

The Legal Regulation of the Imposition of Punishment for Cumulative Offenses in the Republic of Kazakhstan

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Abstract: The problems of regulation of sentencing for cumulative offenses in the Criminal Law of the Republic of Kazakhstan. The ambiguity of the value of methods of punishment for crimes and set criteria for identifying its limits causes violation of fundamental principles of justice. Thus, the author raises the question of the rules of sentencing set for minor and medium gravity offences under Article 58 Part 2 of the Criminal Code that while prescribing sentencing as a single offense, in fact, negate the value of cumulative crimes. In addition, the criteria determining the numerical limits of sentencing set for committing a battery of grievous and extremely grievous crimes, whereas the regulation of sentencing for grievous extremely grievous offenses is absent from the Criminal Code of the Republic of Kazakhstan. In this connection, the author conducts a study of these issues and offers her insight into their solutions.

Key words: Criminal law • Multiple crimes • Cumulative crimes • Sentencing • The justice of punishment

INTRODUCTION

Improvement of provisions of any legislation is a continuous process determined by the importance of solved issues and social changes. The standards, which regulate responsibility for commitment of multiple crimes, are not an exclusion, particularly, provisions on imposing punishment for cumulative crimes, which are the subject of our research. During the research, we used methods of materialistic dialectics, structured system analysis as well as methods of formal and deontic logic.

The rules of imposing punishment for a cumulative crime are formulated in Article 58 Part 1 of the Criminal Code of the Republic of Kazakhstan. In case of a cumulative crime, the court after having imposed punishment (main and additional) for each offense separately, determines the final punishment by way of absorption of less severe punishment by the more severe one or by way of summation of punishments.

According to the provision, courts impose punishments in two stages. First, a court imposes main and additional punishment for each offense separately.

Secondly, the court determines the final punishment by way of absorption of the more severe punishment by the less severe one or by way of summation of punishments. At the same time, Clause 18 of the Regulatory Decree of the Supreme Court of Kazakhstan "On Courts' Abidance by Legitimacy at Imposing Criminal Punishment" #1 dated April 30, 1999 (with further amendments and supplements) supplements Article 58 Part 1 of the Criminal Code of the Republic of Kazakhstan by emphasizing the option for a court to apply both principles at a time: "When imposing cumulative punishment for three or more offenses, a court is entitled to apply both principles simultaneously, by application of the principle of absorption of a less severe punishment by the other, more severe one, which was imposed for minor offenses and then, the principle of partial or complete addition of this punishment to the punishments imposed for offenses of medium gravity, grievous and extremely grievous offenses, which compose the whole cumulative crime" [1, 249].

Article 58 Part 2 of the Criminal Code of the Republic of Kazakhstan says, "If a cumulative crime includes only

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minor and medium-gravity offenses, the final punishment is to be imposed by means of absorption of the less severe punishment by the more severe one".

If we follow the letter of the law, the words "minor and medium-gravity crimes" provided in Article 58 Part 2 of the Criminal Code of the Republic of Kazakhstan mean that this method is to be applied only for cumulative punishments consisting of minor and medium gravity crimes and the crimes consisting of only minor crimes or only medium-gravity crimes are excluded from this meaning. This concept is related to using the conjunction "and" and is, most probably, a technical error of lawmakers. Similar parsimonious interpretation will exist with respect to using the conjunction "or", which would mean only minor or only medium gravity crimes. Therefore, the most appropriate structure for this would be "minor and (or) medium-gravity crimes", which would completely eliminate erroneous interpretation of this issue.

According to Article 58 Part 2 of the Criminal Code of the Republic of Kazakhstan, imposing punishment in cases of cumulative minor or medium-gravity crimes is limited to the method of absorption of the less severe punishment by the more severe one. Besides, we believe that the strict limitation by lawmakers of the punishment-imposing procedures in cases of minor and medium-gravity crimes in Article 58 Part 2 of the Criminal Code of the Republic of Kazakhstan by only absorption of the less severe punishment by the more severe one, contradicts the penal meaning of the cumulative crime and, accordingly, the principle of justice at imposing punishment (Article 52 of the Criminal Code of the Republic of Kazakhstan). It turns out so that having committed two, five, or ten minor or medium-gravity crimes, a person will be punished as though it had committed a single crime, which is to be punished more severely and this is obviously not in proportion with the social harm caused by the committed crimes. In this view, I.B. Agaev believes that: "... at imposing punishment for cumulative crimes, the absorption must be used in exclusive cases, when it is impossible to determine the final punishment by other methods" [2, 286]. According to O.A. Sadovnikova, "the principle of absorption of the less severe punishment by the more severe one stated by Article 69 Part 2 of the Criminal Code of the Republic of Kazakhstan (Article 58 Part 2 of the Criminal Code of the Republic of Kazakhstan - author's remark) is to be applied for imposing punishment for cumulative crimes of minor and (or) medium-gravity nature in the following cases: 1) for a cumulative crime committed because of negligence

