

# GENERAL LEGAL OVERVIEW ON THE SYSTEM OF PRIVATE PRISONS

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Criminal law is the most ancient and classical branch of the law. There is no doubt that elementary, simple norms of criminal law existed even in primitive society.<sup>1</sup> Main specific of criminal law is that, generally this branch of law is connected with two main notions: crime and punishment. It can be said that this two main notions create some sort of judicial results in criminal law. These two notions are closely related with each other: there is no punishment without crime and there should be no crime without punishment. Of course, right on punishment is exclusive monopoly right of state.<sup>2</sup> In modern judicial literature is often mentioned that criminal law is, "last resort".<sup>3</sup> Usually, the most important values (ex. life, health, personal inviolability etc) are reserved by criminal law. These values are not only important for separate individuals, but also for whole society. So, when these interests are at risk state should take appropriate measures: make full investigation and use criminal responsibility on persons who are threatening above mentioned important interests.<sup>4</sup> The only chance to keep order, develop society and country is to prevent threatening such values. Main point of state monopoly in this case is that only state has exclusive rights on following issues:

- 1 Zane J.M., 2018. The story of law, Liberty Fund press, Indianapolis pp.17-20.
- 2 Nachkebia G., (Editor), 2007, Introduction to criminal law, Meiridiani, Tbilisi, p.p.49-50..
- 3 Asworth A., 2016. Principles of criminal law, (8-th edition), Oxford University Press, p.66.
- 4 Veselsi I., Biolke V., 2012. Criminal law, General part, structure of crime, 38th edition, Tbilisi State University, Tbilisi p.p.40-42.

- Define restricted actions
- Define penalties for restricted actions
- Determine appropriate penalty on concrete offenders
- Use, enforce penalty on offenders.

Also, essential part of above mentioned monopoly right is that only state has right to define and enforce punishment. Even court decision is made by the name of state and only state has legal right to enforce penalty.<sup>5</sup>

Criminal code of Georgia was approved on 22 July of 1999 year, by Georgian parliament. Before that, criminal offences were regulated by criminal code of Soviet Georgia, which was approved on 1960 year.<sup>6</sup> After, collapse and fall of Soviet Union Georgia became Democratic country. So, it was natural that the main issue was to create modern, democratic legal system for new Georgia. One of the most important issue was working on criminal code of Georgia. That's why special commission was founded for that time. The commission was staffed with famous practicing lawyers, scientists, researches etc. Commission had worked out draft of criminal code that was later approved by Georgian parliament. Tenth part of criminal code is about penalties and there are various types of penalties.<sup>7</sup> From the day of approving criminal code, some types of penalties have changed. The only penalty that is irreplaceable is imprisonment. Moreover, imprisonment is the most propagated type of penalty in Georgia. Imprisonment means isolation of a convicted person from the society and his/her placement in a penitentiary institution provided for by law.<sup>8</sup> Obviously, Decision on imprisonment should be made by Georgian court.

It may be strange, but there is not much history in the world, on the imprisonment penalty. According to historical sources, initially it was used as a measure for enforcing other penalty, as a measure of temporary detention.<sup>9</sup> In An-

cient times penalties largely were collective, for example like stoning. Inflicting collective pain and suffer was the main aim of collective penalties. Accordingly, imprisonment in ancient times was used to keep offender in safe place, to prepare him/her for collective, punishment.<sup>10</sup>

According to historical sources imprisonment was created in Great Britain. For the first time this penalty was used in London. It is known that Famous legal philosopher Jeremy Bentham was against death penalty and that's why he created conception of imprisonment.<sup>11</sup> From XIX century building prisons and penitentiary systems become more actual in the world. From this time, main purpose of prison is changing dramatically and main aim of imprisonment is to use this measure as a penalty, as the way of long term isolation for offenders from society, to prevent criminal offences in future. So, offenders spend different time in prisons. They also perform various useful jobs in prison, sometimes they were in a very bad conditions. Later, human rights issues are becoming more important for society and so democratic part of the world started working on prisoner's rights and improving conditions in penitentiary system.<sup>12</sup> According to modern ideology, offender's rehabilitation is main purpose of criminal penalty. Researchers and lawyers think that imprisonment is already great stress, pressure for every human being, so it is not necessary to use other forms of pain.<sup>13</sup> Prisoners should have right on elementary living conditions, right on education, mental health and other guaranties that are necessary for normal living of every human being. Though this democratic attitude still have many opponents, Critics think that such a loyal attitude cannot prevent criminal offences and does not serve main purposes if criminal law.<sup>14</sup>

