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Formation of the criminal law of the Republic of Kazakhstan on the responsibility for compulsion to perform sexual acts

The article is devoted to the historical and legal review of the regulation of criminal liability for compulsion to perform sexual acts. Studying the historical development and improvement of criminal law provision, authors mark the basic legislative acts adopted during the certain periods of development of domestic legislation, considering their features. Analysis of changes and amendments to the Criminal Code the Republic of Kazakhstan, includes theoretical underpinning of the new laws of recent years.

Key words: compulsion to perform sexual acts, history of the criminal law of the Republic of Kazakhstan, Kazakh customary law, Russian criminal law, Soviet criminal law, Criminal Code of the republic of Kazakhstan of 1997, Criminal Code of the republic of Kazakhstan of 2014, punishment for compulsion to perform sexual acts.

Modern criminal situation in Kazakhstan attracts an increased interest in the study of problems of protection of sexual freedom and sexual inviolability among the most important components of personal safety. Public danger of compulsion to sexual act is that it encroaches on the sexual personal liberty by using blackmail, threat of destruction, damaging or removing property or financial or other dependence of the victim in order to force entering into sexual relations with the offender. Moreover, this crime may lead to committing other more serious crimes, such as rape or forcible sexual actions.

Reforming of the criminal legislation of the Republic of Kazakhstan (adoption on July 3, 2014 of a new Criminal Code of the Republic of Kazakhstan, its introduction into effect on January 1, 2015) actualizes the need to analyze the evolution and practice of provisions on liability for compulsion to perform sexual acts. Indeed, without mastering the legal existence and culture of our people, without turning them into the foundation of the state and legal system, we have our eyes closed to the past and there is a clear neglect of history lessons, the manifestation of inexcusable negligence in the knowledge of ways to make the reforms efficient and powerful.

Periodization of the history of national legislation is ambiguously laid in the literature. The differences are marked not only in the time parameters of differentiation, but also in their evaluation. We support scientists who believe that the most productive is «civilizational approach to the history of the Kazakh state and law, that, taking into account the achievement of the formational approach to the history of the state and law and typology of states, allows to consider deeply and thoroughly the state legal and social development of the nomadic Kazakh society that was in turn caused by the recognition of the multi-variant and polycentric system of the world-historical process — especially when a nomadic way of production and reproduction had been formed for centuries»[1; 3, 4].

In the regard to the said above, we will highlight the stages of development of national criminal law, depending on which basic regulations were adopted in a given period.

1) Kazakh customary law, that contains the following main sources: the oral custom — adat (әдет); erezhe — provision or guiding regulations of the Congress of biys; Shariah (Islamic law); judicial decisions and verdicts of the most authoritative and well-known biys (бидің билігі). This form of rights was the most appropriate for individual features of Kazakhs, leading a nomadic lifestyle for a long time.

The prominent researcher of the Kazakh customary law S.L.Fuks notes that in the customary law of Kazakhs in the 18th — first half of the 19th century «homogeneous crimes that were closest to the crimes not against persons but to the crimes against property were extramarital sexual intimacy, adultery, rape and the kidnapping of women. In all these cases basically not a violation of sexual freedom of women... not a violation of religious and moral requirements were prosecuted,... it comes not about the revenge of the wounded and outraged husband. The main and decisive... that determines the scope and nature of the liability for each case, determines the persons bearing the responsibility of a guilty person, since we are talking about the financial compensation — it is an attempt to compensate the damage made to the owner, to protect his proper-

ty, to approve and secure the integrity of the rights of the owner. Since a woman is first of all a property value, proprietary subject matter» [2; 186, 187].

Another researcher of the Kazakh criminal customary law T.M.Kulteleyev allocates these trespasses in an independent group of crimes in the area of family relations. Thus the scientist also notes that trespasses to the women's rights and interests are considered as socially dangerous acts against the family and property rights of men, as in the Kazakh society a woman was in full possession of a man (father, husband, brother) equally with other property.