or for combination of an intentional crime and crime of negligence; 2) at imposing punishment for a cumulative crime consisting of several intentional offenses, if the court has applied the rules stipulated by Article 64 of the Criminal Code of the Republic of Kazakhstan (Article 55 of the Criminal Code of the Republic of Kazakhstan – the author's remark) with respect to one or several crimes, which constitute the cumulative crime" [3, 8]. This viewpoint is reasonable and comports with the Concept of Legal Policy of the Republic of Kazakhstan during 2010-2020, which was approved by the Decree of the President of the Republic of Kazakhstan #858 dated 24.08.2009 with respect to humanization of the criminal law: "the criminal law policy of the government must be oriented to: ... providing adequacy of punishments in sanctions stipulated by Articles of the Criminal Code that relate to crimes of the same gravity and their abidance by the principle of justice" [4, 8]. Thus, punishment for a cumulative minor and medium-gravity crime must be imposed both by way of absorption of the less severe punishment by the more severe one and by way of partial or complete summation of punishments, as application of only the absorption method contradicts the penal concept of the cumulative crime and the principle of justified imposition of punishment.

It is to be noted that the Criminal Law of the Republic of Kazakhstan does not contain any procedures concerning imposition of punishment for cumulative crimes consisting of medium-gravity and grievous crimes. According to Article 58 Part 1 of the Criminal Code of the Republic of Kazakhstan, the punishment in this case must be imposed using both principles, while the upper limit of the final punishment is determined by the court at its own discretion.

According to Article 58 Part 3 of the Criminal Code of the Republic of Kazakhstan, if a cumulative crime consists of grievous and extremely grievous crimes, the final punishment must be imposed using the principle of absorption of the less severe punishment by the more severe one or the principle of partial or complete summation of punishments. At that, the final punishment in the form of imprisonment cannot exceed twenty years.

If a cumulative crime includes at least one extremely grievous crime, for committing which the Criminal Code of the Republic of Kazakhstan stipulates punishment in the form of imprisonment for a period of up to twenty years or death penalty, or life imprisonment, the final punishment is to be imposed by way of partial or complete summation of punishments. At that, the final punishment in the form of imprisonment cannot exceed twenty five years. If life

imprisonment or death penalty is the punishment for a crime, which is part of a cumulative crime, the final punishment is to be imposed in the form of life imprisonment or death penalty, accordingly (Article 58 Part 4 of the Criminal Code of the Republic of Kazakhstan).

The conjunction "or" used in Article 58 Part 3 of the Criminal Code of the Republic of Kazakhstan assumes the alternative between grievous and extremely grievous crimes, which is not entirely correct, as it excludes any battery of grievous and extremely grievous crimes. It is more preferable to use "grievous and (or) extremely grievous crimes" here to ensure correct interpretation of the procedure of imposition of punishment for a battery of crimes of the mentioned category.

Parts 3 and 4 of Article 58 of the Criminal Code of the Republic of Kazakhstan also stipulate partial or complete summation of punishment for a cumulative offense consisting of grievous and extremely grievous crimes, which provides courts with flexibility to ensure imposing righteous punishment taking into account all circumstances of the crime. As we have mentioned above, the application of the method of absorption of the less severe punishment by the more severe one contradicts the penal nature of the cumulative crime concept and the principle of justice at imposition of punishment. However, usage of the principle of complete summation of maximum punishment for a battery of grievous and extremely grievous crimes is neither virtually practicable because of the limits of final punishments stated in the mentioned regulations with the maximum punishments being 20 and 25 years of imprisonment (Article 58 Parts 3 and 4, Article 49 Part 3, Article 69 Part 5 and Article 75 Part 4 of the Criminal Code of the Republic of Kazakhstan).

For example according to Article 10 Part 4 of the Criminal Code of the Republic of Kazakhstan, those offenses are acknowledged grievous, for which the Criminal Code of the Republic of Kazakhstan states the maximum punishment of 12 years of imprisonment and Article 10 Part 5 of the Criminal Code of the Republic of Kazakhstan states that intentional offenses are acknowledged extremely grievous if the legal punishment for them is 12 years of imprisonment and more, or death penalty, meanwhile Article 48 Part 3 of the Criminal Code of the Republic of Kazakhstan stipulates the maximum imprisonment period for having committed a single offense equal to 15 years and for having committed an extremely grievous offense - equal to twenty years or life imprisonment. Study of the Special Part of the Criminal Code of the Republic of Kazakhstan shows that penal

sanctions for extremely grievous crime mostly stipulate "up to 20 years of imprisonment". This means that the difference between the terms of imprisonment for having committed an extremely grievous offense and a battery of grievous and extremely grievous offense is only five years, which eliminates the possibility to apply the principle of complete summation of punishments for a cumulative crime. Thus, imposition of punishment for a cumulative crime consisting of grievous and (or) extremely grievous offenses is possible only by means of partial summation.

