Alternatives to imprisonment in Kazakhstan: problems and prospects

Victor Nikolayevich Zhamuldinov

Pavlodar State Pedagogical Institute. Mira Street 60, Pavlodar, Republic of Kazakhstan
vicniczham@inbox.ru

Abstract: In this article the author analyzes the Criminal Code of the Republic of Kazakhstan and deals the interrelation between crime and punishment. Moreover, studies the types of criminal penalties and the grounds for release from punishment. Noting such kind of punishment as imprisonment the author puts forward an alternative to imprisonment, dwelling on problems and prospects. The author considers imprisonment as the result of the courts application of the criminal law and proposes further improvement of criminal legislation in the form of offers to the project of a new Criminal Code of the Republic of Kazakhstan. On this basis, decline in the prison population and the prisons maintaining costs is projected as well as stabilization of the crime situation and reduce in the number of offenses in the country. In the conducted research the common ground between national criminal law systems, especially those of the CIS countries has been sought, so as to contribute to the enrichment of theoretical thought, and for dialogue between the scientific community of the country and the government. This is definitely not a complete solution, but an attempt to get closer to it.
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1. Introduction

Today, no one can say exactly neither when the first crime was committed nor when and what penalty was applied for the first time. Only one is known for certain - at all times a crime was followed by a punishment. The penalties applied were very different - from the inhuman tortures and sophisticated executions to public censure. With the development of society and its attitude to punishment changed as well. And today, at the beginning of the third millennium, the question arises: what will the prison system be in the new century? [1]

2. Crime and Punishment

Crime and punishment are closely interrelated. In accordance with Article 9 of the Criminal Code of the Republic of Kazakhstan an offense is an accomplished guilty socially dangerous act (act or omission), prohibited by the criminal law under penalty threat. [2]

The state has a right to use enforcement actions in relation to the offenders by applying criminal punishments.

If the state does not provide a criminal punishment as a consequence for committing any given action, then such an act, even dishonest in terms of morality and ethics, that have caused damage to someone's rights and legitimate interests, cannot be regarded as a crime.

Crime and punishment have a close relationship also in the sense that if an action is not specified as a crime in the Special Part of the Criminal Code, so it cannot be punished by penal measures.

The current Criminal Code of the Republic of Kazakhstan recognizes 298 crimes for which appointment of criminal penalties is provided.

The concept of criminal penalties is specified in Article 38 of the Criminal Code, according to which a criminal penalty - is:

- A measure of state coercion;
- Measure, appointed by a court;
- Measure applied to a person convicted of a crime under the Criminal Code of RK;
- Measure depriving or limiting the rights and freedoms of the individual.

The state applies the measures relating to the perpetrator of a crime by administering law. Courts established by the law act on behalf of the State. Only the courts have the right to apply criminal penalties to those convicted of a crime on behalf of the State. No other state agencies have such powers.

In this connection it should also be noted that although the prosecution is carried out by other bodies and is accomplished solely for the purpose of crime detection and to establish the evidence of guilt in committing a crime, but a person can be recognized guilty of the offense only by a court. The court is obliged to check all the evidence gathered during the investigation and only after confirming the guilt of the person under prosecution, verdict the sentence.

The court can apply a criminal sentence to a person convicted of an offense, only after judicial decision of conviction.

The question of the purpose of punishment is both a theoretical and a practical problem.

Clarifying the purposes of punishment is important. Courts before applying criminal penalties should be aware of the reasons and the results pursued to be achieved.

The objectives of the criminal punishment are defined in the criminal law. Thus, in the Article 20 of the Criminal Code of the Kazakh SSR, along with the purpose of reformation and re-education of the convicts, as well as prevention of new crimes by prisoners and other persons, the punitive character of the punishment was emphasized.

In Article 38 of the Criminal Code of the Republic of Kazakhstan the targets of punishment are indicated:

1) Rehabilitation of social justice;

2) Correction of the convicted person;

3) Prevention of new crimes by convicts, and other persons.

The legislator interested in that the convicted person could realize the connection between punishment and crime as fair reaction of the state and society in relation to the guilty. [3]

The history of criminal law, including criminal penalties, shows that the objectives and purpose of the punishment are inextricably linked to the socio-economic and political processes occurring in the state.

