
ҚЫЛМЫСТЫҚ ҚҰҚЫҚ ЖӘНЕ ҚЫЛМЫСТЫҚ ІС ЖҮРГІЗУ УГОЛОВНОЕ ПРАВО И УГОЛОВНЫЙ ПРОЦЕСС CRIMINAL LAW AND CRIMINAL PROCEDURE

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A.A. Biebayeva¹, A.M. Kalguzhinova^{2*}, D.O. Ozbekov²

¹Academy of Justice under the Supreme Court of the Republic of Kazakhstan, Nur-Sultan, Kazakhstan

²Karaganda University of the name of Academician E.A. Buketov, Kazakhstan
(E-mail: ardak_22@mail.ru, aigul.kalguzhinova@ksu.kz, d_ozbekov@mail.ru)

Current state and prospects for improving the institutions of exemption from criminal liability and punishment

One of the key areas of the criminal policy of the Republic of Kazakhstan is the humanization of criminal legislation through a gradual reduction in the scope of criminal repression by improving the institution of exemption from criminal liability, expanding the grounds for exemption from criminal punishment and parole. The authors of this article comprehensively studied the content of the institutions of exemption from criminal liability and exemption from punishment in the previously existing criminal laws: Criminal Codes of the RSFSR of 1922 and 1926, the Criminal Code of the Kazakh SSR of 1959, and the Criminal Code of the Republic of Kazakhstan of 1997. In addition, they analyzed the novelties of the Criminal Code of the Republic of Kazakhstan of 2014, corresponding to the idea of restorative justice, which is gradually entering the legal reality of Kazakhstan. The main part of the article defines the essence of establishing a surety, which is classified by the Law of the Republic of Kazakhstan as of December 27, 2019 as a type of exemption from punishment. The legal nature is revealed, the grounds and conditions enshrined in the law, the procedure for applying this type of exemption from punishment are analyzed, and its importance in stimulating positive post-criminal behavior is shown. The scientific recommendations proposed by the authors are aimed at overcoming the most common problems in the practice of applying the rules governing the conditions and procedure for exemption from criminal liability and punishment.

Keywords: criminal liability, punishment, release, history of development, improvement of legislation, establishment of surety.

Introduction

Exemption from criminal liability and release from punishment are important, widely used in law enforcement practice, and at the same time, problematic institutions of criminal law. The norms of these institutions stimulate persons who have broken the law to positive post-criminal behavior, promote faster and more complete restoration of harm caused by a criminal offense, respect the rights of the victim, than ensure the implementation of the principles of humanism and economy of criminal repression.

In the large majority of cases, Kazakhstani society, the state, citizens do not doubt that only realized criminal liability is an extremely effective instrument of criminal law policy. However, this is not always the case. For example, criminal prosecution and the application of punishment turn out to be unfair, do not correspond to the goals defined in the law, when a person, although he has committed a criminal offense, does not need any compulsory correction with the help of criminal legal means at all. In these cases, the practical implementation of criminal liability becomes inappropriate, improper and unjustified. The institution of exemption from criminal liability and punishment is called upon to contribute to a fair solution of such cases.

* Corresponding author's e-mail: aigul.kalguzhinova@ksu.kz

Therefore, a repressive approach to influencing the offender requires a significant addition to the active use of incentive techniques for regulating criminal liability.

Experimental

The authors analyzed the current domestic legislation governing the institutions of exemption from criminal liability and exemption from punishment, as well as the latest scientific studies on this issue.

The research instrumentarium includes the use of general scientific methods of theoretical analysis (dialectical method as the basis for cognition of legal phenomena), as well as specific scientific methods (systemic, formal-logical, historical-legal). The study is based on work directly with the texts of laws, and consisted in the analysis of the features of the regulation of the institutions of exemption from criminal liability and exemption from punishment in the normative acts in force of Kazakhstan (the Criminal Code of the Russian Soviet Federative Socialist Republic (RSFSR) 1922, the Criminal Code of the RSFSR 1926, the Criminal Code of the Kazakh SSR 1959, the Criminal Code of the Republic of Kazakhstan (RK) 1997, the Criminal Code of RK 2014).

