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About Implementation of the International Standards and Limits of Reception of Foreign Experience to the Sphere of Execution of the Punishment in the Republic of Kazakhstan

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Abstract: An article considers an implementation and reception of law norms which act as traditional and effective mechanisms of improvement of the national legislation, including governing the relations in the sphere of criminal justice, as main beginning of which there has to admit a voluntary nature. At the same time, borrowing of the international and foreign experience in the sphere of criminal justice is represented productive only within the relevant standards of the Constitution, and equally has to answer both national legal traditions, and earlier concluded interstate and international obligations.

Keywords: Restrictions of pretrial freedom, suspended sentence, deferred sentences, parole, probation supervision, probation services, probational control.

1. INTRODUCTION

Modern penal system of democratic society and the constitutional state, by which our state was approved in article 1 of the Constitution of RK [1, page 4], has to solve problems of a humanization of the punishment execution, providing of priority of the purpose of correction and re-socialization in relation to the preventive purposes of punishment, creation of effective system of post-penitentiary adaptation of the persons released from correctional facilities, publicity and openness of penal system, active use of the international experience.

In the light of implementation of the Address of the President of the Republic of Kazakhstan the Leader Nation N.A. Nazarbayev to the people of Kazakhstan "Strategy "Kazakhstan – 2050": New political course of established state" [2, page 35-36] as a result of active work of scientists, practicians and deputies in 2014 there were adopted Criminal procedure, Criminal, Criminal and executive codes of the Republic of Kazakhstan which were entered into force on January 1, 2015.

The task of the state consists in that, on the one hand to provide inevitability of punishment for the committed crime, and on the other hand to make this punishment the most fair and effective, maximum having reduced the social consequences both for the convict, and for the state, in general.

The available foreign experience and practice of the organization of law-enforcement activity naturally raise a question of a possibility of their application in the conditions of the legal construction which is carried out by the Republic of Kazakhstan in the sphere of reforming of a penal correction system. In this context the main line of our reasonings will be developed anyway within such category as right reception.

Reception (from Latin "Receptio" – acceptance, reception) [2, 564] is, as it is known, perception by interstate legal system of the principles, institutes, the main lines of other interstate legal systems. And borrowing is not fragmentary, in the form of separate norms that was observed between various legal systems always, and it is total and comprehensive, such as for example, assimilation of the Roman right by countries of Western Europe in Renaissance.

2. DISCUSSION

In this regard we will focus on a number of provisions, essential to further development of the legislation in the sphere of criminal justice, taking into account both possibilities of the national legal system of the Republic of Kazakhstan, and the accumulated experience, and also potential of the international cooperation in this direction.

As all sense of international legal regulation consists in achievement of a certain final result, where the participants of the international communication are sought to it, according to the fair remark of the famous Russian lawyer I.I. Lukashuk: "implementation of international legal norms is, as a rule, much more complex and responsible task, than their acceptance" [4, 10].

Permission of this task is possible only in the presence of the optimum mechanism of implementation as certain set of the legal and organizational means, used by subjects of international law at the international and national levels for the purpose of the embodiment of instructions of orms of international law. In the most cases, implementation of norms of international law is a prerogative of the sovereign states, using for this purpose the internal organizational legal mechanism.

It is necessary to notice that relevance considerably increases in the specified choice in connection with the perspectives of change of the legislation according to ratification by Kazakhstan of a number of the international-right contracts [5; 6; 7] concerning fight against crime and implementation of justice. Besides, it is necessary to consider that now the Republic of Kazakhstan is being sent the application to the General Secretariat of the Europe Council about intention to be the participant of a number of conventions of the Europe Council in the field of criminal prosecution.

In our opinion, in this context it is especially marked out the Convention on legal aid and legal relations on civil, family and criminal cases signed on October 7, 2002 in the city of Kishinev (Republic of Moldova) by Heads of states of the Commonwealth of Independent States, and also the Interstate program [8], adopted on its basis.

The purpose of signing of this Convention was need of development of cooperation in rendering legal aid in civil, family and criminal cases on the basis of reciprocity and respect between courts, prosecutor's offices, law-enforcement bodies, security service and other institutions of Contracting Parties, to the competence of which there are referred civil, family and criminal cases [9].

