



## Alternatives to Imprisonment, a Solution to Reforming the Perpetrator

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### **Abstract**

In the 19th century, which witnessed the emergence of criminological ideas and attention to the knowledge of the roots of crime and the approach of fighting the causes and not the effects of crime, a fundamental change occurred in the purpose of punishing the perpetrators. From now on, reforming and re-socializing the perpetrators and fighting the causes of crime was the main goal of punishment. However, there was not much change in the method and type of punishment and prison remained the common tool and method of punishing criminals. With the passage of time and the experience of countries in the use of the maximum prison sentence, there was no noticeable change in achieving the goal of reducing the number of crimes. Therefore, from now on, the prison sentence was faced with serious questions and challenges. Criminology thinkers came up with a new solution to deal with criminals, for which the idea of humanism and a reform-oriented approach in to criminal policy was put forward as an idea. The product of this effort is to achieve diversity and variety of society's reaction against lawbreakers, one of which is referred to as "alternatives to prison". Afghanistan's criminal justice system, influenced by modern criminal ideas and learning from other countries, introduced prison alternatives officially and broadly into the criminal justice system in 2016. This article has discussed and analyzed the theoretical framework, the reasons for turning from prison and rehabilitative punishment to "alternatives", as well as the public and private conditions of using alternatives to imprisonment, the mechanism of its executive guarantee, and the positive effects of this type of reaction. In addition to explaining "deprivation of social rights" as one of the alternative examples of imprisonment, in the legal and judicial penal policy of Afghanistan, it has been explored and evaluated. In this study, the efficiency and effectiveness of the new policy towards the perpetrators and its reformative effect have been evaluated more than prison punishment.

**Keywords:** *Crime; Criminal; Prison Inefficiency; Prison Alternative; Conditions; Efficiency*

### **Introduction**

The beginning of adjustment, reform, and humanization of punishment in the form of prison dates back to the 18th century; Because in France, the usefulness and effectiveness of corporal punishment were seriously questioned and challenged. In this period, prison punishment was considered the most appropriate punishment for the civilized world, because in this century, the importance of the right to freedom of the individual in society on the one hand, and the harsh and inhuman appearance of corporal

punishment on the other hand, caused criminal justice. choose prison and deprivation of liberty) as a new tool to enforce order in society. After that, the scene in criminal justice moved from the physical status of criminals to their social status; Punishment was not inflicted on the body of the criminal, but on his social status as a free citizen and separated him from the society in which he had committed the crime. (Prison replaced corporal punishment). In this period, as in the previous period, the purpose of penal justice was to punish the perpetrator and intimidate and deter him and potential violators who had not yet committed a crime. The only difference was in the method and means of intimidation and deterrence and not the difference in the goal.<sup>1</sup>

In the 19th century, with the spread of criminological ideas and attention to the causes and roots of crime and the approach of fighting the causes and roots of crime and not the effect, criminal justice changed its goal of punishing the perpetrators. In this period, reformation and resocialization of criminals and fighting the causes of crime were the goals of punishment. Despite the change in the purpose of punishment from mere deterrence to reform and resocialization, the punishment method did not change and prison remained the common tool and method of punishing criminals. with the difference that the approach to the efficiency of the prison was different and the prison turned into a correctional-therapeutic place. For this reason, in this period, we are witnessing an influx of correctional forces (psychiatrists, criminologists, social workers) towards prisons.<sup>2</sup>

However, it did not take long for the usefulness and inefficiency of the prison to reform and treat the perpetrators to be revealed,<sup>3</sup> because the research and experience of the countries show that the punishment of the prison, which separates the perpetrators from social and normal life, itself caused the formation of an anti-social spirit and behavior among the prisoners. And you can't expect a spirit and a procedure to comply with social norms from a non-social place.

Such a policy in the punishment framework, by distancing the criminal from himself, would cause more conflict between the criminal and society. Due to the ineffectiveness of the prison in the reformation and socialization of the perpetrator, nowadays short-term prisons have been removed from the category of legal punishments in most countries, including in Afghanistan, where there is no imprisonment of less than three months in our country.<sup>4</sup> Long-term imprisonment is only for dangerous people who protect society from their danger by depriving them of their freedom. Despite this, penal systems cannot give up the goals of correction and treatment for the perpetrators of minor crimes and criminals who are capable of reformation and reparability. In this way, the prison itself replaced corporal punishments in the name of talatif punishment, nowadays it needs to be accompanied by social punishments and alternatives.<sup>5</sup>

This is because all the perpetrators are not dangerous and a threat to society and many of them who are arrested and convicted for the first time, do not want to continue their activities and criminal actions again. On the other hand, there are non-custodial punishments and other social performance guarantees that help penal justice with less cost and more benefits. Contrary to the negative function of imprisonment, which creates a distance between the offender and the victim, there are some social performance guarantees that can replace social services with punishment and punitive justice and allow the perpetrator the opportunity to do community service outside of prison or compensate the victim instead of spending time in prison and being exposed to the training of dangerous criminals. compensate and with this method and mechanism be responsible for their illegal behavior in society.

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<sup>1</sup> Mirzaei, Ahmad, *Effective criminal convictions in Iranian law*, p. 31.

<sup>2</sup> Ajtenabi, Maryam; *Criminal investigation of alternative punishments of imprisonment*, Qonunyar Scientific-Legal Quarterly, page 8, Qonunyar Institute, Tehran, second period-number 8, winter 2017.

<sup>3</sup> Regarding the harms of prison, see: Ahmadi, Eid Mohammad; PhD Thesis, alternatives to imprisonment in the penal system of Iran and Afghanistan, pp. 140-9, Shahid Beheshti University, Tehran, 2017.

<sup>4</sup> Penal Code, Part 1, Article 147.