Results

Exemption from criminal liability for one reason or another has been applied for a long time, and it can be argued that it takes its origins from criminal liability itself.

The 1922 Criminal Code of the RSFSR provided such types as the expiration of periods of limitations, exemption from criminal liability of minors and bribe-givers. The Criminal Code of the RSFSR 1926, in addition to them, consolidated such types as changing the criminal law or the socio-political situation and release under an amnesty. At the same time, until the end of the 50s of the last century, all these norms were considered, by both the legislator and scientists, as types of exemption from punishment, and not from criminal liability.

Unrelated norms, providing for the possibility of exemption from criminal liability of persons who committed a crime, were formed into an independent institution of criminal law only with the entry into force of the Fundamentals of Criminal Legislation of the USSR and the Union Republics of 1958, and the Criminal Code of the Kazakh SSR 1959. At the same time, the theoretical development of this institute began. The first Soviet authors who published works on this topic were E.V. Boldyrev, G.B. Wittenberg, G.A. Krieger, G.M. Minkovsky, A.P. Chugaev. Later, the studies by I.M. Galperin, N.F. Kuznetsova, S.G. Kelina, Kh.D. Alikperova, S.I. Zeldova, G.D. Korobkov, E. Tenchova and others were published.

The Criminal Code of the Kazakh SSR 1959 provided the following types of exemption from criminal liability: a) release due to the disappearance of the public danger of the act and the person who committed it; b) release due to the expiration of the period of limitations for criminal prosecution; c) release with the transfer of the case to a comrades' court; d) release with bail; e) release with administrative liability; f) release in connection with voluntary assistance in the investigation of a crime (it was included in the Criminal Code of the Kazakh SSR in 1995).

As we can see, the legislator was guided by the ideas, widespread in the second half of the 1950s, of replacing punishment with educational measures, involving the public in the fight against crime, and even transferring this function to the public as a part of the implementation of the theory of the "withering away of the state".

In general, in the Soviet period, the development of our state was characterized by the dominance of a punitive criminal policy, which implies the intensive application of harsh measures of criminal punishment to persons who have committed a crime. In the conditions of the domination of the command-administrative system, when it was impossible to solve specific problems requiring radical economic and organizational transformations, they often resorted to means of criminal repression [1; 44]. The low efficiency of such a policy, which produces crime and deforms public consciousness, demanded qualitatively new, non-traditional approaches to the problem of combating crime and neutralizing its consequences. As a result, in science and in positive criminal law, new ideas and approaches have emerged, related to the reaction of society and the state to crimes [2; 55].

In the world practice, an active search for alternatives to the outdated punitive justice has led to the emergence of the concept of restorative justice, the essence of which comes down to the involvement of the conflicting parties themselves and the public in solving the consequences of a crime, which contributes to the social reintegration of the offender and a decrease in the volume of repression. An objective assessment of the role, capabilities of the state and its institutions in the fight against crime, as well as the study of the po-

tential of civil society in combating crime in the conditions of modern Kazakhstan also unequivocally speaks in favor of the need to consolidate their efforts [3; 78].

When developing the 1997 Criminal Code of Kazakhstan, the legislator, having abandoned the outdated types of exemption from criminal liability, introduced new types. Thus, the domestic legislator has demonstrated his adherence to the principles of humanism and a positive attitude towards the institution of exemption from criminal liability.

For the first time, the legislator has combined the norms on exemption from criminal liability and punishment in an independent section. However, the system of these norms did not have clear criteria for the construction and detailed theoretical justification.

Institutions of exemption from criminal liability and exemption from punishment differ from each other in the stages of criminal proceedings when release is possible; by persons and bodies authorized to make such decisions; on legal consequences and procedural order of application.

The adopted law singled out general and special types of exemption from criminal liability. Among the general types, exemption from criminal liability was fixed: in connection with active repentance (Article 65 of the Criminal Code of the Republic of Kazakhstan); in connection with exceeding the limits of necessary defense (Article 66 of the Criminal Code of the Republic of Kazakhstan); in connection with reconciliation with the victim (Article 67 of the Criminal Code of the Republic of Kazakhstan); in connection with a change in the situation (Article 68 of the Criminal Code of the Republic of Kazakhstan); in connection with the expiration of the statute of limitations (Article 69 of the Criminal Code of the Republic of Kazakhstan), in connection with the act of amnesty (Article 76 of the Criminal Code of the Republic of Kazakhstan).

