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About Coercion and Encouragement in the Criminal Legislatio of the Republic of Kazakhstan

[1]Talgat K. Akimzhanov, [1]Balgyn A. Torgautova, [2]Tatyana I. Zinkevich,
[1]Victoria V. Lyutsik, [1]Zhanar M. Chokin and [1]Marina V. Chokina
[1]Turan University, Almaty, Kazakhstan
[2]Eurasian Law Academy named after D.A. Kunayev, Almaty, Kazakhstan

Abstract: This research is considered the measures on humanization of criminal and legal policy of the Republic of Kazakhstan where their realization will allow to reduce an application of coercion in the criminal legislation and the process of involvement of citizens to the sphere of criminal legal relations will be minimized by the offered way. The problem of incentive norms in criminal law, concessions from the state in favor of guilty or so-called "compromises" in the sphere of criminal and legal policy was a subject of independent research by scientists of other states; however, the Kazakh jurisprudence practically wasn't investigated the given matters independently. Art of law enforcement system consists in providing equivalence of coercive and incentive measures of impact on offenders.

Key words: Criminal and legal policy, coercion, incentive, punishment, law-enforcement activity, humanization

INTRODUCTION

It was considered for a long time in criminal and legal policy of the former USSR that punishment is the only method of criminal and legal regulation. Today, it is impossible to deny that for such statement there are taken place the objective and subjective prerequisites during this period of the development of our state.

So, Kovalyov (1971) wrote in the fundamental work: "the Soviet criminal law" (course of lectures) that the only method of regulation of criminal legal relations are threat of enforcement of a penalty containing in criminal and legal sanctions and its application in case of commission of penal act.

This position was generally accepted among scientists of that period and remained practically to the middle of the 70th year of the 20th century. And only by the beginning of the 80th years there were begun to appear the works of such leading scientists as V.M. Galkin, N.A. Struchkov, N.I. Zagorodnikov, A.B. Sakharov and others challenging and considering a subjective position the leading role of a punitive method in criminal law.

The specified position was influenced on the existing criminal legislation of the USSR and Union Republics for that period.

So, it was specified in the Article 20 "pnishment Purposes" of the criminal code of Kazakh Soviet Socialist Republic, that: "punishment is not only a penalty for the committed crime but also it has aim to be corrected and re-educated of the condemned in the spirit of the honest attitude to work, exact fulfillment of laws, respect to the rules of the socialist community and also the prevention of commission of new crimes as condemned and other person. Punishment does not have aim to be caused physical sufferings or humiliation of human dignity".

In criminal codes of the Republic of Kazakhstan from 1997 (Article 38) and 2014 (Article 39) in comparison with the criminal code of Kazakhstan from 1961, the definition of punishment was underwent considerable changes and it was defined as "the measure of the state coercion, appointed by a court judgment. Punishment is applied to the person found guilty in the commission of a criminal offense and it is consisted in deprivation or restriction of the rights and freedoms of this person, provided of the present code.

Punishment is applied in order to restore social justice and also the correction of the condemned and the prevention of commission of new criminal offenses as condemned and other persons. Punishment has no the purpose the causing physical sufferings or humiliation of human dignity".

The content of the specified punishment definition was shown that the legislator completely refused from the word "penalty" but at the same time he gave preference to interpretation of punishment as "measures of the state coercion" as without coercion the criminal law

Corresponding Author: Talgat K. Akimzhanov, Turan University, Almaty, Kazakhstan

as branch of the right could be lost the purpose. A lot of things depend on contents of the criminal legislation.

First, punishment defines an essence of criminal policy of the state. It follows from the definition of "criminal policy". In the explanatory dictionary of Russian language there was written: "criminal" belonging to crime, crimes and their punishability (Ojegov and Yu, 1991).

Secondly, according to opinion of scientists, the term "criminal law" more gravitates to punishment than to a crime. And in this sense "criminal law" is in fact, the synonym of law "penalty" (Korobeev, 2008). Thirdly, the criminal legislation has to be effective, low-cost, promote future development of our state.

It is easy to notice that in the new criminal code of Kazakhstan 2014 it is remained the preference of the legislator to punitive purpose of criminal law. So, such types of punishments most often occur in research of special part of the criminal code of Kazakhstan: imprisonment (744), a penalty (471), correctional works (468), work restriction (342), confiscation of property (264), community service (152), arrest (150), the death penalty (12).

