

Alternatives to imprisonment in the legislation of Kazakhstan, Kyrgyzstan and Tajikistan



International Standards

International standards in the field of alternatives to imprisonment are identified in a number of universal and regional international instruments.

One of the most significant is the UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), adopted by General Assembly resolution 45/110 of 14 December 1990 (hereafter - the Tokyo Rules).

The Tokyo Rules contain a set of basic principles to promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment. The document has a wide scope of application. According to paragraph 2.1, the Tokyo Rules apply to all persons under prosecution, trial, or the execution of the sentence, at all stages of criminal justice. For these purposes, the Tokyo Rules refer to such persons as “offenders”, regardless of their status as suspects, defendants or convicts.

The Tokyo Rules allow for the use of their provisions, taking into account the political, economic, social and cultural context of each country, but prohibit discrimination based on race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth or other status.

Types of alternatives to imprisonment

The criminal justice system should provide a wide range of non-custodial measures at pre-trial and post-sentencing stages in order to provide greater flexibility consistent with the nature and gravity of the offence, the personality and background of the offender, and the protection of society, and to avoid unnecessary use of imprisonment (Tokyo Rules, p 2.3).

The criminal codes of the focus countries contain the following types of alternatives to imprisonment, used as primary or additional penalties.

Primary and additional penalties alternatives to imprisonment

KAZAKHSTAN	KYRGYZSTAN	TAJIKISTAN
Monetary (Compensatory) Sanctions		
Fines	Fines	Fines
Confiscation of property	Confiscation of property	Confiscation of property
--	<i>Aiyp</i> Treble damages	--
--	Public apology and restitution	--
Limitation of employment rights		
Community service	Community service	Compulsory labour
Corrective labour	Corrective labour	Corrective labour
Restrictions on military service	--	Restrictions on military service
Withdrawal of Rights		
Deprivation of rights to hold certain positions or perform certain activities	Deprivation of rights to hold certain positions or perform certain activities	Deprivation of rights to hold certain positions or perform certain activities
Deprivation of special, military rank or honorary title, class rank, diplomatic rank,	Deprivation of special, military rank or honorary title, class rank, diplomatic rank,	Deprivation of military, diplomatic, special ranks, government decorations and

qualification class and government decorations	qualification class and government decorations	honorary titles
Limitation of personal freedoms		
Restriction of liberty	Restriction of liberty	Restriction of liberty

It is evident from the above table that the criminal legislation of Kazakhstan, Kyrgyzstan and Tajikistan provide a fairly wide range of punishments other than imprisonment. They target property rights, personal freedoms, employment rights and some others. Especially noteworthy is the system of monetary sanctions. Along with fines and confiscation of property, the Criminal Code of the Kyrgyz Republic prescribes the measure of treble damages, *ayip*. Its application includes payment of compensation (in the interest of the victim) and confiscation of property (in the interest of the state), as well as an order of public apology and restitution. It is the prototype of the two penalties, previously enshrined in criminal laws of most Soviet republics - public censure and duty to make amends.

Community service, compulsory work, corrective labour, restrictions on military service, restriction of liberty - are primary penalties that can be used separately. Community service, fines, restriction of the right to hold certain positions and engage in certain activities, public apology and restitution - can be used as primary and additional penalties. These penalties in aggregate make up the system of non-custodial sanctions.

The penalties that can be used only as additional measures (deprivation of special, military rank or honorary title, class, diplomatic rank and government decorations; confiscation of property) may be applied to substitute imprisonment only to the extent that criminal law prescribes their use in combination with other non-custodial sanctions. The net increase in the punitive nature of the punishment resulting from a combination of primary and additional penalties must serve as a convincing alternative to imprisonment.

The Tokyo Rules recommend determining the number and types of non-custodial measures available in the law in such a way that consistent sentencing remains possible (p. 2.3).

To implement this provision, the focus countries must introduce in their criminal legislation not only criminal penalties but also other measures of

criminal enforcement in order to provide viable alternatives to imprisonment.¹

Depending on the stage of the criminal proceedings at which their application is possible, the following criminal enforcement measures are envisaged in the legislation of Kazakhstan, Kyrgyzstan and Tajikistan.