Special types of exemption from criminal liability were established by the norms of the Special Part of the Criminal Code (for example, notes to Articles 125, 165, 231 of the Criminal Code of the Republic of Kazakhstan, etc.).

Also, the Criminal Code provided the following types of exemption from punishment: provisional release (Article 70 of the Criminal Code of the Republic of Kazakhstan); replacement of the unserved part of the punishment with a milder type of punishment (Article 71 of the Criminal Code of the Republic of Kazakhstan); postponement of serving sentences for pregnant women and women with young children (Article 72 of the Criminal Code of the Republic of Kazakhstan); release from punishment due to illness (Article 73 of the Criminal Code of the Republic of Kazakhstan); release from punishment and postponement of serving punishment due to extraordinary circumstances (Article 74 of the Criminal Code of the Republic of Kazakhstan); release from serving a sentence in connection with the expiration of the statute of limitations for the conviction (Article 70 of the Criminal Code of the Republic of Kazakhstan); release from punishment on the basis of an act of amnesty (Article 76 of the Criminal Code of the Republic of Kazakhstan); release from punishment on the basis of an act of pardon (Article 76 of the Criminal Code of the Republic of Kazakhstan).

A new stage in the development of national law is associated with the implementation of the Concepts of Legal Policy of the Republic of Kazakhstan dated September 20, 2002, August 21, 2009. Both Concepts identified the most important directions in the development of criminal law:

- the possibilities of a gradual reduction in the scope of criminal repression by expanding the conditions for exemption from criminal punishment, primarily in relation to persons who do not pose a great public danger (minors, persons who have committed reckless crimes, other persons — in the presence of mitigating circumstances);
- introduction of alternative to criminal punishment measures of official enforcement;
- improving the institutions of exemption from criminal liability, serving a sentence, provisional release.

During the period of validity of the Criminal Code of the Republic of Kazakhstan in 1997, about fifteen amendments and additions were made to the norms of Section 5 of the Criminal Code. The norms on exemption from criminal liability in connection with reconciliation, and the expiration of the period of limitations, provisional release, and postponement of serving a sentence have been repeatedly amended.

The result of the improvement of criminal policy was the adoption on July 3, 2014 of the Criminal Code of the Republic of Kazakhstan that entered into force on January 1, 2015. The new criminal law, in general, while retaining the provisions of the 1997 Criminal Code of the Republic of Kazakhstan, expanded the scope of the institution of reconciliation, the conditions of parole for socially vulnerable segments of the population. Thus, release in connection with reconciliation when committing for the first time a grave crime not related to causing death or serious harm to health became possible not only for minors, but also for pregnant women, parents with dependent young children, pensioners. Independent types of exemption from criminal

liability have become novelties of the criminal law when the conditions of the procedural agreement are fulfilled (Article 67 of the Criminal Code of the Republic of Kazakhstan) and with the establishment of a surety (Article 69 of the Criminal Code of the Republic of Kazakhstan).

According to official statistics, in 2014, 106,782 persons committed crimes. More than half of them were exempted from criminal liability — 62603 persons (58.6 %). However, due to the change in the form of the statistical report 1-M “On registered criminal offenses”, some data on persons prosecuted and released from criminal liability in 2015–2020 is not highlighted.

The norms of the institute of exemption from criminal liability and punishment in the Criminal Code of the Republic of Kazakhstan in 2014 are also regularly revised. Thus, the conditions for release in connection with active repentance have been expanded, subject to the fulfillment of the terms of the procedural agreement, in connection with reconciliation, provisional release, replacing the unserved part of the sentence with a softer type of punishment or reducing the term of the imposed sentence, release from punishment and postponement of serving punishment due to the confluence of difficult circumstances, release from criminal liability and punishment on the basis of an act of amnesty or pardon. At the same time, restrictions have been introduced on the application of parole from punishment to persons convicted of a grave, especially grave corruption crime.

