

R.U. Tatikov¹ , K.I. Nagornov² *

¹*Astana City Police Department, Astana, Kazakhstan;*

²*Volgograd State University, Volgograd, Russia*

(E-mail: tatikov.renat17@mail.ru, nagornov_k@inbox.ru)

ORCID ID: 0009-0003-4987-9589

ORCID ID: 0000-0002-9700-1856

Probation control as a compulsory measure of educational influence in the criminal legislation of the Republic of Kazakhstan

In the new criminal law in the Republic of Kazakhstan adopted in 2014, the list of compulsory educational measures applied to juvenile offenders has been somewhat updated and supplemented with a new measure in the form of establishing probation control. The authors of the work attempted to give a comprehensive legal description of this compulsory measure, while paying attention to some imperfections of the provisions of the Criminal Code of the Republic of Kazakhstan, the Criminal Execution Code of the Republic of Kazakhstan and the Law of the Republic of Kazakhstan “On Probation,” which negatively affect its preventive potential and application practice. In particular, the article draws attention to the not quite advantageous placement of the measure in the list of compulsory educational measures, to the imperfection of the wording of the content of the measure presented in Part 9 of Article 85 and Part 2 of Article 44 of the Criminal Code of the Republic of Kazakhstan, for the presence of substantial similarity and even identity of probation control as a compulsory measure of educational influence and some other measures provided for by the Criminal Code of the Republic of Kazakhstan, for the absence of a minimum period and criminological validity of the maximum period of application of the measure, for the lack of differentiation of the terms of application of the measure depending on the type of criminal offense and the category of severity of the crime. During the consideration of the problems, the authors expressed separate considerations. They proposed specific measures to eliminate them by improving the legal basis of probation control as a compulsory measure of educational influence.

Keywords: minors, compulsory measures of educational influence, probation control, content, responsibilities, terms of use.

Introduction

The Criminal Code of the Republic of Kazakhstan adopted in 2014 provides compulsory educational measures (hereinafter referred to as CEM) among the measures that can be applied against juvenile offenders of the criminal law. These measures are listed in Part 1 of Article 84 of the Criminal Code RK and include seven measures, many of which were adopted from the Criminal Code of the Republic of Kazakhstan of 1997 and the Criminal Code of the Kazakh SSR of 1959 with some changes in the wording of their names and/or contents. This applies to such measures as a warning, the obligation to apologize to the victim, the obligation to make amends for the harm caused, transfer under supervision of parents or persons replacing them, or a specialized government agency, restriction of leisure and enactment of special requirements to the minor’s behavior, placement in an educational institution with a special detention regime. In the new Criminal Code adopted in 2014, the legislator provided a new CEM of probation control in addition to the above

* Corresponding author. E-mail: nagornov_k@inbox.ru

measures. The authors of one of the comments on domestic criminal law attributed this legislative decision to the number of significant innovations of Article 84 of the Criminal Code RK [1; 466]. It is worth agreeing with this statement since no similar measure was previously provided in Kazakhstan's criminal legislation. Its appearance on the CEM list is associated with introducing the probation institute into the national Criminal Code. The expansion of the CEM list with a new measure and the introduction of the probation institute into the Criminal Code deserve our support. Moreover, according to M.A. Ayubayev, "the newly formed Kazakhstani model of probation is currently an exemplary one for the post-Soviet countries" [2; 37].

At the same time, an analysis of certain provisions of the Criminal Code RK 2014 and some other acts related to probation control allows us to find several imperfections that negatively affect the preventive potential of this measure and the practice of its application. Despite seemingly being relevant, this issue still receives insufficient attention in modern legal literature. This, in turn, led the authors to research the topic to form a theoretical and legal framework on probation control as a CEM, and to develop proposals for possible solutions to existing problems related to the legal regulation and legal implementation of this measure. The choice of the topic is also important because among the post-Soviet countries that have adopted compulsory educational measures from the Soviet legislative experience, the Republic of Kazakhstan is one of the few that has provided for a completely new CEM in its criminal legislation — probation control. Such a unique experience of the Republic of Kazakhstan can be useful to the legal communities of the post-Soviet states where CEM was preserved, which, in turn, also aroused the interest of one of the authors and prompted it to be written.

Materials and methods

The methodological basis of scientific research involved in this work is represented by general and private scientific methods of cognition, among which the main place is occupied by formal legal, comparative legal and hermeneutic methods. The formal legal method was applied to analyze provisions of criminal law, penal enforcement regulations, and the Probation Act concerning probation control as a criminal-executive measure (CEM). These legal norms were examined on the basis of formal logic, intentionally abstracting from substantive characteristics of the underlying phenomenon. The comparative legal method was used in the study of previous and current editions of the relevant provisions of the Kazakh legislation. The hermeneutic method was used by the authors when referring to various methods of interpreting legal norms in order to clarify and interpret the essence contained in them. These methods made it possible to identify problems of a legislative and legal nature related to probation control as a CEM, as well as to formulate proposals for their possible resolution.