For example, in the recent past, the government attached great importance to restriction of the country economic basis undermining, in this connection the criminal law provided sufficiently stringent penalties for theft of state property, including the capital punishment. Today, when the patterns of ownership changed, new social-economic and market relations appeared the need for application of such measures of criminal influence disappeared.

3. Types of sentences under the Criminal Code and grounds for release from punishment

Under the Criminal Code of the Republic of Kazakhstan (Article 39) the types of criminal sentences are divided into basic and additional.

The basic types include the following penalties:

- A fine;
- Deprivation of the right to occupy certain positions or to be engaged in certain activities;
- Community service;
- Correctional work;
- Restriction in military service;
- Arrest;
- Detention in a disciplinary military unit;
- Imprisonment, including life imprisonment;
- The capital punishment.

260 articles and parts of articles of the Criminal Code provide for appointment of one of these penalties in response to a crime.

Additional penalties are: deprivation of a special, military or honorary title, class rank, diplomatic rank, qualification class and state awards, and the confiscation of property.

Fine and deprivation of the right to occupy certain positions or to be engaged in certain activities can be used as both basic and additional penalties.

It should be noted that the list of criminal penalties in the law is set out from the least severe to the most severe punishments, in order the courts, while electing a punishing measure, could originally proceed from the opportunity to apply the lesser penalty in relation to a particular person.

The Criminal Code of the Republic of Kazakhstan includes new, previously not used types of criminal penalties: the restriction on military service, community service, restriction of liberty, arrest. As an alternative to the capital punishment the life imprisonment is provided.

The analysis of the sanctions contents of the articles of the Criminal Code of the Republic of Kazakhstan and the former Criminal Code of the Kazakh SSR indicates a reduction in the number of articles providing imprisonment as the sole form of punishment (from 85 of the Criminal Code of the Kazakh SSR to 56 under the Criminal Code of the Republic of Kazakhstan), and the simultaneous increase in the number of articles sanctions (from 48 to 62), which do not provide imprisonment for punishment. At the same time there is a rise in the quantity of articles (from 134 to 156), which sanctions include imprisonment along with other punishments.

With the adoption of the Law "On amendments and additions to the Criminal Code, the Criminal Procedure Code and the Penal Executive Code of the Republic of Kazakhstan" of 21 December 2002, the situation changed towards the elimination of certain articles providing imprisonment and imposing sanctions of other, less severe penalties, along with imprisonment.

The criminal law provides for a number of grounds, due to which the perpetrator of a crime may be released from criminal responsibility and punishment. These include:

- Active repentance of the offender after committing a crime (voluntary surrender, assistance in detection of a crime, reparation of harm caused by the offense);
- Exceeding the limits of necessary defense because of fright, fear or confusion arising from the unlawful acts committed against the person;

- A reflection of infringement on life or of other offences connected with the use or attempted use of weapons;

- Reconciliation with the victim;

- Statute of limitations for criminal responsibility;

- The presence of minor children under the age of 14 years at a convicted woman;

- A serious medical condition that prevents serving a sentence;

- The extraordinary circumstances in the family of the convicted person (fire, natural disaster, serious illness or death of the only, except the convict, employable member of the family, etc.);

- Lapse of time of execution of the sentence.

Thus, it should be stated that the new criminal legislation not only provides for the use of repressive measures in the form of criminal punishment to persons who committed crimes, but also contains a number of humanistic aimed provisions, allowing release of individuals from criminal responsibility in certain cases provided by law, even in cases when legally protected rights and interests of others have been harmed.

4. Circumstances to be considered by the courts in application of the criminal penalties

Before making a decision whether to sanction a particular person for committing a specific crime, in every criminal case, the courts need to determine application of which penalties under the criminal law will achieve the above objectives.

The choice of punishment is quite difficult. Punishment itself as a means of achieving statutory goals involves reducing of crimes by influencing on one person, who after experiencing the hardships of punishment execution will reform, and will not commit other crimes. Also, it is understood that on the example of one criminal's penalty other people will not commit a crime.

