

Death Penalty as the Type of Punishment in the RK Criminal Legislation

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Abstract: This article deals with the problematic issues of refusal from such punishment type as the death penalty in the Kazakhstan legislation. The short retrospective journey into the history of the death penalty application has been made. Thus, in the recent half a century the tendency towards the abolition of the death penalty and the restriction of its application has been observed all over the world. According to the current legislation of the particular foreign countries the death penalty has been retained in China, Iran, Pakistan, Saudi Arabia and the USA. In some countries, including Kazakhstan, the death penalty is not usually implemented in practice even if it is legislated. In this article it is suggested to put the death penalty back and to add to the list the articles, in which sanctions it could be applied, in the blueprint for the New Criminal Code of the Republic of Kazakhstan.

Key words: Criminality • Death penalty • Human life • Murder • Crime • Punishment

INTRODUCTION

Throughout the last century the death penalty and the matters of its application have been of concern to people all over the world, in this case there are both supporters and detractors in the matters of its application. The detractors of the death penalty convince us that the absence of the death penalty in the country is the measure of its civilization. The supporters of the death penalty suppose that the attribute of the society's civilization is the absence of the barbaric crimes by its cruelty, for which it could be imposed [1].

There are now three attitudes towards the issue of the death penalty as a type of a punishment in the literature of the subject, some scientists and practitioners vehemently oppose the application of the death penalty and they are strong for its immediate cancellation, setting it down to the immorality and futility of such punishment. The others favour this measure and are for the reduction of the application and the progressive abolition of the death penalty. The still others endorse the application of the death penalty, considering it both as the legal restriction and the liquidation of a criminal, which absolutely secures the society from such act of this person. The basic argument of the supporters of the death

penalty is a statement that it is an intimidation factor, deterring the criminality [2], the author of the article is a supporter of the last attitude.

Prior to going into the issue under consideration it is necessary to make a short retrospective journey into the history. In the recent half a century the tendency towards the abolition of the death penalty and the restriction of its application has been observed all over the world. As of 2013, the death penalty is retained in five countries: in China, Iran, Pakistan, Saudi Arabia and the USA [3], in such countries this type of punishment is extensively applied to the practice. The foreign and international organizations call the government of a series of countries for the abolition of the death penalty and the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty.

Today in some countries the death penalty is not usually implemented in practice even if it is legislated. Thus, a series of countries, including the former Soviet Union neighbour countries: Azerbaijan, Georgia, Kyrgyzstan, Lithuania, Moldova, Turkmenistan, Ukraine, Uzbekistan and Estonia has ratified or acceded to the International Human Rights Treaty. Over the past twenty years about 50 countries have vacated the death penalty,

97 countries in the world have forbidden it for all the crimes, 8 ones have retained it for the extremely grievous crimes committed at a time of war, 36 ones have declared a moratorium on either rendering the capital punishments or the execution of such sentences. Thus, 141 countries or more than two thirds of the countries in the world do not legislate it or apply to the practice [4, 5]. The only country in the post-Soviet territory, where the death penalty has been still legislated and applied to the practice, is Belarus [6].

Kazakhstan has not become an exception from the global trend. In the context of the taken attitude to the gradual solution to the issue of the death penalty the moratorium on the execution of the death sentence has been selected as the next step towards the restriction of application of the sole penalty by the R K Presidential Decree dated 17th December 2003. The death sentence has not actually executed since 2004 that is the evidence of the observance by our country of the international human rights standards and the participation in the progressive global human rights movements [7].

In November 2005 Kazakhstan ratified the International Covenant on Civil and Political Rights. On 19th December 2006 Kazakhstan concurred with the European Union's Statement of the abolition of the death penalty made during the 61-st Session of the UN General Assembly and supported the Resolution of the 62-nd Session of the UN General Assembly of the "Moratorium on the extreme penalty with the further consideration of the possibility to abolish the death penalty" [8]. By the end of 2007 the issue associated with the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty was placed on the agenda, which had not been solved yet [9]. Since that time there have been two conceptually different attitudes.

The first one. Bringing the criminal and criminal procedure legislations to the formal conformity with the amendments made to the Constitution of RK in May 2007 and hence, obviously impeding the access to the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty [10].

