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Bribe extortion: theory and law enforcement problems

The article is devoted to one of the most acute problems of criminal liability for bribery — the problem of qualifying a bribery, obtained by extortion. In the article, taking into account the materials of judicial practice, the main missteps made by the courts of the Republic of Kazakhstan in this category of cases were analyzed. The most common misstep is the courts' ignoring of the requirement of the necessarily legal nature of the rights and interests protected by the person giving the bribery under the influence of extortion. In addition mandatory elements, which are a condition for this qualifying element imputation, were defined. The types of bribe extortion are defined and described, depending on the method of committing the crime. Special attention is paid to legal nature of exemption from criminal responsibility of a person being extorted. The author referred this type of exemption to institute of special types of exemption from criminal liability, provided by the Special Part of the Criminal Code. The concept of recognition of a bribe extortion as a state of extreme necessity is considered which has recently become widespread. The author concludes that, if bribe extortion is recognized as an irresistible coercion, then the act can be qualified as committed under conditions of extreme necessity that exclude criminality of act.

Keywords: bribe extortion, qualifying, legal nature, exemption from criminal liability, extreme necessity.

Introduction

Bribery taking is one of the most common types of corruption-related offences. Criminal law provides for taking bribery by extortion as one of the classified elements of it (cl. 1 p. 3 of art. 366 of the Criminal Code of the Republic of Kazakhstan). It should be noted that courts do not always impute correctly this classified element: it is charged where there is not and, on the contrary, it is not charged if there is. Certainly, this state of affairs is unacceptable, as it entails an unjust sentence decision that does not comply with real public danger of the committed crime. In addition, improper imputation of this qualifying element entails another significant consequence, related no longer to bribery taker's actions, but to the bribery giver in accordance with Note 2 to art. 367 of the Criminal Code of the Republic of Kazakhstan as follows «a person who has given bribery is exempt from criminal liability if he has been extorted». If bribe extortion is classified in an improper way, so, there can be a situation in which a person, who is subject to exemption from criminal liability on this basis, will nevertheless be unfairly subjected to it. And, vice versa, a person, who was not extorted, will be exempt from criminal liability.

In this regard, it is difficult to overestimate the correct meaning of «bribery extortion» by a law enforcer.

The purpose of study undertaken in this article is to clarify legal nature of the institution of exemption from criminal responsibility of a person being extorted, and to develop recommendations for proper application of the law on taking a bribery committed by extortion.

The achievement of the above goals determined setting and solution of the main *tasks*: 1) to study judicial practice in this category of cases; 2) to define the main typical missteps arising in application practice of this provision; 3) to analyze the theory available in criminal law doctrine, concerning the grounds for exemption from criminal liability of a person extorted.

The following basic *methods* of scientific knowledge were used during the research: formal and logical, statistic, rather-legal, system-structural, methods of theoretic analysis and detail. Sentences, passed by the courts of the Republic of Kazakhstan under Paragraph 1 of Part 3 of Article 366 and Article 367 of the Criminal Code of the Republic of Kazakhstan for the period 2010–2018, have been studied. The statistical data of the Committee on the legal statistics and special accounts of the state office of public Prosecutor of Republic of Kazakhstan for the period 2008–2018 has been analyzed in this category of cases.

Results

The main missteps arising in judicial and investigative practice in classifying these crimes were revealed as a result of the sentence analysis passed by the courts of the Republic of Kazakhstan concerning bribery extortion.

The imputation of such qualifying element as «taking bribery by extortion» and bribe giver's corresponding exemption from criminal liability are defined and described.

The author drew conclusions when analyzing literature views concerning the legal nature of the institution of exemption from criminal responsibility of a person extorted.

Discussion

So, how should the meaning of «extortion of bribery» term be understood? The Supreme Court of the Republic of Kazakhstan in its regulatory resolution № 8 of November 27, 2015 «On jurisprudence of some corruption offences» gives the following explanation: «Extortion means bribe request by a person under threat of actions that can harm the legitimate interests of a bribe giver or the persons he represents, or intentionally creating conditions in which he is forced to give a bribe in order to prevent harmful consequences for law-protected interests».

According to this clarification, extortion of bribery has two types:

«In the first case, the official intentionally and unequivocally demands to give him a bribe by threatening to commit any actions that will harm the legitimate interests of the person being extorted (bringing to justice illegally, dismissing illegally, etc.), or not to take any lawful action which the bribe giver is interested in and which the official is obliged to perform without violating any order and legal acts (for example, threatens with unlawful denial to register an individual entrepreneur or a legal entity, license denial, etc.)» [1; 196, 197].