It is not only the common interest of mankind that crimes should not be committed, but that crimes of every kind should be less frequent, in proportion to the evil they produce to society. Therefore, the means made use of by the legislature to prevent crimes, should be more powerful, in proportion as they are destructive of the public safety and happiness, and as the inducements to commit them are stronger. Therefore there ought to be a fixed proportion between crimes and punishments. [4]

In order to ensure the use of fair punishments for the crimes the Criminal Code of the RK identified a number of provisions that should be considered by courts in sentencing:

1. The degree of public danger of crimes is determined by dividing them into four categories: low weight, moderate, severe and very serious depending on the term of imprisonment established for their committing.

2. Each article of the General Part of the Criminal Code of the RK, which gives the concept of any given criminal punishment, the minimum and maximum periods and sizes for each type of punishment, the limits of which the courts must abide.

3. The list of circumstances mitigating and aggravating responsibility and punishment, which are subject to mandatory registration in sentencing.

4. Established rules for determining recidivism and sentencing for a certain kind of relapse.

5. Defined maximum limits of sentencing under an unfinished crime, active repentance of the culprit for multiple offenses or cumulative sentences.

6. A possibility of a softer punishment than that provided for the offense is stipulated.

7. Finally, in the Article 52 of the Criminal Code the basic principles of sentencing are fixed:

- The punishment should be fair and must be within the limits set in the relevant articles of the Criminal Code;

- The punishment must be necessary and sufficient to correct the defendant and to prevent new crimes;

- A more severe punishment may be imposed only when less severe penalties provided by an article (part of the article) of the Criminal Code, cannot achieve the purpose of punishment;

- When sentencing should take into account the nature and degree of social danger of the crime, the identity of the perpetrator, his behavior before and after the commission of the crime, mitigating and aggravating responsibility and punishment circumstances, and also the impact of the sentence on correction of the convict and the living conditions of his family members and his dependents.

The specified criminal statutory provisions are sufficient to ensure that the perpetrators of the crime received a fair sentence, which would conform to both the gravity of the crime and the identity of the perpetrators.

Moreover, in order to ensure the correct application of criminal penalties and the formation of a uniform court practice in the appointment of criminal penalties the Supreme Court of the Republic of Kazakhstan adopted Regulations: "Compliance of law in the appointment of the Criminal Punishment by the courts" No 1, from April 30, 1999, "On some issues of punishment in the form of imprisonment," No 15, from October 19, 2001, "On the judicial practice in cases of offences by minors, and about their involvement in crime and other antisocial activities," No 6, from April 11, 2002, as well as

other regulatory action relevant to application of the Article 67 of the Criminal Code, parole from punishment, release from punishment due to illness.

5. Imprisonment - the result of application of the criminal law by the courts

By using prison as an answer to all offences committed by such individuals, not only is the issue of safety in the community not addressed in any sustainable manner, the cycle of impoverishment, loss of jobs, weakening of employment chances, damage to relationships, worsening of psychological and mental illnesses and continued or increased drug use is perpetuated. There are also many health risks associated with overcrowded prisons, including the spread of infectious disease, such as tuberculosis and HIV. [5]

The application of criminal law in practice has shown that the courts in some cases are limited in the choice of punishment during sentencing, so the number of persons subjected to deprivation of liberty, still continues to be considerable, and the prison terms assigned to them - long.

Many crimes are committed more often by the people with outstanding convictions, i.e., at relapse. This situation obliges courts to be guided by Article 59 of the Criminal Code, according to which the relapse should be followed only by the most severe punishment, i.e. the deprivation of liberty. Moreover, until recently, a simple recurrence sentence must have been at least 1/2, a dangerous recidivism - no less than 2/3, a particularly dangerous recidivism - no less than 3/4 the size of the maximum period referred to in Article sanctions, for the qualified crime. Only in the law of 21 December 2002 these limits were reduced, respectively, to 1/3, 1/2, 2/3. This implies that for all crimes committed in the relapse, the courts must appoint imprisonment.

In most parts of the Criminal Code articles the aggravating circumstances of the crimes are listed, as the result strict limits of the minimum and maximum sentences are set, which the court must take into account when sentencing. Some of the features that characterize the defendant's identity are specified in the articles as the qualifying elements of crimes, along with the fact that these aggravating circumstances coincide with the circumstances aggravating criminal responsibility and punishment. Because of this, the criminal law establishes increased punishment for the offense under the above factors.