Such customs as bride price, marriage to an underage girl, polygamy, etc. that are the trespass to the reputation and dignity of a woman, putting her in an unequal position to a man, were not considered as crimes. A number of other means of compulsion of women in the field of family relations were not considered as crimes: forcing a woman against her will to marry or to continue marital cohabitation; prohibiting a woman to marry according her wish; forcing her to divorce and so on. [3; 236]

Under such circumstances a woman did not have her right to personal liberty and integrity at all, and to sexual freedom in particular. Crimes that aim sexual freedom or actions that violate by any way existing ideas about sexual morality, are considered here mainly as an offence against the property.

For committing various crimes in the field of marriage and family relations up to the middle of the 19th century, the Kazakh customary law assigned the following punishments: death penalty, physical shameful punishment, slavery, kun (кун) and aiyp (айып). From the middle of the 19th Century biys used aiyp, physical shameful punishment. From the second half of the 19th Century the courts of biys hardly used physical shameful punishments, they were mostly used by the courts of kadees (mullahs), that were also engaged in family and marriage issues of Kazakhs [4; 19, 20, 51, 85, 91, 115, 179].

2) Russian criminal law. In 1731–1744 Kazakh khans took the allegiance of Russia and Kazakhstan started using Russian laws.

Provisions on liability for crimes against sexual freedom and sexual integrity were contained in different Acts. For example, in the Council Code of 1649 it was mentioned about the death penalty for military men (soldiers) who were starting the service or coming back from the service «to those who committed the sex violation to females...» [5; 273].

The legislation of Peter I said about the punishment for seduction of unmarried woman by promising to marry her, some types of voluntary and involuntary sexual intercourse and its unnatural forms («…if a man mixes with cattle and insane creature and perform a disgusting act…», «… if anyone defiles a child or man having homosexual relations with another man …») [5; 387]. Thus the liability for sexual offenses was considered not by the secular but by the church legislation.

The Penal and Criminal Code of 1885 first codified various penal acts, marked out a special section «Crimes against the honor and chastity of women». Its article established liability for defilement of girls under 14 years of age; rape of a female over 14; kidnapping; seduction of women or girls. With respect to each of these activities there were set the appropriate qualifying circumstances [6; 117].

The Code contained a number of provisions that stated such a violent impact on human health, which forced them to act or refrain in the interests of the rapist. Thus, Article 383 of the Code fixed responsibility for the chief forcing his subordinate «... to be engaged in affairs that do not belong to his duties in the service...» Article 1548 stipulated responsibility in cases when «... there was a threat from anybody in order to force the threatened to any illegal acts...», according to Article 1584 the liability was held by «... a husband, who using his power for evil purposes or trust of the other spouse... to force them to any unlawful case or action...» [7; 15].

Criminal Code of 1903 greatly expanded the range of criminal assaults by including the two groups of crimes: a) directly related to the satisfaction of the sexual needs by the convicted (concupiscential actions, adultery…) and b) directly unrelated (procurement, pandering, inducement to lewdness...). Particular attention was paid to the protection of the interests of persons, one way or another dependent on the offender [8; 118].

The Code allocated the compulsion as a separate type of offense. Compulsion was understood as «a deliberate influence on the person through physical violence or threat of unlawful actions aimed to bring on from the person an act that violated their rights or obligations without acquiring from the enforcing person any property or property benefit» [9; 38, 39]. Compulsion that was haunting vested interests referred to property crimes and was provided by other sections of the Criminal Code.

3) Soviet criminal law. The next stage in the development of domestic criminal legislation related to the establishment of Soviet power in the territory of Kazakhstan. The first decrees on marriage and family were

adopted in the RSFSR during the second month of Soviet power. All the following Soviet state laws regarding marriage and family had a great political importance for the Kazakh women, whose position was especially powerless.

