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Collisions And Clarifications Of The Criminal Legislation Of The Republic Of Kazakhstan

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Abstract

The article reveals the content of the purposes on criminal penalty enshrined in the Criminal legislation of the Republic of Kazakhstan via comparative qualitative research methods. As a result, the legislative reflection of private prevention is traced concerning the legislator to responsibility for the recurrence of crimes: with the strengthening of the recurrence, it is amplified responsibility as well. In conclusion, such an important question of criminal law, as the purposes of punishment, needs further judgment and improvement, as it has as theoretical and practical value as well.

Keywords: Constitutional state, crime, punishment, politics.

Colisiones y aclaraciones de la legislación penal de la República de Kazajstán

Resumen

El artículo revela el contenido de los fines de la sanción penal consagrados en la legislación penal de la República de Kazajstán a través de métodos de investigación cualitativa comparativa. Como resultado, la reflexión legislativa de la prevención privada se remonta en relación con el legislador y la responsabilidad por la recurrencia de delitos: con el fortalecimiento de la recurrencia, también se amplía la responsabilidad. En conclusión, una cuestión tan importante del derecho penal, como los fines del castigo, necesita un mayor juicio y mejora, ya que tiene también un valor teórico y práctico.

Palabras clave: Estado constitucional, delito, castigo, política.

1. INTRODUCTION

Adoption of the new Criminal Code of the Republic of Kazakhstan (further CC RK) on July 3, 2014 was a big event and achievement of legal understanding and law enforcement in the Republic of Kazakhstan. Firstly, this was facilitated by the general policy pursued in our country in the area of further improvement of the law-enforcement system and liberalization of the criminal legislation. Secondly, the law-enforcement practice (the high index of the prison population of the country) contributed to the adoption of the new criminal legislation. Thirdly, it is the influence of the international

cooperation and aspiration to respect for rules of international law by the Republic of Kazakhstan. It is known, in Part 2 of Article 39 of the CC RK concept and purposes of punishment, it is enshrined that punishment is used for restoration of social justice and also correction of the convict and prevention of the commission of new crimes, both to the convict, and other persons. Punishment does not aim at causing physical sufferings or humiliation of human dignity. As it is shown from the text of the criminal legislation, the problem of the punishment purposes, despite the external simplicity (they are determined legislatively), is very difficult, as the concept of punishment is rather volume, multidimensional and wide. For this reason, it did not lead to the emergence of the conventional position, despite close attention to it from many scientists of the pre-Soviet, Soviet and post-Soviet periods.

In the Criminal Codes of Kazakhstan of 1997 (Article 38) and 2014 (Article 39), in comparison with the CC RK of 1961, definition of punishment underwent significant changes and it was defined as the coercive measure associated with a judgment pronounced by a court. Punishment is applied to the person convicted of the criminal offense and consists in the deprivation or restriction of the rights and freedoms of this person, provided by the present Code. The analysis of legal literature confirms insufficiency on the solution of theoretical and practical problems of the purposes of criminal penalties. The theory of punishment passed a big evolutionary way of its development. The correct explanation of the purposes on criminal penalty has great theoretical and practical value. The punishment purpose in social

society has a complex character; it consists in protection against socially dangerous encroachments of those public relations, in strengthening and development of which the state is interested.

Punishment – is acute and rigid means of social influence, but it is a necessary reaction of the state to a criminal offense (criminal offense, crime). Famous Kazakhstan's scientist Dzhekebayev (2001) fairly noted that the correct explanation of the purposes on criminal penalty has great theoretical and practical value. It is well-known, that nothing is done without conscious intention in society, without the desirable purpose. From this point, it becomes clear the importance of a clear understanding about the purposes of criminal penalty. The purposes, determined by the legislation, influence on the one hand, on choice of means, and with another – the chosen means influence in the way of implementation of this purpose. Knowledge of these difficult dependences is necessary both for improvement of the legislation, and for its practical application. Thus, first of all, it is necessary to be determined conceptually in the true content of the purposes on criminal penalties for ensuring high efficiency of the imposition of punishment. At implementation of criminal policy, it is necessary to take into account opinion of the famous scientist-criminologist Avanesov (2010) who considers that crime is generated by conditions of public life, but it is the part of these conditions.