In the course of the research, the authors referred to previously published works on criminal and penal enforcement law, which highlighted the specifics of the regulation of CEM in the criminal legislation of the Republic of Kazakhstan and their practical implementation. Among them, for example, one can single out the works of N.A. Abdikanov, T.J. Atzhanov, K.J. Baltabaev, A.B. Bekmagambetov, I.S. Borchashvili, M.K. Intykbaev, L.M. Karzhaubayeva, S.R. Koshenova, Z.I. Kursabayeva, S.M. Naurzalieva, S.M. Rakhmetov, V.P. Revin, O.B. Filipets et al. At the same time, a careful study of the works of these authors and an assessment of the current state of the legal regulation of CEM under the current Criminal Code of the Republic of Kazakhstan allowed us to conclude that many issues related to probation control as a CEM have not yet been adequately addressed and resolved. This, in turn, also prompted the authors of this paper to take some steps aimed at developing the stated issues.

The materials of judicial practice of the use of probation control as a CEM were used in the work.

Discussion and results

1. About the place of probation control in the list of compulsory educational measures. This measure completes the list of CEM, set out in Part 1, Article 84 of the Criminal Code RK, and is mentioned in paragraph 7 of the mentioned part. From this, it could be concluded that probation control is the strictest of all CEM, presented in Part 1, Article 84 of the Criminal Code RK. However, this is not the case at all. A careful study of the relevant list makes it possible to notice that the first five measures presented are arranged depending on the severity of their content. Other authors also pay attention to this fact [3; 24]. However, the last two measures, which are the imposition of the obligation to apologize to the victim and the establishment of probation control, violate this logic, since they are placed after a stricter measure by the nature of the restrictions. We are talking about the measure specified in paragraph 5, Part 1, Article 84 of the Criminal Code RK that requires isolation of a teenager from society for a certain period, which is designated in the law as

placement in an educational institution with a special detention regime. The sequence of these measures corresponds with the timing of their inclusion in the CEM list. The original version of the Criminal Code of the Republic of Kazakhstan in 1997 did not contain the obligation to apologize to the victim and probation control. By the Law of the Republic of Kazakhstan dated 23.11.2010 No. 354-IV the first of these measures was included in the CEM list and located after the measure of placement of a teenager in an educational institution with a special detention regime. The Criminal Code of the Republic of Kazakhstan, adopted in 2014, inherited the list of CEM and their sequence from the previous criminal law and supplemented it with a new measure of establishing probation control, which was placed after the obligation to apologize to the victim.

Since the CEM list serves as a guideline for a law enforcement officer who individualizes the responsibility of juvenile offenders, it seems this list should be structured by a certain conceptual intention. The intention of Part 1, Article 84 of the Criminal Code RK, in our opinion, should be not only an exhaustive definition of all measures related to CEM, but also their arrangement in a certain sequence, depending on the severity of the measures. Considering this approach, what should be the place of probation control in the CEM list? So far, it seems difficult and premature to answer this question, since it is necessary to determine the substantive potential of this measure, which demonstrates certain regulatory shortcomings. However, before addressing the issue raised, let us study the measure, starting with its legislative formulation.

2. *On the formulation of the CEM in the form of probation control.* When describing the content of probation control in Part 9 of Article 85 of the Criminal Code RK, the legislator limited himself to specifying only the period of this measure's application in accordance with the rules established by Part 2 of Article 44 of the Criminal Code RK. Referring to Part 2 of Article 44 of the Criminal Code of the Republic of Kazakhstan highlights certain responsibilities that may be imposed during probation control as part of the restriction of freedom. It is important to note that the punishment in the form of freedom restriction, aside from probation control, also encompasses forced labor. But since certain categories of people, including minors, according to Part 1 of Article 44 of the Criminal Code of RK, cannot be subjected to forced labor. The punishment in the form of restriction of freedom for minors is limited to probationary control. The circumstances mentioned above allow us to draw the following conclusion. The legislator, having referred to Part 2 of Article 44 of the Criminal Code of RK in Part 9 of Article 85 of the Code, equalized the content of one of the CEM and one of the types of punishment, which is unacceptable, since with this approach, CEM transformed into a punishment. However, in contrast to punishment, as many researchers correctly note, "CEM have a different legal essence and purpose" [4; 184], "they are educational measures, since their main purpose, unlike criminal punishment, is persuasion and education. They do not present punishment for the wrong doings; they do not entail a criminal record" [5; 392]. G.B. Samatova draws attention to this problem, pointing out that "... with regard to the disclosure of the content of such a compulsory measure of educational influence as the establishment of probation control (Part 9 of Article 85 of the Criminal Code of RK), there is no need to refer to Part 2 of Article 44 of the Criminal Code of RK, but it would be more correct to provide for independent conditions for probation control as a compulsory measure of educational influence" [6; 102]. It seems possible to agree with the author's opinion regarding the need to adjust Part 9 of Article 85 of the Criminal Code of RK. However, we believe the latter should be adjusted by pointing out the essential substantive features of the corresponding CEM.

Now we will try to identify these essential substantive features of the measure, which should subsequently be reflected in Part 9 of Article 85 of the Criminal Code of the Republic of Kazakhstan.

