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Comparative analysis of the criminal law institution “Expulsion from the Republic of Kazakhstan of a foreigner or stateless person”

The article illustrates problematic issues of regulation and practice of applying foreigner or stateless persons expulsion from the Republic of Kazakhstan as a criminal punishment type. The analysis of the features of regulation and the practice of applying such punishment abroad and in Kazakhstan was carried out. The purpose of the research is a comprehensive theory and practice analysis of the expulsion implementation as a criminal punishment type. The research is carried out through general and special legal methods, analysis and generalization of the legal norms governing expulsion in the legislation of different countries, the comparative legal method allows us to identify the main trends in the legal institution development “expulsion of a foreigner or stateless person” at the present time. The main result of the research is the provision on the need to improve the institute “Expulsion of a foreigner or stateless person” in the criminal law of the Republic of Kazakhstan. As conclusions, additions to the norms of the Criminal Code of the Republic of Kazakhstan are proposed, aimed at improving the Criminal Code Article 51, specifying the process of expulsion, as well as conditions list under which expulsion from the Republic of Kazakhstan is not assigned. It is proposed to supplement the article with provisions on “indefinite expulsion from the Republic of Kazakhstan”.

Keywords: stateless person, expulsion, migration, migration processes, foreign citizen, stateless person, citizen.

Introduction

The main purpose of the research is a criminal law regulation comprehensive analysis and the implementing the expulsion practice of a foreigner or stateless person as a criminal punishment type. Open borders, global world processes, an increase in terrorist threats, an increase in migration flows, have an impact on the legal regulation of the foreign citizens and stateless person’s situation. Migration of the population has both negative and positive aspects, requiring legal regulation. Expulsion from a country as a criminal punishment form or other criminal law measure is the forced person removal from the given country territory by a court sentence in the crime event for a certain period or indefinitely [1]. According to Article 51 of the Criminal Code of the Republic of Kazakhstan, the travel ban is determined for 5 years period.

In the modern world, almost all states constitutions and laws contain a provision according to which a citizen cannot be sent abroad against his will [2]. At the same time, the foreign citizens’ expulsion and stateless persons is currently enshrined in the criminal legislation of many countries in the world. Expulsion, as a criminal law institution, is enshrined in many countries’ legislation: Azerbaijan, Albania, Andorra, Bangladesh, Hungary, Venezuela, East Timor, Vietnam, Dominican Republic, China, Colombia, Costa Rica, Cuba, Latvia, Madagascar, Oman, Peru, El Salvador, Slovakia, France, Estonia. In the criminal law of some countries, expulsion is considered as a security measure: Federation of Bosnia and Herzegovina, Greece, Macedonia, Moldova, Nicaragua, Romania, San Marino, Serbia, Croatia or as another criminal law measure: Brunei, Spain, Turkey, Ethiopia. In countries where expulsion is considered a punishment form, it is usually regarded as an additional punishment. The exceptions are: Vietnam, China, where the foreigners’ expulsion can be used as an independent or additional punishment. In Costa Rican criminal law, expulsion is considered the main punishment [2]. In Kazakhstan, the foreigners’ expulsion and stateless persons has been a

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criminal sanction since January 2015. Thus, the important legal criminal conviction consequences, which have the sanction character, have entered the criminal law sphere.

