

CRIMES AGAINST SEXUAL INVIOLABILITY OF MINORS: CRIMINAL LEGAL AND PENITENTIARY FEATURES

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ABSTRACT

The study is devoted to criminal legal and penitentiary features of counteraction to criminal attacks on the sexual inviolability of minors. The goal is to analyze the criminal legal and penitentiary methods of combating crime directed against the sexual inviolability of minors, provided for in the national criminal and executive legislation of Kazakhstan, the USA, and European countries. The study examines the international organizational and legal experience of protecting minors and norms of criminal legislation. Based on the research of the materials on criminal and executive law and experience of different countries in the field of combating crimes against sexual inviolability of minors, the authors propose further improvement of the criminal legislation of the Republic of Kazakhstan, in terms of protecting minors from sexual assault. In particular, the necessity of introducing voluntary chemical castration as a prerequisite for mitigating punishment, changing the type of punishment, and early release for persons who committed these crimes for the first time is substantiated. The main provisions and conclusions of the study can be used in scientific and practical activities when considering the issues of crime prevention and the effectiveness of the norms on crimes against sexual inviolability of minors, as well as in subsequent reform of the norms of criminal and executive legislation in the field of sexual freedom and inviolability.

Keywords: Criminal Law, Executive Law, Penitentiary System, Sexual Inviolability.

INTRODUCTION

In modern society, protection of the rights and freedoms of minors, including protection from sexual assault, is one of the most important tasks (Khyshiktuev & Kalashnikova, 2020; Bogdanov & Orlov, 2010; Ishigeev & Val'z Dorf, 2013). This issue is becoming, without exaggeration, a real social disaster that threatens the safety of children and adolescents. Often, adults commit crimes that infringe on sexual freedom and inviolability and threaten not only social relations, which ensure the normal physical and moral development of the younger generation, but the inalienable right of a child to be, grow, and develop in a natural environment, in a family or conditions similar to family (Grukhin et al., 2017; Vardanian & Leneva, 2016; Talan & Dunin, 2019; Annas & Geiger, 2013).

Many branches of Kazakh law protect minors from various unlawful encroachments, criminal and executive law, in particular.

The criminal legislation of the Republic of Kazakhstan, in turn, protects social relations that are associated with the fulfillment of conditions that contribute to the normal physical, intellectual, and moral formation of the child's personality. Criminal law also acts as one of the means of protecting a child from criminal attacks and ensures normal development and education of minors. The Criminal Code of the Republic of Kazakhstan 2014 (The Criminal Code of the Republic of Kazakhstan, 2014) provides for offenses against minors, and criminal liability for committing it is established.

The protection of minors is carried out within the framework of the executive legislation. Its norms regulate the state's penitentiary system. In this context, one of the main issues is the impact of the use, along with punishment, of coercive and voluntary medical measures against persons convicted of abuse of the sexual inviolability of minors suffering from mental disabilities (sexual preference disorder in the form of pedophilia) on the termination of punishment or its change.

Today, according to official statistics, the number of those convicted of violations of the sexual inviolability of minors is steadily growing. In 2015, there were 181, in 2016-263, in 2017-391, in 2018-413, and in 2019-423. This fact may testify not only in favor of the effective work of law enforcement agencies in the search for perpetrators, preliminary investigation, and strong position of the court but also the insufficient preventive role of criminal law means and penitentiary system in preventing such encroachments.

LITERATURE REVIEW

These circumstances are of undoubted interest among many researchers. Several works are devoted to the problems of counteracting infringements on the sexual inviolability of minors within the framework of the institutions of criminal and penal law: Kadyrbekov (2020), Abisheva (2020), Dogadina & Perezhogin (2007), Ovsianikova (2013), Romantsov (2013) and others.

The criminological characteristics of crimes against sexual inviolability and the main directions of their prevention were given by Deriagin (2008), the founder of "*criminal sexology*". However, we do not fully agree with his point of view. Deryagin argues that the concept "*pedophile*" is not equivalent to the concept "*criminal*", pedophilia is a biosocial phenomenon,

and crime is a socially dangerous act that is prohibited by the Criminal Code under the threat of punishment; crimes against the sexual integrity of children are most often committed not by pedophiles, but by sexual sadists, for whom neither the age nor gender of the victim is usually important.

The increased public danger of crimes against sexual inviolability against minors is highlighted in the study by Guseeva (2011), who found out that the social danger of pedophilic actions consists in an extremely negative effect on the psyche of the child, and also noted the high level of latency of crimes associated with pedophilia. Martirosian (2010) noted that there is a victimological aspect in the analyzed group of acts that, however, should not be considered, because minors (especially the younger age group) belong to the category of “*inexperienced victims*”. The prevention of violent sexual crimes against minors should be carried out in three main areas simultaneously: 1) general social prevention measures; 2) special prevention in relation to criminals and potential victims; 3) improving the regulatory framework for law enforcement and preventive activities; 4) criminal liability and punishment of those responsible.

The study by Shuvalova (2011) is of great importance for improving the mechanism for preventing crimes against sexual inviolability against children. She proposed to define such crimes as crimes with the use of mental or physical pressure, threats, intimidation, as well as through bringing a minor to a helpless state or using such a state; after beating them, where sex appears as a means.

