

ПРАВА

УДК 343.247.29

G. A. VASILEVICH, E. A. SARKISOVA

**ABOUT CAPITAL PUNISHMENT: THE REPUBLIC OF BELARUS
AND EUROPEAN EXPERIENCE**

The Constitutional Court of the Republic of Belarus

(Has been reseved 04.02.2014)

The article is printed with the references to cited acts on March, 29 2007.

The abolition of capital punishment is one of disputable issues treated differently in different countries. Every country comes to the abolition in its own way and it may take a lot of time to arrive at this decision.

Sometimes things happen inversely when the accepted decision is annulled and capital punishment is reinstated. This happened in the USA in 1972 when capital punishment was recognized as unconstitutional and was reestablished in 38 states. Capital punishment was annulled, established and again annulled in Italy. And this happened fourfold in Russia and then in the USSR.

Today there are flashes of public opinion demanding its reinstatement in the number of countries where capital punishment is not applied. These flashes are particularly frequent after terror attacks or slaughters with numerous casualties.

At the same time negative attitude to this kind of punishment is obvious, particularly in European countries, where overwhelming majority of states hasn't been applying capital punishment for decades. This process was started on April, 23 in 1983 with Protocol #6 to the European convention on Human Rights regarding the abolition of capital punishment. But a number of states has defined their attitude to this issue long before the Protocol and even the Convention itself, dating back to November, 4 1950 excluding capital punishment from their practice not mentioning it as a kind of penalty in their legal system.

An important stage in the abolition of capital punishment was made on 3 May 2002 at signing by 36 countries Protocol #13 to the European convention on Human Rights by 36 countries, which excludes this kind of punishment under any circumstances including wartime and inevitable threat of war. This Protocol shows an irreversible character of democratic process on the way to reject capital punishment in no time and under no circumstances by all European countries. Thus, many disputes and doubts are argued by the real practice of states showing their definitely negative approach to this kind of punishment. It is stated in Clause 1 of Protocol #6 to the European convention on Human Rights that capital punishment is abolished and nobody can be sentenced to death penalty or executed.

The former republics of the USSR (Azerbaijan, Armenia, Georgia, Kazakhstan, Latvia, Lithuania, Moldova, the Russian Federation, Ukraine, Estonia, etc.) has followed Europe and abolished capital punishment.

Their experience is important for the Republic of Belarus, which development has much in common with these states.

At the same time a European example hasn't been perceived by many countries. Needless to mention that the majority of US sates and countries on Asian and African continents still exercise capital punishment. For instance, in the Criminal code of People's Republic of China death penalty is not only preserved but it includes rather a wide range of crimes (over 70). Meanwhile, many crimes that lead to

capital punishment are not connected with inflicting death or other harm to an individual (smuggling, robbery, state or private embezzlement, etc.).

However, many researches even in the USA mention that the number of death sentences which was counted in hundreds and thousands has been dwindling recently: the number of death sentences passed annually in the USA has decreased by 60% in the last five years. This leap occurred due to a sudden change of attitude to death penalty among states' legislators, jurors, prosecutors and even victims' relatives who now prefer an alternative in the form of life imprisonment without a right to parole.

Returning to the Republic of Belarus, the measures accepted attest to a European direction although currently it's the only European country where capital punishment is preserved in legislation and applied in practice (though in restricted volume).

Sufficient steps to restrict usage of capital punishment as an exclusive penalty has already been made in the Republic of Belarus.

First of all there are some changes in legislation.

There is a mentioning in the Criminal code (hereinafter CC) BSSR of 1928 that this punishment could be applied to more than 60 types of crimes, and in 1969 the range of crimes was restricted though still remained rather wide. Death penalty could be applied to more than 30 types of crimes (including military ones) which could be not connected with willful death infliction.

It's worth mentioning that both codes highlight temporary character of death penalty. Besides, there was a tendency to apply it only for willful homicide committed under aggravating circumstances.

Starting since 1990-s the legislator following international trends started to narrow the sphere of capital punishment application excluding it from CC clauses, describing responsibility for crimes that are not connected with willful human life infringement (practically the law was adjusted in accordance with practice trends).

The narrowing of capital punishment application was realized alongside with increasing the groups of people who cannot be sentenced to death. In particular, according to CC of 1960, before the acceptance of the Law dated 1 March 1994 these were people under age, women who were pregnant while committing a crime or by passing or applying the sentence. According to Clause 22 CC of the Law mentioned, capital punishment wasn't applied to women at all.

