

## **Analysis of Institution of Punishment on Criminal Law of the Republic of Kazakhstan and Foreign Countries**

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**Abstract:** In the present research, there was an attempt to analyze the institution of punishment on criminal law of the Republic of Kazakhstan and Foreign countries. The work offers a historical analysis of the development of the legislation on the issues, the main problems arising in judiciary practice during imposition of punishment and proposals to improve the criminal legislation and other normative and legal acts of the Republic of Kazakhstan which governing the institution of punishment. The relevance of the research is to study theoretical and applied problems of criminal punishment in Kazakhstan and Foreign countries with the aim of further development of problems enabling the future adoption of a new criminal punishment corresponding to new society. Because, it is obvious that there has been a trend of transition to a democratic mode of execution of punishments and the formation of civil society in Kazakhstan. This determines the need to conduct comparative analysis for the purpose of making alterations in the criminal law of Kazakhstan. It seems that carried out comprehensive comparative and legal research of the Institute of Punishment under the Current Criminal legislation of the Republic of Kazakhstan and Foreign countries will contribute to the humanization of the punitive policy. Of course, science does not stand still and further study of the problems of criminal punishment will have its further continuation

**Key words:** Criminal law, punishment, property punishments, non property punishments, imprisonment, arrest

### **INTRODUCTION**

**Problem statement:** Comparative law is intended to reveal common and peculiar features in the development of the legal systems of different countries, to trace the history of development, borrowing and mutual influence of these systems. Only considering National Criminal Law in relation to other legal systems, it is possible to understand values, priorities, tendencies and prospects of development of the National Criminal Law.

Active legislative process in recent years in the Republic of Kazakhstan, more active inclusion of Kazakhstan in international cooperation in the fight against crime have led to intense interest in Foreign Criminal Law and experience of its application and in particular to systems and punishments.

The relevance of the research is to study theoretical and applied problems of criminal punishment in Kazakhstan and in the Arab countries with the aim of further development of problems enabling the future adoption of a new criminal punishment corresponding to new society.

Because, it is obvious that there has been a trend of transition to a democratic mode of execution of punishments and the formation of civil society in Kazakhstan.

In accordance with Article 39 of the Constitution of the Republic of Kazakhstan the rights and freedoms of human and citizen may be limited only by laws and only to the extent necessary for protection of the constitutional order, public order, rights and freedoms, health and morality of the population (Anonymous, 2015).

However, the formation of this democratic regime is guided more by trial and error than based on scientifically informed decisions. In this regard, it should be noted that timeliness of the adoption of the new concept of legal policy of Kazakhstan, according to which the most important link of legal policy of the state is the criminal policy which improvement is carried out by complex, interconnected correction of criminal, criminal procedural and criminal enforcement law and also law enforcement (Kazakhstanskaya, 2009).

Evaluating the current state of the criminal law, it can be stated that in general, its future development is

ensured. The current criminal code is an effective tool in the fight against crime and criminal-legal protection of rights and freedoms, interests of the state and society.

We require a sound criminal law policy in this area which is based on the criminal law, the interpretations of the norms and practice of their application, aimed at the elaboration and decision of criminal-legal problems on the protection of individuals, society and state from criminal attacks and prevention of crimes (Zhumabaev, 2014).

The existing criminal legislation of Kazakhstan and Arab countries have a different interpretation of the concept and purposes of punishment, different kind of criminal punishments and different approaches to criminal punishment. In our opinion, separate decisions of the legislator of some Arab countries are more in line with current practice in the fight against crime, at the same time, separate decisions of the Kazakhstan legislator seem to be preferable. This determines the need to conduct comparative analysis for the purpose of making alterations in the Criminal Law of Kazakhstan.

The radical reform of the economic, social-political and spiritual spheres of life of society and fundamental change in Kazakhstan's Criminal Law put a question of finding the optimal models of the system of criminal punishments and their new types that are able to ensure the success of the initiated reforms.

Analysis of recent researches and publications. Theoretical basis of research is the findings of scientists-lawyers on the problem under study as well as provisions of the General theory of state and law, criminal law, criminal and penal, etc. The importance for disclosure of contents of issues of the criminal punishment system in this thesis have theoretical and legal researches: M.O. Auezova, S.B. Baisheva, Ch. Valikhanova, S.K. Kanesbaeva, T.M. Kulteleva, A.I. Levshina, S.M. Mukaniva, A.N. Nusupbekova, S.N. Pokrovskiy, G.S. Sapargaliev, S.L. Fuksa and V.F. Shakhmatova, etc.

