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Challenges and Prospects for the Implementation Certain International Anti-Corruption Standards in Uzbekistan (In Terms of Imposition of Corporate Criminal Liability)

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Abstract

This article provides analysis of the approaches to the definition of corruption, delivers an examination of international legal mechanisms to combat corruption and anti-corruption standards in terms of establishing corporate criminal liability. Moreover, it considers the possibility of introducing the institute of criminal liability of legal persons in the criminal legislation of Uzbekistan, in particular, specifies examples from the criminal legislation of countries such as England, USA, Moldova. In addition, proposals on introducing the liability of legal persons are presented.

Keywords: *Corruption; International Anti-Corruption Standards; Legal Persons; Corporate Criminal Liability*

Introduction

Corruption causes great losses for society, economy and the state. The 2021 Corruption Perceptions Index (CPI) released by Transparency International showed that corruption levels remain at a standstill worldwide, with 86 percent of countries making little to no progress in the last 10 years [1].

Corruption is a threat to democracy, the rule of law, human rights, social justice, the authority and stability of institutions of power and the moral fundamentals of society. In addition, it causes significant damage to the social and economic development of countries and nations and slows down the achievement of sustainable development goals.

The complexity and relevance of the study of corruption as a social phenomenon leads to a high interest in this issue on the part of researchers. It has been observed by several social and humanitarian sciences as legal, economics, political, sociology and history and others. Every year various studies of the corrupt behaviour of civil servants are conducted around the world, and hundreds of scientific papers are written on the topic.

The Main Results and Findings

In the modern world, corruption is a serious and urgent problem for almost all states. So, what does corruption mean? Like any complex social phenomenon, there is no single universally accepted definition of corruption. There have been attempts in the international community, as well as in the various legal, social and humanitarian sciences, to develop a universal definition of corruption as a social phenomenon that would become universally accepted. We decided to analyse the term "corruption" from the criminal law perspective.

Within criminal law science, the definition of corruption is formulated by researchers according to a commitment to a narrow or broad approach to its understanding.

One of the most popular and cited definition of corruption has been provided by Colin Nye. He interprets narrower definition, describing corruption as a "behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains" [2]. The same approach can be seen in Mushtak Khan's definition [3].

Robert Klitgaard emphasizes that corruption is the misuse of office for unofficial ends [4]. Based on this definition, the first thing that comes to mind are cases of bribery involving public officials.

Supporters of the narrow approach, underline that the broad interpretation "blurs" understanding of corruption crime. For example, Colin Nye, arguing his point, writes: "… broadly defined as perversion or change from good to bad, it covers a wide range of behaviour from venality to ideological erosion" [2].

An analysis of international legal acts also showed a commitment to the narrow approach. The most widely accepted and used definition of corruption among public institutions and civil society organizations, including the World Bank [5] and Transparency International [6], is "the abuse of public office for private gain".

Jens Christopher Andvig states that a strict and narrow definition of corruption, which limits corruption to particular agents, sectors or transactions, can be handy for fighting corruption when the problem is limited. However, as narrow (legal) definitions may ignore vital parts of the problem, broader and more open-ended definitions, like corruption in terms of power abuse, will have to be applied to address the situations of pervasive and massive corruption [7].

Some international acts do not contain definition of corruption, but instead they contain list of actions, which should be considered as corruption. For example, the United Nations Convention against Corruption [8] (hereinafter UNCAC) and Criminal Law Convention on Corruption [9] provide a broad list of acts of corruption to be criminalized.

It can be considered that the inclusion in international legal acts of actions that are subject to criminalization of acts of corruption, within the framework of criminal law science, is undoubtedly correct. While a few centuries ago corruption was understood only as bribery, nowadays it covers a wide and unlimited range of acts of corruption. That is why it is important to use a broad approach to corruption within criminal law science, not limiting it to the perception of bribery. In our opinion, this approach is more correct from both a theoretical and a law enforcement perspective.

The international community has sought to regulate relations in the field of combating corruption through the adoption of numerous acts, ranging from the development of criminal, civil and legal norms to the preparation of specific documents. In recent years, several important universal conventions have been adopted as the UNCAC (2005), the Convention on Combating Bribery of Foreign Public Officials in

International Business Transactions [10] (1997), and the Convention against Transnational Organized Crime [11] (2000).