The second one. The complete and unconditional exemption of such punishment as the death penalty from the RK criminal legislation and hence, the removal of any difficulties in the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights. This argument deals with the validity of application of the death penalty for the extremely grievous

crimes of terrorism and war crimes. Resisting these arguments in this case it is necessary to draw the attention to that the global community actually recognizes the acts of terrorism and waging of the war of aggression as a serious threat for the international legitimacy and the interests of the whole humanity. However there are even no references to the possibility of the death penalty application for the crimes of terrorism in one of the decisions of the UN Security Council, the UN Conventions adopted on this issue and other international instruments, adopted by international organizations and intended to fight against terrorism.

No one of the states parties to the International Covenant on Civil and Political Rights being subject to the terrorist attacks (the United Kingdom, Spain and others) has raised a question of the revision of this international rule, amending its criminal legislation and restitution of such punitive measure in it.

At the present stage Kazakhstan brings its national legislation to the conformity with the amendments made to the Constitution of RK in May 2007, which are in our opinion still half-way and not enough sequential.

In this context the author will state case for the retaining the death penalty as a type of the criminal penalty in the RK Criminal Code. The wording of the constitutional provision of P. 2 Art. 15 of the Constitution: "No one has the right to arbitrarily take the human life. The death penalty is fixed by law as the sole penalty for the crimes of terrorism associated with the loss of life and for the extremely grievous crimes committed at a time of war, giving the sentenced person the right to intercede for mercy" [11] does not offer the opportunity to exclude the death penalty from the criminal legislation. The mentioned constitutional wording should be understood not as a mandatory imposition of the death penalty for the specified crimes but as a procedure definition - "fixed by law" and as the restriction of its application - "for the crimes of terrorism associated with the loss of life and for the extremely grievous crimes committed at a time of war". In other words the Constitution does not embody the rules of the compulsory capture of such punitive measure as the death penalty for the crimes of terrorism and war crimes in the criminal law, but only legislates the duty to impose such punitive measure by the law solely and precisely defines its potential application for the crimes specified in the Constitution only. These arguments are supported also by that the criminal legislation provides alternative punitive measures, including the life imprisonment, in all the cases of the said crimes commitment.

Another constitutional provision specified in P.1 Art. 1 of the Constitution should be remembered: "The Republic of Kazakhstan identifies itself as a democratic, secular, constitutional and social state, which supreme values are the individual, his life, rights and freedoms" [11]. Crimes of terrorism associated with the loss of life and the extremely grievous crimes committed at a time of war undoubtedly pose a high risk to the public. Besides that to the large extent the crimes of terrorism have grown into internationality in the 21 century, Kazakhstan, which is impended by the threat of the commitment of the crimes of terrorism, is not an exception, in this case the legislative attitude is reasonable. However it does not comply with the constitutional provision specified in P.1 Art.1 as the individual, his life, rights and freedoms are not protected in case of the commitment against him of the extremely grievous personal crimes and the punishment is a fundamental measure of the public enforcement imposed under the sentence.

While imposing a punishment the court should take into account the crime's nature and the extent of risk to the public, the personality of guilty, including his behaviour before and after the commitment of a crime, the circumstances which commute and aggravate the liability to the punishment, the influence of the imposed punishment on the correction of the convicted person and the living conditions of his family and the persons who are dependent on him (P. 3 Art. 52 of the RK CC). It is also emphasized by the Supreme Court of the Republic of Kazakhstan in the Regulatory Resolution "On statutory compliance by courts when criminal sentencing" dated 30th April 1999 [12].

One of the key elements of the criminal punishment is the justice. The only punishment which provides not only the correction of the guilty, but also preserves the rights and safety of all the members of the society, protecting them from the criminal offences, is fair. Each guilty should be imposed only such punishment, which he is deserved. The court should clearly reason out the society of the justice and legality of the punishment [13].

In such circumstances the punishment continues to be an important legal instrument to fight with the extremely grievous crimes. In this case the attitude towards the amendments made legislatively by the Law of the Republic of Kazakhstan "On Introducing Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Death Penalty" dated 10th July 2009 [14] and the amendments to the Criminal Code of the Republic of Kazakhstan should be expressed.

As mentioned earlier the author agrees with the concept which impelled the legislative officer to refuse the death penalty in the particular crimes but does not agree with the way it was carried out.