The issues of foreigners or stateless persons expulsion from Kazakhstan are based on the norms of the Constitution and are regulated by the norms of the Civil Procedure Code, the Code “On Administrative Offenses”, the Criminal Code, the Law of the Republic of Kazakhstan dated June 19, 1995 “On the Legal Status of Foreigners” and other regulatory legal acts. In more details, the expulsion process is regulated by the “Rules for the foreigner deportation or stateless person from the Republic of Kazakhstan by force, as well as the detention in a special institution of the internal affairs deported person bodies, in respect of which a court decision was made on preventive movement freedom restriction” [3]. In the cases of non-compliance by a foreigner or a stateless person with the decision taken in relation to him to be expelled from the territory, criminal liability is provided under Article 393 of the Criminal Code. Previously, administrative liability was provided for this offense. In 2015, this norm was transferred to the criminal offenses composition. At the same time, in practice, the foreigner expulsion or a stateless person causes certain problems in law enforcement practice. In accordance with Part 2 of Article 70 of the Penal Code, the expulsion costs of the convict are borne by him or the individuals or legal entities who invited him to the country. In the cases of absence or funds insufficiency of the named persons to cover the expenses, the expulsion is carried out at the budgetary funds expense. A similar provision is provided in Article 60 of the Law “On Population Migration” [4]. Thus, if the person being expelled does not have money to leave, then, accordingly, he does not have the intent to not comply with the court decision on expulsion, and his actions do not contain the elements of a criminal act under Article 393 of the Criminal Code of the Republic of Kazakhstan. In addition, in accordance with Part 2 of Article 916 of the Code of Administrative Offenses of the Republic of Kazakhstan, a person who has not executed a court decision on expulsion and has not left the territory of Kazakhstan within the period specified in the decision is subject to forced expulsion by a court decision. Contradictory in essence, however, at the same time, a similar rule is contained in Article 28 of the Law of the Republic of Kazakhstan “On the legal foreigners’ status”. In accordance with which a person in respect of whom a decision on forced expulsion has been made does not leave the territory of Kazakhstan within the period specified in the decision, he is subject to detention and forced expulsion. Based on the above norms, it follows that the legislator entrusts the decision on the foreigners’ expulsion issue at the budgetary funds expense or by force to the body that is entrusted with this execution. That is, the national security and internal affairs bodies [5]. At the same time, there is no normative act or instruction on regulating the procedure for allocating these budget funds or a mechanism for forced expulsion. The existing problem in this matter is evidenced by the fact that all the funds allocated for these purposes by the republican budget remain unused, and also, according to statistics, no acts of forced expulsion have been adopted by the courts or prosecutors. In this situation, in order to use Part 2 of Article 916 of the Code of Administrative Offenses, the authorized body must, in our opinion, apply to the court to change the procedure and method for executing the court on expulsion decision (decree). It seems necessary to develop rules for the allocation and funding distribution to cover the expulsion costs. At the same time, another question arises in which cases a criminal offense is formed in failure case to comply with a court decision on expulsion, if these persons do not leave the country on a voluntary basis, the authorized bodies will take measures to enforce the court decision in the manner prescribed by the above law. Currently, the internal affairs bodies initiate criminal cases under Article 393 of the Criminal Code only on the grounds that the person being expelled did not leave the country within the period established by the court, without fulfilling the obligations imposed on them by law to use the other above-mentioned measures. In turn, the courts considering these criminal cases, within the limits of this article sanction, fine and again “expulsion” are applied to these persons. And thus, everything is repeated again, that is, the article sanction does not provide for “forced” expulsion, and its disposition does not provide for “repetition”. If a person does not comply with a judicial act on expulsion, but now on the sentence basis, then he will already be liable under Article 430 of the Criminal Code, that is, for sentence non-execution, court decision or another judicial act or executive document. And in this situation, it would be appropriate in the sanctions of Article 393 of the Criminal Code provide for punishment in the “forced expulsion” form.

Paragraph 16 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated December 13, 2013 stipulates that “legal costs, as well as the expulsion costs, are borne by the deported foreigners or stateless persons or organizations or individuals who invited them to the Republic of Kazakhstan. In absence cases or funds insufficiency from the named persons to cover the expulsion costs, the financing of the relevant measures is carried out at the budgetary funds expense [6]. At the same time, the financing procedure has not been regulated, since at present there is no detailed procedure regulation for purchasing travel

tickets for minor children whose parents, according to a court order, are subject to deportation from the country. Difficulties remain with the legal execution of documents for the persons expulsion whose documents are missing and/or expired. Accordingly, at present, the appropriate amendments adoption to the current legislation is necessary to eliminate contradictions and gaps.

Methodology and research methods

The methodological research basis is a scientifically based approach to the problems investigation of foreigner expulsion or stateless persons from the Republic of Kazakhstan, as well as the prospects for overcoming these problems. To achieve objectivity, completeness and comprehensiveness of the research results, a general scientific and special methods cognition complex was used. Their use is due to a systematic approach, thanks to which all the issues raised in their unity and interconnection are considered.