Legal basis in combating the national vestiges became the decrees of Central Executive Committee and the Council of People's Commissars of KASSR «On divorce» dated 18 December 1917, «On civil marriage» dated 19 December 1917, «On Cancellation of bride price» dated December 28, 1920; Declaration of the Rights of workers of KASSR dated October 6, 1920; the decrees of the Council of People's Commissars of KASSR «On marriage law for Kyrgyz» dated January 17, 1921 and «On punishability for the polygamy» dated November 9, 1921.

Declaration of the rights of workers of KASSR stated: «Based on the fact that society can consider itself liberated, the woman still remains enslaved, a Kyrgyz woman, who was up to this day a slave in social and family life, and at the same time a humble worker in the premises, now to consider an equal member of society, having all political and civil rights that are the heritage of the entire mass of workers» [10; 87].

Considering the following periods of domestic criminal law, it is necessary to clarify that since 1922 the Kyrgyz (Kazakh) Republic was an autonomous republic, part of the RSFSR, and had the legislation of the RSFSR on its territory.

First RSFSR Criminal Code was entered into force on June 1, 1922. In Chapter 5 of the Criminal Code, «Crimes against life, health, freedom and dignity» the section «Crimes in the field of sexual relations» has been allocated. This section included two groups of crimes: crimes related and unrelated to the satisfaction of the sexual needs by the convicted persons. The encroachments group was concerned with the components of sexual intercourse with a person under the sexual maturity age; corruption of minors; rape. The second group of crimes consisted the compositions of forced prostitution; pandering; brothels, as well as the recruitment of women for prostitution.

The introduction of the norms of criminal responsibility for violence to life, health, freedom and dignity of women contributed to the elimination of judicial and actual inequality of women and all forms of discrimination against them. However, as it was reasonably pointed out by criminologists of that time, life showed that the ban of the rape only was not enough [11; 75]. Hired labor of women had been widely used at home (maids), and vestiges of the former attitude towards women was still quite seriously manifested in public life. In particular, «the question arose about the need to protect women workers from attacks on their sexual freedom from the owners or individual officials'» [12; 218].

By the resolution of the second session of the Central Executive Committee on 10 July 1923 the Criminal Code was amended by Article 169-a «Forcing a woman to have sexual relations with a person on whom the woman is financially or professionally». The sanction for the forcing was provided the same as for the rape — imprisonment for not less than three years [13; 165].

As it was fairly considered by V.F.Ivanova, «in this case the use of the concept of «forcing» was due to the need, on the one hand, of accurately expressing the essence of violent crime on the will of the victim in order to get her to sexual intercourse, and on the other hand — to distinguish it from a form of forcing the victim as compulsion, expressed in the immediate threats of physical violence against the victim or her family in case of failure to meet the requirement of the rapist and stands as one of the ways to commit rape» [7, 15]. In addition, such compulsion cases that occur in practice showed the need to include the appropriate component in the Criminal Code [12; 218].

Introduction to the criminal law of a new concept caused a lot of conflicting opinions. At the same time, «expositors did not find any difference between it and already familiar to them «forcing», preferring in the analysis of Article 77 of the Criminal Code the familiar term» [7; 17]. Problems of theoretical and practical interpretation of «compulsion» and «forcing» in the period of 1924–1926 are discussed in details by V.F.Ivanov in the thesis «Criminal legal assessment of compulsion». We only note that in the theory of criminal law and judicial practice of those years there was no consensus on this issue.

On October 16, 1924 the second session of the Central Executive Committee of the eleventh convocation at the initiative of the Central Executive Committee of the Kyrgyz (Kazakh) Autonomous Republic updated the Criminal Code of RSFSR with the ninth chapter of domestic crimes. For the Kyrgyz (Kazakh) Republic the following articles were introduced: adoption of kun, barymta, payment of bride price, forcing a woman to enter into marriage, bigamy and polygamy [13; 180, 181].