It is necessary to take into account the words of famous Beccaria (1995) who fairly noted that the punishment purpose, therefore, consists in the prevention of the new acts of the offender,

doing harm to his fellow citizens and in deterring other people from such actions. Therefore, it is necessary to apply such punishments and such ways of their use, which being adequate to the committed crime, would make the strongest and longest impression on people's souls and would not inflict on the offender the considerable physical sufferings.

2. RESULTS AND DISCUSSION

Let us analyze the Concept and the purposes of punishment of the CC RK in more detail, which are enshrined in Part 2 of Article 39. The first purpose of punishment is the restoration of social justice. We will consider the content of the words social and justice for understanding of the essence of this purpose. The word social has two meanings in the Russian dictionary of Ozhegov (2008): 1) as public, belonging to the life of people and their relation in society; 2) making changes in production relations of society. The word meaning justice is also specified in two meanings: 1) fair – acting impartially, according to the truth; directed on implementation of the correct essential tasks; true, correct; 2) fair attitude towards somebody. Proceeding from the meaning of these words and arguing about this purpose of punishment, in our opinion, the state, reacting by application of the measure of the state coercion to the fact of the commission of a criminal offense, to seek to provide the rule of law, justice by punishment of the guilty person.

The term social justice is quite complicated, as it assumes setting forth of the rule of law. It should be distinguished from the term just justice as commensurability of the criminal action and imposed sentence. The social nature of justice takes into account such moments as the interests of society, state, the convict and victim. It is necessary to notice that setting forth by the criminal legislation of RK

and the CIS countries before punishment of the main purpose as restoration of social justice caused polemic in the scientific environment. In due time, Yakovlev (1962) was one of the first who expressed his opinion on the presence of such purpose at criminal penalty as restoration social justice. The opposite point of view in the matter belonged to another scientist Shargorodsky (1973) who believed that for the criminal law as a protective branch of law, restoration function is alien. From our point of view, ambiguity of the position of scientists-lawyers in the matter is caused by question that at imposition of punishment it is difficult, and some times, it is impossible to provide them.

Some scientists consider that punishment does not possess the restoration function, and the proclaimed purpose - restoration of social justice does not correspond to the content of punishment. The possibility of restoration of the violated rights exists only within civil law, but not at realization of criminal legal relationship. Criminal penalty cannot compensate the physical and moral harm caused by committed criminal offense. It is capable to satisfy only feeling of social justice (which, in this case, is similar to the feeling of revenge). Other scientists claim that criminal penalty has the possibility to restore social justice as it is possessed restorative or compensatory properties. That is it is about the possible restoration of the rights, violated by a criminal offense or to compensate the done harm, as a result of the application of criminal penalty. At the same time, according to the opinion of scientists, it is difficult to establish how

such purpose of punishment (as restoration of social justice) is achieved, as so far there are no the developed complex of measures for influence and the indicators of efficiency of their application because of their scientific non-readiness. According to the point of views from Russian scientists, restoration of social justice as the process is bringing in a previous state (violated by means of criminal encroachment) legitimate rights, duties and the interests of natural and legal entities, society, the state and the international community. We adhere to this position that the punishment can restore social justice, but it is not in full volume and only in single cases, in our opinion, it will be more precisely - if talk is not about restoration, but about ensuring social justice in the process of criminal sentencing. For example, how it can be possible to restore social justice if it is about murder or rape, etc.

The second purpose of punishment is a correction of the convict. It is known, that the concept correction of the convict is fixed at the legislative level. So, according to Paragraph 10 of Article 3 Criminal-Executive Code of the Republic of Kazakhstan (further CEC RK), correction of the convict assumes formation at the condemned law-abiding behavior, the positive attitude towards the personality, society, work, norms, rules and ethical behavior in society. The purpose – correction of the convict – assumes the aspiration of the state to form the person who committed a criminal offense (crime, criminal offense) better, than he was at the moment of commission of the socially dangerous act. It is about application by the state, represented by its

authorized bodies, to the condemned whole complex of measures of legal, psychological, social, economic and even political character. The problem on correction is directed to change condemned in the positive side by formation in the mentality of the person of negative attitude as to committed by his act (private prevention), and, in general, to criminal forms of behavior of other persons (the general prevention) (Tambunan, 2019).