In the research course, general scientific and particular scientific methods were used. The sociological method made it possible to take into account a social factors set that are outside the law scope, but which have a great influence on the foreigner or stateless person's observance. Using the comparative method, in conjunction with general analogy and generalization scientific methods, the general and particular identification in the protecting field the observance of the foreigner rights or stateless persons in the different countries law was carried out. The formal legal method was used in the analysis of the law and legal practice norms, the terms definition, the signs identification of legal phenomena and their classification implementation. Through the legal hermeneutics method, new approaches to the legal terminology formation in the field of observance of the foreigner rights or stateless persons are determined.

Results

In the research course, the following aspects were identified.

- Expulsion as a criminal punishment form is used in many countries in the world, however, in each country it has its own normative structure specifics and procedure for the execution of this punishment type.

- The problems of expulsion application, in expenses compensation terms, also apply to the administrative foreigner expulsion or a stateless person.

- The criminal law regulation of the expulsion of a foreigner or a stateless person expulsion, as a criminal punishment type, is less meaningful as a norm, as a result many problems arise in applying this norm practice.

- In contrast to the regulation in the foreign countries criminal legislation, in Kazakhstani criminal law, Article 51 of the Criminal Code does not provide for circumstances excluding the possibility of forced expulsion of a foreigner or stateless person, nor does it provide for the applying expulsion possibility as a circumstance replacing liberty or parole deprivation [1].

- The expulsion exclusion issue is not regulated in cases where there are sufficient grounds for the removed person to believe that they will be subjected to torture or persecution in the country where they will arrive after expulsion, or whose forced expulsion is contrary to the ensuring national security interests. For example, in the Criminal Code of Azerbaijan, forced expulsion from the country is not assigned to persons: a) who have lived in the territory of the Republic for five years by the time the sentence comes into force; b) married to a citizen of Azerbaijan by the time the verdict enters into force; c) born in the Republic of Azerbaijan; d) one of whose parents is a citizen of Azerbaijan; e) having refugee status or political asylum in Azerbaijan; f) who are dependent on minors, as well as incapacitated persons or persons recognized as disabled of the first or second group; g) in respect of whom there are reasonable grounds to believe that they will be subjected to torture or persecution in the country where they arrive after expulsion [7].

- The national legislation does not regulate evading cases: the execution of a sentence by a foreigner or a stateless person from the execution of a sentence in the forced expulsion form the Republic of Kazakhstan or in case there are sufficient grounds to assume the possibility of such evasion.

- The indefinite expulsion regulation issues are not reflected in the legislation, despite the fact that such expulsion can be assigned to persons who have committed a crime and whose presence in the country would significantly threaten public security due to the nature of the committed act and the perpetrator connections. However, the current criminal legislation of the Republic of Kazakhstan defines only one five-year term, and, without any adjustment possibility, for possible circumstances of particular importance for national security.

Thus, it should be noted that the expulsion institution, foreigners and stateless persons has a comprehensive development in various branches of national legislation. However, the existing norms do not quite correlate with each other and do not dispose of their effective application.

Discussion

Comparative analysis of articles regulating expulsion in the criminal legislation of the Republic of Kazakhstan [1] and Azerbaijan Republic [7], demonstrates different approaches to the regulation of these norms and legislative structure.

Criminal Code of the Republic of Azerbaijan regulates this punishment type more detailed than the Criminal Code of the Republic of Kazakhstan, and it should be noted that the Azerbaijani Code reflects more humane provisions. It is not important to emphasize that the Criminal Code of Azerbaijan provides in detail the procedure excluding the expulsion application in relation to persons' number, which, in our opinion, is not provided in the Criminal Code of the Republic of Kazakhstan.