<sup>5</sup> Bullock, Bernard; *Criminology*, p. 20.

In this way, the legitimacy and acceptability of prison, like corporal punishment, has been doubted and the widespread use of deprivation of liberty for criminals has faced a serious challenge. Such as human rights, economic, criminology, social, and family challenges. These wide problems, along with the practical and effective discontinuity of prison punishment, forced thinkers and practitioners of criminal science to look for alternatives to prison punishment.

In this way, the theoretical problems on the widespread use of prisons and the failure and failure of prisons in reforming and treating prisoners, the high cost of maintaining prisoners, the effects of mislabeling, the density of the prison population, etc. justify and rationalize the use of less prison punishment. Therefore, efforts to limit the use of prison sentences and to diversify the punishments have been made in the framework of the de-incarceration policy at the world level and have become a practical measure.

The challenges of imprisonment in Afghanistan are not few, that is why a significant movement has been made in the direction of de-imprisonment. The formulation and approval of "alternatives to imprisonment" can be evaluated in this regard, and this policy is a positive move toward limiting the use of prison sentences. Therefore, alternatives to imprisonment or social-oriented punishments are a new measure that requires comprehensive study and research on the examples, human, and organizational conditions, possibilities, and mechanism of its correct application. This article wills and tries to address the issues related to "alternatives of imprisonment" in a hierarchical and continuous manner hierarchically and continuously, to study and research with a focus on the Penal Code<sup>6</sup> and the regulation of how to adapt the alternatives of imprisonment and detention.<sup>7</sup>

The research questions are as follows: What are the alternatives to imprisonment? What are the cases and conditions of using social punishments? What is the guarantee of its implementation, works, and results? The answer to these questions forms the main frame and structure of the research serially and continuously.

In the beginning, we follow the general issues related to social punishments, such as the background, definition of concepts, general features and effects, and positive results of alternatives to imprisonment, and then we study and analyze the cases, conditions, and guarantees of implementation of its use in the Afghan penal system. We pay them.

### 1-1. Definition of Concepts

Substitute for imprisonment in this research is its narrow concept and includes cases that are sentenced as independent punishment by the court, such as public service, care period, deprivation of social rights, and house arrest.<sup>8</sup> The narrow concept of alternatives to imprisonment is defined by the code of punishment: "An alternative to imprisonment is a punishment that is imposed on the perpetrator of a crime in the form of conditional release by the court"<sup>9</sup> The definition of punishment, perpetrator of a crime, and court order all indicate an alternative to imprisonment in its narrow sense, and this definition does not include parole, suspension of trial, suspension of sentence execution, and mediation.

Knowledge of the characteristics, principles, and general conditions of the policy of alternatives to imprisonment is a prerequisite for entering the discussion of alternatives to imprisonment, and this helps both to understand and understand this measure and to use and implement it, which is a relatively new and new measure.

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<sup>6</sup> The Penal Code is the official penal law of Afghanistan, which was approved and ratified in 2016.

<sup>7</sup> This regulation specifies the method and conditions for implementing alternatives to imprisonment and detention.

<sup>8</sup> The extended concept of alternative imprisonment includes suspension of trial, postponement of execution of punishment or parole mediation.

<sup>9</sup> Penal Code, Article 148.

1-2. Characteristics and benefits of the policy of alternatives to deprivation of liberty Adopting the policy of alternatives to imprisonment have benefits and features, which make the necessity of changing the criminal policy toward the selection of alternatives clear and necessary.

#### 1-2-1. Attributes

1-2-1-1. Participatory: The politics of alternatives is a clear symbol of participatory criminal politics, and the meaning of participation is that all people and public and private institutions, along with the judiciary, participate and participate in the process of providing criminal justice.

1-2-1-2. Monitoring: The correct implementation of this policy requires careful monitoring and care methods, which must be done correctly in order to reduce the risk of committing a crime against the convict, so there must be a monitoring institution.<sup>10</sup>

#### 1-2-2. Benefits of Alternatives to Incarceration

1-2-2-1. Respecting human rights and human dignity: planning alternatives to imprisonment is the reason for more respect for human rights and human dignity on the one hand and a significant reduction in the cost of criminal justice on the other hand.<sup>11</sup>

1-2-2-2. The possibility of reforming and reducing the population of prisons: the policy of alternatives to imprisonment will lead to the reformation of more criminals and a significant reduction of the criminal population of prisons.<sup>12</sup>

1-2-2-3. Restrictions on freedom: Alternative methods of imprisonment do not take away the freedom of the convict, but only limit the freedom of the convict.

#### 1-3. Scope and General Conditions of Using Alternatives to Imprisonment

It is necessary to point out an important point about the use of alternatives to prison, which is one of the most important topics and indicators of the justification of the alternative to prison. The point is that it should be clarified what is the scope and scope of using alternatives and which type of crimes. Is it useful and effective? In this important issue, it should be said that the use of alternative means of imprisonment in serious crimes is neither permissible nor expedient, for example in criminal crimes.<sup>13</sup> or security crimes, it is never in the best interest of society to use alternatives, therefore, Kodjaza has defined limitations and conditions in two ways:

##### 1-3-1. The Type and Amount of Punishment, the Condition of Using Alternatives to Imprisonment

According to paragraph 1 of Article 151 of the Penal Code, the sentence of alternative imprisonment and its implementation is possible only in crimes whose main punishment is medium or short imprisonment. According to the provisions of this law, he will be sentenced to an alternative punishment of imprisonment. The message of this paragraph is related to the realm of alternative imprisonment. First, the type of punishment for the committed crime should be provided by imprisonment and not other punishments. Second, the amount of imprisonment for the committed crime is short imprisonment or medium imprisonment; Therefore, if the type of punishment for the crime in the penal code is other than imprisonment (for example, execution) or the punishment is long imprisonment or life imprisonment, in such cases, the use of alternative imprisonment is not allowed except in the exceptional

<sup>10</sup> Refer to the method of matching the alternatives of imprisonment and detention.