3. *On the essential substantive features of probation control as a compulsory educational measure.* Firstly, under the direct indication of the criminal law, the content of the measure in question is formed by the obligations listed in Part 2 of Article 44 of the Criminal Code of RK, including, for example, not to change one's place of permanent residence, not to visit certain locations, etc. We will examine them in greater detail later. For now, it is sufficient to note that they constitute a key substantive feature of this CEM and, as such, must be referenced in Part 9 of Article 85 of the Criminal Code of the Republic of Kazakhstan.

Secondly, another essential feature of this measure should be the complex of organizational and socio-legal measures implemented in its application, provided by the legislation on probation. This conclusion is based on the analysis of the provisions of Articles 18 and 19 of the Law of the Republic of Kazakhstan No. 38-VI "On Probation" dated 30.12.2016, according to which various measures of social and legal assistance may be provided to minors during probation control (their list is given in Article 6 of the Law), such as: in support to a teacher or psychologist, additional agencies and organizations can be involved to perform guardianship functions, protect the rights of the child, as well as various public associations, legal entities and individual citizens. Along with this, housing surveys of minors are conducted quarterly.

At the same time, it should be noted that the Law of the Republic of Kazakhstan “On Probation” does not mention the people in respect of whom CEM has been applied in the form of probation control, among the subjects of probation, which drew attention of other researchers [6, 7; 102, 74-75]. For example, even within the same law, probation applies to individuals subject to another CEM—namely, the restriction of leisure activities and the imposition of specific behavioral requirements on minors. In our opinion, this does not mean that the abovementioned organizational and social-legal measures provided by the Law of the Republic of Kazakhstan “On Probation” should not be applied to persons in respect of whom probation control is established as CEM. According to S.M. Rakhmetov, “when registering a minor under probation control, the probation service determines the amount of social and legal assistance he needs and implements a set of measures under articles 69, 169 and 174 of the Criminal Executive Code of the Republic of Kazakhstan, considering the provisions of Article 18 of the Law of the Republic of Kazakhstan “On Probation”. Under Article 69 of the Criminal Executive Code, probation control over minors subjected to a compulsory educational measure in the form of probation control is carried out by the probation service at their residence” [8; 382]. The reference made in Part 9 of Article 85 of the Criminal Code of RK, under which probation control as a CEM is established following the rules of Part 2 of Article 44 of the Criminal Code of RK, implies the implementation of probation control applied as a CEM according to the regulations for restriction of freedom, i.e. Article 15 of the Law of the Republic of Kazakhstan “On Probation” (taking into account Articles 18 and 19), as well as Article 69 of the Criminal Executive Code of the Republic of Kazakhstan. However, the dissemination of the rules provided for in these articles concerning probation control, which is established as CEM, does not seem to be the right solution, due to the following: 1) under the direct instruction of Article 15 of the Law of the Republic of Kazakhstan “On Probation”, sentencing probation will apply only to persons sentenced to restriction of liberty or conditional conviction, and Article 69 of the Criminal Executive Code of RK applies only to convicts serving sentences of restriction of liberty; 2) Article 15 of the Law of the Republic of Kazakhstan “On Probation” addresses sentencing probation. Based on its title and content, the grounds for applying probation should be either a final and enforceable verdict or a resolution amending such a verdict, establishing the person’s conviction. Under Part 1 of Article 83 of the Criminal Code of RK, probation control as a CEM can also be applied upon release from criminal liability, i.e. when there was no conviction at all; 3) the provisions of Article 15 of the Law of the Republic of Kazakhstan “On Probation” practically do not define the specifics of probation control as a CEM. In our opinion, a much more acceptable solution is the inclusion of certain provisions that disclose the specifics of probation control as a CEM into the Law of the Republic of Kazakhstan “On Probation”.

The above makes it possible to conclude that probation control in CEM contains a set of responsibilities defined by the Criminal Code of RK imposed by the court, and a set of organizational and socio-legal measures provided by the legislation on probation. With that said, we believe it is possible to adjust the wording of Part 9 of Article 85 of the Criminal Code of RK by supplementing two essential features of the measure. In addition, in the Law of the Republic of Kazakhstan “On Probation”, among the persons subject to probation, it is necessary to specify the persons who underwent the compulsory educational measure in the form of probation control separately, while defining the specifics of this measure’s implementation.

Next, we will review the responsibilities imposed by the court when establishing probation control as a compulsory educational measure.

4. About the open list of responsibilities imposed when establishing probation control as a compulsory educational measure. To begin with, the Criminal Code of the Republic of Kazakhstan does not comprehensively define the list of responsibilities imposed by the court when establishing probation control, indicating that the court has the right to establish other responsibilities that contribute to the correction of a convicted person and the prevention of new criminal offenses. At first glance, it may seem that granting such powers to the courts makes it possible to optimally individualize the responsibility of a juvenile offender by selecting the most appropriate set of responsibilities for each specific case. However, such legal regulation, in our opinion, makes the analyzed measure’s content bottomless, which, of course, prevents assessment of its real meaningful potential. In our opinion, it could become very repressive in some cases. Moreover, granting the courts with such powers allows law enforcement officers to legally establish the means of criminal legal reaction, corresponding with the list of compulsory educational measures in each specific case. For example, the court may obligate a minor to perform socially useful work, undergo a course of psychological or medical and social rehabilitation.

