

SOME ISSUES OF THE INTERPRETATION OF CORRUPTION AND OTHER CRIMES AGAINST THE INTERESTS OF SERVICE IN THE EFFECTIVE CRIMINAL LEGISLATION OF THE REPUBLIC OF AZERBAIJAN

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The article is about a number of important issues in the definition of corruption crimes and other crimes against the interests of the service and ways to solve them. In addition, the article highlights the problems that arise in the description of corruption crimes and other crimes against the interests of the service, referring to the different views expressed by the authors in the literature on the description of the crimes mentioned.

Key words: corruption, service interests, abuse of office, bribery, official, description, criminal liability.

Beingcomes from the Arabic word “advice”description means to give suggestions, advice, ways on how to act, how to do something. In criminal law, thedescriptionis used as an action of choosing one or another norm of the law in the settlement of liability for a crime [7, p.130].

According to the view of R.A.Shamsizade and T.Y.Garayev, the description of the crimeis determination of the basis of criminal liability, in other words, the first stage of application of the norm expressed in the presence of criminal elements in practice. The description of the crime is expressedwith reference to the article (articles, part of the article) of the Criminal Code. However, referring to an article of the law is not naturally an independent purpose and is not limited to the application of the law [3, p.16].

In general, the outline of the crime gives an actual legal assessment of the crime.

Therefore, the outline must be accurate and fully cover the act committed. Such activity should not be based on bias, and should not be allowed to be interpreted in a way that does not follow the spirit of the criminal law. Because the correct description of the crime has important socio-political and legal significance. Thus, an incorrect description may lead to the prosecution of an inaccurate person, or to the impunity of a person guilty of a crime, or to the improper application of punishment. Therefore, while rendering a verdict, the courts must clarify the nature of the crime in the act and under which article of the law the offense was committed by the offender.

As seen, the precondition for whether a person’s act is a crime and for choosing the form of legal regulation for that act is a correct description of the act. Because, first of all, it is necessary to take into account that the definition of a crime is crucial for distinguishing criminal acts from non-criminal violations and immoral acts. Mistakes here can lead to unjustified criminal prosecution of the perpetrator and, consequently, gross violations of the law. Such “assessment” of the act leads to the exclusion of the offender from responsibility, impedes the implementation of the principle of inevitability of responsibility, and seriously undermines the fight against crime [3, p.51-52].

From the point of view of the above, the definition of corruption and other crimes against the service interests is as important

as other criminal acts. Since the correct description of a crime is a definition of a crime in a specific act, in addition to the official recognition of a person's crime as a crime under the relevant article of the Criminal Code, in other words, the person is found guilty of a crime, has other legal consequences, such as sentencing and sentencing. Therefore, in order to correctly describe criminal acts related to corruption, first of all, it is necessary to clearly define the general and individual components that characterize these acts. Thus, the corruption offenses provided for in the provisions of Chapter 33 of the Criminal Code, so called "Corruption Crimes and Other Crimes against the Service interests", possess some common features:

1. The object of these crimes is public relations related to the normal functioning of the state apparatus and local self-government apparatus and their separate structural units. Additional objects of some of them are the rights and legitimate interests of citizens or organizations, as well as the legally protected interests of society and the state. In some crimes, the subject of the crime is considered as a mandatory feature: material reward, privilege or privilege (Articles 311, 312 and 312-1 of the Criminal Code), official documents (Article 313 of the Criminal Code).

2. These crimes can be divided into two parts according to the structure of the objective side:

a) Materially defined – Articles 308, 309.1, 310 of the Criminal Code. Legislation refers to a material violation of the rights and legitimate interests of citizens or organizations, or a significant violation of the legally protected interests of society and the state.

b) Formally defined – Articles 309.2, 311, 312, 312-1, 313 of the Criminal Code.

Most crimes can be committed only by action, but the acts provided for in Article 308 of the Criminal Code can be committed by both motionlessness and action.