The convention was signed by the Azerbaijan Republic, the Republic of Armenia, Republic of Belarus, Georgia, the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, Ukraine, and in a sense, it was continuation of that cooperation which was developed on the basis of earlier existing Minsk Convention [10].

Entry into force of this Convention for the Republic of Kazakhstan is important for expansion of legal relations with the State Parties of the Convention on the directions provided by article 6 of the Convention.

It should be noted that according to article 5 of the present Convention legal aid will be given by both the central institutions, and territorial authorities of justice, courts, prosecutor's offices, law-enforcement bodies, security service and other institutions, to the competence of which there are referred civil, family and criminal cases.

Thus, it is possible to conclude that institutes of implementation and rendering legal aid in modern conditions have high potential on condition of their adequate perception by the legislation of the states, and also owing to whether there are in law enforcement agencies experts who can realize this potential.

However, it should be noted that rendering such help within the CIS countries is characterized by the common problems. The condition of crime in the State Parties of the CIS continues to cause serious concern. Practically in all State Parties of the Commonwealth there is observed the interrelation of an aggravation of a criminal situation with the crisis phenomena in economic, social and other spheres of life of society. The special concern causes rise in crime, connected with activization of steady criminal groups with interregional and transnational communications. On this background there is a further escalation of the organized crime and other types of dangerous crimes.

Here we naturally approach to comprehension that in practice of cooperation and rendering the interstate help in the sphere of criminal justice paramount value belongs to joint (model) lawmaking, where the model of activity of Inter-parliamentary Assembly is real instrument, and its structures – as an optimal variant of joint legislative activity of the corresponding experts, use of personnel capacity of the State Parties of the CIS acts.

Development of the accumulated experience in the field of inter-parliamentary cooperation in the legislative sphere is represented exclusively productive and from positions of historical realities.

Now two tendencies of development of criminal justice are the most widespread, from which:

- the first - reflects the concept of control of crime (policy of legality and an order) which has an ultimate goal by rigid means to control the crime in case of need, sacrificing the rights and freedoms of participants of criminal procedures in the limits, fixed by the national legislation;
- the second - corresponds to the concept of so-called formal process of law according to which priority value are the rights and personal freedoms which aren't subject to restriction even for fight against crime.

We naturally come to that the institute of guarantees of the rights of the personality as one of elements of legal system of the state, in general, reflects a condition of development of system of criminal justice, causing at the same time displacement of emphases or on interests of justice, or on interests of the personality.

Complexity of the choice is connected with the fact that each of earlier mentioned directions of development has the merits and demerits.

The dignity of the first is increase in overall performance of bodies of criminal justice, respect for the principle of economy of criminal repression. However fight against crime, its reduction and elimination of determinants

is the general social task, in which solution the achievements depend on real living conditions of the population, on a condition of public and legal consciousness. Change of these factors isn't connected directly with criminal justice from which society can and must demand, first of all, adequate response to the facts of offenses on the basis of reasonable and fair implementation of the law. Therefore it is natural to assume that high effectiveness of functioning of system of criminal justice can be unstable in the case under consideration.

The second direction loses in respect of fast effectiveness in the sphere of restriction of crime, leads to formalization of the law and, as a result, bulkiness of all process of justice, danger of reorientation to legal, but not the actual innocence when due processes of law turn not into means, and into end in itself of process. At the same time, it can gradually increase the potential due to increase as social control over activity of bodies of criminal justice, and sense of justice of the population.

Choosing priorities of development of criminal justice, it is necessary to proceed from dialectic unity and contrast of tasks of law enforcement agencies of control over crime and protection of the rights, freedoms of process participants. At the same time, protecting all possible lawful ways of the right of suspects, accused, defendants and convicts, it must be kept in mind contents of paragraph 5 of article 12 of the Constitution of the Republic of Kazakhstan according to which implementation of the rights and freedoms of the person and citizen shouldn't violate the rights and freedoms of other persons, first of all – the victims from illegal activity. [1, page 7]

Not less important question is definition of the system of legal relationship which should adhere at further development of the legislation in the sphere of criminal justice.