Besides correction of the convict includes such measures as the penitentiary and post-penitentiary probation, re-socialization and other measures which would promote to the formation of the positive relation to the generally accepted basic rules of behavior and readiness to behave according to these rules. In our opinion, criminal penalty is not just the penalty from the state to the person for the criminal offense committed by him, it has broader purpose. Punishment is the way by use of criminal law provisions for the solution of social contradictions between the state, represented by its authorized bodies, and the person who committed a criminal offense (crime, criminal offense). Correction assumes gradual transition of the condemned person from the status of the criminal in the law-abiding person. It does not mean that in the process of execution of the punishment he turned into the highly moral personality. The real task, which is possible to solve during the correction of the convict, is the task-minimum that he did not become worse than was before condemnation and did not commit the new crime during serving sentence; and the task-maximum is the full re-education of the convict, his refusal from all harmful criminal

habits to break the criminal law, that is not to commit new crimes in the future, even after release from punishment.

Process of correction of the convict has to begin with the moment of criminal prosecution of the guilty party and continues in the process of court session, adjudgement and assignment of punishment, and also execution of this punishment and fixing of its results after the release of the convict. Correction of the convict assumes not only neutralization of antisocial views and guidelines of the convict, and it is directed to the formation at him steady skills of respect for the person, society, work, to rules of human community and morality, stimulation of law-abiding behavior. This purpose is considered as reached if during execution of the punishment or after release from punishment (conditional early release, release due to illness, punishment replacements with its milder type of it, etc.) the person does not commit a new crime. This purpose of punishment as correction of the convict has no objections, in relation to the majority of types of punishments. But, there is the fair question, that it is applicable not to all types of criminal penalties. For example, the criminal law does not do the reservation or note at determining of the purposes of punishment that they cover not all types of punishments; for example, as after application of such types as the death penalty (Article 47 of the CC RK), when the person loses life and stops his existence. Or: how it is possible to correct the condemned after his deprivation of citizenship (Article 50-1 of the CC RK) or deportation from the Republic of Kazakhstan of the foreigner or the person without

citizenship (Article 51 of the CC RK) (Kurganov, 2008; Baroughi & ZareiMatin, 2013).

The third purpose of criminal penalty, enshrined in the criminal legislation, is prevention of the commission of new crimes by the convict (private prevention) by his isolation. Ensuring the specified purpose is one of the main tasks of law-enforcement process. It is no coincidence that this purpose of punishment, as well as other purposes of punishment, found reflection and in the criminal enforcement legislation of the Republic of Kazakhstan. So, Article 4 of the CEC RK is enshrined that the purposes of the criminal enforcement legislation of the Republic of Kazakhstan are restoration of social justice, correction of convicts, prevention of the commission of new criminal offenses as condemned, and other persons. Ensuring the performance of this purpose of punishment requires, first of all, the identification of the personality of the convict, his psychobiological, social characteristics, bents and level of criminal guideline. The personality of the criminal, as the system of social and demographic, social and role, social and psychological characteristics of the person who committed the crime is studied by the science of criminology and it is one of the components of the subject on studying by this branch of knowledge (Dewi & Ahamat, 2018).

Identification of the personality of criminal from all mass of people is carried out on the basis of two criteria: legal and social (social and psychological). Proceeding only from legal criterion, the personality of the criminal is determined as the person who committed

the crime. However, it is possible to see tautology elements in this judgment. Such concept of the personality, according to the famous scientist Struchkov (1983), has the formal shade. Therefore the legal criterion has to be, as necessary, complemented with criterion social (social and psychological), according to which, to the personality of the criminal are inherent this or that degree of antisocial direction (orientation) or, at least, separate antisocial features. According to the opinion of the famous scientist Antonyan (1982), this situation belongs not only to malicious, but also to the so-called random crime, and also to the persons committing crimes in the heat of passion and even by carelessness. Here is also included the studying of those persons who did not break the criminal law yet, but owing to the antisocial views and habits, which are shown for example - in the form of commission of the corresponding administrative offenses, they can follow in the criminal way (Dana & Sabzi, 2014).

