Criminal Law Nature of Criminal Incomes Legalization

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Abstract:

Combat against crimes relating to the legalization of criminal incomes became one of the most important directions of the economic and criminal policy of the state nowadays. The domestic law of almost every state, including Russia, contain the relevant legal provisions. However, the lack of clear theoretical base determining the legal nature of this crime impedes the effective application of law. Specialists tend to associate the said crime with theoretical concepts of involvement in a crime and degrees of crime commission. However, today such approach appears to fail to ensure the correct understanding of the level of social danger of criminal incomes legalization, as well as fails to ensure that the crime qualification issues are adequately addressed. This article proves the necessity for reconsideration of common approach to criminal incomes legalization and, based on analysis of the economic mechanism and economic consequences of criminal incomes legalization, substantiates the point that this crime has a specific legal nature.

Key words: *Legal nature of criminal incomes legalization, concealment, criminal complicity, theoretical constructions and practical needs.*

The time frame within which the legal provisions regarding the criminal liability for criminal incomes legalization are contained in the Russian criminal law is quite short in terms of historical standards relating to science progress stages. Therefore, it is easy to explain that criminal law elaboration of issues which have to be solved in order to ensure effective application of the relevant legal provisions has a short history and faces many difficulties.

From the theoretical perspective, one of the most serious difficulties is to substantiate the legal nature of legalization and to correlate it with the existing constructions of *corpus delicti*, degrees of crime commission and complicity.

It is not much of exaggeration to say that Russian scholarship often follows the momentum of earlier times and achievements, and therefore it has by now failed to get the complete understanding of legalization nature and the grounds of its legal qualification.

Turning to the actual discussion of this crucial issue, it should be noted that it shall necessary “fall into” two directions: substantiating the nature of criminal incomes legalization received by third parties and that of one’s own criminal incomes, as we believe their legal nature differs.

Thus we shall take a typical situation which started the legal history of the legalization in the Russian criminal law: legalization of monetary funds and other property acquired by third parties by criminal means.

In such case the actions of a person (say, a legalizer) is assessed through the criminal law from the perspective of two mutually exclusive criminal law constructions, choice and application of which depends on the point when the legalizer becomes aware of the criminal nature of money or property laundered and the point when he agrees to do so.

Therefore, in a situation when a person who did not participate in the predicate crime, but was aware of the criminal nature of money and property, legalizes it after the predicate crime is committed, the aforementioned actions fall within the framework of crime involvement construction which is well known in the legal theory.

The involvement has always been regarded as the activity different from complicity and, in that sense, as an independent activity. In the middle of the past century V.G. Smirnov wrote that "involvement in a crime is the deliberate activity of persons not participating in the crime, aimed at hiding of criminal traces, instruments and objects of the crime or disposal of its outcomes"[1]. Modern definitions of the involvement have not essentially changed.

Many specialists write that it is possible and purposeful to regard legalization of criminal incomes as a type of involvement. In one of the earlier comments to the Criminal Code of the Russian Federation it was directly stated that legalization elements from the technical perspective are similar to the elements of acquisition or purchase of property knowingly obtained be criminal means[2].

At the same time, equation of the legal nature of legalization and involvement inevitably leads to consequences caused by the aforementioned legal nature.

In particular:

- the logical conclusion would be that this crime is independent and cannot be associated with complicity; therefore, that it requires separate legal provisions defining the relevant *corpus delicti* within the Special part of the Criminal Code;

- analysis of legalization object from the perspective of involvement in a crime leads to the conclusion that the interests of justice[3] or the public safety[4] should be regarded as the one;

- analysis of characteristic features of legalization perpetrator from the perspective of the involvement theory shall lead to conclusion that it is impossible to bring to criminal liability a person who has committed a crime legalization of the property and money acquired by him or herself as a result of crime[5];

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[1] Smirnov V.G. The notion of the involvement in the Soviet criminal law (Смирнов В.Г. Понятие прикосновенности по советскому уголовному праву. – Л.: Изд-во ЛГУ, 1957. – С. 44.)

[2] Comments to the Criminal Code of the Russian Federation / edited by Yu. I. Skuratov and V.M. Lebedev (Комментарий к Уголовному кодексу Российской Федерации / под ред. Ю.И. Скуратова и В.М. Лебедева. – М.: ИНФРА-М - НОРМА, 1997. – С. 397.)