It should be noted that an essential gap at the level of conceptual (both legal, and ordinary) perceptions is the settled stereotype of consideration of questions of law-enforcement activity in the sphere of criminal justice without specifics of the legal relationship, arising in an occasion and in the course of execution of criminal penalties.

Meanwhile, if to analyze the existing criminal and executive legislation, its the most priority purposes are "restoration of social justice, correction of convicts, the prevention of commission of new crimes as condemned, and other persons", and "regulation of an order and conditions of serving of punishments, determination of means of correction of convicts, protection of their rights, freedoms and legitimate interests, rendering the help in social adaptation" act as the major tasks (Art. 4, The Criminal Executive Code of RK (CEC RK)).

Concerning the most debatable functions at execution of punishments, for example, such as the forms and limits of judicial control and public prosecutor's supervision, it is necessary to emphasize that they also find the direct reflection and a regulation in the criminal and executive legislation (Art. 27 Judicial control, Art. 30 Public prosecutor's supervision of CEC RK) [13, page 24], and, apparently, they shouldn't leave doubts in a part of perception of a penal correction system as subject of penal justice and criminal justice.

Also, in this regard, it would be desirable to pay attention on in essence two paradoxical, but interconnected elements, in our opinion, interfering to the given perception. The first - is that law-enforcement activities for execution of criminal penalties owing to historical inertia come down only to activity of penal institutions of the closed type. The second - consists in traditional and unreasonable ignoring of execution bodies of criminal penalties (regardless of their departmental accessory) as full-fledged subjects of law-enforcement activity in the sphere of criminal justice, proceeding besides, from narrowness of perception of justice as legal category.

These circumstances first of all demonstrate obviously insufficient development of problems of criminal and executive science in the Kazakhstan law.

Many problems of legal regulation of the measures, connected with execution of criminal penalties, and practice of their application in new conditions of activity of correctional facilities aren't studied. First of all,

primarily they include: the reasons of lack of united approach to determination of prescription and structure of elements of progressive system of execution of imprisonment [11, page 27], its scientific concept, the place and a role among other legal phenomena; need of identification of the legal nature of the norms, changing serving sentence conditions; development and justification of the principles and limits of the public control in activity of a penal correction system and many others.

It is deserved attention, formulated by A.B. Skakov, determination of the progressive system of execution of the punishment as complex of institutions of the criminal and criminal and executive law where at application of which the legal status of the convict changes, depending on degree of its correction or towards expansion of its rights, or towards their restriction. [18, page 22]

At the same time, it is obviously necessary to note that in modern Kazakhstan there were main prerequisites for formation and development of own criminal and executive policy. In this part it is close to us the position of A.E. Natashev where according to his definition, as factors of development of criminal and executive policy act those interacting phenomena, which as driving forces define a social orientation, the main contents and the prospects of further development of a penal correction system. [12, 285]

Attempting to somewhat fill the gap of the Kazakhstan jurisprudence, which was noted above, consisting in acute shortage of in-depth and complex scientific research of legal bases of activity of system of execution of criminal penalties it should be noted that the conceptual, ideological foundation for its reforming had been laid in approved Decree by the President of the Republic of Kazakhstan of August 24, 2009 No. 858 "Concepts of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020" in subsection 2.10 of the section 2 "Main Directions of Development of the National Right" [15].

Program aims at reforming of execution system of criminal penalties had been realized in the Criminal and executive legislation of the Republic of Kazakhstan, adopted on July 5, 2014 and entered into force since January 1, 2015 [13].

It should be noted that the recommendatory legislative model for the Commonwealth of Independent States, accepted at the eighth plenary session of Inter-parliamentary Assembly of the states - participants of the CIS (on November 2, 1996) was the cornerstone of this codified regulatory legal act [19].

Without exaggeration, a considerable event in the Kazakhstan law there was issue of the first national itemized comment to the CEC RK in development of which along with domestic scientists (Valiyev H. H., Skakov A. B., Chukmaitov D. S.) took part the leading Russian experts of the criminal and executive right – A.S. Mikhlin, P.G. Ponomarev, I.V. Shmarov, V.I. Seliverstov [14].