For example Mr. X. caused intentional grievous bodily harm to Mr. Y, being driven by social, race, or religious intolerance, with extreme atrocity, which recklessly resulted in the death of the victim (Article 103 Part 3 of the Criminal Code of the Republic of Kazakhstan - between five and ten years of imprisonment) and then murders Mr. Z. with the purpose to secrete the other offense Article 96 Part 2 Item "k" of the Criminal Code of the Republic of Kazakhstan - between ten and twenty years of imprisonment). If we apply complete summation of maximum punishments stated for the committed offenses, the final punishment will be equal to thirty years of imprisonment, which does not comply with Article 58 Part 4 of the Criminal Code of the Republic of Kazakhstan.

Of course, stating maximum limits for final punishment in the form of imprisonment using only maximum punishments for the offenses that constitute a cumulative crime is not acceptable due to the probability of imposing punishment in the form of an excessively long imprisonment, which the offender cannot survive and which is economically unreasoned and contradicts the purposes of punishment, which include, in particular, correction of the prisoner, because in some cases he can be deprived of such an opportunity.

It is fair to note that the issue of imposing a justified punishment has been and remains the subject of researches of legal theorists for a long time.

Starting from 1960s, the issues of justice of imposed punishment, its type and limit became the topic of researches of such scientists as Mabbott J.D. [5, 152-156]; Armstrong K.G. [6, 471-490]; A. Von Hirsch [7, 591-634]; Babbage S.B. [8]; Tata C., Hutton N. [9] who represented the USA and other countries.

As to the studied issue, E.V. Blagov wrote, "Current legislation provides two types of imprisonment: for a definite term and for life (Articles 56 and 57 of the Criminal Code of the Republic of Kazakhstan). It is obvious that the first type must not transform to the second one, which means that in order to impose punishment for a

cumulative crime, there should be some certain maximum limit of the imprisonment period that can be survived by the imprisoned person" [10, 658]. This means that setting some definite limit for final punishment for a cumulative crime is a necessity.

It is fair to notice that Parts 2, 3 and 4 of Article 58 of the Criminal Code of the Republic of Kazakhstan concern only imposition of main punishment in the form of imprisonment and imposition of the final additional punishment and punishment of other type except for imprisonment (Article 39 of the Criminal Code of the Republic of Kazakhstan) is ignored. It is obvious that imposition of punishments not related to imprisonment must be fulfilled by both methods of imposition of punishment according to Article 58 Part 1 of the Criminal Code of the Republic of Kazakhstan. However, the limit of the maximum punishment of such type can be determined only to some extent taking into account Article 61 of the Criminal Code of the Republic of Kazakhstan and legislative logics (Article 58 Part 5 of the Criminal Code of the Republic of Kazakhstan) – it cannot exceed the maximum term stipulated for this type of punishment by the General Part of the Criminal Code of the Republic of Kazakhstan.

Thus, the above evidences the worthlessness of the legislative regulation of the considered rules of imposition of punishment. At the same time, setting a specific limit for a final punishment for a cumulative offense is quite substantiated. As, for example, when applying the principle of complete summation of maximum punishments for offenses that constitute a cumulative crime, there is a probability to impose excessively long imprisonment, which a person would not be able to survive, it seems nonsensical and unacceptable from the economic point of view and contradicts the goals of imposition of punishment, particularly, the goal of the prisoner's correction.

On top of that, it is to be noted that provisions of Article 58 of the Criminal Code of the Republic of Kazakhstan omit the issue of imposing punishment for each episode of a cumulative crime, which provides the court with excessive opportunities to vary the punishment and, thus, leads to violation of the principle of individualization of punishment.

Solution of the mentioned problems and contradictions can be found in elimination of the principle of absorption of the less severe punishment by the more severe one and statement of a universal limit for final punishment for a cumulative crime in the Criminal Code of the Republic of Kazakhstan disregarding the type of punishment and the gravity of the offenses, namely - not

exceeding half of the maximum term and size of the punishment, which can be imposed for the most grievous crime.

Such limits of the maximum punishment, which do not depend on the gravity of the offenses, constituting a cumulative crime and the types of punishments stated for their commitment, would be determined according to the penal sanction for the offenses. This would allow to regulate imposition of punishment in each case of cumulative crimes, contribute to elimination of the mentioned contradictions and implementation of the principles of individualization, justice and legitimacy of the imposition of punishment. Such limits for punishments exist in the criminal codes of Russia and Japan.

Thus, we suggest to adopt the following edition of Article 58 Part 1 of the Criminal Code of the Republic of Kazakhstan: "In case of cumulative crime, the court after having imposed punishment (main and additional) for each crime separately, states the final punishment by way of absorption of full or partial summation", to exclude Article 58 Part 2 and Article 58 Part 4 of the Criminal Code of the Republic of Kazakhstan and to adopt the following edition of Article 58 Part 3 of the Criminal Code of the Republic of Kazakhstan: "In case of cumulative crime, the final punishment cannot exceed half of the maximum term or size of punishment provided for the most grievous of the committed crimes. If life imprisonment or death penalty is provided for a crime, which is part of a cumulative crime, the final punishment is to be imposed in the form of life imprisonment or death penalty, accordingly" [11, 149].

In summary, we would like to note that the studied issue concerns rights and interests of prosecuted persons, so it is necessary to take relevant measures for its solution and creation of an efficient institution of multiple crime, which would meet the basic principles of justice.

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