By the Decree of the Central Executive Committee of the twelfth convocation on 22 November, 1926 a new criminal law was adopted in the RSFSR. In Chapter 6 of the Criminal Code «Crimes against life, health, freedom and dignity» sexual crimes were not allocated in a separate section. A criminal liability was applied

for sexual intercourse with persons under the age of sexual maturity; corruption of minors; rape; compulsion of a woman to have sexual intercourse. Article 154 of the Criminal Code strengthened the responsibility and provided the components of compulsion not only to sexual intercourse, but also to the satisfaction of sexual desire in some form by a person in respect of whom a woman had financial or service dependent. A punishment of imprisonment for a term not exceeding five years was applied for such crime [13; 283]. In our opinion, the introduction of this supplement contributed to a better protection of sexual freedom of women from criminal encroachments.

The Commission of the Central Executive Committee for the study of work and life of women of the East published some data in the magazine «New East» showing that the number of persons convicted of forcing women into marriage, during the period from 1924 to 1927 increased from 59 to 180 people. In the first half of 1928 68 persons were sentenced for the crime [14; 167–169].

By the Decree of Central Executive Committee dated April 6, 1928, the term «domestic crimes» was replaced by «crimes constituting the vestiges of the tribal system», which became the name of the tenth chapter of the Criminal Code of the RSFSR in 1926. These crimes were distinguished from other domestic crimes. The number of crimes has been increased from nine to nineteen. Chapter was supplemented by new components: forcing a woman to continue marital cohabitation; forcing persons under the age of sexual maturity to marriage.

The Criminal Code of the Kazakh Soviet Socialist Republic was adopted by the Supreme Council of the Kazakh SSR on 22 July, 1959, and entered into force on 1 January 1960. The chapter about the crimes constituting vestiges of the tribal system has been removed. In the case of such crimes on the territory of the Republic the guilty party was convicted on an equal basis, regardless of whether they committed such crimes due to the vestiges of tribal relations or due to other causes [15; 26]. The Criminal Code of the Kazakh SSR fixed the responsibility only for forcing a woman to marriage.

It should be noted that the norm of criminal liability for compulsion of a woman to have sexual intercourse or to the satisfaction of sexual desire in a different form had been included in all criminal codes of the Union republics, except for the Kazakh, Latvian and Estonian SSR.

However, the disposition of the article was presented differently. Thus, the Criminal Code of the Ukrainian, Georgian and Moldavian Republics fixed the responsibility for compulsion to sexual intercourse. In the Criminal Code of the RSFSR, Tajik, Uzbek, Lithuanian, Azerbaijan, Kyrgyz, Armenian and Turkmen SSR containing the compulsion was an article of sexual relations or satisfaction of sexual passion in a different form, in the Criminal Code of Belorussian SSR — in a perverted form.

These codes, in addition to the Criminal Code of Azerbaijan and the Uzbek SSR set as a condition for liability the material dependence of women on the guilty party, or its dependence on service. In the the Criminal Code of Georgia, Azerbaijan, Turkmen and Moldavian republics a condition for responsibility included not only material and service dependence, but also the different dependence of the victim on her forcing party, which created a great opportunity to fight this crime. According to the Criminal Code of the Georgian and Moldavian Republic not only the presence of dependence was required, but also establishment of the fact of its application. According to V.N.Ivanova, such a clarification was unnecessary, since the very existence of such a dependence has a definite impact on the victim [16; 100].

The need to improve regulations, providing the criminal liability for violent sexual crimes, was noted by many scholars. For example, L.A.Andreyeva proposed to provide a separate component for cases of forced sexual intercourse by threats of other nature than rape [17; 156].

G.K.Kostrov, A.D.Chernyavsky and some modern scholars considered the possibility of adoption of the general rule of criminal liability for illegal forcing as an encroachment against the rights and freedoms of the individual [18; 16, 19; 21, 20; 93, 21; 49, 50].

Domestic legislator in solving this issue took the first way, i.e the way including in the criminal law of the sufficient number of specific offenses, providing for liability for certain types of compulsion (forcing).