<sup>11</sup> Ashuri, Mohammad; Previous 1994, p. 46.

<sup>12</sup> Raymond, Gassen; The crisis of criminal policy in Western countries, translated by Ali Hossein Najafi Ebrandabadi, Journal of Legal Research, No. 10, Spring and Summer 71, Shahid Beheshti University Publications, p. 284 onwards.

<sup>13</sup> Article 31 of the Penal Code: "Crime is a crime that is punishable by long imprisonment, 2nd degree long term imprisonment, 1st degree long term imprisonment or execution".

cases that are stated. In other words, when a person commits a crime that is a misdemeanor or misdemeanor and the legal punishment is only imprisonment, if there are other conditions, the court can sentence the perpetrator to one of the alternatives of imprisonment instead of sentencing him to endure imprisonment.

#### 1-3-2. The Nature of the Crime is Another Limiting Factor

Paragraph 3 of Article 151 of the Penal Code says: "Perpetrators of crimes against internal and external security, terrorism, terrorist financing, sexual assault, corruption and financial crimes and crimes of genocide, anti-humanity, war and aggression against the state are exempted from the sentence contained in paragraph 1 of this article." Also, Article 10 of the law on the implementation of alternatives to imprisonment and detention of the perpetrators of the above crimes, in addition to repeated criminals, the perpetrators of violence against women, drug trafficking, and the crime of kidnapping are also exempted from the sentence of paragraph 1 of Article 151 of the Penal Code, and the scope of the prohibition has been expanded. These crimes are either committed against the principle of the system and national sovereignty, or the nature of the crime is very serious and dangerous, or it is an international crime; Therefore, the perpetrators of these crimes cannot benefit from the amnesty and mitigation of the alternative imprisonment policy, and the court is not allowed to sentence the perpetrators of these types of crimes to alternative imprisonment.

#### 1-4. Special Conditions Necessary to Use Alternative Imprisonment

Alternatives to imprisonment, which is a new institution and measure in the country's penal system, in order for its implementation to be effective and useful, the necessary conditions, facilities, and platforms must be available. Judicial and judicial institutions can get good results from the new policy if they comply with the conditions; Because the policy of alternatives, which is considered a solution to overcoming the challenges of imprisonment, does not have the unfortunate consequences of prison, or it will minimize the consequences if there are reasonable and appropriate conditions, structures and facilities in its application and use, so that judicial and judicial institutions Apply it appropriately. One of the conditions is the intellectual, mental, and educational foundation that, in the first step, the institutions in charge of the rule of law believe in the usefulness of alternatives and find their implementation useful and fruitful. The conditions in the law are stated as follows:

1-4-1. Payment of damages to the victim: Part 1, Paragraph 1, Article 4 of the Law on Implementing Alternatives to Imprisonment and Confinement considers payment of damages to the victim as a condition;

1-4-2. Obtaining the victim's consent: Part 2, Paragraph 1, Article 4 of the Law on Implementing Alternatives to Imprisonment and Seizure; That is, in the case of a court case, the perpetrator can be imprisoned as an alternative if he has obtained the consent of the victim.

1-4-3. Obtaining the consent of the convicted person: This condition is mentioned in paragraph 1 of article 7 of the law on implementing alternatives to imprisonment and detention. Obtaining the consent of the convicted person regarding the sentence to perform public services is emphasized both in paragraph 2 of article 7 of this law and in paragraph 3 of article 162 of the Penal Code.

1-4-4. Determining the prison sentence: First, the court should determine the prison sentence according to the crime committed, and then it should be suggested to the convicted person that the prison sentence should be applied to him or an alternative prison sentence. It was necessary for the legislator to at least mention this condition explicitly in the regulation on the alternative implementation of imprisonment; In this case, as an example, we can refer to Iran's Islamic Penal Code, which mentions this

condition in Article 70.<sup>14</sup> Although this condition is not explicitly mentioned in the criminal laws of our country, it can be understood from Article 148, 151, 152, 155, Paragraph 2 of Article 159, 166 of the Penal Code. In addition to that, if the amount of imprisonment is not determined during the court and issuing the sentence, the appeal will face problems, for example, if the court sentences a person to alternative imprisonment and the term of imprisonment is not mentioned in the sentence, the court and the judge do not know that this person is a condition Article 151 of the Penal Code has or has not. In addition, the acceptance of an alternative imprisonment or a prison sentence is optional on the part of the convicted person, and in the case of this option, it means that both the amount of the prison sentence and the type of the alternative prison sentence should be announced for the convicted person, and most importantly, to guarantee the implementation of the conditions of the alternative imprisonment, it should be in First, the court should determine the prison sentence that, in case of violation of the conditions on the part of the convicted person, the previously determined prison sentence will be applied to him, as stipulated in Article 57 of the method of applying the alternative of imprisonment and detention. "In case of committing a crime again while serving the alternative imprisonment, enforcement imprisonment will be imposed on the perpetrator along with the new imprisonment" This issue clearly proves that when determining the alternative imprisonment, the amount of imprisonment must also be determined by the judge.