That is, the subject, considered by criminology, is the personality of the offender, which is much wider than the concept of the subject of crime, as it includes not only actually the criminal, but also other categories of persons which are exposed to purposefully preventive influence. In general, data on personal characteristics in relation to subjects of all crimes and separately by their types contain essential information about the reasons of crimes, which can be used in the determination of the measures, directed to prevention of new crimes. Some of the authors identify the purposes of private prevention and correction of the convict, however, if achievement of the first

purpose means creation of the objective prerequisites, impeding the commission of offenses in the future by the convicted persons (for example, owing to his isolation from society), then achievement of the second purpose involves creation of the subjective prerequisites, impeding the commission of offenses in the future by the punished subject (i.e. formation of the system of social brakes). A legislative reflection of private prevention is traced concerning the legislator to responsibility for the recurrence of crimes: with the strengthening of the recurrence, it is amplified responsibility as well. Besides, in Kazakhstan general provisions are enshrined at the legislative level in Article 20 - the System of measures on prevention of offenses of the Law of the Republic of Kazakhstan On prevention of offenses, where it is fixed that prevention of offenses is carried out by means of the general, special and individual measures (Puspitasari & Syaifuddin, 2019).

The fourth purpose of criminal penalty, enshrined in the criminal legislation, is prevention of the commission of crimes by other persons (the general prevention). In this case, we observe the mediated influence of the criminal legislation on people around, when it is implemented such a function of the criminal legislation as precautionary. It is noted such circumstance in Part 2 of Article 39 of the CC RK that punishment does not aim at causing physical sufferings or humiliation of human dignity. In our opinion, this provision needs clarification. For example, how it is possible in the process of assignment of punishment, which is the measure of the state

coercion, not to inflict physical suffering (application of the handcuffs, escorting by convoy, movement in the special vehicle, etc.) or humiliation of human dignity (putting the person in the cell and at the trial in the cell, showing on television, publishing in the mass media, etc.) (Naumov, 1996).

3. CONCLUSION

The Kazakhstan scientist Shnarbayev (2002) is absolutely right that the punishment always causes to the criminal certain deprivations, sufferings. They can be physical, moral, material and other characters. The convicted person is limited in a number of personal rights and most importantly freedoms at sentencing to the deprivation of liberty. The financial position is worsened at application to the convict of the fine, confiscation of property. The criminal legislation has to be rigid, even cruel in relation to the violent criminals who are convicted several times, committing the crimes intentionally and their stay in society represents the increased danger to people around. They should be isolated from society, certainly. At the same time, the criminal legislation has to show humanity concerning persons committed crimes for the first time, especially if it is about the crimes committed by negligence (Mary & Kwan, 2018).

Moreover, various restrictions are directly provided by Chapters 16 - General provisions of execution of the punishment in the form of

imprisonment (Article 90 - Taking the convicts for serving sentence; Article 91- Movement of the convicts; Article 93 – Taking of the convicts in institutions); Article 17 - The security of serving the sentence in the institutions and the means of ensuring it; Article 18 – The serving sentence conditions in institutions. Unlike the Kazakhstan criminal legislation, in our opinion, in Article 43 - the Concept and the purposes of punishment of the Criminal Code of the Russian Federation are very correct, the article does not contain such formulation that punishment does not aim at causing physical sufferings or humiliation of human dignity because, as we have already noted above, the fact of the sending in the correctional facility of the condemned person already provides causing physical sufferings (convoy to the place of dislocation, quarantine actions and other regime procedures) and also the humiliation of human dignity (Jenaabadi & Khosropour, 2014).

Moreover, the formulation of the purposes of punishment, enshrined in the criminal legislation of the Republic of Kazakhstan found reflection and in Part 1 and Part 3 of Article 4 - the Purposes and tasks of the criminal enforcement legislation of the new CEC RK execution of punishments and other measures of criminal influence does not aim at causing physical sufferings or humiliation of human dignity. It seems that due to the presence of such formulations in the criminal legislation of Kazakhstan, there is often arisen the criticism from non-governmental organizations, human rights activists and lawyers in mass media to the penal correction system of the Ministry

of Internal Affairs of the Republic of Kazakhstan, providing the important and responsible stage of law enforcement as execution of punishments. In our opinion, in order to harmonize the form and content of Article 39 of the CC RK of 2014 - the Concept and the purposes of punishments, it is possible to offer taking into account the content of the criminal policy of our state, the new edition of the specified article, which as much as possible would limit polemic in this question and more would reflect the true content of punishment.

1. Punishment is the coercive measure associated with a judgment pronounced by a court concerning the person, convicted of the criminal offense, provided by the special part of the CC RK.

2. Punishment is not only the penalty for deeds, but it is directed to the correction of the convict and prevention of the commission of the new criminal offenses, both the convict and other persons.

3. Independent change (decrease, exceeding) of limits of the punishment imposed by the court at its execution is not allowed.