3. This category of crimes is usually characterized by a subjective form of guilt. Greed or other personal interest is considered as a mandatory element of the subjective aspect of abuse of office and forgery.

4. According to R.I.Guliyev, corruption crimes can be divided into 4 groups from the point of view of the subject:

– crimes committed only by officials (Articles 308, 309, 311 of the Criminal Code);

– crimes committed by officials, civil servants and employees of municipal bodies (Article 313 of the Criminal Code);

– crimes committed by employees of state and municipal bodies (Article 310 of the Criminal Code);

– crimes committed by a common subject (Articles 312 and 312-1 of the Criminal Code) [4, p.720].

In this view, depending on the criminal legal status of the subject, all corruption crimes can be conditionally divided into three groups:

a) Common official crimes might be committed in any field of activity of the state apparatus and local self-government bodies and are punishable by the regulations of Chapter 33 of the Criminal Code;

b) Special official crimes committed only by officials with additional specific features only in certain structural units and areas of the state apparatus and local self-government bodies;

c) Alternative official crimes might be committed by both officials and individuals.

Here, we must pay special attention to the fact that if an official has committed a crime that completely coincides with the features of both general and special norms, then it is impossible to speak of a set of crimes, and the act should be characterized by a special norm in accordance with Article 17.4 of the Criminal Code. Since this article of the Criminal Code directly states that the commission of a crime provided for in both the general and special norms of the Special Part of the Criminal Code does not constitute a set of crimes, and in this case, a special norm is applied.

Apparently, most of the crimes we are talking about are committed by officials. A broad definition of officials is given in the "Note" part of Article 308 of the Criminal Code. It should be noted that the Plenum of the Constitutional Court of the Republic of Azerbaijan has a Decision dated July 19, 2013 "On the interpretation of the term "official"

provided for in the “Note” part of Article 308 of the Criminal Code of the Republic of Azerbaijan”. Considering the above, the Plenum of the Constitutional Court concludes that according to the meaning of the “Note” part of Article 308 of the Criminal Code:

- civil servants, members of municipalities and municipal servants, officers, ensigns or midshipmen who have the authority to dispose of subordinates or non-subordinates in the manner prescribed by law or to make decisions that are binding on legal entities and individuals are considered as officials;

- Staff of state and municipal enterprises, departments and organizations, as well as other commercial and non-commercial organizations, persons engaged in entrepreneurial activity without establishing a legal entity, or an official who commits actions that may result [13].

In addition, Plenum of the Constitutional Court in the Order dated on July 19, 2013 “On the interpretation of the term “officials” provided for in the “Note” part of Article 308 of the Criminal Code of the Republic of Azerbaijan” based on the meaning of the “Note” part of Article 308 of the Criminal Code, determined that:

- Persons whose candidacy for elected positions in state bodies has been registered in accordance with the procedure established by law means persons registered as candidates for the President of the Republic of Azerbaijan and the Milli Majlis of the Republic of Azerbaijan in accordance with the Election Code of the Republic of Azerbaijan by the relevant election commission.

- According to paragraphs 3-4 of the Note to Article 308 of the Criminal Code, heads and employees of state and municipal enterprises, departments and organizations, other commercial and non-commercial organizations, as well as state and municipal enterprises, departments and organizations, other commercial and non-commercial – Persons performing organizational-administrative or administrative-economic functions under special authority in commercial organizations are considered officials.

- Persons engaged in entrepreneurial activity without establishing a legal entity as an

official means individuals who are registered as taxpayers in this section according to the tax legislation.

- A government representative is a person who, within its authority, makes decisions and makes demands that are binding on departments, enterprises, organizations and citizens, regardless of their sectoral affiliation, subordination and form of ownership. The category of government representatives includes representatives of the legislative, executive and judicial branches exercising state power defined by Article 7 of the Constitution of the Republic of Azerbaijan [13].