The development of the international legal framework against corruption has led to the creation of specific anti-corruption instruments, which include international anti-corruption principles and standards. The State, through its international commitments and the implementation of international anti-corruption standards, reveals great opportunities for effectively combating corruption. One of the effective measures to counteract corruption can be the institution of corporate criminal liability, which is reflected in several international acts and treaties.

Companies are often involved in corruption offences committed by their own managers or employees. This phenomenon is particularly common in commercial transactions and is regulated by major international anti-corruption instruments. In particular, the establishment of liability for legal persons (corporate liability) for corruption criminal offences is a mandatory requirement of the Council of Europe Criminal Law Convention on Corruption (Art. 18), the OECD Anti-Bribery Convention (Art. 2) and the UNCAC (Art. 26) [12]. The conventions do not require imposing specific criminal liability for legal persons, it can be criminal, civil or administrative in nature.

Different views have been expressed in the science as to whether there is a need and a possibility, as well as whether it is appropriate, to impose criminal liability for legal persons, and different arguments have been made for and against it.

Opponents state that it is artificial to treat a corporation as if it has a blameworthy state of mind. It is also impossible to imprison an organisation or attain many of the purposes of penal sanctions, such as rehabilitation and punishment. On the other hand, proponents recognise that corporations play an important role in society and the economy, and as such are capable of doing significant harm. They must therefore be expected to uphold the law just like individuals [13]. In addition, many experts challenge the effectiveness of civil or administrative liability of enterprises, because criminal law is considered as one of the most effective deterrents.

An analysis of current foreign legislation shows that the institution of criminal liability of legal persons is regulated in various legal systems with different approaches. Corporate criminal liability was first established and most typical in common law countries. This can be explained by an important role of case law in the common law system. The United States of America and the United Kingdom are examples of good practice in introducing corporate criminal liability for corruption through the US Foreign Corrupt Practices Act [14] and the UK Bribery Act [15].

The Netherlands, was the first country with a civil law system to provide for the corporate criminal liability in 1950 in its Economic Offences Act [16] and in 1976, this provision was enshrined in the Dutch Criminal Code.

Analysis of the criminal legislation of the CIS countries shows that the rules on the corporate criminal liability for corruption offences are contained in the legislation of Azerbaijan, Kyrgyzstan, Moldova and Ukraine. At the same time corporate criminal liability, when a legal entity is recognized as a subject of a crime on an equal footing with an individual, is provided only in the Criminal Code of Moldova [17] (Art. 21). In Moldova, legal entities are subject to corruption offences such as active corruption (Art. 325), influence peddling (Art. 326), giving bribes (Art. 334) and forgery of accounting documents (Art. 3351).

The international conventions do not necessarily require criminal sanctions, but allow countries to opt between “criminal or non-criminal sanctions, including monetary sanctions” or “criminal or non-criminal fines and [...] other penalties” [18]. The sanctions imposed on legal persons for act of corruption

should be effective, proportionate and dissuasive. In law enforcement practice, two approaches can be distinguished in defining criminal sanctions for legal persons.

In the first case, it is stated that legal persons are subject to the same sanctions as natural persons, sometimes with exceptions to the existing sanctions not applicable to legal persons or indicating those applicable to legal persons. The second establishes special sanctions for legal persons, such as a corporate fine.

Criminal sanctions for legal persons can be divided into main and supplementary penalties. As a rule, a fine is regarded as the main type of sanction, due to its wide application. Usually the winding up of the legal person is also usually considered to be the main sanction. The remaining sanctions, depending on the national characteristics of establishing the criminal liability of legal persons, may be recognized as both main and supplementary. For example, in the Republic of Moldova, deprivation of the right of a legal entity to engage in certain activities and its liquidation are applied as both main and supplementary sanctions.

There are also different approaches to determining the number of types of criminal sanctions for legal persons. For example, in a number of countries, such as Australia, China, New Zealand, Austria, Denmark, Lithuania, Ireland, Iceland, Norway and Switzerland, only one type of sanction is prescribed for legal persons (corporate fine, monetary penalty).