Measures of Criminal Enforcement alternative to imprisonment²

TYPE	KAZAKHSTAN	KYRGYZSTAN	TAJIKISTAN
Conditional sentencing	v	v	v
Compulsory medical treatment	v	v	v
Compulsory educational measures	v	v	v
Suspended sentencing	v	v	v
Release on Parole	-	v	-
Conditional release	v	v	v

The Table shows that measures of criminal enforcement do not differ significantly in these countries. An exception is Kyrgyzstan, where criminal law provides for release on parole under supervision of an employer, community or educational institution. The conditions of parole may include prohibition to visit certain places and restrictions on leisure activities.

An overall assessment of the criminal legislation of Kazakhstan, Kyrgyzstan and Tajikistan demonstrates that the systems of criminal sanctions and enforcement measures are very similar to the Model Penal Code of the Commonwealth of Independent States with the exception of few provisions.³

Firstly, none of the countries included restriction of leisure activities from the Model Penal Code as a

¹ In the Criminal Code of the Republic of Kazakhstan and the Criminal Code of the Kyrgyz Republic, these are called "measures of criminal enforcement"; in the Criminal Code of the Republic of Tajikistan – "enforcement measures of a criminal nature".

² For the purposes of this briefing paper, measures of criminal enforcement are understood to be the state enforcement regime prescribed by law for committing a crime, expressed in the form of restrictions on the rights and freedoms of convicted persons, imposed by courts in place of imprisonment or further serving sentence.

³ Model legislation recommended and adopted by the Inter-parliamentary Assembly of States, members of the Commonwealth of Independent States on February 17, 1996 in St. Petersburg.

measure of criminal enforcement for juvenile delinquents.

Secondly, the Criminal Code of Kyrgyzstan developed additional types of sanctions, such as the measure of treble damages (ayip), public apology and restitution, as well as release on parole. It should be noted that the system of alternative penalties and measures under the criminal law of Kyrgyzstan is the most diverse, but is also most similar to the system of alternatives under the Soviet regime.. To support this argument, however, a rigorous study of sentencing practice is required.

Sentencing practice

While not aiming to analyse all the features of sentencing practice in the focus countries, it is important to examine the main rules for imposing alternative penalties and measures of criminal enforcement under criminal law.

The criminal codes of all countries provide general principles of sentencing. Thus, the Criminal Code of Kazakhstan stipulates that punishment for a person who committed a crime should be necessary and sufficient to ensure correction and prevention of new crimes (Article 52, p.2).

Article 60 of the Criminal Code of Tajikistan requires that the punishment, as defined within the limits established by a specific article, is fair and subject to provisions of the General Part of the Criminal Code. Nevertheless, both countries contain the same provision that stricter punishment from the list of prescribed penalties for a given crime can be imposed if less stringent measures are unable to ensure the purpose of punishment.⁴ The Criminal Code of Kyrgyzstan contains a more well-formed expression of general sentencing principle: "The person who committed a crime should be assigned a fair punishment, necessary and sufficient for correction and prevention of new crimes. Punishment by imprisonment may be imposed only on condition that its objectives can not be achieved by another, more lenient penalty, provided in the appropriate article of the Special Part of this Code." This norm is designed to prompt sentencers towards a less stringent punishment than imprisonment, the reduction of which is a policy priority in all three countries.

These general sentencing principles enshrined in the criminal law of all countries, however, do not envisage the imposition of other measures of criminal enforcement alternative to imprisonment,

including those which can be implemented by probation services. This seems to be their main drawback.

Recommendations

On types of alternative penalties:

The Tokyo Rules recommend the following non-custodial measures: (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge; (c) status penalties; (d) economic sanctions and monetary penalties, such as fines and day-fines; (e) confiscation or an expropriation order; (f) restitution to the victim or a compensation order; (g) suspended or deferred sentence; (h) probation and judicial supervision; (i) community service order; (j) referral to an attendance centre; (k) house arrest (p.8.2).