Comparative analysis of the procedure for the expulsion execution as a criminal punishment type in the Penitentiary Code of the Republic of Kazakhstan [8] with the Code of the Republic of Azerbaijan on the execution of punishments [9] shows that these provisions are regulated in more detail in the Azerbaijan Code. At the same time, it should be noted that the issue of financing the expulsion has not been adequately resolved. The Criminal Executive Code of the Republic of Kazakhstan stipulates that "... the expulsion costs to the convict himself or to a third person who invited him to Kazakhstan, and in cases of absence or funds insufficiency for these persons to cover the costs, expulsion is made at the expense of budgetary funds" [8]. The Code of the Republic of Azerbaijan on the Execution of Sentences stipulates that "... the expulsion costs from the Republic of Azerbaijan are paid by the convict himself or by the diplomatic or consular state representations to his belonging. If payment in the specified order is not possible, the costs of expelling the convict from the country will be paid by the relevant executive authority [9]. Thus, according to the national legislation of Kazakhstan, in impossibility case to pay the expenses, the responsibility is the individuals or legal entities that invited him to the republic. In Azerbaijani legislation — individuals, consular representations of the state or executive bodies. In our opinion, the experience of the Azerbaijan model of expulsion execution is more progressive, because it is effective and expedient, since it is always easier for a country to recover the costs of expelling a foreigner in a recourse order. In the future, these same bodies should be more careful when issuing permits for the possibility of their citizens staying outside the country. At the same time, there are other models of the legislative structure and the procedure for the expulsion execution as a type of criminal punishment.

As the foreign criminal legislation analysis demonstrates, the conditions and procedure for applying the punishment type in question in different countries differ significantly. According to Article 1 of the Convention relating to the Status of Stateless Persons, this status does not apply to refugees [10]. The Universal Declaration of Human Rights clearly and definitely regulates citizenship not as a duty, but as a right. According to the declaration, everyone has the right to citizenship; no one can be arbitrarily deprived of his citizenship or the right to change his citizenship [11]. Based on this rather clear formulation, it follows that the change of citizenship is not only the replacement of one citizenship by another, but also the very fact of acquiring or ceasing citizenship. And since, as a result of the citizenship termination (by voluntary renunciation of citizenship), a person becomes stateless, if he does not acquire another citizenship, then, in accordance with Article 15 of the Universal Declaration of Human Rights, a person has the right to become stateless (stateless person) [11]. A person has the right to citizenship. This means that he is protected from arbitrary deprivation of his citizenship, while he has the right to voluntarily renounce citizenship and become stateless. In this case, under certain circumstances, a person may be expelled, but the issue of the expulsion country is not defined in the legislation. Accordingly, in this case, the issue of the stateless persons expulsion should be excluded from the all-existing norms editions of national legislation.

In the many countries legislation, the fact that a person has committed a criminal or administrative offense acts as a general principle underlying expulsion. Usually, the legislator provides that foreigners can be deported outside the country, for example in liberty deprivation case, after it has been served. At the same time, in Azerbaijan, expulsion is applied only when a person commits grave or especially grave crimes. In Greece, foreigners legally presented in the country can only be deported if they are sentenced to imprisonment for at least 3 months. Sometimes the legislator requires the court decision on expulsion to be motivated. Thus, according to the Albanian Criminal Code, expulsion from the country is applied if the court considers that the continued stay of the specified person in the country is undesirable. According to the Criminal Code

of Latvia, a foreigner may be expelled from the country if the court finds that his stay in the Republic of Latvia is unacceptable, taking into account the circumstances of the case and the perpetrator identity. In Brunei, expulsion from the country is imposed upon mitigation of the main punishment in the order of its replacement. Under the Criminal Code of this country, in every case where a person is sentenced to death or to imprisonment for a term of at least 7 years, the sentence, by decision of the authorities, can be commuted to temporary or permanent expulsion from Brunei. Under the Spanish Penal Code, expulsion from the national territory is also used as an alternative to imprisonment for up to 6 years. It can also be assigned to a foreigner upon serving 3/4 of the term of imprisonment exceeding 6 years.

An important condition for expulsion is the period for which a person can be expelled from the country. The criminal codes of Brunei, Hungary, Macedonia, the Serbian Republic, France provide for the expulsion possibility for a certain period and indefinitely. According to the Criminal Code of Peru, the citizens expatriation period is limited to 10 years, while the exile period of foreigners is not limited at all.

According to the Hungarian Criminal Code, perpetual expulsion can be imposed on persons who have committed crimes, whose presence in the country would significantly threaten public security due to the nature of the committed act and the perpetrator connections. The temporary exile duration under the Criminal Code of Hungary, Macedonia and Serbian Republic is from 1 to 10 years.