Let's expand on this issue and explain what we mean. Bringing the rules of the Criminal Code of the Republic of Kazakhstan into compliance with P. 2 Art 15 of the Constitution of the Republic of Kazakhstan, where the death penalty is fixed by law as the sole penalty for the crimes of terrorism associated with the loss of life and for the extremely grievous crimes committed at a time of war, giving the sentenced person the right to intercede for mercy, instead of 18 crimes where the death penalty was stipulated, the legislative officer actually fixed it in the sanctions of 16 crime components: P.2 Art. 156 of the CC (Planning, Preparation, Initiation or Waging of a War of Aggression), P. 2 Art. 159 of the CC (Application of the Prohibited Means and Methods of Waging of War), P.2 Art. 160 of the CC (Genocide), P.4 Article 162 of the CC (Mercenary Activities), P.2 Art. 165 of the CC (Crime of High Treason), Art. 167 of the CC (Infringement on Life of the President of the Republic of Kazakhstan), Art. 171 of the CC (Sabotage), P.4 Art. 233 of the CC (Terrorism); P. 3-1 Art. 367 of the CC (Disobedience or Another Failure to Comply with Orders), P. 4 Art. 368 of the CC (Resistance to Superior or His Compulsion to Breach of Duties), P. 4 Art. 369 of the CC (Coercive Actions against Superior), P. 4 Art 373 of the CC (Desertion), P. 4 Art. 374 of the CC (Evasion of Military Service by Self-Mutilation on in Another Way), P. 3 Art. 375 of the CC (Violation of Rules of Combat Duties), P.4 Art. 380 of the CC (Abuse of Authority, Excess or Failure to Use Authority), Art. 383 of the CC (Surrender or Leaving to Enemy Means for Waging of War).

According to the review, the death penalty is excluded only in two cases - from the sanctions of P. 2 Art. 96 and Art. 340 of the RK CC. The constitutional provision afforded no ground for understanding it as the legislative officer's call for the expansion of the exposing the death penalty for the military crimes and the crimes of terrorism. Expressing our opinion in this case we believe that the Law of the Republic of Kazakhstan "On Introducing Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Death Penalty" dated 10th July 2009 has not solved the main problem - the reduction of the application of the death penalty, it has moreover considerably confused the rules of the Special Part of the CC.

The main thing that should be noted is that the introduced amendments and additions have excluded the death penalty from the sanction of P.2 Art. 96 of the RK

CC (Murder). We absolutely disagree with the adopted innovations, for the only one reason that the life is more valuable than the interests of the military service, violated even at a time of war and therefore the human life must be defended by the most stringent measures, including the imposition of the death penalty.

According to the statistics of the General Prosecutor Office of the Republic of Kazakhstan the courts sentenced to death: in 2002 - 22 individuals, in 2003 - 17 ones, in 2004 - only 1 individual, in 2005 – 2 ones, in 2006 – 3 ones (later the death penalty was not applied by the courts), they all have been convicted of committing murders under the aggravating circumstances. To the life in prison were sentenced: in 2005 – 10 ones, in 2006 - 5 ones, in 2007 - 9 ones, in 2008 - 13 ones, in 2009 - 6 ones, in 2010 - 5 ones, in 2011 - 10 ones, in 2012 – 9 ones [15].

The human rights advocates say that the individuals who have committed the personal crimes under the aggravating circumstances should be sentenced to such alternative punitive measure as the life imprisonment instead of death. They reason, that no one person who was deserved the death penalty and being sentenced to the life imprisonment, would not be released and would have no future [16]. In this case, there is another reasonable question why the society and the state should finance the individuals who have committed brutal crimes at the expense of the state budget, as the hope to correct them is the smallest. Annually the enormous sums of money are allocated from the state budget to maintain the convicted persons that could be spent on more important social activities, such as the support of the pensioners, large families, orphanages, the construction of orphanages, schools, camps, hospitals, road construction and reconditioning, etc.

Analysing the stated above, it should be noted that the death penalty should not be abolished, even on the contrary the number of crimes for which the punishment of the death penalty could be sentenced should be increased (for example, for rape of minors).

Now in Kazakhstan the full-scale work on the discussion of the blueprint for the New Criminal Code of the Republic of Kazakhstan, where also in the sanctions of the Article 99 of the RK CC (Murder) such type of punishment as the death penalty is not mentioned, is carried out. In order to protect the rights and freedoms of the human and citizen it would be undoubtedly preferable to add to the New RK Criminal Code list the articles in which sanctions the death penalty could be applied.

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