That means that imprisonment both in new criminal code of Kazakhstan and in the criminal code of Kazakhstan 1997 was remained as main type of punishment.

Though in this regard there were direct instructions of the Head of our state, stated in Address of the President of the Republic of Kazakhstan N. Nazarbayev to the nation from January 29, 2010.

So, the President specified that penalties are made less than 5%, correctional works 0.4%, public works 0% in Kazakh system of punishment (the Criminal code of Kazakhstan 1997). The main type of punishment (more than 51%) is imprisonment. Nobody is engaged in rehabilitation released from prisons. As a result they fill up number of criminals. It is known that punishment in the criminal legislation has also negative consequences.

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 and together with it maximally reduced the social consequences both for the condemned and for the state in general.

The ancient Greek philosopher Platon wrote in the early works that punishment is the benefit for the criminal which is capable to restore harmony in his soul. He admitted the death penalty but thus Platon paid attention to legislative process, noted necessity to consider human imperfection, to seek to prevent a crime, to achieve that person to become better as result of punishment. Platon also noted personal nature of punishment; he considered that it shouldn't be extended on the criminal's descendants even in cases of infringement of the state order (Dolgora, 2010).

MATERIALS AND METHODS

For Kazakhstan this problem is very actual as in our country there was formed the difficult situation in questions of right application.

Over one and a half million people passed through correctional facilities for the entire period of sovereign development of Kazakhstan according to data of Committee of correctional system of the Ministry of Internal Affairs of the Republic of Kazakhstan.

Over the last 10 years expenses on penal system were grown by 4.5 times and were made as of January 1, 2015 >50 billion tenges and maintenance of one condemned in a year is cost to the state 640 thousand tenges or 1754 tenges a day. Kazakhstan at an index of "the prison population" 295 takes the 35th place in the world.

For comparison in the former countries of the USSR an index of "the prison population" is higher than in Kazakhstan only at Russia 477 (8 place), Ukraine 302 (the 33rd place), Belorussia 335 (24th place) and in the Central Asian countries this indicator is much lower than in Kazakhstan. So, the index of "the prison population" was made at Turkmenistan 224 (62nd place), Kyrgyzstan 181 (81st place), Uzbekistan 152 (92nd place), Tajikistan 130 (115th place). The USA has the top of this rating where the index of "the prison population, was made the highest rate 716".

The problem of incentive norms in criminal law, concessions from the state in favor of guilty or so-called "compromises" in the sphere of criminal and legal policy was a subject of independent research by scientists of other states; however, the Kazakh jurisprudence practically wasn't investigated the given matters independently.

Though it should be noted that there are constantly discussed at the highest level our country about incentive norms, concessions or compromises in the sphere of fight against crime and they (compromises) were presented and are presented at law-enforcement practice. According to O.V. Starkov opinion, compromise with crime is an agreement by reciprocal concessions and the state concessions are:

Exemption from criminal liability and punishment up to recognition of a crime not criminal (for example, actions of the agents compelled to be at these circumstances; members of the criminal organizations assisted to law enforcement agencies; at voluntary surrender of weapons, etc.).

Mitigation of punishment, prescription of punishment which is lower than the lowest limit in the presence of the mitigating circumstances (for example, with assistance to law enforcement agencies, prevention of harmful consequences of the act and so forth).

The famous scientist A.I. Dolgov, speaking about a compromise in counteraction of crime is pointed to such circumstance where it is special bargain between the state and the criminal but first it is compelled bargain for more optimum results of fight against crime; secondly, it is rather "bargain, forgiveness", than "bargain, compromise": the criminal is exempted from criminal responsibility not because of allowing on certain conditions his criminal behavior.

And according to opinion of A.I. Dolgova the concept "compromise" which is used even more often in relation to fight against crime, doesn't seem as precise. Such "compromise" is allowed only at response to concrete crimes, concerning specific criminals or their certain contingents but not on crime as the mass phenomenon.

But our point of view that the term "compromise" in counteraction with crime can be used slightly more widely, than A.I. Dolgova is offered, as the same humanization and liberalization of the criminal legislation, amnesty, decriminalization of separate corpuses delicti all this in a complex has positive impact not only on separately taken person but also, in general, on all crime.