The above points to the following conclusion: since the legislator defines the content of compulsory educational measures in the form of probation control as a set of responsibilities imposed by the court, their list

should be exhaustively defined in criminal law. This also applies to the list of organizational and socio-legal measures, which should also be comprehensively determined by the legislation on probation, which, in general, can be observed upon careful study.

Let us attempt to figure out what responsibilities should fill the content of the measure under research.

5. *About the responsibilities in probation control assignment as part of compulsory educational measures.* Part 2 of Article 44 of the Criminal Code of RK explicitly mentions a relatively small number of responsibilities assigned when establishing probation control, including: a ban on changing one's place of residence, study or work without notifying the supervisory authority; a ban on visiting certain places; undergoing medical treatment; financial support for the family. Regarding the latter responsibility, we agree with some researchers' opinion that it cannot be assigned to minors [6; 102] and exclude it from the content of the measure under consideration. However, which of the responsibilities explicitly defined in Part 2 of Article 44, and those that can potentially be included in the content of probation control, should fill the content of the measure we are interested in? Unfortunately, it seems difficult to give a clear answer to this question, since probation control as a CEM duplicates a few other measures provided in the Criminal Code of the Republic of Kazakhstan, which further complicates distinguishing the measures from each other and defining the inherent set of restrictions or responsibilities for each measure. Let us illustrate this problem with the following examples.

Firstly, the legislator refers to Part 2 of Article 44 of the Criminal Code of the Republic of Kazakhstan, when describing conditional conviction, as well as probation control as a CEM. And this provision [Part 2 of Article 44 of the Criminal Code of the Republic of Kazakhstan] generally regulates the punishment in the form of restriction of freedom. Paradoxically, Part 5 of Article 63 of the Criminal Code of the Republic of Kazakhstan aggravates the situation by not limiting the list of CEM permitted to use against a minor under probation. This makes it possible to apply the compulsory educational measures regulated by the rules provided in the article, along with conditional conviction, regulated by Part 2 of Article 44 of the Criminal Code RK. It is possible that the inclusion of probation control in these measures of criminal legal impact is due to the desire of the legislator to expand the scope of its application, making it possible to apply it when exonerating from criminal liability and applying appropriate types of exemption, accompanied by compulsory educational measures; when convicted with punishment, when exempted from the actual serving of the assigned sentence, through conditional conviction. However, this approach mixes the legal nature of completely different criminal law measures.

Secondly, the measure we are considering duplicates the content of such compulsory educational measures as the restriction of leisure time and the establishment of special requirements for the minor's behavior, as noted by some authors [9; 96]. Comparing the provisions of Part 9 of Article 85, Part 2 of Article 44 and Part 5 of Article 85 of the Criminal Code of the Republic of Kazakhstan, it can be noted that these measures provide for a general requirement or obligation not to visit certain places. In addition, the list of requirements or responsibilities provided for in the above-mentioned provisions of the criminal law is not exhaustive, which makes it possible to establish the same requirements or responsibilities within their framework. The situation is aggravated by Article 19 of the Law of the Republic of Kazakhstan "On Probation", which provides probation control in relation to minors sentenced to restriction of leisure time and establishment of special behavior requirements. As we can see, an ultimate mixture of compulsory educational measures provided both in paragraph 7) of Part 1 of Article 84 and in paragraph 4) of Part 1 of Article 84 of the Criminal Code of the Republic of Kazakhstan occurred in this case, since each of them provides for the implementation of probation control over the fulfillment of responsibilities or requirements assigned to a minor. Moreover, by virtue of Part 2 of Article 84 of the Criminal Code of the Republic of Kazakhstan, several measures may be imposed on a minor at the same time. This does not exclude the possibility of combined use of probation control and restrictions on leisure time and the establishment of special requirements for the minor's behavior. The above-mentioned provisions of the Law of the Republic of Kazakhstan "On Probation," imply the implementation of probationary control over a minor twice.

Thirdly, there is a significant similarity between probation control and such CEM as the transfer of a minor under the supervision of a specialized government agency. Upon disclosing the content of the transfer under supervision, the legislator, in Part 2 of Article 85 of the Criminal Code of the Republic of Kazakhstan, indicated only that this measure consists in assigning responsibilities, including to the specified subject, for educational influence and control. The latter, in turn, due to the lack of any specification in the Criminal Code of the Republic of Kazakhstan, may be expressed in establishing the minor's responsibilities similar to those provided for in Part 2 art. 44 of the Criminal Code of the Republic of Kazakhstan. Along with this, we

note that in contrast to the Law of the Republic of Kazakhstan “On Probation”, where the list of government bodies carrying out probation control is defined, the specialized state body remains unclear in the context of Part 2 of Article 85 of the Criminal Code of the Republic of Kazakhstan. The Criminal law and the provisions of the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 04/11/2002 No. 6 on the criminal liability of minors do not mention anything about this. In such a situation, the same government body may be entrusted with the authority to enforce the above-mentioned CEMs, which will further unify them.