Thus, the courts are obliged to apply the most severe punishment for committing theft of property to those persons who have outstanding convictions for similar offenses. This leads to the fact that such persons are required to receive always more severe punishment than those who have committed theft of property of the same amount, but have a few outstanding convictions not for theft, but for other crimes, often more serious, such as banditry, terrorism, murder, grievous bodily harm, rape, etc. This state of the law, in our opinion, is in contradiction with the principles of equality before the law and fairness of punishment.

Intuitively, this can be observeв on a specific example. For theft in the amount of, say, 15 thousand tenge potential thief having two or more outstanding convictions for about the same theft, the law requires only to assign a deprivation of liberty, within the limits of not less than 3 years and up to 10 years, and the murderer and rapist having outstanding convictions for these crimes, the law for committing such a theft involves the appointment of a sentence of imprisonment within no more than 3 years. This raises the question of whether a legislative recognition of strict liability for persons who have served sentences for two or more previously committed thefts and re–committed the theft, the circumstance, which reflects not so much as the fairness of punishment as retribution for a criminal history of the person for what it was before we judgment for identical offenses, this ignores the fact that he served his sentence for the previous offense?

Of course, one can argue that in such cases the court has the right to apply Article 55 of the Criminal Code and impose a penalty below the lower limit than that provided in the sanction of the criminal law. But let's look at the circumstances under which a court may apply the rules of this article.

The law specifies that the sentencing below the lower limit than that specified in the sanction of the criminal law, is allowed only in exceptional circumstances listed in Article 55 of the Criminal Code. In practice, those who commit crimes repeatedly do not have in most cases not only exceptional circumstances, but the circumstances mitigating criminal responsibility and punishment referred to in Article 53 of the Criminal Code. Consequently, the court in deciding the punishment has no reason to refer to these articles and to sentence below the minimum limit.

Another factor, which, in our opinion, affects the level of severity of the punishment and its dimensions, is the lack of criminal law prohibitions on the appointment of rigorous and lengthy sentences in the presence of a number of mitigating circumstances.

Thus, whereas the Criminal Code contains several provisions requiring imposition of penalties in the amount not less than the specified limits prohibiting assign of a lesser penalty, at the same time not in all appropriate cases there are provisions

(restrictions) on appointment of the strict, lengthy or large sized punishments.

For instance, the legislature does not set the limits of punishment that could not be exceeded if the defendant had young children or other dependents, had a chronic disease, committed a crime for the first time because of a confluence of fortuitous circumstances or due to difficult personal, family, or other circumstances, as the result of unlawful behaviour of the victim, etc. From this we can conclude that the legislature has shown a definite trend, preventing the possibility of appointing softer penalties, and left the issue of appointment of excessively harsh penalties without proper attention.

During the six years of validity of the Criminal Code of the Republic of Kazakhstan a number of changes and additions has been made, which to some extent have influenced the issue of sentencing. Thereby, transfer of some offences from the category of moderate to severe crimes immediately affected the question of the form of recidivism, and this, as was already noted, is directly related to the type and size of the punishment. It should be noted that the offenses under Part 1 of Article 101, part 2 of Article 175 and others, were repeatedly transferred from one category to another by increasing the maximum period of imprisonment by 1 year, and subsequently reducing it by 1 year. At the same time any solid reasons for these alterations were not given. By the Law of 21 December 2002, these crimes again were transferred to the category of crimes of medium gravity, which indicates the invalidity of their previous transfer from the category of moderate to serious crimes.

Instability of the legislation and the frequent introduction of amendments and additions to some extent influence the state of jurisprudence on the issue of criminal sentencing. Some types of criminal penalties have been put in place recently, and some are still not introduced. For instance, short-term detention, appointed for a period from one to six months, has not been used yet, since it has not entered the action.

But there are other circumstances that oblige the courts to apply only the deprivation of liberty, even in cases where the sanction of the criminal law that qualified the crime involves other, less severe penalties. First of all, this is due to the very essence of punishment, as defined in the Criminal Code. Thus, the Article 43 specifies that the corrective work cannot be assigned to disabled persons, persons not employed permanently and students on leave from production.