In CC of the Republic of Belarus dated 9 July 1999 and brought on 1 January 2001 the sphere of capital punishment application has been decreased half as much. It is applied only to grave crimes connected with willful homicide under aggravating circumstances.

At the same time the group of people who cannot be sentenced to death included men aged 65 by the day of passing the sentence.

In other words, the development of criminal legislation in the Republic of Belarus regulating application of capital punishment shows that there is a tendency to capital punishment reduction, which shows the perspective to work out a negative attitude to such a penalty.

The same trend is evidenced by judicial practice. First, for decades the death penalty has been used only for intentional murder with aggravating circumstances. Second, if prior to 1999, inclusive, there were dozens of sentenced to death each year (eg, in 1995, 1996, 1997, 1998, 1999 – 37, 29, 46, 47, 13 people were sentenced to death penalty), then, beginning from 2000, this number is less (in 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011 – 4, 7, 4, 4, 2, 2, 9, 4, 2, 2, 2, 3 people were sentenced to death, as a percentage of the total number of convicts, these figures are 1/1000). In 2012, no one have been sentenced to death.

We also note that the average annual number of condemned persons for aggravated murder is about 360 people. However, most of them are not condemned to life imprisonment as an alternative measure of the death penalty, but to imprisonment for various terms, including a period of 25 years (a life sentence imposed in the Criminal Code only by the end of 1997, in 1998–2006 were used, respectively, to 3, 29, 18, 11, 15, 12, 12, 8 and 7 prisoners). Both exceptional punishments are insignificant in the application of penalties for the most serious crimes committed in aggravating circumstances. For example, over the last 10 years (2002–2011) 117 people have been convicted of the death penalty and life imprisonment, which is 3.2% of the total number of those convicted of crimes for which the law provides for the possibility of the application of these exceptional punishment.

Thus, court practice itself shows the desire to have moratorium on death penalty, treating such cases rather cautiously and tending to pass life imprisonment instead.

Characteristically, the choice of exceptional punishment affected the positive dynamics of the crimes for which they are prescribed by law and therefore persons convicted for their commission. For example, since 2007, there is the process of reducing murders, including committed under aggravating circumstances. Accordingly sharply reduced the number of persons convicted under Part 2 of Art. 139 of the Criminal Code (2007, 2008, 2009, 2010 and 2011, they were convicted, respectively 392, 270, 241, 209 and 164). In these years, the death penalty was sentenced on 4, 2, 2, 2, and 3 people.

The process of evolution of our government attitude to death penalty matching the European one demonstrates not only legislation development and practice in Belarus. The issue was brought to a Republican Referendum in November 1996. We also hold international conferences and seminars on this issue and follow public opinion by means of mass media.

A serious step was to conduct parliamentary discussions on this issue in May 2002 arranged by the House of Representatives of the National Assembly of the Republic of Belarus, after which a number of recommendations was accepted.

It's necessary to stress, that the fact of such discussions draw lawyers' and public attention to this problem which is still being discussed in press and other mass media.

A great impact in identifying approaches to death penalty was its discussion in the Constitutional Court of the Republic of Belarus. The House of Representatives of the National Assembly initiated the case applying to the Constitutional Court to check the constitutionality of CC clauses dealing with application of capital punishment.

The Constitutional Court in its Conclusion issued on 11 March 2004 stressed the comparison of Constitutional clauses of the Republic of Belarus and international acts ratified by our government and CC norms.

It is stated in clause 24 of the Constitution dated 15 March 1994 that every person has the right to life. The government protects human life from any illegal infringements. Death penalty before its abolishment can be applied as an exclusive punishment for grave crimes and only by court verdict. This Constitutional norm stated an inherent right to life and an obligation of the government to protect human life from any illegal infringements. To protect human right to life the legislator allowed to apply capital punishment, mentioning its exclusive and temporary character. Thus, the Constitution states the possibility to apply capital punishment. In this part national legislation cannot be regarded as contradicting the Main Law. Neither contradicts it international acts, which were ratified by the Republic of Belarus, which as mentioned in clause 8 of the Constitution acknowledges the priority of international law.