Note that the legislation also includes civil servants in a group of officials. According to Article 14 of the Law of the Republic of Azerbaijan “On Civil Service” of July 21, 2000, entitled “Civil Servant”, a civil servant shall be a paid civil servant (salary may be paid only from the state budget) is a citizen of the Republic of Azerbaijan who has sworn allegiance to the Republic of Azerbaijan upon admission [11].

The “Note” of Article 308 of the Criminal Code also applies to municipal members and municipal servants as officials. According to Article 15 of the Law of the Republic of Azerbaijan “On the Status of Municipalities” dated on July 02, 1999 (“Municipal member”), a member of a municipality is a person elected in municipal elections and whose mandate is approved by the territorial election commission [12].

It should be noted that from the point of view of the criminal legislation of the Republic of Azerbaijan, the concepts of “civil servant” and “official” cannot be equated. This is because the concepts of “duties person” and “civil servant” are partially overlapping, but have different meanings. Thus, there is an official who is not a civil servant and there is a civil servant who does not have the characteristics of an official.

As mentioned earlier, for the correct and successful description of corruption offenses and other crimes against the service interests, it is necessary to specify, in addition to the general characteristics that characterize these acts, the individual components. Because, in addition to helping to correctly describe the

act, these features define the boundaries of the separation of similar and close criminal elements among corruption crimes, distinguishing them from each other. For example, in the description of Articles 308 (abuse of power), 309 (abuse of power) and 310 (misappropriation of official authority) of the Criminal Code, it should be taken into account that liability for abuse of power is provided. According to the content of the disposition of the relevant article, the action or omission, which is an objective aspect of the abuse of power, must arise from the legal powers of the official. If an official uses his authority to act outside the scope of his authority, this act will be classified under Article 309 or 310 of the Criminal Code, if there are relevant indications, and not under the said article.

Alternatively, Article 308.2 of the Code states that the actions provided for in Article 308.1 of the Criminal Code may have grave consequences or be committed for the purpose of influencing the results of elections (referendums) as aggravating signs of abuse of office. Here, serious consequences include violation of the work of the state administration and enterprise, mass violation of the rights and freedoms of citizens, significant property damage to citizens, the state and individual organizations, and so on. can be understood. If the serious consequences constitute another crime, the act must be classified as a cumulative offense (for example, in the case of large-scale property damage, the act can be classified under Articles 308.2 and 186 of the Criminal Code) [6, p.632].

In addition, the crime in question is material in nature. This means that one of the necessary signs of the objective nature of the abuse of power is the occurrence of a socially dangerous consequence, which is expressed in significant harm to the rights and legitimate interests of individuals or legal entities, or the legally protected interests of society or the state. Such a result can be expressed in real material damage, lost profits, as well as other damage to various values protected by law (violation of constitutional rights and freedoms of citizens, discrediting the authorities, obstruction of their work, violation of public order, etc.). In addition, the consequences of

abuse of power may include minor or less serious damage to the health of citizens.

However, if, in the course of the use of force, there is an intentional infliction of grievous bodily harm or death, the act will be classified as a cumulative offense under Articles 309.2 and 126 or 120 of the Criminal Code. It should be noted that illegal arrest, detention or detention are not included in these signs. Because the above-mentioned acts are fully covered by Article 292 of the Criminal Code, they must be described by that article.

Examples of Article 311 (bribery (passive bribery)) can be used to describe another problem in the description. For example, the article states that the crime was committed in person or through an intermediary as a method of committing a crime. It should be noted that in this case, if the mediator is a person who can be prosecuted (16 years of age and reasonable) and the case of mediating in bribery is realized, its practical assistance as bribery (Articles 32.5 and 311 of the Criminal Code) should be described. It should also be noted that a family member or close friend may act as a mediator with the consent of the bribee; financial resources can also be transferred directly to the account of the bribee. In addition, liability for taking a bribe will arise regardless of when (before or after performing a certain action or motionlessness) the bribe was taken by the official, whether it was conditioned in advance, and whether any action was taken in the interests of the briberer as a result.