#### 1-4-5. Compliance with the Principle of Individualization of Punishment

The principle of individualization is one of the progressive principles governing punishments, and it means the application and execution of punishments the personality and physical, mental, social, and family characteristics of the criminal, which is foreseen by the legislator based on the nature of the crime committed or the characteristics of the crime victim. It has been done and it must be implemented by the judicial institution. The idea of reducing or suspending punishment, including alternatives to imprisonment, is a mechanism for implementing the idea of individualization of punishment. Fortunately, the criminal law of our country seeks to achieve social and individual goals by applying the principle of individualizing punishments, including rehabilitation and establishing justice in society, and in this way, it uses important tools in the field of individualizing punishments. One of them is to consider the circumstances and situation of the criminal and also the judge's attention to the case of the person's character, because it is very important in determining how to deal with the criminal. In order to implement this principle, in the penal system of the country, we have Article 149 of the Penal Code, which states: "Alternative punishments of imprisonment, taking into account the nature and character of the crime committed, the personality of the perpetrator, the frequency of the crime, the state of the victim, the results of the crime and other aspects of the crime are determined will be"

The message of the article is that in determining the alternative principle of imprisonment and its type in all cases, the type and nature of the crime committed, the psychological, family, and social personality of the perpetrator and, the frequency or repetition of the crime by the perpetrator, the state of the victim, the harm caused to the society and the individual due to the crime entered as well as other aspects of the discount should be taken into consideration; For example, if a skilled doctor commits a crime, and if there are general circumstances, using an alternative to imprisonment if the court sentences him to perform surgery in a public hospital, the court's decision is appropriate and justifiable, but if he is deprived of his liberty There is no justification to sentence him to prison or house arrest. This is where compliance with Article 149 of the Penal Code, regarding whether the perpetrator is sentenced to deprivation of liberty, or sentenced to an alternative imprisonment, requires great care and experience.

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<sup>14</sup> "While determining the alternative punishment, the court also determines the term of imprisonment so that in case of inability to implement the alternative punishment, violation of the orders or inability to pay the fine, imprisonment will be implemented."



## 1-5. Mechanisms to Guarantee the Implementation of Alternative Imprisonment

Any institution and plan that has a plan to deal with violators, without a guarantee of implementation, is unsuccessful. In Article 155 of the Penal Code, the legislator has provided for the guarantee of executions, and the court, when issuing a sentence with an alternative punishment of imprisonment, must clearly and clearly mention the consequences of not complying with the court's order in the text of the decision and inform the accused clearly and clearly. It should be noted that in general, two types of performance guarantee with two different situations are foreseen.

### 1-5-1. Guarantee of Execution of Violation of Alternative Terms of Imprisonment

Sometimes the convicted person may violate the conditions while serving the social punishment and alternative imprisonment, in this case, he will face legal and judicial reaction against his violation; For example, according to part 2 of Article 158 of the Criminal Code, the court has sentenced the thief to "prohibition of movement and visiting the place of theft for one year", which is an alternative to imprisonment of the type of supervision period. In this case, the court must write in the text of the decision, that if the convicted person violates the court's order within one year and travels in a prohibited place, The sentence of Article 159 of the Penal Code is applied to him in proportion to the amount of the violation; In this way, if a person violates the court's order and wanders in a prohibited place, the first time, one-half will be added to his period of care, and if he commits a violation for the second time, the court that issued the order will cancel his period of care, and the remaining period of the period will be canceled. It turns care into enforced imprisonment and applies it to the convicted person.

Article 12 of the Law on the Implementation of Alternatives to Imprisonment and Confinement states the mechanism and implementation method of this guarantee and the supervisory authority predicts and says that if the convicted person does not comply with the conditions during the period of the alternative imprisonment period, the supervising authority is obliged to report the violation of the convicted person to the relevant Saranwali. and Saranwali investigates and examines the original report within ten days, and if a violation is proven, it submits the matter to the court issuing the verdict, and the court takes the necessary decision within the framework of the law, an example of which was mentioned in the form of the monitoring period; For example, if the convicted person commits another crime during the period of supervision, according to Article 152 of the Penal Code and according to Article 57 of the Law on the Implementation of Alternatives to Imprisonment and Seizure, the alternative sentence of imprisonment will be canceled and the remaining period of the supervision period will be converted to enforced imprisonment along with the punishment for the new crime. Conviction is applied against.

### 1-5-2. Executive Guarantee of Non-Commitment of a Crime During the Implementation of Alternative Imprisonment

One of the reasons and justifications for the use of alternatives to imprisonment is its effect on the rehabilitation and resocialization of the offender. Now, if the convicted person commits a crime while serving the sentence to alternative imprisonment, he will face a stronger reaction in this situation. If the alternative imprisonment is sentenced to imprisonment for another crime, the remaining term of the alternative imprisonment will be converted into enforced imprisonment and will be applied to the punishment of the new crime.<sup>15</sup>

According to Part 4, Article 4 of the Law on Implementing Alternatives to Imprisonment and Seizure, Appendix No. 2, Q.A.J. When sentencing to alternative imprisonment, the court takes a written commitment from the convicted person not to commit a crime during this period.<sup>16</sup> If the convicted person

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<sup>15</sup> Penal Code, Article 152.

<sup>16</sup> "Pledge not to commit a crime in the future". Part 4, Article 4 of the Law on Implementation of Alternatives to Imprisonment and Confinement.

is sentenced to imprisonment for committing a new crime during the same period, the remaining period of alternative imprisonment will be converted into enforced imprisonment, and the alternative imprisonment, which has been converted into enforced imprisonment, will be applied to the convicted person along with the punishment of the new crime.

#### 1-6. Responsible and Supervisory Institutions

Since the alternatives to imprisonment are a reaction and often a social solution to lawbreakers, in addition to judicial and judicial institutions, there is a need for other institutions to come to the aid of judicial and judicial institutions in both the implementation and monitoring stages, and in fact, with this mechanism, a greater role is given to society and civil institutions.