Discussions

Amendments to the norms of the criminal law on the establishment of surety deserve special attention. In the initial version of the 2014 criminal law, the establishment of surety was introduced as a form of exemption from criminal liability. However, as is rightly noted in the literature, “not...well thought-out legislative regulation of surety with a bail” [4; 152], as well as the issues arising over the five-year period of the criminal law on the application of Article 69 of the Criminal Code of the Republic of Kazakhstan, necessitated changing the content of this criminal law norm.

By the Law of the Republic of Kazakhstan dated December 27, 2019 “On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Improvement of Criminal, Criminal Procedure Legislation and Strengthening the Protection of Individual Rights”, the establishment of a surety was transferred to the number of grounds for exemption from punishment. At the same time, the amount of the bail is tied to the maximum amount of the fine stipulated for a committed criminal offense, while earlier the amount of the bail depended on who was the guarantor — an individual or a legal entity.

To understand the legal essence of the concepts of “bail” and “surety”, it is necessary to refer to the concepts of “bail” and “personal surety” used in criminal proceedings as a measure of restraint and additional restrictions.

In Part 1 of Article 145 of the Code of Criminal Procedure of the Republic of Kazakhstan, bail is defined as “the payment by the suspect, the accused or another person to the court's deposit of money to ensure that the suspect, accused fulfill their obligations to appear before the person conducting the pre-trial investigation, to the prosecutor or to the court upon their summons”. “Other valuables, movable and immovable property, on which the arrest is imposed, can be accepted as a bail”. Personal surety, in accordance with Part 1 of Article 142 of the Criminal Procedure Code of the Republic of Kazakhstan, “is the acceptance by trustworthy persons of a written obligation that they vouch for the proper behavior of the suspect, the accused and their appearance when summoned by the body conducting the criminal process”.

It is important to decide whether the guilty person can post the bail himself. Article 145 of the Code of Criminal Procedure of the Republic of Kazakhstan allows such a possibility. However, Article 69 of the Criminal Code of the Republic of Kazakhstan excludes such a possibility, since the criminal-legal bail includes elements of surety. Therefore, the guarantor can only be a third person, and not the guilty person himself. At the same time, Article 69 of the Criminal Code of the Republic of Kazakhstan does not provide clarification of the reputation of guarantors as trustworthy persons. Consequently, this circumstance is not included in the subject of proof to resolve the issue of establishing surety.

The next question that arises in a comparative analysis of Article 69 of the Criminal Code of the Republic of Kazakhstan and Article 145 of the Code of Criminal Procedure of the Republic of Kazakhstan is to determine the subject of the bail. Is money always the subject of collateral, and does the surety have the opportunity to provide collateral in the form of other valuables, movable or immovable property? This question can be answered positively, since the legislator in Article 69 of the Criminal Code of the Republic of Kazakhstan does not indicate that the subject of the bail is money. Consequently, when determining the subject of a bail not in the form of money, one can and should use the provisions of Article 145 of the Code

of Criminal Procedure, according to which, when providing other valuables, movable and immovable property as a bail, the pledger is obliged to provide them to the body conducting the criminal proceedings at the same time with title documents.

In accordance with Part 1 of Article 69 of the Criminal Code of the Republic of Kazakhstan, the conditions for release from punishment with the establishment of a surety are: 1) the person commits a criminal offense or a crime of minor or medium gravity, not related to causing death or serious harm to human health; 2) the commission of this act for the first time; 3) the presence of a fine among other types of basic punishments in the sanction of a criminal law norm providing for liability for the committed act.

Exemption from punishment on this basis falls within the competence of only the court. At the same time, release with the establishment of a surety is not an obligation, but the right of the court, i. e. in deciding this issue, the judge has discretionary powers. The court has the right to issue a guilty verdict with the release of a person from punishment with the establishment of a surety, if the bail is paid on the court's deposit before the court is retired to the deliberation room.

The surety is established for a certain period, the duration of which depends on the type of criminal offense (criminal offense or crime), the category of the crime (small or medium gravity).