5 Donjashvili T., 2006, introduction to criminal law, Tbilisi State University, Tbilisi, p.p.12-29.

6 Nachkebia G., (Editor), 2007, Introduction to criminal law, Meiridiani, Tbilisi, p.p.69-70.

7 Criminal code of Georgia, National herald of Georgia.

8 Law of Georgia, Criminal code of Georgia p.12 (English translation).

9 Zane J.M., 2018. The story of law, Liberty Fund press,

Indianapolis p.p.200-201.

10 a/m. pp.34-36.

11 Crime museum, History of imprisonment, official link on web site: <https://www.crimemuseum.org/crime-library/famous-prisons-incarceration/history-of-imprisonment/a/m>.

12 Jones M., Johnstone P., 2017. History of criminal justice, Fifth edition, Taylor and Francis, p.p.95-97.

14 Crime museum, History of imprisonment, official link on web site: <https://www.crimemuseum.org/crime-library/famous-prisons-incarceration/history-of-imprisonment/>

According to official statistics, Imprisonment is the most popular and dominant penalty in Georgia, Nowadays. Main basis and circumstances of using imprisonment is defined in criminal code of Georgia. Special law on prisoner's also regulates main conditions and rights of prisoners in penitentiary system. 15 penitentiary institutions are functioning in Georgia nowadays.<sup>15</sup> According to the data's given by national department of statistic total quantity of prisoners is 9280. It should be noted that from 2013 year this data has changed dramatically, quantity of prisoners has decreased. We think that these changes were caused by changing criminal law policy in country<sup>16</sup>.

### Scheme #1, Statistical research, quantity of prisoners in Georgia 2011-2017



When people hear word “prison” it is natural that the first association on this word is connected with state institutions and Governmental bodies. Though, more interesting it that according to experience of foreign systems, prison and penitentiary institutions may be not only state but they also may be private. Many countries in the world have private prisons. In this regard, one of the successful examples is the examples of United States penitentiary system. It is long time, since in USA prison became one of the ordinary businesses. There

are various companies that offer society prison service.

There are several models, of such private prisons and we want to present these models in our research:

- **Private management on new state prison:** The state is in need of prison infrastructure. So, state builds a prison and on the basis of contract, handles management of the prison to private company. State and company agree on concrete service fee, which state has to pay to company. On the other hand company is taking full responsibility on managing prison and providing necessary security guaranties;
- **Private prison and private management:** Private Company builds prison, company receives special permission from state and on the basis of contract is managing prison. Such kind of relation may also include agreement on redemption of prison from private company;
- **Private management on existing state prison:** The prison that is already functioning in state is handled to private company for managing it.<sup>17</sup>

United States is one of the biggest countries in the world. So, it is natural that statistic of crimes is quite high in USA. That's why prevention of crime is one of the biggest challenges for United States. One of the main roles while crime prevention is using appropriate measures of imprisonment. United States statistics of imprisonment is quite high. From 1971 year dramatically was increased quantity of prisoners. Mainly this was caused from drug crime preventing policy.<sup>18</sup> From time to time, after changing government, was also changing criminal law policy in country. These changes increased penalties and prisoner quantity in prisons. With increasing quantity the most important issue became penitentiary sys-

15 Special penitentiary department of ministry of justice. Link on official web-site: <http://www.moc.gov.ge/ka/dauqvemdebarebeli-utsyebebi/article/21337-penitenciuri-datsebulebebi>

16 National department of statistics, official web site: [http://www.geostat.ge/?action=page&p\\_id=601&lang=geo](http://www.geostat.ge/?action=page&p_id=601&lang=geo)

17 Stewart T.L., 2016. Private Prisons Advantages and misconceptions from an Arizona director's perspective, Morrison Institute for public policy, Publications, pp.3-4.

18 Younhee K., Byron E.P., 2014. Revisiting prison privatization an examination of the magnitude of prison privatization, Administration and society, research gate, p.p.13-14.



state. Using penalty is exclusive right of the state. When private company enforces criminal penalty, it seems that this breaks main principle of criminal law – using penalty only by state, exclusively. On the other hand, delegation of such monopolies on private company creates new risks connected with security system in prison and corruption. As far as, some time has already passed from the day of creating private prison system, various risks and points may be underlined.