In conditions of unemployment, many defendants do not have a permanent place of work, living off occasional jobs; the proportion of such persons among offenders is high, therefore they are not applicable to community work due to the direct prohibition by law.

Community service cannot be applied to disabled people of the I and II groups, pregnant women, or those having children under the age of 3 years; for women aged 55 years or men over 60. In some regions of Kazakhstan there are no conditions for execution of the community service sentence. The courts know this and to maintain the principle of inevitability of punishment, are forced to appoint another penalty.

There is no point in pressing courts for example to use alternatives to prison sentences if there is no law allowing such alternatives to be imposed and no administrative structure to implement them. [6]

Judicial errors are not excluded in the practice of sentencing when unnecessarily long terms of imprisonment are given or when imprisonment is assigned, without sufficient grounds and motives, in the absence of obstacles to the use of other forms of punishment specified in the sanction of the article.

In some cases unwarranted sentencing of imprisonment is associated with erroneous qualification of the criminal offense under the law providing a more severe punishment. The statistical data confirm the changes in sentencing in the appeal or supervisory courts with the change of the offense and sentence reduction.

At the same time, analysis of judicial practice has shown that, as a rule, deprivation of liberty is assigned to persons guilty of grave and especially grave crimes.

Among the perpetrators of minor offenses every sixth person (16.6 %) was convicted to prison in 2003, and of serious crime - one in three persons (33.5 %). In this case, the courts often practice appointment of imprisonment for up to 1 year. This practice is observed in persons accused under articles of the Criminal Code which do not provide for an alternative to imprisonment (for example, Article 175, part 2), as well as recidivism, when Article 59 of the Criminal Code requires the use deprivation of liberty. In addition, imprisonment for minor and moderate crimes is appointed to the persons who committed new crimes in state of alcohol or drugs intoxication, during the period of probation, on parole after release from prison, under suspension of execution of the sentence, in prison while serving the previous sentence. In the vast majority of cases the sentencing to imprisonment for committing new crimes to the specified persons follows the law.

We would like to draw attention to the following circumstances. When the judicial practice of assigning criminal penalties is being discussed on

various meetings, conducted with the aim of reducing the so-called "prison population", it is usually assessed solely by the number of persons sentenced to imprisonment in correctional institutions. And it is usually considered in conjunction with the poor conditions of convicts' detention in prisons and the violation of their rights.

Meanwhile, the practice of assigning criminal penalties should not depend on the fact that prisons are either overcrowded, or, conversely, are not filled; likewise it should not depend on convicts' maintenance conditions in prisons: nutrition, treatment, beatings, violations of their rights, etc.

It seems that the problem of reducing the numbers of convicted and sentenced prisoners should be considered in conjunction with the study of such issues as application of legislation governing parole and early release of prisoners, the use of suspended sentence, the state of recidivism, and data of the Courts Statistics.

Meanwhile, two thirds of 27,069 persons sentenced to imprisonment were found guilty of grave and especially grave crimes (respectively 17,958 and 2,323 people) in 2002, and more than half (respectively 9639 and 2182 people) in 2003. In the sanctions of the Criminal Code articles provide only deprivation of liberty for serious and very serious crimes, that is, the legislation itself points out that such persons should be set to imprisonment. The number of persons sentenced to imprisonment is not more than 41-44% of the total number of sentenced persons, both in 2002 and in 2003

Is it a lot or a little?

In countries of the developed world prison system can be a significant drain on public resources and sometimes difficult choices have to be made about providing sufficient resources at the expense of other essential services. In developing countries where resources are scarce the choices are even starker. [7]

It should be noted that in 2001, Kazakhstan was the third in the world in the number of persons sentenced to imprisonment, in 2010 the country was on the twenty second place, and this is a serious decline in the prison population.

Starting in 2011, reducing in the number of convicts slowed down and Kazakhstan is currently the thirty second in the world in the number of persons sentenced to imprisonment. As you can see, there is a significant decline in the overall prison population.