The Rules also allow for the use of any other mode of non-institutional treatment or some combination of the measures listed above. In this regard, it is recommended that the focus countries consider expanding the list of alternative penalties and measures of criminal enforcement through the current process of criminal law reform.

With regard to criminal penalties, for instance, focus countries may consider an expulsion of a foreign citizen outside the country with a ban on reentering from 5 to 10 years (as the primary and additional penalty) and public apology with restitution (as the primary penalty).

In relation to other measures of criminal enforcement, focus countries can explore the possibility of introducing a parole bond, issued for a period of 2 to 5 years, to guarantee lawful behaviour; compulsory drug treatment, as a condition of release from punishment for crimes committed by persons suffering from drug dependence.

On sentencing guidelines:

In the process of criminal law reform it is recommended to amend the general sentencing principles to ensure that they are applied not only with regard to criminal penalties but also to other measures of criminal enforcement. To this effect, the general rule must state that punishment by imprisonment may be imposed only on condition that its objectives cannot be achieved by a more lenient penalty or criminal enforcement measure provided in appropriate article of the Special Part or norms of General Part of the Criminal Code.

⁴ Article 52, part 2 of the Criminal Code of Kazakhstan and Article 60, part 2 of the Criminal Code of Tajikistan.

It is recommended to integrate probation services at the sentencing stage in the form of a social inquiry report to enable the court to decide a suitable sentence. As prescribed by The Tokyo Rules: “If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency . The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified” (p. 7.1).

This may be one of the functions of probation officers carried out at the pre-trial stage. Since the introduction of social inquiry reports may incur financial costs, different options for implementation can be considered. For instance, one option is to make such reports compulsory in respect to certain categories of defendants (e.g. juveniles and women with dependent children), and to leave it to the discretion of the court for other groups. Another possibility is to make social inquiry reports obligatory for only certain types of criminal charges or other conditions.

On application of alternatives to imprisonment:

One of the significant challenges facing the focus countries is the lack of infrastructure to enforce alternatives to imprisonment, namely penal inspections. In this regard, it is recommended to establish independent probation services. Among other functions the probation service can undertake the duty of supervising the application of alternative penalties and criminal enforcement measures, including probation monitoring of offender behaviour.

Probation is understood to be a system of measures applied to offenders by courts with the aim of monitoring and supervising their behaviour, ensuring their social adaptation and rehabilitation and protection of rights and interests of those who found themselves in difficult situations. In this sense, probation covers pre-trial, sentencing and post-sentencing stages of the criminal process.

Options for administration of probation services

1. Establishment of probation service as a single, centralised and independent system of social institutions. Penitentiary inspections are transferred to the new structure of the probation service.

2 . Establishment of probation service on the basis of existing penal inspections within given legal and operational framework of penal systems of Kazakhstan, Kyrgyzstan and Tajikistan.

3. Phased adoption of individual elements of probation (e.g. social inquiry reports, probationary supervision, and various forms of social assistance) at different stages of criminal procedure and law enforcement practice without the formation of an independent probation service.

The decision on the administration of probation services depends on several factors, primarily the economic situation of the country and its priorities in the socio-economic and political spheres.⁵

Given the difficulties of allocating significant resources to establish a fully-fledged probation service, a more realistic prospect for the focus countries may be a phased adoption approach. Subsequent introduction of various probation elements may lead to formation of probation services in the existing institutional and legal framework of penal inspections. In due course, the probation service can be transformed into an independent structure within the penal system. The timeframe and stages of development of any probation service will depend on the economic and socio-political development of Kazakhstan, Kyrgyzstan and Tajikistan.

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⁵ In 2013 the Ministry of Justice of the Russian Federation prepared draft legislation on establishment of independent Federal Probation Service during 2014-2016, which would operate under the Ministry of Justice. However, this initiative was not approved by the government due to high financial costs. In January 2014, the Ministry of Justice initiated legislative changes on implementation of several probation elements, in particular social and psychological inquiries of juveniles before sentencing; transfer of convicted juveniles who have reached the age of majority to the isolated section of general security colony, functioning within the juvenile correctional facility.

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