[3] Klepitskiy I.A. The system of economic crimes (Клепицкий И.А. Система хозяйственных преступлений. – М.: Статут, 2005. – С. 517.)

[4] Razgildiev B.T. Criminal law issues of involvement in a crime (Разгильдиев Б.Т. Уголовно-правовые проблемы прикосновенности к преступлению. – Саратов: изд-во Саратов. ун-та, 1981. – С. 25.)

[5] Serezhkina K.N. Involvement in a crime in the Russian criminal law: provisions and their implementation optimisation: dissertation abstract ... (Сережкина К.Н. Прикосновенность к преступлению в уголовном праве России: оптимизация норм и практики их применения: автореф. … дис. канд. юрид. наук. – Самара, 2009. – С. 7 – 8.).

- taking into account the independent nature of the criminal legalization, issues related to crime degrees, multiplicity of crimes and complicity shall be considered on the general grounds.

In case we regard legalization of criminal incomes as the involvement in a crime we have to specify its place within other actions regarded as the involvement. Acquiescence and concealment that was not promised beforehand and failure to report a crime are regarded today as the involvement in a crime.

We believe it to be evident that legalization is a specific type of concealment not promised beforehand, because, as it is well known, its nature consists in hiding the criminal source of property or money. However, such approach gives rise to the question regarding relation between legalization criminalised by Article 174 of the Criminal Code of the Russian Federation and concealment criminalized by Article 316 of Criminal Code of the Russian Federation (as well as whether the note to Article 316 of the Criminal Code of the Russian Federation that exempts close relatives and spouses from the liability applies to the legalizer).

Some specialists believe that legalization of monetary funds or other property acquired as the result of particularly serious crime should be qualified as a multiplicity under Articles 174 and 316 of the Criminal Code of the Russian Federation[6]. We assume that it is possible only in case the legalization and concealment are treated as different notions and events, which we believe to be wrong. In case the concealment takes place in the form of legalization, these acts partially overlap, which raises the risk of violation of *non bis in idem* principle. We believe that is more justifiable to regard legalisation as a special case of concealment and the correlation between Articles 174 and 316 of the Criminal Code of the Russian Federation shall be regarded as *lex generalis* and *lex specialis*, which means that the special norm (i.e. Article 174 of the Criminal Code of the Russian Federation[7]) prevails (this in particular concerns the application of the note to Article 316 of the Criminal Code of the Russian Federation: it can not be applied to legalizers due to the fact that it is not provided for by the special norm).

Other line of reasoning and conclusions follows from the analysis of a case when the legalizer expresses his consent to perform the relevant actions with monetary funds or property before the crime that leads to acquisition of such objects is committed. Legalization promised beforehand has a considerable inflicting feature, which makes it possible to consider it from the standpoint of complicity. As it was indicated by A.N. Traynin: “In case the actions close to complicity, i.e. concealment and failure to report, were promised to a criminal beforehand and therefore became part of the general plot which led to the criminal result, they lose their distinctive feature and stop being themselves and shall be regarded as the form of complicity, namely the aiding and abetting”[8]. The criminal legislation in force also provides for that a person who promised beforehand to purchase or conceal objects acquired through a crime shall be

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[6] Mikhaylov V.I. Combating legalisation of income derived from criminal activity: legal regulation, criminal liability, special investigation activities and international cooperation (Михайлов В.И. Противодействие легализации доходов от преступной деятельности: правовое регулирование, уголовная ответственность, оперативно-розыскные мероприятия и международное сотрудничество. – СПб.: Юридический Центр Пресс, 2002. – С. 81.).

[7] Gorelik A.S., Lobanova L.V. Crimes against justice (Горелик А.С., Лобанова Л.В. Преступления против правосудия. – СПБ.: Юридический Центр Пресс, 2005. – С. 214.).

[8] Traynin A.N. Doctrine of complicity (Трайнин А.Н. Учение о соучастии. – М.: Юрид. изд-во НКЮ СССР. – С. 130.).

regarded as an accomplice (Article 33 § 5 of the Criminal Code of the Russian Federation).

In case the beforehand promised legalization is regarded as aiding in crime which should result in acquisition of legalization objects, the following line of argumentation is presupposed:

- social relations which stand as the aim of the "predicate" crime shall be regarded as the legalization object;

- legalization does not require separate criminalisation and can be qualified within the legal framework of complicity, in case it is causally connected to harm inflicted to above-mentioned object as the part of joint activities of the accomplices connected by the united intent;

- legalization being the type of aiding and abetting *ceteris paribus* has a relatively low degree of social danger.