Summing up the above-mentioned arguments about the responsibilities appropriate for the content of the measure under consideration, we note the following.

1. Certain responsibilities specified in Part 2 of Article 44 of the Criminal Code of the Republic of Kazakhstan (financial support of the family) may be excluded from the content of the considered compulsory educational measure.

2. Criminal law should not contain substantially identical criminal legal measures which have a completely different legal nature. Some substantive similarities between the measures may be justified by the presence of substantive differences. So far, these (substantive differences) have not been properly objectified in the content of the measures. In this regard, the following can serve as the first steps towards distinguishing probation control as a compulsory educational measure from restriction of freedom and compulsory conviction: 1) provision of an exhaustive set of responsibilities in the content of this CEM, which, for instance, may include undergoing medical treatment, a prohibition on changing one's place of residence, study or work without notifying the supervisory authority, a ban on leaving the territory of the district or city of the minor's residence without the permission of the supervisory authority, a ban on visiting certain places, participation in certain activities, staying outside the home at certain times of the day; 2) since this measure is classified as an educational measure, the content of probation control should closely reflect the educational component represented by various methods and means of education. For example, this can be implemented by establishing mandatory passage of a special psychological and pedagogical program by the minor.

3. There should be no substantially identical measures in the criminal law among the CEM. Regarding the differentiation of meaningfully similar compulsory educational measures, several options are possible. The first is more time-consuming and involves defining a list of responsibilities and requirements imposed by the restriction of leisure and probation control, which practically should not coincide with each other. In the case of transfer to supervision, it is necessary to determine the supposed educational impact and control, which should not fully coincide with the responsibilities and requirements imposed by the above-mentioned compulsory educational measures. It is also necessary to determine which government body should be responsible for the implementation of probation control within the compulsory educational measures provided for in paragraphs 7) and paragraph 4) of Part 1 of Article 84 of the Criminal Code of the Republic of Kazakhstan, as well as for supervision within the compulsory educational measures provided for in paragraph 2) of Part 1 of Article 84 of the Criminal Code of the Republic of Kazakhstan.

The second option is related to the absorption of the restriction of leisure time and the establishment of special requirements for the minor's behavior by probation control (or vice versa), as well as determination of the authorized body assigned to execute probation control (if maintained) and supervision over the minor. In this case, it will also be necessary to determine the educational impact and control within the framework of transfer under specialized state body supervision. The resolution of the above-mentioned issues will directly determine the decision on the position of probation control in the list of compulsory educational measures. It seems that with its preservation and certain modernization in the Criminal Code of the Republic of Kazakhstan, it can take an intermediate position between transfer under supervision and placement in an educational institution with special detention regime, adjacent to the restriction of leisure time and the establishment of special requirements for the minor's behavior, if it is preserved as a compulsory educational measure, and, accordingly, it can take the place of this compulsory educational measure in case of absorption.

6. *About the period of application of probation control as a compulsory educational measure.* The impact of the measure under consideration is carried out within certain time limits, which are mentioned in Part 9 of Article 85 of the Criminal Code of the Republic of Kazakhstan. Studying this provision prompts us to pay attention to the following.

Firstly, Part 9 of Article 85 of the Criminal Code of the Republic of Kazakhstan determines only the upper limit of one year for the execution of the considered measure, and nothing is said about the minimum allowed period. This does not prohibit applying the measure for a short period of time (for instance, a month

or two months), which is insufficient to ensure the correction of a minor with compulsory educational measures.

At the same time, the time limits of the measure's implementation should be a guideline for the law enforcement officer, who individualizes the responsibility of the offender, and limits his discretionary powers. That is why it is necessary to determine the minimum limit for the use of this compulsory educational measure by making an appropriate indication in Part 9 of art. 85 of the Criminal Code of the Republic of Kazakhstan. It should be noted that the minimum period of probation control established within the framework of restriction of liberty and conditional conviction is defined at 6 months (see Part 1 of Article 44 and Part 3 of Article 63 of the Criminal Code of the Republic of Kazakhstan). An analysis of the few judicial practices regarding probation control as a CEM has shown that the courts also focus on a six-month period, not allocating less time in these cases [10].

Secondly, the question arises about the criminological validity of the upper time limit for probation control. Along with the repressive and educational content of the measure, does it adequately reflect the social danger of the most serious category of crime (we are talking about moderate severity) for which it can be established? We don't think so. We are guided to this conclusion by the time periods defined by criminal legislature that is significantly similar to probation control. Therefore, for a crime of moderate severity, compulsory educational measures in the form of restriction of leisure time and the establishment of special requirements for the minor's behavior can be applied for a period of one to two years (Part 10 of Article 85 of the Criminal Code of the Republic of Kazakhstan).