In this way, the implementation of community-oriented reactions requires the establishment of new institutions, educational workshops, and overall changes in the theoretical foundations, policy-making, and the minds and ideas of public officials, judges, and society. Otherwise, the implementation of these punishments will be faced with judicial and social challenges and ultimately inefficiency. Therefore, the necessary training should be provided specifically in the judicial sector and at the community level about the losses caused by incarceration and it should be clearly stated that although the defense of society and its order requires that a reaction be shown against the crime and the perpetrator; But the legislative system, the minds of the community and those involved in judicial affairs should be aware that the reaction to the criminal is not only to put him in prison, but one of the reactions can be alternatives to imprisonment. According to these findings and data from criminal sciences, Article 154 of the Penal Code has been drafted and approved.<sup>17</sup>

This article and Article 55 of the regulation on alternatives to imprisonment and detention require the court to specify an institution that supervises and implements alternative imprisonment in its ruling. Part 3 of Article 2 of the Law on Implementing Alternatives to Imprisonment and Confinement has defined supervision, which consists of measures that the court orders to implement, considering the crime committed and the circumstances of the perpetrator.

Article 56 of the Law on Implementation of Alternatives to Imprisonment and Seizure, Appendix No. 2 of Q.A.J. The Ministries of Justice, Interior Affairs, Ministry of Labor, Social Affairs, Martyrs and Disabled, and other relevant authorities are obliged to, after 90 days from the enforcement of this law (Law on Alternatives to Imprisonment) establish and identify its workers. Also, paragraph 4 of article 56 of this law obliges the above-mentioned ministries to prepare and approve the alternative implementation procedure of imprisonment and detention.

One point to be remembered is that in the absence of a supervisory body or lack of access to it, it should not be used as an excuse or an obstacle to the implementation of the court's decision regarding the alternative of imprisonment; As the task of this issue is specified in paragraph 2 of article 56 of the law on implementation of alternatives to imprisonment and detention, if the court deems it necessary to monitor the implementation of alternatives to imprisonment, in the absence of a monitoring institution or lack of access to it, the court can appoint a trusted person or a social worker. or appoint a private social service institution or the police or the police in the order mentioned in the law to supervise the implementation of alternative imprisonment, therefore, the absence of the monitoring institution should not be an excuse and obstacle to the sentence and implementation of alternative imprisonment.

Now, considering these features, the benefits and effective approaches of alternative policy, cases, conditions, guarantee of implementation, and positive results of alternative measures of deprivation of liberty, we start with the case of deprivation of social rights.

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<sup>17</sup> "The court, in its ruling, specified the supervising authority of the implementation of the alternative punishment of imprisonment, and obliges him to implement it"



## 2. Deprivation of Social Rights, a Way to Reform the Perpetrator

Social rights are the advantages and privileges that exist in society in relation to other members of society, in such a way that the application of these rights is related to the fate and social life of all members. The right to participate in the administration of the country, to choose, to be elected, to be a member of associations, groups, employment, and education, freedom to choose a place of residence, economic activity, and prohibition of forced labor are examples of social rights.<sup>18</sup>

Every citizen has these rights in social and political life and can exercise and claim them.

It was pointed out that the meaning of alternatives to imprisonment in this research is its narrow meaning. In this section, new alternatives to imprisonment are explored and evaluated.

One of the new alternatives to imprisonment is "deprivation of social rights", which is a society-oriented reaction against criminals, which is discussed in criminal law, and it means that a person, as a result of committing some crimes and receiving a criminal conviction, will be deprived of all or some. He is deprived of his social and political rights and benefits. Community-oriented punishments are a new generation of punishments or social reactions that, since three decades ago and in continuation of the movement of decriminalization (diversification of response to crime) and de-imprisonment, at least in the case of light and insignificant crimes, first in the form of alternatives to imprisonment and then independently of other Penalties have entered the legislative family. Today, this kind of reaction takes many and varied forms, such as depriving criminals of social rights, with different functions, including the rehabilitative function, in order to respond to the convicts.

Social rights, as the fundamental manifestations of human rights, include those human rights that have been identified for social and economic equality and as a result to eliminate injustices caused by the social, political, and economic conditions of societies. Among international documents, these rights were recognized for the first time in the Universal Declaration of Human Rights in 1948 and then widely in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in 1966. According to international documents, everyone has the right to freedom, employment, and business within their own country.

These issues are among the obvious manifestations of citizenship rights, which have been recognized by many countries, including Afghanistan. The legislators of the Constitution adopted in 1382, through some of the articles as the rights of the nation "fundamental rights and nationals", have taken into consideration the said rights, and based on that, no one can be prohibited from the right to employment, or business. Thus, without social rights, the Constitution has only tried to identify its examples in the light of several principles and articles. Examples of deprivation of social rights have been reflected in the penal code under different headings; Article 172 of the Penal Code describes the deprivation of social rights as a secondary punishment, and Article 178 of the Penal Code describes this deprivation as a supplementary punishment, and Article 197 of the Penal Code describes the security measures in detail.<sup>19</sup>

In this regard, an important development that has occurred in the country's criminal policy and legislation in the last two decades is that alternatives to imprisonment were accepted for the first time in the Criminal Procedures Law approved in 2013 and also in the Askari Criminal Law in a very limited manner, but in the second step of the evolution of "Kedja", alternatives to imprisonment have been widely and comprehensively predicted. This movement and a new approach for the first time caused important developments and changes in the penal system of the country. This policy, which is influenced by the new

<sup>18</sup> Ahmadi Eid Mohammad, doctoral dissertation, previous, p. 181.

<sup>19</sup> To know the difference between deprivation of social rights as an alternative to imprisonment and security measures on the one hand and the difference between supplementary and secondary punishment on the other hand, refer to: Description of Penal Code, Vol. 1, a collection of authors, Asia Foundation, Kabul, 2018, pp. 459-457.

knowledge of criminal science, can be evaluated in the direction of reducing the challenges of imprisonment and incarceration and the hope of correction and resocialization of the perpetrator.