It should be noted that only temporary expulsion is provided for by the Criminal Code of the Federation of Bosnia and Herzegovina, the Dominican Republic, Spain, Costa Rica, Madagascar, El Salvador, and Estonia on average from six months to ten years. As a general rule, when determining the exile terms, the time spent in custody is not taken into account. There is no mention of the convicts' expulsion terms in the Criminal Code of Azerbaijan, Albania, Romania. According to the Criminal Code of Latvia, this punishment is awarded "without specifying its term".

An important question is which persons may be subject to expulsion. In almost all world countries, the only foreign citizens and stateless persons can be subjected to expulsion, which is directly indicated by the criminal legislation providing for this measure. In some countries, criminal law provides for the expulsion possibility in their own citizens from the country. For example, in Peru there is a clear distinction between the expatriation of its own citizens and the foreigners' expulsion. The first of them is applied as an exceptional measure only for a few anti-state crimes. U.S. federal law, as an additional punishment, provides for the deprivation of American persons citizenship treason convicted attempted to overthrow the U.S. government by force, or the weapons use for this purpose.

The criminal laws provide for certain cases in which foreigners cannot be expelled from the country. The most detailed list of such cases is contained in the Criminal Code of Azerbaijan, according to which forced expulsion from the Republic is not imposed on persons of a strictly defined circle of persons [7]. Only one such case is mentioned in the Hungarian Criminal Law — persons who have received refugee status cannot be expelled. In Estonia, expulsion cannot only be applied to a convicted foreigner who, at the time of the crime commission, has not reached the 18 years age. If the convicted person has a spouse or a minor child residing with him in Estonia, the court must justify the application of expulsion in the judgment.

Thus, the criminal law institution "Expulsion from the Republic of Kazakhstan of a foreigner or stateless person" requires further comparative research and its improvement.

Conclusions

Based on the research, in order to improve the institution of "Expulsion from the Republic of Kazakhstan of a foreigner or stateless person" as a criminal punishment type, we consider it appropriate to propose amendments and additions to the current version of the articles of the Criminal Code and the Penitentiary Codes of the Republic of Kazakhstan.

We propose to supplement Article 51 of the Criminal Code of the Republic of Kazakhstan and state it in the following wording:

- 1) Paragraph 3. Expulsion from the Republic of Kazakhstan is not assigned to persons:
 - a) who have lived in the territory of the Republic for five years by the time the sentence enters into force;
 - b) married to a citizen of Kazakhstan by the time the sentence comes into force;
 - c) born in the Republic of Kazakhstan;
 - d) one of whose parents is a citizen of Kazakhstan;
 - e) having refugee status or political asylum in Azerbaijan;

f) who are dependent on minors, as well as incapacitated persons or persons recognized as disabled of the first or second group;

g) in respect of whom there are reasonable grounds to believe that they will be subjected to torture or persecution in the country where they arrive after expulsion.

2) to supplement the article under consideration with paragraph 4 “Indefinite expulsion from the Republic of Kazakhstan of a foreigner or stateless person” is assigned to persons who have committed crimes, whose presence in the country significantly threatens the national security of the Republic of Kazakhstan in view of the nature of the act committed by him.

3) add Paragraph 5 as follows: “The expulsion of a foreigner or a stateless person can be applied as an alternative to deprivation of liberty upon serving 3/4 of the term of imprisonment”

4) supplement with paragraph 6 “In case of evasion of execution of the sentence by a foreigner or stateless person from the execution of punishment in the form of forced expulsion from the Republic of Kazakhstan or if there is sufficient reason to assume the possibility of such evasion”, replace it with a sentence of imprisonment for the same period.

5) Paragraph 2 of Article 70 of the Criminal Executive Code of the Republic of Kazakhstan — The procedure for the execution of punishment in the form of deportation of a foreigner or stateless person from the Republic of Kazakhstan shall be supplemented with the words “or diplomatic or consular representations of the state of his homeland” and stated as follows:

“The expulsion costs of the convict are borne by him or by the individuals or legal entities who invited him to the Republic of Kazakhstan or “or by diplomatic or consular representations of the state of his residence”. In cases of absence or funds insufficiency to cover the expenses of the named persons, the expulsion is carried out at the expense of budgetary funds.