«In the second case, the official does not require a bribe intentionally and does not threaten the bribe-giver. He just fails to fulfill his obligations aiming at encouraging the bribe giver to give a bribe, delays certain actions deliberately, in which the future bribe giver is interested in, although the official was obliged and had a real opportunity to fulfill them, which entails harmful consequences for bribe giver's law-protected interests» [1; 197].

These two types of bribe extortion are committed in different ways from objective viewpoint. In the first case, the bribe taker is active: he makes demands, reinforcing them with various kinds of threats. In the second case, the bribe taker is mostly inactive, without fulfilling any actions needed for the bribe giver, and thereby, forcing him to give a bribe. For example, he does not visa any documents, or give land allocation permission, or include in the waiting list for subsidized housing, etc. But sometimes such a form of bribe extortion is not excluded. For example, the head always finds a subordinate's faults that prevent his promotability, advancement, etc.

The common feature of these two types of extortion is exclusively legitimate interests which a person protects by giving an extorted bribe.

If the above mentioned bribe taker's acts took place, but the demands put forward by him were not aimed at bribe giver's lawful interests, but in order to «conceal» his illegal and sometimes criminal actions, the extortion is excluded.

In this regard, the investigation and the court should always clarify whether those interests were legal or illegal, the violation of which could occur in the event of refusal to give a bribe.

It should be specially emphasized that in any case, to classify an act as extortion, the only fact of demanding a bribe is not enough, regardless of the form in which this demand was made. This requirement needs to be accompanied by threat of harm to the bribe giver's legal interests. «The mere offer to give a bribe by a bribe taker, if there are no other conditions, in particular, threats to refuse person's legitimate interests, is not a sufficient ground for constituting acknowledgment of extortion» [1; 197].

Nevertheless, there are cases of violating this particular demand. Thus, by the verdict of the Kordai district court of Zhambyl region of December 26, 2016 according to case № 1–293/2016, a police officer of «Rubezh» static checkpoints of the road police battalion sub-unit of the Department of Internal Affairs of Zhambyl region was convicted for bribery extortion. The verdict states that the police officer demanded money from a bus driver for «freecross through the check point, namely, for not checking vehicle documents, threatening to draw up a protocol for road traffic offense» [2]. Free cross through the check point, as well as road traffic offense can hardly be called legal. As you can see, the court did not take into account the

requirements of necessarily legal rights and interests protected by the bribe giver and classified as «taking a bribe by extortion».

As A.V. Koval notes, «in reality, this method of bribery does not go beyond the ordinary bribery or «purchase and sale» misdoing, and is not different from cases when the initiative to give a bribe for illegal actions (inaction) comes from the bribe giver. Therefore, the bribe taker's requirement to give bribery for illegal actions (inaction) does not have a high degree of public danger, which determines liability as extortion» [3; 111]. «In such situations, the bribe giver pursues his own illegal interests even under pressure» [4; 83].

A very difficult situation also occurs in such cases where the bribe taker has discretionary powers towards the bribe giver, for example, when he has the right to perform or not to perform any actions in bribe giver's interests. With that, both variants on his part will be legal, but the bribe giver is interested only in one of the variants, and it is due to choosing this variant by the bribe taker that a bribe is given. At the same time, choosing the second variant, which is disadvantageous for the bribe giver, does not violate his legal rights and interests. Can a threat on the part of a bribe taker choose the variant that is disadvantageous for the bribe giver to be classified as extortion? Let us suppose that a judge, demanding a bribe from the accused or his relatives, threatens to sentence him to prison under the article, the sanction of which is alternative and provides for other types of punishment that are not related to deprivation of liberty, such as a fine. Certainly, the accused is interested in sentence, not related to deprivation of liberty. Can we say in such a case that the judge will violate legal rights of the accused by putting imprisonment while there are other types of punishment? No, we can't. It is the liability of the accused, found guilty, but not his right to be subjected to any punishment imposed by the court, provided for by the sanction of the article. So, there is no bribery extortion in such cases.

Thus, the key condition for classifying an act as extortion is solely legal rights and interests protected by the person who gives bribe by extortion.

The next problem that needs to be resolved is the legal nature of exemption from criminal responsibility of the person who gave the bribe by extortion.

This is not an idle problem, because its solution depends on the bribe giver's status as a person who committed a crime, but was exonerated, or as a victim, with all the ensuing consequences. One of such consequences is return of the bribe amount to the victim.