Thirdly, probation control can be used as a compulsory educational measure for a juvenile criminal offense, a crime of minor or moderate severity. At the same time, in Part 9 of Article 85 of the Criminal Code of the Republic of Kazakhstan, the time period is not differentiated depending on the type of criminal offense and the category of the crime severity, as, for example, it is done in Part 10 of Article 85 of the Criminal Code of the Republic of Kazakhstan in relation to the restriction of leisure and the establishment of special requirements for the minor's behavior, the transfer of the latter under supervision. In this case, the measure in question can be applied equally for both the commission of a criminal offense and for the commission of a crime of moderate severity, which is considered unacceptable.

The individual shortcomings of regulation of the probation control period, accompanied by our comments above, make it necessary to develop measures to eliminate them. In this regard, we propose to define a six-month period as the minimum allowable period for the application of the measure, and two years as the maximum period. The indicated lower and upper limits of the measure's application are seen as the most optimal from the point of view of ensuring the possibility of correcting a minor with compulsory educational measures. Taking into account the time limits mentioned above, it seems possible to differentiate the period of the measure implementation depending on the type of criminal offense and the severity of the crime, for example, as follows: from six months to one year for committing a criminal offense, from one year to one and a half years for committing a minor crime, from one and a half to two years for a medium gravity crime. The proposed innovations may subsequently be reflected in Parts 9 and 10 of Article 85 of the Criminal Code of the Republic of Kazakhstan.

Conclusions

The attempt to comprehensively research probation control as a compulsory educational measure, including certain problems of its legal regulation and implementation, clearly demonstrates the relevance of the topic, necessitating further discussion and exploration. The provisions of the legislation of the Republic of Kazakhstan devoted to compulsory educational measure in the form of probation control, having a certain uniqueness, arouse great research interest and, at the same time, require due attention from the legislator and the scientific community. The expressed considerations and proposed specific measures are aimed at improving the legal framework of this CEM, as one of the promising areas for the development of criminal law policy. Of course, these recommendations are far from indisputable, and therefore the authors of this paper hope for their further critical reflection and discussion.

The research was conducted with support from the Ministry of Science and Higher Education of the Russian Federation (Order No. 486 dated June 15, 2021).

References

1. Борчашвили И.Ш. Комментарий к Уголовному кодексу Республики Казахстан. Общая часть / И.Ш. Борчашвили; под общ. ред. Даулбаева А.К. — Алматы: Жеті Жарғы, 2015. — Т. 1. — 504 с.
2. Аюбаев М.А. О практике применения исправительных работ и дополнительного вида наказания в виде лишения права занимать определенные должности или заниматься определенной деятельностью / М.А. Аюбаев // Современное состояние теории и практики института наказания в системе мер предупреждения уголовных правонарушений (27.05.2021 г.) / Расследование уголовных правонарушений в сети Интернет: проблемы и пути решения (28.05.2021 г.): сборник материалов круглых столов, приуроченных к 30-летию Независимости Республики Казахстан. — Косшы: Академия правоохранительных органов при Генеральной прокуратуре Республики Казахстан, 2021. — С. 36–39.
3. Амуртаева Д.Т. Понятие и сущность принудительных мер воспитательного воздействия / Д.Т. Амуртаева, З.И. Курсабаева // Современные проблемы уголовной политики: международная коллективная монография. — Екатеринбург-Костанай, 2019. — С. 16–26.
4. Наурзалиева С.М. Уголовная ответственность несовершеннолетних в Республике Казахстан: дисс. ... канд. юрид. наук / С.М. Наурзалиева. — М., 2019. — 239 с.
5. Бекмагамбетов А.Б. Уголовное право Республики Казахстан. Общая часть. Учебник / А.Б. Бекмагамбетов; под ред. В.П. Ревина. — 2-ое изд., перераб. и доп. — Алматы: Жеті Жарғы, 2015. — 504 с.
6. Саматова Г.Б. Роль института наказания в предупреждении уголовных правонарушений против несовершеннолетних / Г.Б. Саматова // Современное состояние теории и практики института наказания в системе мер предупреждения уголовных правонарушений (27.05.2021 г.) / Расследование уголовных правонарушений в сети Интернет: проблемы и пути решения (28.05.2021 г.): сборник материалов круглых столов, приуроченных к 30-летию Независимости Республики Казахстан. — Косшы: Академия правоохранительных органов при Генеральной прокуратуре Республики Казахстан, 2021. — С. 99–103.
7. Кыстаубаева А.Б. Институт пробации: современное состояние и перспективы развития в Республике Казахстан: дисс. ... д-ра философии PhD / А.Б. Кыстаубаева. — Нур-Султан, 2019. — 161 с.
8. Рахметов С.М. Уголовное право Республики Казахстан. Общая часть: Учебник / С.М. Рахметов. — Алматы: ТОО Лантар Трейд, 2020. — 404 с.
9. Курсабаева З.И. Особенности установления пробационного контроля как уголовно-правовой меры воздействия на несовершеннолетних / З.И. Курсабаева // Актуальные вопросы современной науки: материалы международной научно-практической онлайн-конференции. — Караганда: Карагандинская академия МВД Республики Казахстан им. Б. Бейсенова, 2020. — С. 93–97.
10. Постановление специализированного межрайонного суда по делам несовершеннолетних г. Нур-Султан по делу № 7130–19-0-1/76 от 09.12.2019 // Архив специализированного межрайонного суда по делам несовершеннолетних г. Нур-Султан.