It is obvious that private prisons increase risks of corruption and other type violations in prisons, because in this case, control is not as strict as in state prisons. Moreover, because of some illegal financial motivations, this system creates some various motivations on corruption. This opinion is proved by experience also. For example, there was famous series of cases known as „kids for cash” case. According to case materials, became clear that in 2008 year, two American judges were caught on corruption crime - taking bribe, they took a bribe from the owner of juvenile colony. Instead of taking bribe they were sentencing juveniles for stricter imprisonment penalties than offenders deserve. So, quantity of juvenile prisoners increased and accordingly increased total income of prison owner. This case had very bad influence on the idea of private prison system and reputation. Based on this case, changing and reviewing several court decisions became necessary.<sup>22</sup>

Despite this, we have to say that there are no guarantees that corruption and violation would not be in state prisons. This is also proved by experience (ex. In 2012 year, various types of violations were discovered in Georgian state prisons that were under control of state).

For analyzing this issue fully we have to overview advantages and disadvantages of both systems. While over viewing judicial literature and researches main disadvantages of private prisons are:

1. The most popular argument in this case

22 Guggenheim M., Hertz. R., 2016. Selling kids short: How "rights for kids" turned into kids for cash." Temple law review, Beasley school of law, Volume 88, No4, summer, pp.5-6.

is that, private prisons are not secured enough. State is not controlling such prisons and risks connected with corruption or other violation is higher. Also, there are higher risks of breaking human rights<sup>23</sup>

2. Private prisons are not build close enough and sending offenders to concrete prisons is based on random selection. So, prisoners are not close to their family members, this hurts re-socialization process<sup>24</sup>
3. One of the main arguments also is high statistic of recidivism. According to researches after leaving private prisons, statistic of recidivism is higher than in state prisons. Opponents think that, state prisons have better re-socialization instruments than private prisons, because management of private prisons are trying to save money on everything<sup>25</sup>
4. Private prisons are ordinary private business. So, private prisons try to use minimal recourses and are always oriented on saving money. Salary of employees is less than in state prisons. Ex. Yearly income of state prison employee is 75 000 USD. While daily income of average private prison employee is 14 USD. Researches prove that daily cost of prisoner in private prison is lower than in state prison. Experts think that this is because of low quality of service and low quality of risk prevention.<sup>26</sup>

After reviewing disadvantages of private prisons, it will be fair to review advantages of the system:

1. Private prisons have positive influence on economic of country. Additional working places are created, taxes are paid in budget, additional products are bought for providing service etc.<sup>27</sup>

23 Stewart T.L., 2016. Private Prisons Advantages and misconceptions from an Arizona director's perspective, Morrison Institute for public policy, Publications, p.p.2-3.

24 Stewart T.L., 2016. Private Prisons Advantages and misconceptions from an Arizona director's perspective, Morrison Institute for public policy, Publications, p.p.5-6.

25 a/m.

26 a/m pp.5-6.

27 a/m p.5.



2. Finally private prison service needs less financial recourses – costs of one prisoner is lesser than in state prisons<sup>28</sup>
3. A condition of prisoners is better in the system where private prisons exist. Prisoners are sent in various, state and private prisons, so, prisons are not overcrowded. This effects conditions positively<sup>29</sup>
4. Usually, private companies create expensive and well build penitentiary infrastructure, which can be used for other purposes also. For example, In the United States, several museums and gyms are created in private prisons nowadays<sup>30</sup>
5. Managing private prison is more flexible, and decisions are taken easier, faster. Private prisons are free from bureaucracy and they mostly are oriented on action and final results. For example adding additional places is more simple and fast process. It is clear, that private prisons is not depending on various bureaucracy and decision making process does not depend on different departments etc.<sup>31</sup>
6. Private prisons are paying taxes in state budget and are not consuming state finances. They usually are private companies, holding etc. So, they have great role in tax system.<sup>32</sup>
7. Private prisons are giving young people chances for developing their career.