Baroness Vivien Stern of Great Britain said: "Reforms of the penitentiary system initiated by Kazakhstan President have been acknowledged by international organizations. Kazakhstan experience should be spread to other countries". [8]

It should also be noted that in the Criminal Code of Kazakhstan have accumulated a lot of systemic problems that are difficult to solve only by means of correction of the existing law. In our view, many of the articles are clearly out of date. There was a need to develop a fundamentally new, scientifically based strategy of the crime policy, in the meantime modernizing and maintaining the basic, justified by time and practice, penal institutions responsive to modern realities of rules aimed at the effective protection of the rights and freedoms of citizens and the interests of society and the state.

It is noteworthy that adoption in 1997 of the Criminal Code of the Republic of Kazakhstan, as a whole fulfilled its task of fighting crime in the first years of independence. And as over this period more than sixty changes have been made, the development of the new Penal Code is overdue.

6. Prospects

In view of the above mentioned changes the new project is more extensional than the active Criminal Code of the Republic of Kazakhstan: it reflects 467 items instead of 422. Many of them are included in the new project for the first time. It is made with due consideration of the concept of further development of the state and international laws, ratified by Kazakhstan.

The draft Criminal Code of the Republic of Kazakhstan includes many significant innovations. They trace the more humane policy of the state in regard to socially vulnerable population, tolerant attitude towards people who have committed a crime for the first time. Introduced the concept of "criminal misdemeanor". For its commitment the new edition of the Criminal Code provides the use of more democratic forms of punishment, such as fines, community service and an arrest. Therefore, as stated by the Deputy Attorney General Johann Merkel, it is necessary to build the country's detention homes, where those who have committed serious offenses will serve their sentences no longer than six months. This kind of punishment, if passed by the Parliament, would not be applied to single mothers with minor children, women over the age of 58 years. Also will not get under arrest men over the age of 63 years, invalids of the first and second groups. A fine, according to the speaker, will become a universal punishment and will be equal from 25 to 50 MCI, and a more serious offense - from 500 to 1000 MCI. Meanwhile, the fines of all sanctions will be increased by 50-70 per cent. [9]

It is necessary to research more traditional alternatives to custody in order to deal with the inappropriate use of imprisonment which has led to widespread prison overcrowding. [10]

In order to reduce the number of persons sentenced to imprisonment, it is necessary to introduce amendments to the penal law:

1) the decriminalization of offenses under, for example, Article 116, Part 1, Article 129 of the Criminal Code, Part 1, etc.;

2) the extinction of the qualifying feature - a crime by a person previously convicted of a similar offense two or more times, with the allocation of such cases to the qualifying features characterizing the crime as multiple;

3) a ban on the use of imprisonment for pregnant or women having children under the age of 14, who have committed crimes of minor and medium gravity, as well as to women at the age of 55, and men at the age of 60;

4) the introduction of regulations in the Penal Executive Code of the Republic of Kazakhstan, which require the administration of the institution to provide the court with materials on parole release for convicted persons who have served their sentence specified in Article 70 of the Criminal Code, regardless the characteristics of the convicts, and their need for further correction in isolation, in order to timely address issues related to the sentence execution;

At the end of this article we would like to draw some conclusions and outlook for the future. The new draft Criminal Code contains a lot of changes and we appreciate the innovations that are offered in the law and will undoubtedly contribute to law enforcement. We especially wish to acknowledge the new concept of "criminal misdemeanor" in the Kazakhstan Code. This, in our opinion, will help improve the situation in the country.

- In practice, prisons, unfortunately, do not correct people. By the way, in neighboring Russia this institution is not used, although the discussion is already underway. I think in the near future, such kind of punishment, as a misdemeanor, will find its place in Russian legislation as well.

We are confident in the future, since the introduction of the new Criminal Code, will lower the maintenance costs of the correctional facilities and significantly reduce the number of convicts.

- The Criminal Code is a very important document for the state and is very sensitive to the society, for the public, so we should pay more attention to its discussion, including at various conferences.

Therefore, to some extent, the new project of the Criminal Code of the Republic of Kazakhstan, if adopted in the proposed wording, will give impulse to more democratic approaches to the criminal laws of other CIS countries.

Corresponding Author:
Zhamuldinov
Pavlodar State Pedagogical Institute. Mira Street 60, Pavlodar, Republic of Kazakhstan
vicniczham@inbox.ru

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