Р.У. Татилов, К.И. Нагорнов

Пробациялық бақылау Қазақстан Республикасының қылмыстық заңнамасында тәрбиелік ықпал ету мақсатындағы мәжбүрлеу шарасы ретінде

2014 жылы Қазақстан Республикасында жаңа қылмыстық заңның қабылдануымен қылмыстық құқық бұзушылықтар жасаған кәмелетке толмағандарға қатысты қолданылатын тәрбиелік ықпал етудің мәжбүрлеу шараларының түрлерінің тізбесі біршама жаңартылды және пробациялық бақылауды анықтау түріндегі жаңа шарамен толықтырылды. Мақала авторлары осы мәжбүрлеу шарасына кешенді құқықтық сипаттама беруге тырысты, сонымен бірге ҚР ҚК, ҚР ҚАК және ҚР «Пробация туралы» Заңының кейбір кемшіліктеріне назар аударды, бұл оның алдын алу әлеуеті мен қолдану тәжірибесіне теріс әсер етеді. Атап айтқанда, тәрбиелік ықпал ету мақсатындағы мәжбүрлеу шараларының тізбесінде шараның дұрыс анықталмауына; ҚР ҚК 85-бабының 9-тармағында және 44-бабының 2-тармағында ұсынылған шара мазмұнының тұжырымдамаларының жетілмегендігіне; ҚР ҚК-де көзделген кейбір басқа шаралармен тәрбиелік ықпал етудің мәжбүрлеу шарасы ретінде пробациялық бақылаудың мазмұндық ұқсастығы және тіпті бірдейлігіне; шараны қолданудың ең аз мерзімі мен криминологиялық негіздемесіне; қылмыстық құқық бұзушылықтың түріне және қылмыстың ауырлық санатына байланысты шараны қолдану мерзімдерін саралаудың болмауына назар аударылды. Мәселелерді қарау барысында авторлар жекелеген ойларды білдіре отырып, тәрбиелік ықпал ету мақсатындағы мәжбүрлеу шарасы ретінде пробациялық бақылаудың құқықтық негізін жетілдіру арқылы аталған мәселелерді жоюға бағытталған нақты шараларды ұсынды.

Кілт сөздер: кәмелетке толмағандар, тәрбиелік ықпал ету мақсатындағы мәжбүрлеу шаралары, пробациялық бақылау, мазмұны, міндеттері, қолдану мерзімдері.

Р.У. Татилов, К.И. Нагорнов

Пробационный контроль как принудительная мера воспитательного воздействия в уголовном законодательстве Республики Казахстан

С принятием в Республике Казахстан в 2014 году нового уголовного закона перечень видов принудительных мер воспитательного воздействия, применяемых в отношении несовершеннолетних, учинивших уголовные правонарушения, несколько обновился и дополнился новой мерой в виде установления пробационного контроля. Авторы статьи предприняли попытку дать комплексную правовую характеристику данной принудительной меры, обратив при этом внимание и на некоторые несовершенства посвященных ей положений УК РК, УИК РК и Закона РК «О пробации», которые отрицательным образом сказываются на ее предупредительном потенциале и практике применения. В частности, было обращено внимание на не совсем удачное расположение меры в перечне принудительных мер воспитательного воздействия; несовершенство формулировок содержания меры, представленных в ч. 9 ст. 85 и ч. 2 ст. 44 УК РК; наличие содержательной схожести и даже идентичности пробационного контроля как принудительной меры воспитательного воздействия с некоторыми другими мерами, предусмотренными УК РК; отсутствие минимального срока и криминологической обоснованности максимального срока применения меры; отсутствие дифференциации сроков применения меры в зависимости от вида уголовного правонарушения и категории тяжести преступления. По ходу рассмотрения проблем авторами высказывались отдельные соображения и предлагались конкретные меры, ориентированные на их устранение путем совершенствования правовой основы пробационного контроля как принудительной меры воспитательного воздействия.

Ключевые слова: несовершеннолетние, принудительные меры воспитательного воздействия, пробационный контроль, содержание, обязанности, сроки применения.