From this point of view, paragraph 5 of the Decision No. 3 of the Plenum of the Supreme Court of the USSR of March 30, 1990 "On Cases of Bribery" is about the act of the offender will be considered as bribery or bribetaking in cases where bribery and although there is no prior agreement on the receipt of bribes and the provision of services, the perpetrators realize that bribes are paid in the interests of the briberer [6, p.647].

If, despite the offer or promise of a bribe, if the official refuses to accept the offer or promise, that is, if an official does not agree to the offer or promise, or rejects the offer or promise, then the act must be classified as an attempt to bribe (Articles 29 and 312 of the Criminal Code).

Refer that Article 311.3 of the Criminal Code specifies the aggravating features of bribery, which also include::

a) Bribery by a group of individuals or an organized group in advance. Only officials who are joint executors may act as a group of persons who have agreed in advance to correctly describe the act. The actions of other subjects should be described with reference to Article 32 of the Criminal Code. It should be noted that premeditated collusion may be related to the fact of receiving a specific bribe from one person, as well as the fact that in the future they will work together to repeatedly take bribes from an unknown number of people. However, if an official transfers part of the bribe to another official (without the prior consent of the latter) in order to perform the desired action in favor of the briberer, he must be prosecuted under Articles 311 and 312 of the Criminal Code.

Generally, officials who take bribes with prior consent are not required to act in favor of the briberer. Such actions may be taken by one official with the consent or negligence of the other. For example, the prosecutor's office investigator terminates a criminal case with the consent of the prosecutor.

Further, it is not required to know whether the briberer was aware of the existence of several bribees in order to accuse it of the aggravating circumstance in question. At least one member of the group is considered to have committed the crime from the moment he or she receives at least part of the bribe in order to divide it among themselves in the future.

b) Repeated bribery can occur in the following cases:

- Since the person has been previously convicted of bribery and the conviction has not been paid and considered with the law;
- Since the bribe is taken from the same person at different times for different actions in his favor;
- Since the bribe is taken from different people at different times for different actions;
- Since the bribe is taken from different persons at the same time and in order to act independently in favor of each of them;
- Since the bribe is taken at different times from several persons who act indepen-

dently without prior consent and are unaware of each other's actions, in order to do the same in their favor, provided that the fact on the bribee acted independently of each other should be covered by the bribee's consciousness is important.

It should also be noted that bribery in several ways for the same act cannot be considered a repeat offense.

c) Bribery in a large amount, ie more than five thousand manats, according to Article 311 of the Criminal Code.

d) Bribery through frighten. A threat is the demand for a bribe under the threat of committing an act in the service that may harm the interests of the briberer, or the intentional creation of a situation in which the briberer is forced to pay a bribe to prevent harmful consequences. If the refusal to pay a bribe threatens to violate the legitimate interests of the briberer, then this aggravating circumstance may not be applied [4, p.737-739].

If the subject, after receiving the object of bribery to give to the official, transfers it to his property (false intermediary), then the briberer's actions must be described in Articles 29 (completed attempt) and 312 of the Criminal Code, and the actions of a false mediator must be described in Article 178 of the CC, in addition to Articles 32, 29 and 312 of the Criminal Code, in case of incited to pay a bribe.

The actions of false bribees, those who present themselves as officials and take bribes on their behalf, should be described in a similar way. In this case, actions of a civil servant or an employee of a local self-government body introducing himself as an official, must be described in Articles 178 and 310 of the Criminal Code.

In another case, while a person illegally and gratuitously transfers property to itself entrusted to him by order, management, procurement and other powers in connection with its title, then its action will be described by Article 179.2.3 of the Criminal Code (embezzlement or waste using the position of service) (for example, brigade, supplier, etc.).