Thus, taking into account the above, the current national legislation development stage and law enforcement practice requires a rethinking of the grounds for the foreign citizens’ expulsion and stateless persons from the country. The changes proposed in the article will ensure the complementary nature of the considered measures, which are an effective legal influence mechanism on public relations and increase the legal mechanisms and procedures transparency for the foreigner or stateless person expulsion from the Republic of Kazakhstan.

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«Шетелдікті немесе азаматтығы жоқ адамды Қазақстан Республикасының шегінен тысқары жерге шығарып жіберу» қылмыстық-құқықтық институтының компартивистік талдауы

Мақалада қылмыстық жаза түрі ретінде шетелдікті немесе азаматтығы жоқ адамды Қазақстан Республикасының шегінен тысқары жерге шығарып жіберуді реттеу мен қолдану практикасының проблемалық маңыздылығы қарастырылған. Шетелдегі және Қазақстандағы осындай жазаны қолдану тәжірибесі мен реттеу ерекшеліктеріне талдау жүргізілген. Зерттеудің мақсаты — қылмыстық жазаның бір түрі ретінде шығаруды жүзеге асырудың теориясы мен практикасын кешенді талдау. Зерттеу жалпы және арнайы құқықтық әдістер арқылы жүзеге асырылды, әртүрлі елдердің заңнамасында шығаруды реттейтін құқықтық нормаларды талдау және жалпылау, салыстырмалы-құқықтық әдіс қазіргі уақытта «шетелдікті немесе азаматтығы жоқ адамды Қазақстан Республикасының шегінен тысқары жерге шығарып жіберу» құқықтық институтының дамуының негізгі тенденцияларын анықтауға мүмкіндік береді. Зерттеудің негізгі нәтижесі Қазақстан Республикасының Қылмыстық құқығындағы «шетелдікті немесе азаматтығы жоқ адамды Қазақстан Республикасының шегінен тысқары жерге шығарып жіберу» институтын жетілдіру қажеттілігі туралы ереже болып табылады. Қорытынды ретінде шығарып жіберуді іске асыру процесін нақтылайтын, Қылмыстық кодекстің 51-бабын жетілдіруге бағытталған Қазақстан Республикасы Қылмыстық кодексінің нормаларына толықтырулар, сондай-ақ Қазақстан Республикасынан тыс жерге шығарып жіберу тағайындалмайтын шарттардың тізбесі, сонымен қатар «Қазақстан Республикасынан шегінен тысқары жерге мерзімсіз шығарып жіберу» туралы ережелермен толықтыру ұсынылған.

Кілт сөздер: апатрид, шығарып жіберу, көші-қон, көші-қон процестері, шетелдік азамат, азаматтығы жоқ адам, азамат.

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Компартивистский анализ уголовно-правового института «Выдворение за пределы Республики Казахстан иностранца или лица без гражданства»

В статье рассмотрены проблемные вопросы регламентации и практики применения выдворения за пределы Республики Казахстан иностранца или лиц без гражданства как вида уголовного наказания. Проведен анализ особенностей регламентации и практики применения подобного наказания за рубежом и в Казахстане. Цель исследования — комплексный анализ теории и практики реализации выдворения как вида уголовного наказания. Исследование осуществлялось посредством общих и специально-правовых методов, анализ и обобщение правовых норм, регламентирующих выдворение в законодательстве разных стран, сравнительно-правовой метод позволяют выявить основные тенденции развития правового института «выдворение иностранца или лица без гражданства» в настоящее время. Основным результатом исследования является положение о необходимости совершенствования института «выдворение иностранца или лица без гражданства» в уголовном праве Республики Казахстан. В качестве выводов предложены дополнения в нормы Уголовного кодекса Республики Казахстан, направленные на совершенствование статьи 51 Уголовного кодекса, конкретизирующие процесс реализации выдворения, а также перечень условий, при которых выдворение за пределы Республики Казахстан не назначается и, кроме того, внесено положение о «бессрочном выдворении за пределы Республики Казахстан».

Ключевые слова: апатрид, выдворение, миграция, миграционные процессы, иностранный гражданин, лицо без гражданства, гражданин.

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