Not incidentally, all complex of the planned measures in the criminal and executive sphere is penetrated by the general idea of strengthening of the preventive direction in the questions of organization of punishment execution in subsection 2.10 of the section 2 "General directions of development of the national law" of the "The concepts of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020", approved in the Decree of August 24, 2009 No. 858 by the President of the Republic of Kazakhstan. [15]

At the same time, reforming of a penal correction system – it is a process rather long and multi-stage. Its efficiency depends on a number of factors and conditions of economic, social, legal and other character including from the criminal and executive policy pursued by the state. Ensuring realization of the rights of the persons who are kept in places of imprisonment, according to the legislation of the Republic of Kazakhstan and the international standards, demands full state support, considerable financial expenses and staffing.

If to argue in relation to further reforming of the criminal and executive legislation of our country, then realization of various models of development is essentially possible. We consider three priority directions.

The first, it is further improvement within the concept of the criminal and executive policy, mainly oriented on the Russian doctrinal basis of the criminal and executive right which is earlier chosen by the legislator.

The second is the direction of widespread introduction and distribution of the liberal principles of justice based on institutes of public control, the concept of social justice, reconstructive justice and progressive system of execution of punishments, more focused on the "western" standards of criminal and executive policy.

The third, it is the reasonable combination of the most acceptable elements from the listed above models which is carried out in the conditions of implementation of concrete provisions of the Concept of legal policy of the Republic of Kazakhstan.

In our opinion, excessive ardour for Anglo-American system of the right is explained by more and more accruing crisis of the western theory and tradition of the right, according to which Western Europe was considered as the center of the world, and from 90th years of the XX century this role was to claim America. But the matter is that in spite of the existing ambitions, the world space doesn't become monopolar, and the West turns into one of its components. According to opinion of the representatives of the western law, the right, seeming to earlier natural, was only western, and it is more and more observed even in it the gap with individualism of the traditional right and turn to a collectivism in the right [16, p. 48-53].

Therefore the aspiration to extend Anglo-American system of the right for territories of the former USSR - is nothing else as desperate attempt in any ways to keep the western system of the right by means of its distribution for the young developing states, not having owing to the historical development of natural prerequisites for independent doctrinal state and legal construction.

In this sense, we share the position that any norms which are subject to borrowing from the foreign legislation, as well as again offered, and also the principles of justice and criminal legal proceedings which are been the basis for activity of system of criminal justice it is necessary to consider only through a prism of the General Law [17], and also from a position of reconsideration of a role of the constitutional norms and institutes in formation of new political system.

In this perspective, the existing Concept of legal policy has to be essential help and a reference point regarding reception of legal institutes in relation to Kazakhstan. Not incidentally, it is accurately designated in the section concerning priorities of criminal and executive policy to the forthcoming prospect, that: "In general the system of execution of criminal penalties should be brought closer further to the conventional international standards" [15].

At the same time, process of approach to the international standards shouldn't have spontaneous and rash character. For example, as one of characteristic examples it is possible to consider the situation developing around a problem of introduction of institute of probation in practice of work of a penal correction system of Kazakhstan.

It is known that the probation represents the independent form of social and legal control uniting methods of educational impact on the persons who are committed crimes, and are released and have period of probation.

In the Republic of Kazakhstan probation as independent legal institute was absent earlier. However its elements were shown in a legislative structure of punishment such as:

- restrictions of pretrial freedom;
- suspended sentence;
- deferred sentences to the pregnant women and women having juvenile children;
- parole.

The first three alternative measures are executed by criminal and executive inspections. It is deserve attention that circumstance that in Kazakhstan there are taken place the following signs of a probation identical existing in Great Britain, the USA, Japan and other developed countries:

1. probation supervision for convicted;
2. vesting on convicts with the main and additional obligations;
3. legal duties (in the course of application of punishment in the form of restriction of pretrial freedom);
4. presence of the specialized subject of control - criminal and executive inspections (CEI).