However, many of these problems do not yet have their own organizational and legal solution, which makes new research on the topic relevant.

The hypothesis of the study: for effective counteraction to infringements on the sexual integrity of minors, it is advisable to introduce the possibility of voluntary chemical castration as one of the conditions for mitigating criminal punishment in criminal law and consolidate the procedure for the use of voluntary chemical castration in the penal legislation.

RESULTS

Building a state governed by the rule of law is impossible without fully ensuring the security of its future-the younger generation. The regulation of the legal protection of sexual inviolability of minors in criminal law as a special component of ensuring the appropriate level of development of members of society is of significant importance for Kazakhstan. According to the current criminal legislation, adopted in July 2014 (entered into force on January 1, 2015), certain novelties appeared in the area of actions under consideration. Firstly, the legislator introduced an article that explained some concepts in the Criminal Code of the Republic of Kazakhstan. According to Paragraph 42 of Article 3 of the Criminal Code of the Republic of Kazakhstan, crimes against sexual inviolability of minors “*are acts provided for in Articles 120 (rape), 121 (violent acts of a sexual nature), 122 (sexual intercourse or other actions of a sexual nature with a person under 16 years old), 123 (compulsion to sexual intercourse, sodomy, lesbianism, or other actions of a sexual nature), 124 (perversion of minors), committed against minors*” (The Criminal Code of the Republic of Kazakhstan, 2014). These changes to the current criminal legislation not only gave a clear list of a group of crimes against sexual inviolability of minors but also played a role in toughening criminal liability for violations of the sexual inviolability of persons under the age of 18 (Abisheva, 2020). Before the introduction of

amendments by the Law of the Republic of Kazakhstan “*On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Protection of the Rights of the Child*”, adopted on April 9, 2016 (Law of the Republic of Kazakhstan, 2016), sexual inviolability of minors was given priority protection. These amendments have expanded the scope of the prohibition on the use of incentive norms (exemption from criminal liability, punishment, probation, parole) in relation to persons who have committed crimes against sexual inviolability of minors (Abisheva, 2020). The legislator has significantly toughened sanctions for committing violent crimes against minors.

One of the goals of the sanctions is to prevent repeated assaults on the sexual inviolability of minors. In this regard, it seems appropriate to consider measures of a medical nature applied to those convicted of violations of sexual inviolability of minors in the process of execution of the sentence.

One of the compulsory measures of a medical nature, applied specifically to those who have committed an encroachment on sexual inviolability of minors, is chemical castration provided for in Paragraph 5 of Part 1 of Article 93 of the Criminal Code of the Republic of Kazakhstan, the execution of which is determined by the Criminal Executive Code of the Republic of Kazakhstan (Article 26) (Law of the Republic of Kazakhstan, 2016) and the legislation of the Republic of Kazakhstan in the field of healthcare. Chemical castration in Kazakhstan has been introduced and is used as a compulsory medical measure since January 1, 2018. In accordance with the Order of the Minister of Health of the Republic of Kazakhstan dated December 15, 2020 no. KR DSM-262/2020, chemical castration is the intake of an antiandrogenic drug that reduces sexual desire, carried out by a medical organization based on a court decision. Due to the short period of use of this measure in Kazakhstan, it is too early to study its effectiveness. Instead, we consider the experience of other countries where chemical castration has been introduced and used for more than a decade.

DISCUSSION

US federal legislation, considering the issue of the criminal legal protection of the sexual inviolability of a child, includes in the group of “*child sexual abuse*” several acts that have not only direct but also indirect connection with the sexual motivation of the perpetrator. American criminologists classify these acts into two types: sexual relations between an adult and a child within the family (incest) and non-family sexual relations (pedophilia). At the level of legislation in most US states, child prostitution is punishable not only by the provider of sexual services but also by the person who uses them (the so-called patronage). This principle of the American legislator seems to be appropriate since it allows creating an evidence base and preventing crimes.

Forced chemical castration is used in some states of America (California, Florida, Georgia, Texas, Louisiana, Montana, etc.). For example, in Florida, it is mandatory to apply this measure to persons who have been convicted again. In the USA, the drug “*Depo-Provera*” is usually used for chemical castration, it is injected approximately every three to four months, and after the cessation of use, the suppressed body functions are restored. However, such drugs have several side effects, such as weight gain, osteoporosis, increased risk of cardiovascular diseases, and others (Romanovskii, 2015). Therefore, the issue of using forced chemical castration is

considered by the court and can be resolved positively only in the absence of serious medical contraindications.

Chemical castration for pedophiles and rapists is also used in several European countries, such as France, Germany, Italy, Denmark, Norway, and others, where the procedure is voluntary. In France, for example, pedophiles are placed in special institutions, where they are given a choice: to agree to chemical castration or stay within these walls for life (Khyshiktuev & Kalashnikova, 2020). Poland is an exception. In 2010, amendments were introduced to the Criminal Code of Poland, according to which for violent incest with a minor chemical castration is mandatory (Bogdanov & Orlov, 2010).