The judicial system of the country, considering the type of crime and the quality of its commission, the history and character of the perpetrator, and the status of the victim of the crime, with the observance of conditions, can punish imprisonment mentioned in the court order, such as the deprivation of some social rights or the performance of public services or the period of care. or become house arrest. The compilers of the Afghan Penal Code have provided the conditions for applying alternatives to imprisonment, providing criteria for punishments that can be replaced and other provisions, one of which (deprivation of social rights) is discussed and researched in this part. In this way, community-oriented punishments impose restrictions or deprivation on the rights and freedoms of criminals in the context of society and complying with conditions or performing various duties. These tasks are usually implemented in the light of supervision, intervention, or participation of government and community institutions. On the other hand, since this punishment deals with the social and political benefits of individuals and the legitimate and legal rights and freedoms of citizens, and in some cases, it limits these rights and freedoms or deprives the convicted person of them; Therefore, it is necessary to know the concept and examples of social rights and to present a precise regulation, so that the legitimate rights and freedoms of the members of the society, especially the convicts, are not violated unnecessarily and without specific legal regulation; It means that the principle of legality of using an alternative to imprisonment should also be observed in this measure. In this research, the reformist functions of depriving criminals of social rights are examined in two parts of depriving them of civil rights and economic rights.

## 2-1. The Concept and Background of Deprivation of Civil Rights

Civil rights are one of the basic conditions of a person's social life, and without it, a person's civil life becomes impossible.<sup>20</sup>

In this sense, this category of rights is considered a necessary part of the free and progressive life of an individual, and the basis of this category of rights is based on the principle of equal opportunities for all human beings equally.<sup>21</sup>

For this reason, the individual's benefit from this right is guaranteed by the governments.<sup>22</sup> Civil rights include a set of human rights regarding life,<sup>23</sup> personal security, jobs,<sup>24</sup> education,<sup>25</sup> commuting<sup>26</sup>, and things like these. These rights seek to prevent the government from interfering in the individual sphere and thus leaving people free in their activities in the field of life. These rights have many examples, of which the right of humans to enjoy freedom in choosing a job, being a member of companies, and conducting transactions are among its obvious manifestations. Despite this, it is allowed by the governments to limit or exclude this right through legislation in an exceptional way and under special conditions. For this reason, several international documents such as the International Covenant on Civil and Political Rights of 1966, The 1978 American Convention on Human Rights, and the 1981

<sup>20</sup> The second chapter of the constitution has recognized the civil rights of citizens in detail.

<sup>21</sup> Article 22 of the Constitution: "Any kind of discrimination and privilege between Afghan nationals is prohibited. Afghan nationals, both male and female, have equal rights and obligations before the law."

<sup>22</sup> Article 57 of the Constitution: "The government guarantees the rights and freedoms of foreign nationals in Afghanistan, according to the law."

<sup>23</sup> Article 23 of the Constitution: "Life is a gift from God and a natural right of man." No person is deprived of this right without legal permission."

<sup>24</sup> Article 48 of the Constitution: "Work is the right of every Afghan. Determination of working hours, paid leave, labor and worker's rights and other related matters are regulated by law." The choice of job and profession is free within the limits of the law.

<sup>25</sup> Article 43 of the Constitution: "Education is the right of all Afghan citizens, which is provided free of charge by the government up to the bachelor's degree in government educational institutions."

<sup>26</sup> "Article 39 of the Constitution: "Every Afghan has the right to travel to any part of the country and choose housing, except in the areas that are prohibited by the law..."

African Charter on Human and People's Rights have given governments permission to limit or deny people access to this right to prevent crime, establish security, maintain public order, and protect the rights and freedoms of other people. This attitude in the constitution is based on the final part of article 23, according to the phrase "the life of God's gift... of man". No person is deprived of this right without legal permission." in the continuation of Article 39 of the Constitution of Afghanistan, which says: "... except in the areas where the law prohibits", it has recognized some restrictions or deprivation of civil rights.<sup>27</sup> By banning employment in some jobs and restricting the right to be a member of companies, the possibility of repeating the crime on their part will be reduced. Based on several criminological researches, the connection of several criminals with such jobs provides the grounds for the emergence of criminal motives, criminal cooperation, and sometimes even the establishment of criminal organizations.

In terms of background, deprivation of civil rights in the Afghan penal system with the approval of the Penal Code (year 1355) has taken into account the guarantee of freedom-limiting executions as secondary,<sup>28</sup> supplementary punishments<sup>29</sup> and security measures,<sup>30</sup> and then in Article 325 of the Criminal Proceedings Law approved in 1393, the deprivation of civil rights is restricted to The title of alternative imprisonment was accepted. With the approval of the Penal Code in 2016, the chapter entitled "Alternative Penalties to Imprisonment" was widely legislated and according to Article 167 of the Penal Code, deprivation of social rights found its main place in the penal policy as an alternative to imprisonment. Therefore, it is a broad measure to create restrictions on some rights and privileges as an alternative to imprisonment from penal code innovations.

It should be noted that the Penal Code, in its Article 150, specifies alternative examples of imprisonment, which include: "a period of care, performing public services, deprivation of social rights and house arrest". Based on this classification, freedom in choosing a job, having a bank account, etc. are examples of social rights. In the plan of this article, civil rights are considered as one of the social rights, which are all examples of alternatives to imprisonment. This method of guaranteeing executions, some of which have the nature of secondary and supplementary punishment or the aspect of security measures, has been recognized as an alternative to imprisonment in the Afghan penal system. Whether this policy and action of the legislator have been carried out with an alternative approach or with the view of secondary punishment, supplementary punishment, and security measures, it is all in the direction of the corrective and preventive goals of the penal policy and shows the attention of the legislators to the principle of individualizing the punishments and its fit with the personality of the criminals to It is their social reform and rehabilitation. explain the situation of deprivation of social rights as an alternative to imprisonment and its conditions requires further analysis and investigation, which we will address.