References

- 1 Borchashvili, I. Sh. (2015). *Kommentarii k Ugolovnomu kodeksu Respubliki Kazakhstan. Obshchaia chast (tom 1) [Commentary on the Criminal Code of the Republic of Kazakhstan. General part (volume 1)]*. A.K. Daulbaev (Ed.). Almaty: Zheti Zhargy [in Russian].
- 2 Ayubaev, M.A. (2021). O praktike primeneniia ispravitelnykh работ i dopolnitel'nogo vida nakazaniia v vide lisheniia prava zanimat opredelennye dolzhnosti ili zanimatsia opredelennoi deiatel'nostiu [On the practice of applying correctional labor and an additional type of punishment in the form of deprivation of the right to hold certain positions or engage in certain activities]. *Sovremennoe sostoianie teorii i praktiki instituta nakazaniia v sisteme mer preduprezhdeniia ugovolnykh pravonarushenii (27.05.2021 g.) / Rassledovanie ugovolnykh pravonarushenii v seti Internet: problemy i puti resheniia (28.05.2021 g.): Sbornik materialov kruglykh stolov, priurochennykh k 30-letiiu Nezavisimosti Respubliki Kazakhstan — The current state of the theory and practice of the institute of punishment in the system of measures for the prevention of criminal offenses (05/27/2021) / Investigation of criminal offenses on the Internet: problems and solutions (05/28/2021): a collection of materials of round tables dedicated to the 30th anniversary of Independence of the Republic of Kazakhstan* (pp. 36–39). Kossy: Akademiia pravookhranitelnykh organov pri Generalnoi prokurature Respubliki Kazakhstan [in Russian].
- 3 Amurtaeva, D.T., & Kursabaeva Z.I. (2019). Poniatie i sushchnost prinuditelnykh mer vospitatel'nogo vozdeistviia [The concept and essence of compulsory educational measures]. *Sovremennye problemy ugovolnoi politiki: Mezhdunarodnaia kollektivnaia monografiia — Modern problems of criminal policy: an international collective monograph* (pp. 16–26). Ekaterinburg-Kostanay [in Russian].
- 4 Naurzalieva, S.M. (2019). Ugolovnaia otvetstvennost nesovershennoletnikh v Respublike Kazakhstan [Criminal responsibility of minors in the Republic of Kazakhstan]. *Candidate's thesis*. Moscow [in Russian].
- 5 Bekmagambetov, A.B. (2015). *Ugolovnoe pravo Respubliki Kazakhstan. Obshchaia chast. Uchebnik [Criminal law of the Republic of Kazakhstan. The general part. Textbook]*. (2nd edition, revised and expanded). V.P. Revn (Ed.). Almaty: Zheti Zhargy [in Russian].
- 6 Samatova, G.B. (2021). Rol instituta nakazaniia v preduprezhdenii ugovolnykh pravonarushenii protiv nesovershennoletnikh [The role of the institute of punishment in the prevention of criminal offenses against minors]. *Sovremennoe sostoianie teorii i praktiki instituta nakazaniia v sisteme mer preduprezhdeniia ugovolnykh pravonarushenii (27.05.2021 g.) / Rassledovanie ugovolnykh pravonarushenii v seti Internet: problemy i puti resheniia (28.05.2021 g.): Sbornik materialov kruglykh stolov, priurochennykh k 30-letiiu Nezavisimosti Respubliki Kazakhstan — The current state of the theory and practice of the institute of punishment in the system of measures for the prevention of criminal offenses (05/27/2021) / Investigation of criminal offenses on the Internet: problems and solutions (05/28/2021): a collection of materials of round tables dedicated to the 30th anniversary of Independence of the Republic of Kazakhstan* (pp. 99–103). Kossy: Akademiia pravookhranitelnykh organov pri Generalnoi prokurature Respubliki Kazakhstan [in Russian].
- 7 Kystaubaeva, A.B. (2019). Institut probatsii: sovremennoe sostoianie i perspektivy razvitiia v Respublike Kazakhstan [Institute of Probation: current state and prospects of development in the Republic of Kazakhstan]. *Doctor's thesis*. Nur-Sultan [in Russian].
- 8 Rakhmetov, S.M. (2020). *Ugolovnoe pravo Respubliki Kazakhstan. Obshchaia chast: Uchebnik [Criminal law of the Republic of Kazakhstan. General part: Textbook]*. Almaty: TOO Lantar Treid [in Russian].

9 Kursabaeva, Z.I. (2020). Osobennosti ustanovleniia probatsionnogo kontroliia kak ugovovno-pravovoi mery vozdeistviia na nesovershennoletnikh [Features of the establishment of probation control as a criminal legal measure of influence on minors]. *Aktualnye voprosy sovremennoi nauki: materialy mezhdunarodnoi nauchno-prakticheskoi onlain-konferentsii — Topical issues of modern science: materials of the international scientific and practical online conference* (pp. 93–97). Karaganda: Karagandinskaia akademiia MVD Respubliki Kazakhstan im. B. Beisenova [in Russian].

10 Postanovlenie spetsializirovannogo mezhraionnogo suda po delam nesovershennoletnikh g. Nur-Sultan po delu № 7130–19-0-1/76 ot 09.12.2019 [Resolution of the specialized interdistrict Juvenile Court of Nur Sultan in case No. 7130-19-00-1/76 dated 09.12.2019]. *Arkhiv spetsializirovannogo mezhraionnogo suda po delam nesovershennoletnikh g. Nur-Sultan — Archive of the specialized interdistrict Juvenile Court of Nur-Sultan* [in Russian].

Information about the authors

Tatkov Renat Urazovich — Operative Officer of the Astana City Police Department, Police Lieutenant Colonel, Doctoral Student, Astana, Kazakhstan; e-mail: tatkov.renat17@mail.ru

Nagornov Kirill Igorevich — Assistant of the Department of Criminal Law of Volgograd State University, Volgograd, Russia; e-mail: nagornov_k@inbox.ru