4) The criminal legislation of the Republic of Kazakhstan. A qualitatively new stage in the development of national criminal law should be considered the period from the date of the proclamation of the state sovereignty of Kazakhstan up to the present time. Adoption of the Declaration «On the State Sovereignty of the Kazakh SSR» dated October 25, 1990 was an important milestone in the establishment of an independent state. By the law of the Kazakh SSR dated 10 December 1991 «On changing the name of the Kazakh SSR» the state was renamed as Republic of Kazakhstan [22].

Gained independence had set for Kazakhstan a number of difficult problems, the most important of them was the creation of state structures and the creation of a legal framework for political and economic

reforms. During the arrangement of its statehood Kazakhstan identified as the basic principles the rule of law and the recognition of the supreme value of human rights and freedoms. At the same the historical roots of modern statehood had been associated with the general civilization processes, and its historical path — with the general long-haul human development.

The Constitution of the Republic of Kazakhstan of 1995 proclaimed the policy of creating a democratic civil society and consolidated that the rights and freedoms belong to everyone from birth, and recognized as absolute and inalienable. Proclaimed by the Basic Law provisions are the fundamental principle of the constitutional order, forming the basis for civil society and providing every person with legally recognized and protected by the state ability to choose their behavior under the law.

This approach has identified a hierarchy of tasks of criminal law, the creation of the Special Part of the Criminal Code, the creation of a number of new offenses relating to the infringement of human rights.

It should be noted as well that on February 17, 1996 the Interparliamentary Assembly of the Commonwealth of Independent States approved the draft of the Model Criminal Code for the CIS member states. The working group for the development of the Model Criminal Code included researchers and law enforcement officials of Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyz Republic, Republic of Moldova, Russian Federation, Tajikistan, Ukraine, Uzbekistan.

One of the main challenges for developers was to bring the criminal law into line with modern social hierarchy of values accepted in a democratic state, protection of human and civil rights. Article 147 of Chapter 7 «Crimes against the person» of the Model Criminal Code provided liability for «forcing a person to sexual intercourse, sodomy, lesbianism or other acts of sexual nature using blackmail, threatening to destroy, damage or remove property or using material or other dependence on the victim». This crime was classified as a minor offense.

Model Criminal Code was scientifically reasoned proposal, addressed to the legislative bodies of CIS countries. Not having the binding force, it served as a model for the creation of national criminal codes, the basis for the formation of the criminal law.

July 16, 1997 Criminal Code the Republic of Kazakhstan was adopted, and entered into effect on January 1, 1998. The adoption of the criminal law, based on a fundamentally new basis, was required by the life, by the awareness of the need of fundamental change of legal doctrine in the formation of new social relations. For the first time in the history of the national criminal legislation liability for compulsion to sexual intercourse, sodomy, lesbianism or other sexual acts was enshrined (Article 123 of Criminal Code of the Republic of Kazakhstan).

Disposition of Article 123 of Criminal Code had been stated as follows: «Compulsion to perform sexual intercourse, sodomy, lesbianism or other acts of a sexual nature using blackmail, threatening to destroy, damage or remove property or using material or other dependence of the victim». Sanction of the considered criminal law provided punishment in the form of a fine, correctional labor, arrest or imprisonment.

As it can be seen, Article 123 of the Criminal Code of the Republic of Kazakhstan fully reproduced Article 147 of the Model Criminal Code. This article expanded the circle of victims committing the crime and specified measures of compulsion which the offender may apply to achieve their goal.

Comparison of the norms of the Criminal Code with the norms of the relevant chapters on the offences against the person of the Criminal Code of the Kazakh SSR allows to state that a new approach was implemented to show the line between permissible and impermissible in sexual relations. On one hand, criminal liability for any forcible sexual actions was established. On the other hand — liability for sexual acts, including sodomy, if committed by persons who have reached a certain age voluntarily committed, was excluded.

Qualitative transformation of the Criminal Code on the basis of a new approach is a distinctive feature of the criminal policy of the Republic of Kazakhstan. The basis of this approach relies on the concept of human rights and legal state, widespread and supported in the world community.