Release from punishment with the establishment of a surety refers to conditional types of release:

- if, during the period of surety, a person commits a new criminal offense, the court cancels the decision to release him from punishment, and assigns him a punishment according to the rules for imposing a punishment based on cumulative sentences. In this case, the pledge turns into state revenue;

- if the person released from punishment did not commit a new criminal offense during the surety period, upon the expiration of the surety period, the bail is returned to the pledger.

The provisions of Article 69 of the Criminal Code of the Republic of Kazakhstan “do not apply to persons who have committed corruption crimes, terrorist crimes, extremist crimes, crimes committed as part of a criminal group, crimes against the sexual inviolability of minors”.

Thus, the formation of surety in Kazakhstan law shows that it acts as a complex institution of material and procedural criminal law, combining elements of property and moral obligations.

Conclusions

Commonly, the improvement of the institutions of exemption from criminal liability and punishment demonstrates the high assessment by the legislator of the considered institutions as effective legal instruments contributing to the implementation of the social and preventive function of criminal law.

Institutions of exemption from criminal liability and punishment acquire particular relevance in modern conditions, when the next Concept of Legal Policy of the Republic of Kazakhstan is being prepared. The new program document of the country is intended not only to determine the main directions of development of the Kazakhstani legal system but also to ensure the consistency of legal policy with reforms in the socio-economic and political fields for the long term.

In particular, it is important to ensure a balance between punitive, restorative and preventive means of criminal law regulation. In this regard, we believe that there is no need to continuously expand the grounds for exemption from criminal liability and punishment. An overly broad list of grounds for exemption from criminal liability and punishment can undermine respect for the law, contribute to the formation of a sense of impunity among the population, and negatively affect general prevention. Further, the development of these institutions should be done through improving the existing types of exemption from criminal liability and punishment: concretizing and formalizing the conditions of release, bringing the norms of criminal procedure legislation regulating the procedure for release with the ideology of substantive criminal law [5; 127]. We consider it expedient to support the idea of transferring additional punishments to the category of criminal-legal measures, with the establishment of the possibility of their application in relation to persons exempted from criminal liability or punishment.

References

- 1 Джекебаев У.С. К вопросу о преемственности в уголовном праве / У.С. Джекебаев // Право и государство. — 2013. — № 3 (60). — С. 43–47.
- 2 Биебаева А.А. Поощрительные нормы в уголовном праве Республики Казахстан / А.А. Биебаева // Право и государство. — 2014. — № 3 (64). — С. 55–57.

3 Чукмаитов Д.С. Консолидация усилий государства и гражданского общества в борьбе с преступностью / Д.С. Чукмаитов // Право и государство. — 2013. — № 2 (59). — С. 78–80.

4 Мицкая Е.В. Залог как условие освобождения от уголовной ответственности с установлением поручительства / Е.В. Мицкая // Правовое государство: теория и практика. — 2016. — № 4 (46). — С. 148–152.

5 Биебаева А.А. Қылмыстық жауаптылықтан босатудың мәні, оның қылмыстық құқықтың сабақтас институттарымен ара қатынасы / А.А. Биебаева, А.М. Калгужинова // Құқық және мемлекет. — 2019. — № 3 (84). — Б. 117–130.

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Қылмыстық жауаптылықтан және жазадан босату институттарының қазіргі кездегі жағдайы және жетілдіру болашағы

Қазақстан Республикасының қылмыстық саясатының негізгі бағыттарының бірі қылмыстық заңнаманы ізгілендіру болып табылады, ол қылмыстық жауаптылықтан босату институтын жетілдіру, қылмыстық жазадан босату, жазадан мерзімінен бұрын шартты түрде босату негіздерін кеңейту арқылы қылмыстық қуғын-сүргін аясын біртіндеп қысқартудан көрінеді. Авторлар бұрын қолданыста болған қылмыстық заңдарды, яғни 1922 және 1926 жылдардағы РКФСР Қылмыстық кодексті, 1959 жылғы ҚазССР Қылмыстық кодексті, 1997 жылғы ҚР Қылмыстық кодекстегі қылмыстық жауаптылықтан босату және жазадан босату институттарының мазмұнын жан-жақты зерделеген. 2014 жылғы ҚР Қылмыстық кодексінің Қазақстанның құқықтық болмысына біртіндеп еніп келе жатқан қалпына келтірушілік сот төрелігі идеясына сәйкес келетін жаңалықтарына талдау жасаған. Мақаланың негізгі бөлімінде 2019 жылғы 27 желтоқсандағы ҚР Заңымен жазадан босатудың түріне жатқызылған кепілгерлік белгілеудің мәні анықталған. Құқықтық табиғаты ашылған, жазадан босатудың осы түрін қолданудың заңда бекітілген негіздері мен шарттары, тәртібі талданып, оның қылмыстық әрекеттен кейінгі жағымды мінез-құлықты ынталандырудағы маңызы көрсетілген. Авторлар тұжырымдаған ғылыми ұсынымдар қылмыстық жауаптылық пен жазадан босату шарттары мен тәртібін реттейтін нормаларды қолдану тәжірибесінде жиі кездесетін мәселелерді жоюға бағытталған.