The most common sanctions for legal persons are as follows:

1. Fine. This type of punishment is usually the main type of punishment imposed on legal persons;

2. Confiscation. This type of punishment for legal persons is provided in many countries (United States, United Arab Emirates, France, Belgium, Finland, Azerbaijan, Czech Republic, Israel, Serbia, Macedonia, etc.) and consists in seizing property, including illegally obtained profits.

3. Restriction of corporate rights, which can include prohibition of participation in public procurement agreements, prohibition on receiving subsidies and favourable credits, prohibition on establishing new legal persons, prohibition to engage in certain activities and others.

4. Liquidation. Liquidation is to a legal person what the death penalty is to a natural person [18]. Because of its devastating social and economic consequences, many states try not to apply liquidation as a form of sanction. However, there are cases where it has been applied in practice. In M.R. Case, in Romania, two companies, which the person receiving the bribes had used as bribe collectors, were convicted and sentenced with the complementary penalty of dissolution [19].

Thus, the criminal sanctions applied to legal persons for corruption offences are mainly pecuniary in nature (fines, various prohibitions) and may also affect the reputation of the organisation itself (publication of the court judgement).

So what about Uzbekistan? The Republic of Uzbekistan is taking crucial steps to prevent corruption and implementing state programmes to combat it. Uzbekistan has now established a legal and institutional framework for addressing corruption: the several international conventions have been ratified, strategic and national anti-corruption documents and normative legal acts have been adopted.

As a member of international anti-corruption treaties, Uzbekistan is taking consistent and systematic measures to improve legislation and law enforcement practice by adopting international anti-corruption standards.

Anti-corruption legislation is being improved systematically. Thus, in January 2017, the Law "On Combating corruption" [20] was adopted, which establishes the main directions of State policy in this sphere, organizational and legal mechanisms for their implementation. The law clarifies concepts such as "corruption", "corruption offence" and "conflict of interest". Thus, the law using the narrow approach defines corruption as "illegal use by a person of official or duty position with the aim of obtaining tangible or intangible benefits in personal interests or in the interests of other persons, and an unlawful provision of such benefit".

An important step in this direction was Uzbekistan's accession to the UN Convention against Transnational Organized Crime in 2004 [21], UNCAC in 2008, as well as to the Istanbul Anti-Corruption Action Plan in 2010. In the last three years in the Corruption Perceptions Index Uzbekistan has improved its position by 20 points (126rd place).

Unfortunately, despite the measures taken, corruption remains one of the most global problems in society and the damage caused by it is increasing year after year. Thus, according to information provided by the General Prosecutors Office of the Republic of Uzbekistan [22], in 2022 the state and society suffered 1 trillion 12 billion sums in damages as a result of the corrupt actions of officials (913.7 billion sums in 2021).

All these and several other problems make it objectively necessary to improve anti-corruption measures, including through the implementation of international anti-corruption standards in national legislation. One of the effective measures to counteract corruption can be the institution of corporate criminal liability.

Art. 27 of the Law "On Combating corruption" states that legal entities are liable for committing corrupt offenses in accordance with the procedure established by the legislation. Currently, Uzbekistan has introduced the liability of legal persons only in civil and economic legislation. Thus, according to Art. 48 of the Civil code, a legal entity is liable for its obligations with all the property belonging to it. The form of fault (intent or negligence) is irrelevant for the imposition of this liability on legal persons. Civil liability is also incurred regardless of the offender's other liability. It is of a property nature.

Besides, legal persons may be subject to financial sanctions in the form of monetary penalties (fines) for tax offences (Art. 218 of the Tax code [23]). However, financial sanctions are crucial for preventing breaches of the law as well as for compensating the offending legal entity for the damage caused [24].

It is generally accepted that only a natural person of sound mind who has reached the age specified by law and may be subject to crime and criminal liability. Uzbekistan's criminal legislation also contains this provision (Art. 17 of the Criminal code [25]). This provision has become something of an axiom in criminal law theory. However, it does not mean that criminal legislation does not need to be improved.

Different views have been expressed among national researchers as to whether there is a need and a possibility, and whether it is appropriate, to introduce corporate criminal liability in Uzbekistan, and various arguments for and against have been presented.