From large number of works devoted to various aspects of criminal punishment, we used the researchs of such modern Kazakh scientists as A.N. Agybaeva, K.Zh. Baltabaeva, B.S. Beisenova, N.O. Dulatbekova, U.S. Zhekebaeva, E.I. Kairzhanova, B.A. Kulmukhambetova, S.S. Moldabaeva, S.M. Rakhmetova, A.B. Skakova, D.S. Chukmaitova and also Russian scientists: M.M. Babaeva, N.A. Beliaeva, Ya.I. Gilinskiy, I.I. Karpets, S.F. Miliukova, I.S. Noi, V.A. Utkina, A.I. Chuchaeva and M.D. Shargorodskiy, etc. The researchs of these researchs have great scientific and practical importance.

Researchs of L.R. Siukiyanen and thesis researchs of Amin Omar Akhmed, Ali Nasher Mutakhar Nabil Abdelrahman Al-Assumi, Ramez Akhmed Elaidi and others, devoted to the study of the formation and development of system of criminal punishments in the Arab countries played a huge role.

## **MATERIALS AND METHODS**

**Research objective:** The main objective of the study is to carry out comprehensive comparative legal research of the Institute of Capital Punishment in the Current Criminal Legislation of the Republic of Kazakhstan and Arab countries. To achieve this goal the following tasks were set:

- To disclose the content of the notion and purpose of "punishment" in the criminal legislation of Kazakhstan and Arab countries from the point of view of the theory of criminal law
- To investigate the system and classification of criminal punishment in Kazakhstan and Arab countries
- To analyze different types of punishment not related to imprisonment, to identify the prospects for further development of this institution through the development of legal civil society and the state
- To analyze the peculiarities of punishment related to imprisonment in the modern criminal law of Kazakhstan and Arab countries
- Based on the analysis of practice of application of criminal punishments and non related with imprisonment to give concrete proposals of improvement of the norms of criminal legislation in Kazakhstan

Main research results. In the research was made an attempt of complex scientific and theoretical research of the Institute of Punishment on Criminal Law of the Republic of Kazakhstan and Foreign countries, taking into account the issues and problems that exist in the theory of law and which arise in practice when applying these issues in close relationship allowed us to obtain the following results.

According to the researchers, the system of punishments fixed by current criminal legislation does not meet the practical needs of law enforcement. It spills over. A number of punishments under the criminal code of the Republic of Kazakhstan are unclaimed and are not applied because they do not correspond to the real possibilities of the state, the Kazakh legal tradition and social psychology of the majority population of our country.

Therefore, in modern judicial practice of Kazakhstan, it is possible to use the positive experience of the practice of application of certain types of criminal punishment which are also practiced in some Arab countries, especially for crimes of little and average gravity.

The conducted research established that in Criminal Law of the Arab countries the questions about the concept and nature of punishment aren't considered. As to the definition of punishment in the criminal legislation of the Arab countries, it is generally absent whereas in Criminal Law of Kazakhstan the concept and essence of punishment are considered very widely and the concept and purposes of punishment are given in Article 38 of the Criminal code of the Republic of Kazakhstan (Kliashtomyi and Sultanov, 2012).

In the Arab states, the purpose of punishment depend on the religious attitudes and social traditions, social relations and criminal-legal policy of the state, therefore, the objectives of punishment in Arab countries are treated differently. However, the precise definition of the purposes of punishment in the law is necessary both for practice and for research studies on the efficacy of criminal law for interpreting the results of the application of punishment and justified conclusions.

The researchs believe that the positive practice of application of punishments not connected with imprisonment, in some Arab countries demonstrate the need for broad application of the "alternative" types of punishments in the Republic of Kazakhstan. More frequent assignment of punishments not related to imprisonment will contribute to humanization of the process of criminal punishments in the Republic of Kazakhstan.

Fines and confiscation of property by their nature are highly effective forms of punishment, because convicted is subjected to assignment of certain material deprivation, expressed in monetary form (Anonymous, 1975). But, however, as evidenced by jurisprudence of the Arab countries, the position of the law on the replacement of a fine with the deprivation of liberty often allows those most wealthy, essentially to pay off the actual responsibility for committing criminally punishable acts then how can the poor be behind bars even in case of commission of minor infringements.

On the basis of the conducted research the authors come to the conclusion that the practice of application of criminal punishment as deprivation of freedom, not connected with isolation from society, demonstrates the need for making changes to existing criminal and criminal-executive legislation.

Comparative legal analysis of life imprisonment as a form of criminal punishment also shows some differences in approaches to the legislative regulation of this institute.

So, in almost all of Arab countries life imprisonment is imposed as one of the harshest punishments. The life imprisonment is often prescribed as an alternative sanction in combination: life imprisonment or death penalty that is offered to be introduced to the Kazakh legislation.