In case the legalization of monetary funds or other property acquired by criminal means is regarded as aiding and abetting, a serious issue arises regarding qualification of the perpetrator's action both as aiding (in predicate crime) and as legalization of criminal incomes. Discussing this issue, P.S. Yani indicates the following: "Due to the fact that there are two objects trespassed, and I believe that the property relations should not be regarded as the additional object protected by the provision stipulating liability for legalization, it should be regarded as multiplicity"[9]. However, in the absence of clarifications of the Plenum of the Supreme Court of the Russian Federation, the criminal law theory provides an alternative solution of the problem. It can be substantiated by the position of the supreme judicial instance stated in the Plenary Resolution No. 11 of the Supreme Court of USSR "On the case-law in the cases concerning intentional concealment and purchase of stolen property, that was not promised beforehand" of 31 July 1962[10] which stated that such multiplicity is not possible due to the fact that the actions regarded as the concealment may either be a complicity or a separate crime.

The stated theoretical approaches to the understanding of legalization disclose, as it was shown, only one construction initially included into the Criminal Code, i.e. legalization of property or monetary funds acquired through criminal means by a third party.

In 2001 the amendments were introduced into the Criminal Code (by the Federal Law of 7 August 2001 No. 121-FZ); according to them, legalization of monetary funds and other property acquired by a person himself as the result of a crime was criminalized as an independent crime.

The results of the doctrinal analysis shown above shall be sufficiently corrected in order to be applied to such *corpus delicti*.

First of all, we shall note that from the standpoint of the today theory, legalization of one's own criminal incomes cannot be considered from the positions of the involvement in a crime or of aiding and abetting. Such legalization is the continuation of the initial criminal activities of a person, and therefore from the theoretical perspective it shall be regarded in the context of crime degree and multiplicity theory.

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[9] Yani P.S. Illegal entrepreneurship and legalisation of property obtained by criminal means//Legislation. - 2005. - No. 3. - Pages 12–13.

[10] Case-Law to the Criminal Code of the Russian Federation/ Prepared by S.V. Borodin, N.I. Ivanova, under the general editing by the V.M. Lebedev (Судебная практика к Уголовному кодексу Российской Федерации / Сост. С.В. Бородин, Н.И. Иванова; под общ. ред. В.М, Лебедева. – 2 изд., перераб. и доп. – М.: Спарк, 2005. – С. 951.).

In this case the situations shall be assessed separately depending on the moment when a person formed the intent to legalize criminal monetary funds and property.

In case a person initially planned to perform financial operations and other transactions with the "dirty" property, i.e. he/she was pursuing the broad investment aims, than the acquisition of the relevant property shall be regarded as one of the degrees of crime commission, i.e. preparation to the main crime.

In such a case the issues of multiplicity are dealt with based on the degree of social danger of the criminal preparation and the crime itself: the less dangerous crimes-degrees shall be covered by the legalization liability norm, the counts of the similar or exceeding degree of danger shall be qualified as multiple counts.

Other criminal law qualification is used in a situation, when the intention to legalize the criminal property or monetary funds appears after the predicative crime is committed. In this case the financial transactions and other actions shall be regarded as one of the means to dispose of property received by criminal means. When assessing this fact, the criminal law theory and case-law traditionally consider that it is not punishable even if, taken separately, it forms the elements of a crime, because utilisation of consumer properties, as well as any other use of property acquired by criminal means, is already taken into account when forming the sanctions of a crime resulting in such property acquisition. Such an approach is based on the concept of the legal nature of purchase of the stolen property. A.I. Boytsov notes in this regard: "Actual utilization and disposal of stolen property falls outside the elements of the crime of theft and shall not be qualified additionally". And further on: "Perpetrator of theft as the initial crime should not be accused under Article 174 of the Criminal Code even if he/she performs financial transactions and other deals with monetary funds or other stolen property or utilises these funds in his entrepreneur or other economic activities"; the criminal liability for such actions with the property acquired as the result of a crime (Article 174[1] of the Criminal Code of the Russian Federation) may lie contrary to the *non bis in idem* principle[11].

Therefore, the analysis of norms on liability for legalization of criminal incomes from the standpoint of its compliance with the well-established legal constructs shows that they do not comply with many of them, and insofar as they do not conflict with such constructs, they have an extremely limited application prospect.