## 2-2. Deprivation of Civil Rights is an Alternative to Imprisonment

"Civil law is a set of rules and regulations that have been created to specify the rights and duties of individuals from the heart of a society by the culture and customs of that society."<sup>31</sup> In the approach of private rights, every person has rights and duties as a creature that can exist in the natural world. Issues such as eligibility to obtain rights and obligations and eligibility to implement rights and obligations and issues of this kind determine the civil rights of individuals.

On the other hand, in the approach of penal systems, the deprivation of civil rights is considered as a punishment, and among other things, in the document "Minimum Rules of the United Nations

<sup>27</sup> Article 167 of the Penal Code.

<sup>28</sup> Article 113 of the Penal Code.

<sup>29</sup> Article 117 of the Penal Code.

<sup>30</sup> Article 121 of the Penal Code.

<sup>31</sup> Jafari Langroudi; Legal terminology, p. 230.

regarding non-liberty measures, the deprivation of social rights is considered as a measure that can be It has been proposed to the member states to use the alternative of imprisonment.<sup>32</sup>

Therefore, deprivation in the term of criminal law is a type of legal prohibition, as a result of which a person loses the competence and competence to exercise his rights, and deprivation of social rights, in fact, is the prohibition and debarment of people from the above rights based on the court order. There are two forms of deprivation of rights: limited deprivation and absolute deprivation. Absolute deprivation means depriving a person of all his social rights; Absolute deprivation may also be temporary or permanent.

### 2-2-1. Special Condition of Deprivation of Civil Rights

The general and general conditions of the alternative to imprisonment were stated in the first chapter of this article, and the sentence of deprivation of social rights, in addition to the general conditions, requires the fulfillment of a special condition, and the special condition is that a person commits a crime, the punishment of which is provided in the "Short Imprisonment" law. be; In this case, the court can deprive the perpetrator of one or more social rights.<sup>33</sup>

The special condition greatly limits the scope and scope of the use of social exclusion and its application is reduced to very mild crimes and cannot be applied to the perpetrators of crimes whose punishment is moderate imprisonment. Therefore, the scope of the sentence for deprivation of social rights is small compared to other alternatives of imprisonment. Now, we examine the deprivations that are provided as an alternative to imprisonment:

### 2-2-2. Examples of Deprivation of Social Rights

Which type of citizenship rights has the legislator considered as a deprivation of social rights? It is studied and analyzed in this section.

#### 2-2-2-1. Demotion of a Rank or Grade

One of the civil rights of every citizen is to have an official job and depend on the rank points and ratings that exist in the offices. Now, if the public service employee commits the crime of Article 413 of the Penal Code<sup>34</sup> And if the court deems it appropriate to determine an alternative punishment of imprisonment in the form of deprivation of social rights, it can deprive her of a rank or administrative post or reduce her salary.<sup>35</sup> The formation of Afghanistan's public offices are divided into eight divisions according to the law of civil service employees; Each position has five steps, and after the annual evaluation, if the evaluation is positive, the civil service officer will be promoted one step in his position, for example, the first position is the highest position in the law of civil service employees, and the incumbent of this position is The order from the first step to the fifth step can be promoted. Now, if a public service official commits the aforementioned crime, the court can deprive him of the rank he has

<sup>32</sup> Nariman Tirgar Fakheri, Alternative cases of deprivation of liberty, doctoral dissertation of Tarbiat Modares University, p. 174.

<sup>33</sup> Article 167 of the Penal Code: "The court can, in accordance with the conditions set forth in this chapter, convict the defendant who is subject to a short prison sentence..."

<sup>34</sup> Article 413 of the Penal Code: "Article 413: (1) Whenever a public service employee unlawfully discloses secrets, documents, decisions or orders or other confidential information that is entrusted to him as a duty or that he has become aware of, or to public knowledge delivers or provides access to the mentioned documents and information to a third party, will be sentenced to short imprisonment."

<sup>35</sup> Article 167: "The court can, by complying with the conditions set forth in this chapter, deprive the defendant who is subject to a short prison sentence, for a certain period of time, from one or more social rights as an alternative sentence to imprisonment as follows:

1. Demotion of a rank or grade.

2. Deduction of one third of salary for one year.

been granted based on the step, deduct it from his monthly salary, or order both deprivations at the same time.

#### 2-2-2-2. Deprivation of Job

Another deprivation of social rights is the deprivation of employment rights. Employment rights are one of the social rights of citizens that are respected and inviolable. Job is a general concept that includes any type of professional activity and business in the form of government employment or employment of public or private institutions. Deprivation and limited exclusion from employment is one of the guarantees of social implementation, which is considered by the legislator as an alternative punishment to imprisonment, therefore, if a person responsible for public service commits the crime of paragraph 1 of Article 445 of the Penal Code, the punishment for which is short imprisonment.<sup>36</sup> and take money from people by using their official authority on highways, depending on the circumstances of the perpetrator, the court can sentence him to deprivation of duty from six months to two years, or for example, a person works in a municipality, which is a non-governmental public institution, and commits the crime of paragraph 1 of article 445 of the penal code and takes money from people under various pretexts and against the law, the court can imprison him for six months to two years<sup>37</sup> Condemn her to be deprived of her job and temporarily remove her from her duty.