References list:

1. Aghayev I.B. Criminal law. Special part: Textbook. – Baku: “NURLAR”, – 2018. – 488 p.
2. Collection of Orders of the Plenum of the Supreme Court of the Republic of Azerbaijan (1991-2016). – Baku: “MSV NESHR”, – 2017. – 480 p.
3. Garayev T.Y., Shamsizade R.A. Theoretical bases of crime description: Textbook. – Baku: Azerbaijan Devlet Universiteti, – 1988. – 78 p.
4. Guliyev R.I., Imanov M.N. Criminal law. Special part: Textbook. Reprinted. – Baku: Qanun, – 2004. – 816 p.
5. Javadov F., Abdullayev Y. Historical roots of corruption and public danger // Actual issues of forensic science, criminology and criminology (collection of scientific works). – Baku, – 2013. №59, p.6-26
6. Reviews on the Criminal Code of the Republic of Azerbaijan / PhD on law, Edited by prof. F.Y.Samandarov. Revised reprint. Part II. Interpretation of Articles 190-353 of the Criminal Code. – Baku: Huquq Yayin Evi, – 2018. – 800 p.
7. Samandarov F.Y. Criminal law. General part: Textbook. Revised reprint. – Baku: Huquq Yayin Evi, – 2018. – 720 p.
8. Агаев И.Б. Уголовное право Азербайджанской Республики. Общая и Особенная части: Учебник / И.Б.Агаев, В.П.Ревин. –М.: Юрист, – 2009. – 684 с. (institutiones)
9. Максимов С.В. Коррупция. Закон. Ответственность. –М.: Учебно-консультационный центр «ЮрИнфоР», – 2000. – 143 с.
10. <http://e-qanun.az/framework/897> – Azerbaijan Respublikasinin 1995-ci il Konstitusiyasi (The Constitution of the Republic of Azerbaijan of 1995).
11. <http://e-qanun.az/framework/4481> – “Dovlet qullughu haqqinda” Azerbaijan Respublikasinin 21 iyul 2000-ci Qanunu (Law of the Republic of Azerbaijan “On Civil Service” dated on July 21, 2000).
12. <http://e-qanun.az/framework/4770> – “Belediyyelerin statusu haqqinda” Azerbaijan Respublikasinin 2 iyul 1999-cu il tarixli Qanunu (Law of the Republic of Azerbaijan “On the Status of Municipalities” dated on July 2, 1999).
13. <http://e-qanun.az/framework/26312> – Azerbaijan Respublikasi Konstitusiyasi Mehkemesi Plenumunun “Azerbaijan Respublikasi Cinayet Mecellesinin 308-ci maddesinin “Qeyd” hissesinde nezerde tutulmuş “vezifeli shexs” anlayishinin sherh olunmasina dair” 19 iyul 2013-cü il tarixli Qerari (Order of the Constitutional Court of the Republic of Azerbaijan “On interpretation of the term “official” provided for in the “Note” part of Article 308 of the Criminal Code of the Republic of Azerbaijan” dated on July 19, 2013).
14. <http://e-qanun.az/framework/46947> – Azerbaijan Respublikasinin 30 dekabr 1999-cu il Cinayet Mecellesi (Criminal Code of the Republic of Azerbaijan dated on December 30, 1999).

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НЕКОТОРЫЕ ВОПРОСЫ КЛАССИФИКАЦИИ КОРРУПЦИОННЫХ И ПРОЧИХ ПРЕСТУПЛЕНИЙ ПРОТИВ СЛУЖЕБНОЙ ВЫГОДЫ В ДЕЙСТВУЮЩЕМ УГОЛОВНОМ ЗАКОНОДАТЕЛЬСТВЕ АЗЕРБАЙДЖАНСКОЙ РЕСПУБЛИКИ

В статье говорится о коррупционных преступлениях и ряде важных проблем классификации других преступлений против служебной выгоды и о путях их решений. Кроме этого, ссылаясь на различные мысли со стороны авторов в литературе, связанной с классификацией названных в статье преступлений, освещаются проблемы, возникающие при описании коррупционных преступлений и иных преступлений против служебной выгоды.

Ключевые слова: Коррупция, служебное положение, злоупотребление должностными полномочиями, взяточничество, должностное лицо, классификация, уголовная ответственность.