The effectiveness of chemical castration is confirmed by statistics. In Germany, about six rapists voluntarily agree to this procedure a year. The chance of a relapse in a freed pedophile is 84%, and in a person to whom chemical castration has been applied—only 3%. The UK Home Office conducted a study, which concluded that the number of repeated crimes decreased by 50% in the countries and states of the US where chemical castration was used (Grukhin et al., 2017).

In world practice, there are also unsuccessful examples of the use of chemical castration in the fight against violations of the sexual inviolability of minors. In Russia, chemical castration was introduced as a measure of influence on pedophiles in 2012, but only with the consent of the convict. It was assumed that the pedophile would voluntarily go to the procedure to protect others and themselves from such desires and possible relapse. In reality, the convicts did not want to lose their “*dignity*”, especially since chemical castration did not in any way alleviate the fate of the criminal; the punishment remained unchanged (Vardanian & Leneva, 2016). Unsurprisingly, under such conditions, there were no volunteers.

In those states where this aspect is more thought out, as in the above example of France, chemical castration is a condition of release from punishment, and refusal of therapy leads to a return to the correctional institution (Khyshiktuev & Kalashnikova, 2020). Thus, the voluntary chemical castration requires an additional incentive, for example, alleviating the fate of the offender in case of consent to this procedure. The convicted person must be aware of the side effects of the procedure, in particular, about its repeated occurrence. Only when fully informed can a person make a decision. This way, the person will not be limited in their rights (Khyshiktuev & Kalashnikova, 2020). The question of the introduction of forced chemical castration is rather controversial since it violates the criminal’s rights to family, personal inviolability, and refusal of medical intervention. The state should not descend to the same level with the criminal but must take care of its population, and the criminal must be punished equal to the harm caused (Khyshiktuev & Kalashnikova, 2020).

It would be naive to assume that the introduction of chemical castration against rapists and pedophiles will guarantee the disappearance of this type of crime, but it contributes to a decrease in its number. It is also impossible to deny the prevalence of the topic of sex in modern society: in films, magazines, literature, and the Internet, more and more sex and sexuality-related topics are discussed, as well as articles about sex education, research, etc. appear, which, it should be noted, increases sexual literacy of the population (Khyshiktuev & Kalashnikova, 2020). That is why castration has the function of psychological pressure on potential criminals. This is expressed in the fear of losing “*their dignity*” since the ability to have sex in modern society is associated in most cases with it (Khyshiktuev & Kalashnikova, 2020).

The comparative table below shows the patterns of use of chemical castration in different countries (Table 1).

Table 1 TYPES OF CHEMICAL CASTRATION AND ITS APPLICATION FEATURES		
Country	Type of chemical castration	Application features
USA (Individual States)	Forced chemical castration	Applied as a general rule for those who have committed a crime again, in the absence of medical contraindications
Poland	Forced chemical castration	Applied as a general rule for those who have committed certain types of crimes
Kazakhstan	Forced chemical castration	Applied by a court decision, the recidivism of crimes and their type are not mandatory conditions for application. It is not a condition for release from punishment, mitigation of punishment, parole
Russia	Voluntary chemical castration	Not a condition for release from punishment, mitigation of punishment, parole
France, Germany	Voluntary chemical castration	A voluntary alternative to imprisonment, used to mitigate punishment

The use of forced castration is possible and justified only in relation to especially dangerous criminals who have repeatedly committed malicious crimes of a sexual nature. The current legislation of Kazakhstan is strict with regard to such persons. The legislator designated for them a milder term of imprisonment of 7 years for nonviolent actions under Part 1 of Articles 122,124 of the Criminal Code of the Republic of Kazakhstan, up to life imprisonment Parts 3-2, 4 Article 121 of the Criminal Code of the Republic of Kazakhstan-for sexual abuse of minors). It seems expedient to use voluntary (and in the case of especially dangerous repeat offenders and forced) chemical castration to this category of criminals.

CONCLUSION

Thus, the analysis of preventive measures and legislation developed by the science of criminology of several countries and, section 7 of the General part of Chapter 1 and 2 of the Special Part of the Criminal Code of the Republic of Kazakhstan allows drawing several conclusions.

Now, the functioning of the institutions of criminal punishment and the penal system makes it possible to effectively resist sexual assault against minors. This efficiency largely depends on the well-coordinated interaction of various law enforcement agencies with bodies of other spheres of government, such as the Ministry of Health, in the application of compulsory medical measures against persons committing these offenses.

Analysis of international legislation in the field of protection of sexual freedom and inviolability of the individual demonstrates the difference between sexual abuse of an adult and a minor.

In a significant part of the legislation of many countries, as well as in the Criminal Code of the Republic of Kazakhstan, increased liability is established for crimes against sexual inviolability of minors. The Criminal Code of the Republic of Kazakhstan identifies acts committed against minors, which makes it possible to better formulate the characteristics of these crimes, and justify increased responsibility for committing.

As a reform of the norms on sexual crimes against minors, legislators should consider the use of voluntary chemical castration, as a condition for mitigating punishment for certain categories of convicts and procedure for such application, which will help to avoid the recurrence of such crimes.

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