Not incidentally, according to opinions of scientists, the criminal policy is understood as the general line developed by the state, defining the main directions, the purposes and controlling means for the criminals by formation of the criminal, criminal procedure, criminal and executive legislation, regulation of practice of its application and also by the development and implementation of measures, directed on the prevention of crimes.

In the approved Decree of the President of the Republic of Kazakhstan from August 24, 2009, No. 858 "The concept of legal policy of the Republic of Kazakhstan for the period from 2010-2020" there was noted that the most important part of the state legal policy is the criminal policy, where the improvement is carried out by the complex, interconnected correction of the criminal, criminal procedure and criminal and executive law and also legal coercion.

The number of grave and gravest crimes has also positive tendency to decrease (by 17.5%) in comparison with last year. Their share in structure of crimes was made 8.8% in 2014 (2013-10.1%) and crimes of medium gravity and less grave crimes of 79.6% (77.6%) and 11.6% (12.2%), respectively.

The greatest specific weight among the registered crimes there are taken places by the crimes against property 79.5% (2013-77.9%) which most part is made by thefts of property 207.0 thousand cases (2013-2102). It should be noted that in this group of crimes in comparison with last year there is observed the small growth of cases of fraud for 2.2%.

In general, it is observed the tendency to decrease by all types of crimes however, there is observed the negative growth of number of the registered crimes of terrorist character in group of crimes against public safety and a public order which in comparison with last year grew by 31.7% and were made 79 cases in 2014.

In our opinion, such sharp fluctuations of number of the registered crimes are testified to the available problems in the sphere of legal coercion and they need to be considered through the scientific understanding and the comprehensive analysis from scientists and experts.

Negative changes of quantitative and qualitative characteristics of modern crime, expenses of law-enforcement activity of law enforcement agencies, determination of the conducted state policy in fight against crime demand a search of new approaches to law understanding and legal coercion, to conception and reconsideration of the existing criminal legislation of the Republic of Kazakhstan.

Existence of the criminogenic intensity in society, caused by crime, indicates on the existence of problems of criminal law of a methodological order which in total define low efficiency of criminal and legal regulation of the public relations.

The following incentive norms (compromises, concessions) are stated in the new criminal legislation of the Republic of Kazakhstan which came into force on January 1, 2015.

The first group of incentive norms (compromises) in the criminal legislation is connected with creation of a number of conditions for release from criminal liability of the persons who committed crimes (Article of the criminal code of Kazakhstan): 2, innocent damnification; 26, voluntary refusal of criminal violation; 30, excess of the accomplice of a criminal offense; 32, necessary defense; 33, damnification at detention of the person who made encroachment; 34, extreme necessity; 35, implementation of investigative measures or confidential investigative actions; 36, reasonable risk; 37, physical or mental coercion; 38, execution of the order or direction).

The second group of incentive norms (compromises) in the criminal legislation at determination of punishment (Article of the Criminal code of Kazakhstan): 53, circumstances, mitigating criminal liability and

punishment; 55, assignment of lighter punishment, than it is provided for this criminal offense; 63, suspended sentence).

The third group of incentive norms (compromises) in the criminal legislation is connected with questions of exemption from criminal liability and punishment (Article of the Criminal code of Kazakhstan: 65, exemption from criminal liability in connection with active repentance; 66, exemption from criminal liability at exceeding limits of necessary defence; 67, exemption from criminal liability at execution conditions of the procedural agreement; 68, exemption from criminal liability in connection with reconciliation; 69, exemption from criminal liability with establishment of the bail; 70, exemption from criminal liability in connection with change of a situation; 71, exemption from criminal liability in connection with statute of limitations; 72, conditional early release from punishment serving; 73, replacements of unserved part of the sentence with mitigation of punishment or reduction of term of the imposed sentence; 74, postponement of punishment to pregnant women and women having juvenile children, to the men alone bringing up juvenile children; 75, exemption from punishment in connection with an illness; 76, exemption from punishment and postponement of punishment owing to confluence of difficult circumstances; 77, exemption from serving of punishment in connection with conviction statute of limitations; 78, exemption from criminal liability and punishment on the basis of the act of amnesty or clemency).