## **RESULTS AND DISCUSSION**

The analysis of the researched issues of criminal punishment of the legislation of the Republic of Kazakhstan and Foreign countries, based on modern achievements of domestic and Foreign Legal Science, history of development, international experience and existing legislation, the practical activities of law enforcement agencies and the courts in this sphere allows to draw the following conclusions.

Kazakh customary law had no punishment as imprisonment, detention, use of convicts for public works, imprisonment in concentration camps, exile or expulsion of offenders. Also, other forms of deprivation of liberties for a very long time were unknown for that law. There were no necessary conditions for the application and implementation of these measures in Kazakh Society. But still, Kazakh Law knew some types of short-term imprisonment (Fuks, 1981). So, it knew the perpetrator imprisonment in the dungeon (pit), kerege, tying to a pole, leaving in a few hours tied up and naked in the hot summer months in the sun and in winter in light clothing in the cold, etc.

Thus, the institution of punishment according to the Kazakh Common Law is a reflection of nomadic society and is based on the following principles: the preservation of peace and harmony, nomadic democracy, reconciliation, humanism which were provided by a high level of social consciousness. Therefore, in the modern life of Kazakhstan's society you can use the positive experience of the practice of application of punishment of the courts, especially, it concerns crimes of the little and average gravity.

The Institute of Punishment, Contributing to the implementation of social and preventive functions of criminal law (general and special prevention of crimes), is one of the most important institutions of criminal law and differs substantially from other measures of state coercion. The main differences between criminal punishment and other measures of state coercion can be found on three grounds.

First, punishment is a consequence of the crime, whereas other measures of legal coercion as a consequence of other, less dangerous offenses.

Secondly, punishment is appointed on behalf of the state and only by the court, other measures of legal regulation can be appointed on behalf of the officials.

Thirdly, the punishment shall entail a criminal record and other measures of legal coercion don't have such effect.

Punishment is fundamental criminal-legal category that expresses the state coercion, the essence of which is punishment imposed by court to a person who is guilty and consisting in provided by the criminal law deprivation or restriction of legal rights and freedoms of that person. In accordance with this punishments characteristics are (Khitrin, 2008):

- The fundamental nature of it as a category
- Triune; social and political, moral and criminal-legal nature, it is punishment which consists of deprivation or limitation of legal rights and freedoms
- State coercion, it is violence within the forms
- Prescribed by the criminal law
- The subject of the court as authority
- The subject of the application; the person who committed the crime
- Reason of appointment; the commission of socially dangerous act containing all crime components
- Fault as the subjective basis of destination

Unlike the Kazakhstan's Criminal Law, where all criminal provisions included in the criminal code, in the Arab world the criminal code and separate criminal laws against a certain crime may exist in parallel.

In addition, shariat has primary importance among all of the sources of criminal law in some countries (for example, in the United Arab Emirates, Sudan, Yemen, Saudi Arabia and Oman) and in other legislation (for example, in Bahrain, in Syria, Lebanon, Egypt).

The majority of Arab states, to the middle of XX century refused Muslim Law as the basic legal system, the legal systems of Lebanon, Sudan, Iraq, Libya, Jordan, Morocco, Syria, Egypt and Algeria were built on the two samples: Romano-Germanic and Anglo-Saxon (Levshyn, 1832). It follows that for most of these countries Islamic law is not the only applicable law. Moreover, Arab and Islamic States, being members of the world community, in particular members of the UN, cannot refuse from international agreements on human rights.

However, the criminal code of the Arab countries does not consider questions about the concept and nature of punishment. As to the definition of punishment in the criminal legislation of the Arab countries, it is non-existent.

In the Criminal Law of the Arab countries, the question about the purposes of punishment cannot be adjusted. However, the purpose of punishment is retribution and prevention which is divided into general

and particular. In Arab countries the criminal code includes articles which can be considered as example of the application of the private prevention in practice: so, in articles 101-106 of the Criminal Code of Jordan, articles 49-54 of the Criminal Code of Iraq, it is a case of the punishment for relapse (Bronevskiy, 1830; Kulteleev, 2014; Kairzhanov, 2015). In accordance with shariat the goal of punishment is prevention which can be general or private. The absence of the goals of punishment in legislation of the Arab countries, often in law enforcement leads to inconsistency in sentencing for similar crimes.

Defining the goals of punishment in the law is necessary both for practice and for research studies on the efficacy of criminal law, for interpreting the results of the application of punishment and justified conclusions. From the system of punishment, its effectiveness primarily depends on whether in the society the crime in the presence of all its roots is minimized or it reaches its maximum.

## CONCLUSION

Summarizing the above, the goals and objectives of the study were illuminated. It seems that comprehensive comparative legal research of the institute of capital punishment in the current criminal legislation of the Republic of Kazakhstan and Arab countries will contribute to the humanization of the punitive policy. Of course, science does not stand still and further study of the problems of criminal punishment will have its further continuation.

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