Besides, the purpose is defined in law as the expected and desired result of realization of these or those possibilities of reality which were previously estimated and chosen. It is necessary to remember that the main mission of the existing the CC RK has to be directed to the solution of the main tasks of the criminal legislation, such as: protection against socially dangerous encroachments of the rights, freedoms and legitimate interests of the person and citizen, property, the rights and legitimate interests of the organizations, public order and safety, the environment, the constitutional system and

territorial integrity of the Republic of Kazakhstan, protected by the law of the interests of society and state, protection of the peace and safety of mankind, and also prevention of criminal offenses, decrease in the number of the prison population of our country, increase in efficiency of the criminal legislation and the law-enforcement system, and the most important - creation of the favorable situation for further development and prosperity of the Republic of Kazakhstan. Summing up the result on the considered problem, it is possible to draw the conclusion that such important question of criminal law, as the purposes of punishment, needs further judgment and improvement, as it has as theoretical and practical value as well.

REFERENCES

- ANTONYAN, Y. 1982. **Studying of the personality of the criminal.** M. Prospekt Publishing house. Russia.
- AVANESOV, G. 2010. **Crime and social estates.** Criminological reasoning: monograph, M. UNITY-DANA. Kazakhstan.
- BAROUGH, E., & ZAREIMATIN, H. 2013. **The ranking of effective factors on efficiency of commercial ads in attracting viewers in Tehran, Iran.** UCT Journal of Management and Accounting Studies, Vol. 4, pp. 22-28. Iran.
- BECCARIA, C. 1995. **About crimes and punishments.** M, Stealth. Kazakhstan.

DANA, A., & SABZI, A. 2014. **The Relationship between Religiosity and Athletic Aggression in Professional Athletes.** Iran.

DEWI, S., & AHAMAT, A. 2018. **The role of entrepreneurial orientation in achieving organization performance through business model innovation and asset relational collaboration.** Humanities & social sciences review. Vol. 6, N° 2: 100-105. India.

DZHEKEBAYEV, U. 2001. **Basic principles of criminal law of the Republic of Kazakhstan.** Comparative commentary to the book of J. Fletcher and A.V. Naumov main concepts of modern criminal law. Zhety zhargy. Almaty. Kazakhstan.

JENAABADI, H., & KHOSROPOUR, A. 2014. **An investigation on the amount of employing total quality management principles by school principals and its' correspondence with their affectivity.** Iran.

KURGANOV, S. 2008. **Punishment: criminal, criminal-executive and criminological aspects.** M.: TK Velbi, Prospekt Publishing house. Russia.

MARY, A., & KWAN, E. 2018. **Impact of Using Graphing Calculator in Problem Solving.** International Electronic Journal of Mathematics Education. Vol. 13, N° 3: 139-148. UK.

NAUMOV, A. 1996. **Criminal law.** General part: course of lectures. USA.

OZHEGOV, S. 2008. **Russian dictionary: About 60 000 words and phraseological expressions/ Ozhegov S.I.; under the general edition of Professor L.N. Skvortsov. – 25 edition, corrected and**

added. M.: LLC Oinks Publishing House: LLC World and Education Publishing house. UK.

PUSPITASARI, L., INAM, A., & SYAIFUDDIN, M. 2019. **Analysis of Students' Creative Thinking in Solving Arithmetic Problems.** International Electronic Journal of Mathematics Education. Vol. 14, No 1: 49-60. UK.

SHARGORODSKY, M. 1973. **Punishment, its purposes and efficiency.** Kazakhstan.

SHNARBAYEV, B. 2002. **Punishment according to the criminal legislation of the Republic of Kazakhstan: Manual.** Daneker. Almaty, Kazakhstan.

STRUCHKOV, N. 1983. **The problem of the personality of the criminal.** Prospekt Publishing house. Russia.

TAMBUNAN, H. 2019. **The Effectiveness of the Problem Solving Strategy and the Scientific Approach to Students' Mathematical Capabilities in High Order Thinking Skills.** International Electronic Journal of Mathematics Education. Vol. 14, No 2: 293-302. UK.

TSVETINOVICH, A. 1996. **The New Criminal Code of the Russian Federation: achievements and miscalculations.** Criminal nature and law. UK.

YAKOVLEV, A. 1962. **About studying of the personality of the criminal.** The Soviet state and law. N° 11. p. 109. UK.



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