In judicial practice, there is no certain approach on this problem. In some cases, the courts return bribe to a person being extorted. So, for example, by the verdict of Taraz court № 2 of December 5, 2016 according to case № 3111-16-00-1 \ 333, funds in the amount of \$18000 were returned to K., who was extorted [2]. In other cases, the court decides on returning those amounts that were real evidence in the case. Thus, by the verdict of Kordai district court of Zhambyl region of December 26, 2016, funds in the amount of 3000 tenge seized from the defendant during his detention red-handed when receiving a bribe, were returned to O., who gave the bribe under extortion, since the sentence had taken effect. Moreover, the whole bribe amount in this case was 20000 tenge. The rest of the bribe amount is not mentioned in the court verdict [2].

Meanwhile, paragraph 29 of the regulatory resolution № 8 of the Supreme Court of the Republic of Kazakhstan of November 27, 2015 «On review of certain corruption offences» states that «seized money and other valuables that have served as bribes and are declared as real evidence are subject to the State revenue». And further, the same paragraph says: «The property obtained as a result of corruption offence commission, and (or) the cost of illegally obtained services is subject to appeal to the State revenue».

This resolution does not differentiate bribes, depending on whether it was obtained by extortion or in a typical way. Two assumptions follow from this: 1) the Supreme Court did not make such a division intentionally, meaning that bribes are subject to the State revenue under any circumstances; 2) a lack of differentiated approach is the omission of the Supreme Court.

Can a person who has given a bribe under the extortion be recognized as a victim of a crime?

This question is important because sometimes the amounts of bribes, as it was demonstrated in the above example, can be quite significant (\$18000). In any case, this question should be clarified in the judgement by the Supreme Court.

But the matter is less as in bribes and more as in social and legal assessment of such a bribe giver's actions and legal consequences of these actions. It is one thing when the act committed by a person is assessed as crime, but a person is exempted from criminal liability due to the possibility in the criminal code, but an entirely different because the act is not criminal at all due to special circumstances of

its commission. Some writer expressed the opinion that the reason for such release is the state of extreme necessity, which the person is in, being forced to give a bribe [5; 17].

Concerning the legal nature of the bribe giver's relief from criminal liability, if there is extortion against him, we see two variants:

1) Such relief refers to the institution of special types of exemption from criminal liability. The person is recognized to have committed the crime, but is exempt from criminal liability;

2) Such exemption refers to the institution of circumstances decriminalizing a criminal act. An act committed by a person is not criminal due to the extreme necessity commission.

So, in the first case, there are no grounds for returning bribes to such a person and in the second, bribes must be returned to a person, since the act committed by him is not a criminal offence.

But as we noted above, the matter is not just in bribes.

Which of the following variants is correct?

Special types of exemption from criminal liability are provided by the Special Section mainly for economic criminal offences, criminal offences against public safety, military criminal offences: pyramid scheme development and management (art. 217), money laundering scheme and (or) another property obtained unlawfully (art. 218), monopolistic activity (art. 221), illegal use of trademark (art. 222), act of terrorism (art. 255), hostage taking (art. 261), etc. As a rule, the ground for such an exemption is a voluntary compensation caused by economic criminal offences or criminal offences against public safety. As for economic criminal offences, such an exemption is lawful from the expediency viewpoint, since the injured party is more interested in compensation than in criminal prosecution. In the case of criminal offences against public safety, the legislator has provided for exemption in order to prevent or minimize possible harmful consequences that may be very significant in this category of crimes. In general, the presence of such rules in criminal law is a manifestation of incentive method in criminal law. The legislator somewhat encourages crime committers to certain post-criminal behavior which is beneficial for victims and other persons. But the situation is different with persons who gave a bribe under the influence of extortion. In this case, we are not talking about post-criminal behavior. The reason for exemption from liability is excusable causes and commission of a crime special circumstances, compelling nature of its commission. In this case, the person acts under mental coercion. As it is known, the responsibility for committing an act under mental coercion, in which the person is able to direct his actions, is decided according to the rules of extreme necessity.