The fourth group of incentive norms (compromises) in the criminal legislation connected with criminal liability of minors (Article of the Criminal code of Kazakhstan): 83, exemption of minors from criminal liability and punishment; 84, coercive measures of educational character; 86, conditional early release of minors from punishment serving; 87, replacement of unserved part of the sentence of the minors; Article 88, statute of limitations; 90, application of provisions of the present section to persons aged from 18 till 21 years).

RESULTS AND DISCUSSION

According to our point of view, it is necessary to reconsider the relation in respect of a humanization a coercion method in the criminal legislation.

The first: The order of a conditional early release of the condemned there is need to be in revision. So, instead of established in the Article 72 of criminal code of Kazakhstan "Conditional early release from punishment serving" obligatory unreasonable long terms of mandatory sentence, there can be replaced with others: for non-grave crimes till 1 year, crimes of medium gravity, till 2 years, heavy crimes till 3 years, especially grave, till 4 year.

It will give the chance to stimulate condemned to correction and essential to reduce the number of the prison population.

The second: It is necessary to continue work on reduction of application of such type of punishment as imprisonment.

The famous Russian scientist, G.F. Hokhryakov, very convincingly passed this opinion: "The common sense dictates that the task of correction and re-education in the conditions of isolation from society is unattainable... Really, setting an aim on the adaptation of the person to life in society, he is separated from this society; wishing to teach him to useful active behavior, kept in a situation where each step is planned and it is developed the passivity; thinking to replace in consciousness of the person addictions by useful; he is kept among similar persons that is promoted to the mutual contamination, etc" (Hokhryakov, 1989).

The third: Considering the international experience of legal coercion there is needed to reconsider the maximum terms of imprisonment. As it is shown an analysis, the maximum term of imprisonment in France makes 30 years, Great Britain 25, in Japan, Singapore, China 20, South Korea 25, in Federal Republic of Germany 15 years, the system of "summation" of punishments is used in the USA, as a result, the final punishment to the condemned can be estimated centuries.

In Kazakhstan the maximum term of imprisonment makes 25 and on accumulative sentences 30 years. It would be expedient to be guided for 10 and 15 years, respectively.

The fourth: There is need to intensify application of article 63 "Suspended sentence" of the Criminal code of the Republic of Kazakhstan.

The fifth: There is need to strengthen preventive functions of civil society. For activization of the criminal legislation of the Republic of Kazakhstan, there would be expedient to use possibilities of the Law RK "About prevention of offences" for consolidation of efforts of all bodies and the public on formation of new ideology in society in the sphere of counteraction of crime. There is need to attract all bodies and public organizations, citizens for implementation of Address of the President of the Republic of Kazakhstan the Leader

Nation N. Nazarbayev to the nation of Kazakhstan "Kazakhstan 2050: common aim, common interests, common future" about following of the state to the principle of zero-tolerance policy to a disorder.

At the organization of counteraction of crime, it is necessary to take into account an opinion of the famous scientific criminologist G.A. Avanesov that the crime is generated by conditions of public life but it is a part of these conditions (Avanesov, 2010).

It will be correct to consider process of fight against crime not only as impact on crime as negative component of society but also the society which generates this crime.

It is necessary more actively to replace coercion with encouragements which are provided by the criminal legislation and they can be applied to the persons who repented of deeds, persons interested in returning to law-abiding behavior and seeking to completely change the life to the best.

That is the legislator, consciously enters incentive norms and allows certain concessions, compromises at determination and release from punishments for increase of efficiency of the criminal legislation.

At the same time, this work has to be continued as the new criminal legislation is not solved the specified problems in full.

It is necessary to agree with a position of the Russian scientists that a question of achievement of original harmony between coercion and encouragement in criminal law is a future question. We are in the beginning of this way.

It should be noted that factors of internal and external character have impact on the maintenance of criminal and legal policy of the state.

CONCLUSION

Thus it is easy to establish direct dependence between the maintenance of criminal policy which is defined by a ratio of coercion and encouragement in criminal law and the happening processes in the sphere of democratization.

So, the one or other society will be more democratic the criminal policy will be more humane and it is the evidence of formation of "the democratic high and social state where the supreme values are the person, his life, the rights and freedoms" as it is fixed in the Constitution of the Republic of Kazakhstan.

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