This conclusion raises one of the crucial issues to the agenda which we believe is not examined by the Russian scholarship to the full extent. The point is whether the common theoretical constructs can be treated as the solid ground for the legal science and whether they could act as the "filters" blocking the provisions which contradict with them from entering the legal framework. Without going further into discussion of this important issue, we shall note that all concepts which seem to be ageless and undeniable usually end up being the relative concepts which are true only within the specific social, criminological, political and legal conditions.

In this regard, the collision of norms on liability for criminal incomes legalisation and the described concepts of concealment, involvement, complicity, degrees and multiplicity of crimes shall be regarded not from the standpoint of their correspondence or non-correspondence to each other, but from the perspective showing how the parties involved in such collision contribute to or obstruct reaching the aims of the criminal policy and ensuring the criminological safety.

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[11] Boytsov A.N. Crimes against property (Бойцов А.И. Преступления против собственности. – СПб.: Юридический Центр Пресс, 2002. – С. 272 – 273.).

As far as the analysis carried out allows to judge, both the provisions regarding liability for legalization of criminal incomes and the theoretical and legal constructions opposing them at least do not help proper reaching those goals. One of the theoretical reasons for such situation is that the Russian specialists constantly trying to put legalization into the Procrustean bed of involvement and concealment. We believe that futility of such efforts shall be evident today. Establishment of liability for inclusion of property acquired by criminal means into the civil trade turnover requires the national legal systems to reconsider some of the basic approaches to the grounds of criminal liability and to the substantiation of the legal nature of legalization, theoretical legitimation of liability for it. The way to substantiate the compatibility of liability for legalization with the theoretical canons of the criminal law lies in acknowledgement of independent danger of the criminal incomes entering the lawful trade turnover and the recognition of independent legal nature of this crime.

As of today, there is only one concept in the legal science that tries to solve this issue, i.e. the concept of secondary crime.

One of the few definitions for it was proposed by M.M. Lapunin. The author states that the secondary crime is an independent intentional action, provided for by the special part of the Criminal Code, which is not the type of complicity, the social danger and criminal punishability of which depends on the main (predicate) crime committed or being committed beforehand by the same or by third party (depending on the specific crime) in connection to which the secondary crime is committed. The main features characterising the secondary crime according to M.M. Lapunin are as follows: 1) the criminal liability for the secondary crime is provided for by the special part of the Criminal Code; 2) the perpetrator of the secondary crime, depending on the type thereof, shall be the person who committed the primary crime or any other person; 3) the secondary crime always follows the certain primary one; 4) the secondary crime gains social danger and is deemed to be the crime only due to its connection with the previous offence; 5) the *mens rea* of the secondary crime consists in the intentional guilt; 6) the secondary crimes may be committed both as actions and omission[12].

While agreeing with the majority of features named by the author, we should focus on one of them which we believe to be the main one. M.M. Lapunin writes that the secondary action gains social danger and is deemed to be the crime in connection with the previous offence. This basic idea brings the author to conclusions which are quite controversial. On the one hand, he emphasizes the independent nature of the secondary crime (which, *inter alia*, include legalization of criminal monetary funds and other property), and on the other hand, he shows that the essence of the secondary crime is the involvement with the previous crime, finding the main definitions and qualification rules of the secondary crimes in the involvement doctrine.

However, in the light of issues considered, such approach is difficult to agree with. Independence of the illegal incomes legalization is demonstrated by the fact that the standard constructions of involvement and complicity cannot be used to define its legal nature. This fact is acknowledged by M.M. Lapunin himself, when he writes that:

- the object of the secondary crime is not predetermined by the primary crime;

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[12] Lapunin M.M. Secondary criminal activity and its criminalisation: dissertation abstract (Лапунин М.М. Вторичная преступная деятельность и ее криминализация: автореф. … дис. канд. юрид. наук. – Саратов, 2006. – С. 6 – 8.).

- criminal liability and punishment for the secondary crime are possible notwithstanding whether the predicative crime has been established by a separate judgment or the relevant conclusion is made by court upon the delivery of judgment for the secondary crime;

- liability for the secondary crime is possible even if a perpetrator of the primary crime does not bear responsibility (due to his/her criminal incapacity, being under age, expiration of the statutory limitation, death) or absconds – the mere opportunity to establish the fact of the predicative offence is sufficient.