Note 2 to Article 367 of the Criminal Code of the Republic of Kazakhstan states that a person is exempt from criminal liability if bribery extortion has occurred against him. From the literal construction of this rule, we can conclude that the legislator assesses such an act as a crime and the person who committed it as a criminal with consequences relevant to his status, but considers it necessary to relieve him from criminal responsibility, since the act was committed as a result of extortion, that is, under mental coercion. Exemption from criminal liability is possible where it is initially provided for, and it is provided for a criminal offence commission. «If there is no crime, then there is nothing to exempt» [6; 113]. Thus, giving a bribe as a result of extortion is recognized by the legislator as a criminal offense, which means the person, who committed it, is the criminal and cannot be recognized as a victim. Therefore, a bribe cannot be returned to such a person.

Such a solution to the problem seems quite logical. However, it is not all as easy as it sounds. As mentioned above, there is a position among scientists according to which, a person forced to give an extorted bribe could be in a state of extreme necessity [7; 15, 5, 8; 1086]. Is it possible to recognize as the extreme necessity in the actions of a person who has been extorted? As it is known, in order to recognize a person as being in a state of extreme necessity, compliance with a number of mandatory conditions is required, the key of which is that «this threat could not be eliminated by other means» (Article 34 of the Criminal Code of the Republic of Kazakhstan). In most cases, a person, who is extorted, has the opportunity to eliminate the impending threat by other means, for example, applying to law enforcement agencies. In fact, giving a bribe within such extortion means action under the influence of avoidable coercion.

But we cannot exclude the outside possibility of such a situation, when a person is really deprived of any other possibilities to avoid threat, but to agree to the extortionist's demands. «After all, in practice there are such situations, when extortion does not give any free choice, for example, there is a situation that requires a quick and urgent decision, a delay of which may result in the death of a person, disruption of production process when giving the demanded bribe is the only way to prevent such threat. In such cases, insurmountable coercion will take place, and the rule of extreme necessity can be applied to the bribe

giver» [6; 113]. In such cases, the act is assessed as non-criminal and, accordingly, does not entail criminal liability.

It should be noted that the legislation of some countries recognizes in principle that giving a bribe can be made in the conditions of extreme necessity. Thus, in note 3 to ch. 35 of the Criminal Code of the Republic of Belarus «Crimes against the service interests» provides that «property given as a bribe or illegal gratification by persons in a state of extreme necessity, which is why they gave a bribe or illegal gratification, is not subject to appeal to the State revenue». Decision № 6 of the plenum of June 23, 2003, of the Supreme Court of the Republic of Belarus «On judicial practice in cases of bribe» clarifies that «money and other valuables are also subject to return to a person being in a state of extreme necessity, and giving a bribe was the only possible means of preventing harm to law-enforcement interests». We recognize and agree with such Belarusian legislation and the Supreme Court, since in certain cases of bribery extortion, the person is in a state of extreme necessity. It is necessary to provide that not any bribe extortion from a person puts him in a state of extreme necessity. At the same time, any extortion is a mental coercion. Depending on this, in one case, the person is not subject to criminal liability at all, in the other he is released from it.

In literature, it is proposed to provide a note to the article on giving a bribe in order to address the issue of assessing the bribe giver's actions in such a situation more correctly and accurately by the following: «A person who has given a bribe under the influence of extortion is not brought to criminal responsibility if it is determined that he was in a state of extreme necessity, or he is exempted from criminal responsibility if there was extortion being avoidable coercion» [6; 113]. In general, having agreed with the need for a differentiated approach to such situations, however, we consider it unnecessary to include it in the article of the criminal code. The General Part of the Criminal Code of the Republic of Kazakhstan contains the extreme necessity regulation (Article 34), which, like all the regulations of the General Part, is universal, and thus, is fully applicable to extortion. But it is necessary to provide an appropriate explanation in the regulatory resolution № 8 of November 27, 2015 «On judicial practice in certain corruption crimes» that would guide the law enforcer on the need for a clear distinction between cases of criminally non-punishable bribery committed in a state of extreme necessity, from giving a bribe, committed under the influence of surmountable coercion. Giving bribery committed under the influence of extortion in a state of extreme necessity is not a crime. Giving bribery should be distinguished from cases, when the coercion imposed on the person is surmountable.

Thus, we distinguish two types of bribe extortion. If in the above types of bribe extortion the division took place according to the method of extortion, then in this case, we classify extortion depending on the nature of coercion provided as surmountable or insurmountable. Surmountable coercion does not exclude criminality, but entails the person's release from criminal liability who gave the bribe under such coercion. Irresistible coercion is recognized as an absolute necessity and excludes criminality.

Conclusions

Based on the conducted study, the following general conclusions can be drawn: in judicial investigation practice, taking a bribe committed by extortion causes classifying difficulties. The courts of the Republic of Kazakhstan often make missteps in this category of cases, the most common of which include the courts' ignoring of the rights and interests legal nature requirement protected by the person who gives bribes under the influence of extortion.