Also, if a person has a specific business or profession and commits a crime in this way, the court can use the measure of social deprivation; For example, if a person has a job selling fruit juice and uses his position to sell wine, that is a crime related to his job. In this case, the court can sentence him to be deprived of this job for a maximum of one year, or a person has a job and profession of selling drugs and in the course of selling drugs commits the crime of Article 886, Paragraph 1 of the Penal Code.<sup>38</sup> In this case, the court can sentence her to be banned from the job of selling medicine for a maximum of one year.

#### 2-2-2-3. Exclusion from Membership in the Founding Board of the Company

One of the social rights of individuals is the right to be a member of the founding board of companies and banks, who can participate as an active member in the establishment of public and private institutions. Also, everyone has the right to become a member of the board of directors of companies and institutions and also to be elected as the CEO of a bank or institution. Now, if a person commits the crime of Article 757 of the Penal Code<sup>39</sup> and damages the commercial reputation or profession of a businessman or institution, and submits a false complaint to the court, the court can, depending on the crime committed and the occupation of the perpetrator, ban him from being a member of the founding board or the board of directors of the company or the managing director of the bank from Imprisonment for a maximum of several months up to one year as an alternative punishment.<sup>40</sup> Prohibition from dealing with government offices or non-governmental institutions, prohibition from having a bank account, receiving government credits, etc. are all cases of deprivation of social rights that are applied to the perpetrator instead of prison.<sup>41</sup>

Contracts and transactions are within the framework of the law of citizenship, and any person can have transactions with government offices or non-governmental institutions. Also, participate in

<sup>36</sup> Article 445 of the Penal Code: "(1) If a member of the military forces or other public service employees use their official authority on public roads, highways, and other places to demand or obtain money, property, or benefits from people against the law, they will be sentenced to a short prison term."

<sup>37</sup> Part 3, Article 167 of the Penal Code: "Temporary dismissal from government jobs and service in non-governmental institutions and public institutions, according to the crime committed, from six months to two years."

<sup>38</sup> "A person who produces, distributes fake or non-standard spices, etc."

<sup>39</sup> "A person who intends to damage the commercial and professional credit of an entrepreneur, businessman, institution, company, etc."

<sup>40</sup> Part 6, Article 167 of the Penal Code: "Deprivation of membership in the founding board and board of directors of commercial companies, banks and institutions or deprivation of executive management for up to one year."

<sup>41</sup> Parts 7 to 12 of Article 167 of the Penal Code are significant.

transactions that are put to auction or tender by the government or the private sector. Now, for example, if a person commits the crime of Article 760 of the Penal Code and uses the Law on Protection of Unfair Competition to harm public interests, he has committed a crime and the court can deprive him of the right to do business with government and non-government agencies from one to fifteen years. Condemn if, for example, a person commits the crime of Article 761 of the Penal Code and aims to monopolize or joins hands with others, he has committed a crime and the court can sentence him to deprivation of the right to participate in tenders and auctions from one year to five years.

#### 2-2-2-4. Exclusion from Having a Driver's License and Carrying a Gun

Having a driver's license and using a gun within the framework of the law, as well as traveling abroad, are examples of civil rights. Exclusion from having a driver's license is also proposed in the traffic law of Afghanistan, and in paragraph 1 of article 79 of the traffic law, the judge is authorized to permanently or temporarily deprive the guilty driver of the right to drive all or some types of vehicles. Also, in paragraph 2 of this article, the traffic officer is given the authority to deprive the driver of the right to drive for three months in case of repeated violations of traffic regulations. According to paragraph 3, the period of deprivation of the right to drive will be entered in the driver's license of the offender and the driver's license will be kept in the relevant traffic office until the expiration of the mentioned period. Also, according to paragraph 8 of Article 156 of the Penal Code, a person who violates driving regulations will be deprived of having a license and the right to drive for six months to three years.

The license to own and carry a gun is also considered one of the rights of citizens; Now, if a person abuses his position and commits a crime, in this case, according to the new penal policy within the framework of paragraph 10 of Article 156 of the Penal Code, he will be sentenced to two years of deprivation of social rights from having a weapon and carrying it under alternative punishments. Regarding the violation of foreign nationals from the time of their stay in Afghanistan, if they do not extend it, in addition to a fine, they will be banned from entering the country for six months, and if they enter the country without a permit, they will be deported from the country.

### **Conclusion**

In this way, in a general summary of society-oriented punishments, it can be concluded that they prevent re-offenses by depriving some social rights (civil rights) and situations. This class of mild measures focuses on eliminating opportunities and taking away suitable crime-causing situations to reduce the rate of crime repetition. On the other hand, the selection of consequences of community-oriented punishments, including the deprivation of social rights of the perpetrators, due to the variety of its types, requires the accurate identification of the prosecutors and judges of the perpetrators' problems and, as a result, identifying the most appropriate response. Therefore, filing the case of the perpetrators and taking appropriate measures in this field plays an effective role in choosing the most realistic criminal decision. Also, considering the structure of Afghanistan's criminal policy and their current nature and tendency towards custodial punishments, the provision of deprivation of civil and social rights of criminals as the main punishment instead of prison, for a number of crimes without public education and those involved in criminal justice, is to some extent acceptable. The category of punishments from public opinion faces ambiguity. Therefore, by applying appropriate measures, let's look for the foundation for the efficiency of these punishments. Policymakers should plan in the field of culture in such a way that public opinion accepts the deprivation of the mentioned rights as a punishment. Therefore, in view of the fact that community-oriented punishments in this country have been given some attention by the decision-makers of criminal, legislative, and judicial policy, predicting suitable tools for the optimal use of its examples, including depriving criminals of social rights and also creating appropriate cultural contexts in This direction can influence the society's tendency to use these punishments and the promotion of this policy can be effective in reducing the crime rate and resocializing the perpetrators.



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