The opponents of establishment of criminal liability of legal persons point to sufficiency and effectiveness of norms of civil and economic legislation [26], moreover, they state that prosecution is initiated only against a natural person and accordingly, the application of coercive measures without recognizing the person as the subject of the crime would be considered illegal action, also contrary to the ongoing policy of freedom of action of business entities [27]. In addition, opponents consider that the Uzbek legislation does not contradict the norms of ratified international conventions, as these documents

indicate that legal persons are not only subject to criminal liability, but also to administrative and civil liability. Therefore, many experts believe that Uzbekistan already have in place the liability that corresponds to the ratified international conventions, and it is not necessary to establish criminal liability.

The proponents of the concept of the legal person as the subject of the crime argue their position as follows: the introduction of criminal liability of legal persons is objectively due to changes in the criminal situation around the world [28], the increase in the number of corruption crimes for corporate purposes in the international arena in recent years requires adopting measures to prevent them and establish legal entities' liability for the crimes committed [29], legal persons, like natural persons, are independent subjects of law, which means that theoretically they can be held criminally liability [30]. The number of supporters of the introduction of criminal liability of legal persons is growing, since the civil liability of legal persons has obvious disadvantages that do not allow to fulfil the requirements of international anti-corruption conventions to ensure effective, proportionate and dissuasive impact on legal persons.

At present, Uzbekistan is engaged in a gradual study of the possibilities of introducing liability of legal persons and abandoning the views established in theory regarding the impossibility of prosecution without actual and objective guilt. There are several obstacles that put this issue on hold.

Thus, according to experts, the main problem is the identification of the subjective side of the act.

In the theory of jurisprudence, the necessary condition for criminal liability is guilt, which is understood as a psychological attitude of a person to the act committed. It should be noted that in all cases the subjects of crimes will be specific individuals. Consequently, the guilt of a legal entity is manifested indirectly through the guilty behaviour of its employees, who control the legal entity's exercise of its rights and obligations. In addition, a legal entity is recognised by law as an autonomous subject of law that exists independently of natural persons. Thus, legal persons may be liable for actions of individuals, when these actions are committed in favour or on behalf of the legal entity.

Another problem is related to the punishment of legal persons: it is pointed out that traditional types of sanctions, such as deprivation of liberty or restriction of movement, cannot be applied to legal persons. But this problem is of organizational and practical nature. Other sanctions of a pecuniary or economic nature may be applied to a legal entity, related to the activities of the legal entity (fines, restriction of corporate rights and other prohibitions) or its reputation (publication the court judgement).

Conclusion

Thus, the issue of introducing the corporate criminal liability is solvable, but will require significant changes in the institutions of criminal law related to the concept, composition and punishment of the crime.

Based on the outlined analysis the following proposals have been formulated for the implementation of corporate criminal liability in national legislation:

1. The following mandatory conditions for criminal liability of legal persons should be specified:

a) the criminal act must be committed in favour of a legal person. The commission of a crime "in favour" of a legal person means that the entity receives some benefit from the criminal act.

b) the criminal act must be committed by its leader or materially responsible persons. The commission of a crime, although in favour of a legal person, but by other persons: technical workers, service personnel, ordinary employees, based on their functional responsibilities, do not entail criminal liability for legal entities;

2. It is necessary to clearly define the range of legal persons responsible for the commission of corruption crimes. For example, in our view, the state in general and state bodies separately should not be held criminally liable;

3. The list of crimes for which legal persons will be held criminally liable should be clearly stated in the criminal law. For example, bribery, trading in influence, money laundering, etc.;

4. Determine the types of criminal penalties that may be imposed on a legal person. For example, a fine, prohibition to engage in certain activities, liquidation of a legal entity, confiscation of property, etc.;

5. Norms relating to the criminal liability of legal persons may be reflected in separate articles of the Criminal Code of the Republic of Uzbekistan (the draft law is attached). At the same time, the peculiarities of criminal proceedings against legal persons are to be established in the Code of Criminal Procedure.

The introduction into practice the above proposed measures of liability of legal persons will help to reduce corruption risks and crimes of this kind.

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