Кілт сөздер: қылмыстық жауаптылық, жаза, босату, даму тарихы, заңнаманы жетілдіру, кепілгерлік белгілеу.

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Современное состояние и перспективы совершенствования институтов освобождения от уголовной ответственности и наказания

Одним из ключевых направлений уголовной политики Республики Казахстан является гуманизация уголовного законодательства, выражающаяся в поэтапном сокращении сферы применения уголовных репрессий путем совершенствования института освобождения от уголовной ответственности, расширения оснований для освобождения от уголовного наказания, условно-досрочного освобождения от отбывания наказания. Авторами всесторонне исследовано содержание институтов освобождения от уголовной ответственности и от наказания в ранее действовавших уголовных законах: Уголовных кодексах РСФСР 1922 и 1926 гг., Уголовном кодексе КазССР 1959 г., Уголовном кодексе РК 1997 г. Проанализированы новеллы Уголовного кодекса РК 2014 г., соответствующие идее восстановительного правосудия, которая постепенно входит в правовую действительность Казахстана. В основной части статьи определена сущность установления поручительства, которое Законом РК от 27 декабря 2019 г. отнесено к разновидности освобождения от наказания. Раскрыта правовая природа, проанализированы закрепленные в законе основания и условия, порядок применения данного вида освобождения от наказания, показано его значение в стимулировании позитивного постпреступного поведения. Предложенные авторами научные рекомендации направлены на преодоление наиболее часто встречающихся проблем в практике применения норм, регламентирующих условия и порядок освобождения от уголовной ответственности и наказания.

Ключевые слова: уголовная ответственность, наказание, освобождение, история развития, совершенствование законодательства, установление поручительства.

References

- 1 Dzekebaev, U.S. (2013). K voprosu o preemstvennosti v ugovnom prave [On the issue of continuity in criminal law]. *Pravo i gosudarstvo — Law and State*, 3 (60), 43–47 [in Russian].
- 2 Biebaeva, A.A. (2014). Pooshchritelnye normy v ugovnom prave Respubliki Kazakhstan [Incentive norms in the criminal law of the Republic of Kazakhstan]. *Pravo i gosudarstvo — Law and State*, 3 (64), 55–57 [in Russian].
- 3 Chuknaitov, D.S. (2013). Konsolidatsiia usilii gosudarstva i grazhdanskogo obshchestva v borbe s prestupnostiu [Consolidation of the efforts of the State and civil society in the fight against crime]. *Pravo i gosudarstvo — Law and State*, 2 (59), 78–80 [in Russian].
- 4 Mitskaia, E.V. (2016). Zalog kak uslovie osvobozhdeniia ot ugovnoi otvetstvennosti s ustanovleniem poruchitelstva [Pledge as a condition of exemption from criminal liability with the establishment of a guarantee]. *Pravovoe gosudarstvo: teoriia i praktika — The rule of law: theory and practice*, 4 (46), 148–152 [in Russian].
- 5 Biebaeva, A.A., & Kalguzhinova, A.M. (2019). Qylmystyq zhauaptylyqtan bosatudyn mani, onyn qylmystyq quyqqtyn sabaqtas instituttarymen ara qatynasy [The essence of exemption from criminal liability, its relationship with related institutions of criminal law]. *Quyq zhane memleket — Law and the State*, 3 (84), 117–130 [in Kazakh].