However, the nature of the secondary crime is such that it follows the crimes, not any other actions or offences. Legalization in its turn may be criminalized, in any case of laundering the illegal (not necessarily criminal) incomes. Following the logics of the secondary crime concept supporters, the legalisation either does not fall into such concept and requires different explanation or can not be regarded as a crime at all.

Apart from that, M.M. Lapunin's notice that the danger of the secondary crime derives from the danger of the primary one brings forth the significant threat of the varied assessment of the social danger of criminal incomes legalization, depending on their source. To accept it shall actually mean to deny the status of legalization as the independent offence and to regard it only as the manifestation of the involvement.

Therefore, it can be acknowledged that the concept of the secondary crime, notwithstanding its distinctiveness and significance, unlikely could provide the explanation of the nature of the criminal incomes legalization.

The domestic criminal law theory does not have the well-grounded list of assertions allowing to substantiate the nature of legalization of criminally acquired property or monetary funds. This results in numerous discussions regarding the elements of this crime and their essence, the place thereof within the Special part of the Criminal Code, just punishment for it etc.

We believe that such situation is caused by the efforts of legal professionals, wishing or not, to "tie" the norms regarding legalization of criminal incomes to the norms regulating liability for actions being the source of such incomes. This path is futile at the very least. We believe that legalization of criminal incomes should get the status of a crime independent from other crimes from the theoretical standpoint. This decision shall be based on recognition of legalization as the independent public safety and order destabilizing factor, which is possible only following the adequate understanding of the whole range of the negative social consequences of this offence, and therefore its social danger.

Taking into account the economics features of the crime at the examination, it should be admitted that the following acts precede legalization of illegal incomes: 1) illegal incomes acquisition; 2) temporary withdrawal of the criminal monetary stock from the financial trade turnover to make searching for it more difficult; 3) accumulation or distribution of monetary funds.

In any case, the material assets are temporary or permanently withdrawn from the economic turnover of the country. Such withdrawal is not planned by the state which is the sole issuer of the national currency determining and correcting the volume of money stock issued and traded within the state and necessary for maintenance of the effective economy and fulfilment of social programmes. Such unplanned decrease of money stock brings forth the whole chain of economic, social and political consequences: lack of money to pay salaries and to effect other social payments leads to decrease of consumer demand which affects the legal manufacturers of goods and providers of services. At the

same time, it justifies the issue of additional money, which in its turn, having no goods to support it, leads to inflation increase, depreciation and fast spending of money savings etc. At a certain moment these consequences overlap.

If we assume that such legalizers introduce "dirty" money into the national trade turnover through their actions, such money infusion may align with the additional money issue and, therefore, aggravate the negative effects. In case the legaliser transfers "dirty" money abroad, the payment balance of the state deteriorates, the exchange rate of the national currency decreases, the investments climate worsens etc.

In any case, legalization presents serious social danger not only as the final stage of the previous crime, but it also has its own negative impact upon the state's economy as a whole.

The nature of the crime in question is determined by the fact that is aimed against the interests of the civilised market-driven economy which prohibits the acquisition and use within the scope of economic activities of income received through violence, fraud, abuse of office and other criminal means. The additional criterion determining the significant harmfulness of such actions is the reproduction of criminal activity, including transnational one, as consequence of the assets acquiring.

The main negative effects of the criminal incomes laundering are as follows: annually, billions of dollars are withdrawn by criminal means from the lawful economy activities, which constitute real threat for the financial well-being of states and affects the stability of the world market; money laundering dilutes international efforts aimed at creation of free and competitive markets and impedes the development of the national economy, disturbs the normal course of market operations, increases the demand for cash, destabilises interests rates and currency exchange rates, creates unfair competition and rises inflation within the states where the criminals carry out their activities; the criminal organisations may gain the significant economical powers allowing them to manipulate the economies of smaller countries by utilising the illegal incomes[13].

The socially dangerous consequences of money laundering therefore go beyond the boundaries of social danger of crimes resulting in money receipt, which makes it possible to regard legalization as an independent crime harming the basic values of the established order of economic relations.

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[13] See: FATF recommendations. International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (Рекомендации ФАТФ. Международные стандарты по противодействию отмыванию денег, финансированию терроризма и финансированию распространения оружия массового уничтожения / Пер. с англ. – М..: Вече, 2012.).

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