However, the adoption of the Criminal Code the Republic of Kazakhstan was not the completion of the criminal law reform. A new stage in the development of national law marked by the Concept of Legal Policy of the Republic of Kazakhstan, approved by the Decree of the President of the Republic of Kazakhstan dated 20 September 2002 and by the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020, approved by Decree of the President of the Republic of Kazakhstan dated August 24, 2009.

The concepts provide further improvement of the criminal law, since the formation and further development of criminal law lay in time and must meet a certain system requirements. The process of development of the law in general is continuous, hence, the basis for improving knowledge of any branch of the law will always exist.

Analysis of the changes and additions made to Article 123 of the Criminal Code, 1997, shows that only the sanction of the criminal law was subjected to legislative adjustments:

– term of imprisonment was increased from one year to two years (Law of the Republic of Kazakhstan «On Introduction of Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on combating crime» dated May 5, 2000);
– due to excluding of the arrest from the penal system this type was replaced by restriction of freedom; the penalty shall be calculated only in the monthly calculation indices (Law of the Republic of Kazakhstan «On Introduction of Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the further humanization of criminal legislation and strengthening the guarantees of legality in criminal proceedings» dated January 18, 2011).

The process of formation of the legislation on liability for compulsion to perform sexual acts lasts to the present day. The next stage of the criminal law reforms related to the adoption on 3 July 2014 of the new Criminal Code of the Republic of Kazakhstan.

In general, the provisions of the Criminal Code of 1997 on Sexual Offences remain unchanged. Under the current law, all encroachments on sexual freedom and sexual integrity of the person are considered as crimes. Formal elements of compulsion to perform sexual acts, as well as other elements of sexual crimes have been left unchanged. At the same time, despite the general trend of increasing the punishment for sexual offenses (an increase of the sentence of imprisonment, the establishment of a life ban on working with children), the size and terms of all kinds of penalties for compulsion to perform sexual acts reduced. In our opinion the sanction of Article 123 of the Criminal Code the Republic of Kazakhstan corresponds to the typical degree of social danger of such crime and is in proportion to the sanctions for other sexual crimes.

Thus, existing criminal law of the Republic of Kazakhstan can be considered as a very effective tool to combat infringement of sexual freedom and sexual integrity of the person. Introduction and preservation of the element of compulsion to perform sexual acts is not accidental, it reflects the general pattern of development of Kazakh society. The trend of development of domestic criminal law is expressed in expanding the scope of punishability for violent attacks on the will of a man, explained by the value of the individual and by the need to strengthen the criminal law to protect its rights and freedoms.

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Қазақстан Республикасының нәпсіқұмарлық сипаттағы әрекеттерге мәжбүрлегені үшін жауаптылық туралы қылмыстық заңнамасының қалыптасуы

Мақала нәпсіқұмарлық сипаттағы әрекеттерге мәжбүрлегені үшін қылмыстық жауаптылықты реттеу мәселелерін тарихи-құқықтық шолуға арналған. Қылмыстық-құқықтық норманың қалыптасуы мен жетілдірілуінің тарихи қырларын зерттей отырып, авторлар отандық заңнаманың дамуының жекелеген кезеңдерінде қабылданған негізгі нормативтік-құқықтық актілерді атап өтіп, олардың ерекшеліктерін қарастырды. Қазақстан Республикасының Қылмыстық кодексіне енгізілген өзгерістер мен толықтыруларды талдау соңғы жылдардың заңнамалық жаңалықтарын теориялық тұрғыдан негіздеуді қамтиды.

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Становление уголовного законодательства Республики Казахстан об ответственности за понуждение к действиям сексуального характера

Статья посвящена историко-правовому обзору регламентации уголовной ответственности за понуждение к действиям сексуального характера. Изучая исторический путь развития и совершенствования уголовно-правовой нормы, авторы отмечают основные нормативные акты, принятые в отдельный период развития отечественного законодательства, рассматривают их особенности. Анализ изменений и дополнений, внесенных в Уголовный кодекс Республики Казахстан, включает теоретическое обоснование законодательных новелл последних лет.

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