Besides, there were also certain divergences of probation with the international tradition. So, in particular, there was entrusted on the CEI execution of the majority of the punishments which aren't connected with imprisonment while their foreign colleagues have "luxury" of communication only with a certain contingent of the criminals who have avoided the direction in penal institutions.

Also carrying out a social and legal research of the identity of convicts didn't practice in Kazakhstan which results essentially influence legal destiny of condemned, duration and intensity of supervision.

Thanks to foreign experience, the specified gaps were filled in by the Criminal and executive code RK, adopted on July 5, 2014 and which was entered into force on January 1, 2015.

Let's stop on the entered innovations in the criminal and executive legislation of the Republic of Kazakhstan in more detail.

So, CEC RK have been fixed conceptions of probation in sub-item 7, 8, 9 of article 3 (complex of measures of social and legal character, developed and realized individually concerning the person who is under probational control, for correction of his behavior for the purpose of the prevention of commission of new criminal offenses), probation services (the body of a penal correction system which is carrying out executive and administrative functions on ensuring execution of criminal penalties without isolation from society and rendering assistance to the convicts who are on its control in receiving social legal aid) and probational control (activities of the authorized bodies for control of execution assigned by court to convicts of duties and their behavior, and also to rendering to them assistance in receiving social legal aid). [13, page 12]

Moreover chapter 5 of CEC RK "Implementation of probational control" [13, page 21-22] was devoted completely to implementation of the organization of the probational control.

So, in article 19 of CEC RK there was determined a group of people, in the relation to whom there is implemented probational control:

1. convicts to punishment in the form of restriction of pretrial freedom;
2. convicts conditionally;
3. released on parole from serving a sentence of imprisonment.

The criminal and executive legislation provides a number of features of implementation of probational control in the relation to minors.

Features of implementation of probational control concerning minors are enshrined in article 20 of CEC RK. So the service of a probation during detention of the minor, who is wanted, immediately calls to parents or other lawful representatives for poll and determination of the reasons and conditions, promoting evasion from serving of punishments, and also together with representatives of body of guardianship and trusteeship quarterly conducts examination of living conditions of minors with drawing up the act.

Categories of minors, concerning whom it is made the probational control, are:

1. convicts to punishment in the form of restriction of pretrial freedom;
2. convicts conditionally;
3. released on parole from serving a sentence of imprisonment.

The service of probation at registration of the minor realizes a complex of measures according to articles 69, 169 and 174 of CEC RK at the presence of parents or other lawful representatives, and if it is necessary – the teacher or the psychologist.

Besides, according to article 22 of CEC RK service of probation:

1. realize the registration of the persons, to whom it is determined the probational control;
2. explains an order of execution of the duties assigned by court and accountability for their non-execution;
3. explains an order and conditions of implementation and the termination of probational control and accountability for violation of an order of probational control;
4. explains an order of granting and refusal of receiving social and legal and other help;
5. determines the residence of the person, state of his health, education level and labor employment, and also other data necessary for scoping of providing social legal and other aid;
6. carries out other functions provided by the legislation of the Republic of Kazakhstan.

Article 21 of CEC RK establishes duties for the persons who are under probational control:

1. The person, concerning to whom there is determined the probational control, has the right to refuse receiving social and legal and other help. In that case the refusal is made out by the act.
2. The person, concerning to whom there is determined the probational control, is obliged:
    1. to be within ten days from the date of sentence or court order of entry into force in service of probation for registration;
    2. to meet the conditions established by the present Code and an order of serving sentence and other measures of criminal and legal influence;
    3. to be in service of probation for participation in a preventive conversation;
    4. to inform service of a probation in writing form on change of the place of work and (or) a residence.

3. CONCLUSION

In case of non-compliance with probational control by the person of conditions the service of probation has the right according to article 23 of CEC RK after the written prevention to direct submission to court.

According to data of the Committee of penal correction system of the Ministry of Internal Affairs of RK, the number of the persons, who were registered by the service of probation, was made in 2015 – 47 862 citizens (in 2014 – 39 530; in 2013 – 34 309).

The analysis of number of convicts was shown that there is a decrease in number of the convicts who are in places of detention, at the same time the number of the convicts who were registered by the service of probation increases.

