic of Kazakhstan should be changed to a new name, one of the versions of which we propose to designate it as «Offenses against the legitimate interests of commercial or non-profit organizations», while it seems appropriate in the disposition of Article 254 of the Criminal Code to exclude the word «to the service».

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# Коммерциялық параға сатып алу үшін қылмыстық жауапкершіліктің даму тарихы

Мақала коммерциялық параға сатып алу үшін қылмыстық жауапкершілік туралы қазақстандық заңнаманың қалыптасу тарихына арналған. Мемлекеттік емес меншік нысандары бар кәсіпорындар мен ұйымдардың пайда болуына байланысты олардың мүдделерін қорғау туралы мәселе туындады, соның нәтижесінде оларда лауазымдық қызмет атқарушы тұлғалардың жауапкершілігі туралы, сондай-ақ олардың жауапкершілігін лауазымдық қылмыстардың субъектілерінің жауапкершілігінен, атап айтқанда, парақорлықтан ажырату туралы мәселесіде орын алады. Нарықта монополиялық жағдайға ие және жеке меншікке негізделген коммерциялық банктердің, ірі экономикалық қызмет субъектілерінің басшыларын немесе қызметшілерін сатып алу экономикадағы нарықтық қатынастардың қалыпты жұмыс істеуі үшін елеулі қауіп төндірді. Кейінірек жүргізілген экономикалық реформалар коммерциялық және өзге де ұйымдарда коммерциялық параға сатып алуды сипаттайтын қоғамдық қатынастарды жаңаша қылмыстық-құқықтық реттеуді талап етті. Қылмыстық құқық теориясына жалпылама талдауларға сүйенсек, Қазақстан Республикасы Қылмыстық кодексінің 9-тарауына кіретін әрекеттерді жасаған кезде зиян қызметке емес, коммерциялық немесе коммерциялық емес ұйымның мүдделеріне келтірілетіндігі туралы қорытынды жасалды. Осыған орай авторлар Қазақстан Республикасы Қылмыстық кодексінің 9-тарауының атауын өзгерту туралы ұсыныс жасады.

*Кілт сөздер:* коммерциялық сатып алу, қылмыстық жауапкершілік, лауазымды тұлға, коммерциялық және басқа ұйымдар, қызметтің мүдделері.

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# История развития уголовной ответственности за коммерческий подкуп

Статья посвящена истории становления казахстанского законодательства об уголовной ответственности за коммерческий подкуп. В связи с появлением предприятий и организаций с негосударственными формами собственности встал вопрос о защите их интересов и, следовательно, об уголовной ответственности лиц, выполняющих в них управленческие функции, а также об отграничении их ответственности от ответственности субъектов должностных преступлений, в том числе от взяточничества. Подкуп руководителей или служащих коммерческих банков, крупных субъектов экономической деятельности, занимающих монопольное положение на рынке и основанных на частной собственности, начал представлять серьезную опасность для нормального функционирования рыночных отношений в экономике. Позже происходящие экономические реформы потребовали нового уголовно-правового регулирования общественных отношений, характеризующих коммерческий подкуп в коммерческих и иных организациях. Исходя из обобщения теории уголовного права, сделан вывод, что при совершении деяний, входящих в главу 9 Уголовного кодекса Республики Казахстан, вред причиняется интересам коммерческой или некоммерческой организации, а не службе. В этой связи авторами предложено изменить заголовок главы 9 Уголовного кодекса Республики Казахстан.

*Ключевые слова:* коммерческий подкуп, уголовная ответственность, должностное лицо, коммерческие и иные организации, интересы службы.

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