Private prison is more familiar to common law system. Though, they also exist in other countries. First private prison in Australia was founded on 1990 year and nowadays 18.4% of total prisoners are serving their sentence in private prison. Only two private prisons were functioning in Canada, but later they were changed by state prisons. Mixed system is presented in France. More specifically, prisons belong to state, but additional (feeding, providing primary consumption materials, rehabilitation activities, prisoner education etc) services are offered by

private companies. Security system and control on infrastructure is totally controlled by state. In Israel, Supreme Court founded illegal, private prison system; Main argument of the court was exclusive rights of state. Court declared that using penalties and enforcing criminal punishment is exclusive monopoly right of state. So, it is against law to give such chances to private companies. One of the most interesting systems is presented in Great Britain. According to 2018 year statistic, 18.46% of total prisoners are serving their penalties in private prisons. In Scotland this indicator is 15.3 %. United Kingdom is one of the first country who implemented private prison system. In Great Britain private prisons exist from 1992 year. These innovations were implemented with the criminal justice act (1991). This act made possible for private companies to manage private prisons on the basis of contracts. Though, later, idea of private prisons had many opponents and nowadays majority of prisons are under state management. Though, previously signed contracts have not terminated and have legal force according to the terms given in the contracts.<sup>33</sup>

Georgian system does not offer private prisons service. Moreover, the idea of private prisons seems impossible, utopian at this moment. For implementing it, we need various changes in all fields. This reform has a lot risks and it will work only in developed countries that have more legal, governmental traditions, where legal, state institutes are working well.

Comparing to total quantity of Georgian population, quantity of prisoners is quite high nowadays. The main reason is that we do not have stable and logical criminal law policy. Georgian criminal code has to be reviewed totally. Code should be free from not serious offences that can be solved by other types of judicial responsibilities, example with civil or administrative responsibility. On the other hand, there is big problem of defining, measuring penalties – penalties are

28 a/m.

29 a/m.

30 a/m.

31 a/m.

32 a/m.

33 Younhee K., Byron E.P., 2014. Revisiting prison privatization an examination of the magnitude of prison privatization, Administration an society, researchgate, p.p.15-16.

not proportional to the offences. There are plenty of offences that may not have imprisonment at all. For example such offence like hiding taxes may not have imprisonment. In case imprisonment, state loses chance to return hided taxes, because offender is in prison and he/she loses all chances of making business for a long time. So it is important, to review criminal code carefully and make a well build, proportional, rational system of offences and penalties. Using imprisonment in ordinary cases, is against main idea of criminal law, imprisonment should be used as a special measure in inevitable situations.

On the other hand, on the light of theoretical perspective it is very important to underline Supreme Court practice of Israel about determining private prison system anti constitutional. This

idea seems rational at first side, but we still think that it is not against monopoly rights of government. The truth is that in these cases State is still the one that makes a decision about imprisonment, enforcement is also made by state, but with legal cooperation of private company, it is just delegation of rights, that is quite useful practice sometimes. It does not mean that state loses rights on punishment. Main point in this case is that delegated prison management should be controlled by state to exclude violation and other illegal activities.

To sum up, it is clear that private prison system has various disadvantages but advantages are still much more in this case. Despite this, at this moment implementing the system in Georgia will risky.

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# კერძო ციხეების სისტემის ზოგად სამართლებრივი მიმოხილვა

## თათია დოლიძე

სამართლის დოქტორი  
ევროპის სასწავლო უნივერსიტეტის ასოცირებული  
პროფესორი

საკვანძო სიტყვები: სასჯელი, თავისუფლების აღკვეთა,  
სისხლის სამართალი

## რეზიუმე

ნაშრომში წარმოდგენილია კვლევა კერძო ციხეების სისტემის შესახებ. კვლევის ფარგლებში განხილულია კერძო ციხეების სისტემის ზოგადი დახასიათება, სისტემის საჭიროება. ნაშრომში ასევე დეტალურად არის განხილული ამ სფეროში არსებული მოდელები და პრაქტიკა. კვლევაში წარმოდგენილია შედარებითი ანალიზი და დეტალურად არის განხილული კერძო ციხეების სისტემის ნაკლოვანება და უპირატესობები. კვლევა შეიცავს ავტორისეულ მოსაზრებებს საქართველოში კერძო ციხეების სისტემის დანერგვის პერსპექტივისა და ზოგადად სისხლის სამართლის პოლიტიკის სრულყოფისათვის.

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