At the same time the number of the persons, released from places of detention, increases annually. It is released from institutions in 2015 – 16 218 convicts (2014 – 11 255; 2013 – 9 020), from them on the end of the sentence of 2015 – 4 675 convicts (2014 – 4 414; 2013 – 3 711).

All persons need the social help, released from places of detention who in the first two-three months after release need means for accommodation and job search.

In Kazakhstan it is created the legal basis of realization of the mechanism of re-socialization. The criminal and executive legislation defines meaning of the term "probation" as complex of measures of social and legal character, developed and realized individually concerning the person, who is under probational control for correction of his behavior for the purpose of the prevention of commission of new criminal offenses by him.

Thus, consideration of the questions, connected with borrowing and perception by the Kazakhstan criminal and executive legislation of both institutes and norms of international law, and foreign experience, allows to come to the following conclusions.

Implementation and reception of law norms act as traditional and effective mechanisms of improvement of the national legislation, including governing the relations in the sphere of criminal justice, as main beginning of which there has to admit a voluntary nature.

At the same time, borrowing of the international and foreign experience in the sphere of criminal justice is represented productive only within the relevant standards of the Constitution, and equally has to answer both national legal traditions, and earlier concluded interstate and international obligations.

REFERENCES

[1] Constitution of the Republic of Kazakhstan. Practical guide: - Almaty: "Norma-K" Publishing House LLP, - 2016.

[2] Strategy "Kazakhstan-2050": New political course of established state. Address of the President of the Republic of Kazakhstan - Leader of the Nation N.A.Nazarbayev to people of Kazakhstan. - Almaty: Lawyer, 2013, page 35-36.

[3] Foreign words dictionary. - M., 1964.

[4] Lukashuk I.I. International legal regulation of the international relations (system approach). - M.: International relations, 1975.

[5] About signing by the Republic of Kazakhstan of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights: Decree of the President of the Republic of Kazakhstan of November 15, 2003 No. 1227.

[6] About ratification of the Convention on transfer of convicts to imprisonment for further serving sentence: Law of the Republic of Kazakhstan of July 16, 1999 N 432-1.

[7] About accession of the Republic of Kazakhstan to the Vienna convention on the right of international treaties of 1969: The resolution of the Supreme Council of the Republic of Kazakhstan from 31 marta1993 No. 2059-XII.

[8] Decision of Council of heads of the states of the Commonwealth of Independent States on the Interstate program of joint efforts of fight against crime for 2003-2004 (Chisinau, on October 7, 2002).

[9] About ratification of the Convention on legal aid and legal relations on civil, family and criminal cases: Law of the Republic of Kazakhstan of March 10, 2004 No. 531-II.

[10] About ratification of the Convention of legal aid and legal relations on civil, family and criminal cases: The resolution of the Supreme Council of the Republic of Kazakhstan of March 31, 1993 N 2055-XII.

[11] Shaymurunova A.K. Progressive system of execution of imprisonment (theoretical and applied research). Dissertation abstract of Candidate of juridical sciences. - Karaganda, 2004.

[12] Management of the bodies, executing punishment / edited by Tumanov G.A. and Zubkova A.I. - M, 1993.

[13] Criminal and executive code of the Republic of Kazakhstan: Practical guide. - Almaty: "Norma-K" Publishing House LLP, - 2014.

[14] The comment to Criminal and executive code of the Republic of Kazakhstan. - Almaty, 1999.

[15] The concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020// "Kazakhstan truth" newspaper. – 2009. - August 27.

[16] Berman G.J. The western tradition of law: an era of the formation / Translated from English – the 2nd publ. – M.: MSU publishing house: INFRA publishing group – M.: NORMA, 1998.

[17] Bychkova C.F. Through a prism of the General Law there should to be considered loans from the foreign legislation// Law newspaper. – 2002. - June 26.

[18] Skakov A.B. Progressive system of execution of imprisonment and its reflection in the new legislation of the Republic of Kazakhstan. Monograph. - Almaty, 2004, page 22.

[19] MPA Newsletter.-1996.-No. 12.