As for legal nature of exemption from criminal liability of a bribe giver extorted, it should be concluded that such an exemption refers to special types of exemption from criminal liability institution, provided for in Note 2 to Article 367 of the Criminal Code of the Republic of Kazakhstan. It does not mean the absence of criminal elements in person's actions. Extortion, which is an insuperable coercion, acquires the nature of extreme necessity and refers to the institution of circumstances precluding criminality. These differences in legal nature cause the above differences of legal consequences. Such consequences also include determination of bribes.

The issue on classifying bribe extortion problems, we have considered, certainly requires further discussion. This is related to the idea of dividing bribe extortion into types, discussion about the admission of person's act subjected to extortion, features of extreme necessity and determination of bribes under the mentioned circumstances. The solution of these issues will allow minimizing missteps in the application of the law on bribery extortion, and in general, contribute to the sentence imposition, corresponding to the nature and degree of public danger of the committed act.

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А.Р. Хасенова, А.В. Кудрявцева

Пара бопсалау: теория және құқық қолдану мәселелері

Мақала паракорлық үшін қылмыстық жауапкершіліктің ең өзекті мәселелерінің біріне — бопсалау арқылы алынған параны саралау мәселесіне арналған. Сот практикасының материалдарын ескере отырып, Қазақстан Республикасы соттарының осы санаттағы істер бойынша жіберетін негізгі қателіктері талданды. Типтік қателер арасында бопсалау әсерінен пара беретін адам қорғайтын құқықтар мен мүдделердің міндетті түрде заңды сипаты туралы талаптарды соттардың елемегені аталған. Авторлар осы біліктілік белгісін белгілеу үшін болуы шарт болып табылатын міндетті белгілерді анықтады. Жасау тәсіліне байланысты параны бопсалау түрлері бөлініп, сипатталған. Мақалада параны қорқытып алу орын алған адамды қылмыстық жауаптылықтан босатудың құқықтық табиғаты туралы мәселеге ерекше көңіл бөлінген. Бұл мәселе бойынша авторлық ұстаным тұжырымдалды — босатудың осы түрі Қылмыстық кодекстің Ерекше бөлімінде көзделген қылмыстық жауаптылықтан босатудың арнайы түрлері институтына жатқызылған. Соңғы уақытта бопсалаушылық параны аса қажеттіліктің жай-күйіне мойындау концепциясы қарастырылды. Авторлар пара бопсалау еңсерілмейтін мәжбүрлеу деп танылған жағдайда әрекет аса қажеттілік жағдайында жасалған, әрекеттің қылмыстылығын болдырмайтын әрекет ретінде саралануы мүмкін деген тұжырымды жіктеген.

Кілт сөздер: пара бопсалау, біліктілік, құқықтық табиғат, қылмыстық жауапкершіліктен босату, аса қажеттілік.

А.Р. Хасенова, А.В. Кудрявцева

Вымогательство взятки: проблемы теории и правоприменения

Статья посвящена одной из наиболее актуальных проблем уголовной ответственности за взяточничество — проблеме квалификации взятки, полученной путем вымогательства. С учетом материалов судебной практики, авторами проанализированы основные ошибки, допускаемые судами Республики Казахстан по данной категории дел. Среди типичных ошибок названо игнорирование судами требования о непременно законном характере прав и интересов, защищаемых лицом, дающим взятку под воздействием вымогательства. Кроме того, определены обязательные признаки, наличие которых является условием для вменения данного квалифицирующего признака. В зависимости от способа совершения, выделены и описаны виды вымогательства взятки. Особое внимание в статье уделено вопросу о правовой природе освобождения от уголовной ответственности лица, в отношении которого имело место вымогательство взятки. Сформулирована авторская позиция по этому вопросу — данный вид освобождения отнесен к институту специальных видов освобождения от уголовной ответственности, предусматриваемых Особой частью Уголовного кодекса. Рассмотрена получившая в последнее время распространение концепция признания вымогательства взятки состоянием крайней необходимости. Авторами формулируется вывод о том, что в случае признания вымогательства взят-

ки непреодолимым принуждением, деяние может быть квалифицировано как совершенное в условиях крайней необходимости, исключающих преступность деяния.

Ключевые слова: вымогательство взятки, квалификация, правовая природа, освобождение от уголовной ответственности, крайняя необходимость.

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