For instance, it is stated in clause 6 of the International pact of civil and political rights that countries, which haven't abolished capital punishment, can pass death sentence only for the gravest crimes according to law acting during perpetration (clauses 1, 2). The pact states that death penalty should be an exclusive measure and its implementation should be justified for grave crimes and with restricted groups of people who can be sentenced to it. These principle conditions for capital punishment are implemented in Belarusian national legislation.

Belarus takes into consideration that the Pact regards as positive trend the desire of states to abolish capital punishment and supports legislation development in this direction. This is seen in criminal legislation and practice and in attempts to say its own word on this issue at a governmental level.

Regarding possible solutions to this problem it's necessary to mention that although the Republic of Belarus is not a member of European agreements it can't but consider trends and processes connected with the abolishment of capital punishment taking place in international community.

In the mentioned conclusion The Constitutional Court paid special attention to such important documents of the Council of Europe as European Convention on Human Rights of 1950 and its Protocols #6 dated 28 April 1983 and #13 dated 3 May 2002 that determined the «fate» of capital punishment in Europe.

At present the overwhelming majority of member-states of the Council of Europe have abolished capital punishment. The tendency to decreasing its usage is observed all over the world. Currently about 100 states don't apply capital punishment.

The Constitutional Court of the Republic of Belarus treating positively this trend has studied legal ways of solving capital punishment issue in its own country. To answer this question we should have a look in clause 24 of the Constitution.

The Constitution proclaimed the Republic of Belarus a democratic constitutional state. It is stated in the preamble that the people of the Republic of Belarus perceive themselves as a competent subject of international community showing their loyalty to general values. Part I of the Constitution «The foundations of the constitutional order» lays down the norms and principles of the Main Law alongside with general vectors of state policy, regarding human and civil rights as the prime value of the state.

As mentioned in the Conclusion of the Constitutional Court on 11 March 2004 human life is the main value in a civilized community, the right to it is inherent and inalienable and is given at birth. When deprived of life all other rights are senseless since their holder disappears. This axiomatic statement is interconnected with the issue of lawfulness of human life deprivation including by means of capital punishment as a kind of criminal penalty.

Part III in clause 24 of the Constitution reads that capital punishment till its abolishment can be applied as an exclusive penalty in accordance with law only for grave crimes and by a court verdict. This norm, on the one hand, guarantees human life protection from any infringements, which was to a certain extent stipulated by the absence of life imprisonment at that time, and on the other, hand it is an expression of a tough state stance on the perspective of the abolishment of capital punishment.

Therefore, the Constitutional Court mentioned in its conclusion that the norm of part III clause 24 of the Constitution anticipating the abolishment of capital punishment and establishing a kind of transitional state when it can be applied for grave crimes as an exclusive penalty implies country's rejection it in future.

This stance of the Constitutional Court is decisive in determination of legal ways to refuse death penalty in Belarus. Besides, while making this conclusion on 11 March 2004 the Constitutional Court was guided not only by clause 24 of the Constitution but also it considered the dynamics of crime rate in Belarus. And it doesn't show decrease in crimes, in homicides under aggravating circumstances first of all.

For instance, whereas there were 952 murders in 1994 including attempted murders the number of such crimes rose by 23,7% in 2002 although the preventative role of death penalty, connection of its application and crime rate is not traced. Neither practice, nor research showed connection between killings and application of capital punishment and didn't identify the level of its deterring effect. This situation is observed in other countries, which was one of the weighty arguments to abolish capital punishment. On the contrary, the rise of homicides committed under aggravating circumstances fit the years when capital punishment was frequently applied. For example the number of people sentenced to death had been increasing (25, 37, 29, 46, 47 people) from 1994 to 1998 alongside with the number of homicides committed under aggravating circumstances (278, 345, 411, 480, 517 people). But in spite of the fact that 4 people were sentenced to death in 2003 the number of murders including attempted murders fell by 104 crimes compared with 2002. A significant decrease of registered murders (by 69 cases) was observed in 2004. Unfortunately, in 2005 there was a rise in such crimes. If there were 1010 registered in 2004, then there were 1032 murders including attempted murders in 2005. The number of capital sentences, as mentioned above, was minimum those years. The rise of homicides in 2005 in comparison with 2004 (by 22 crimes) didn't change legal practice of capital punishment. But a slightly another picture was observed in proportion of murders and death penalty in 2006. There were registered 946 homicides and attempted murders. There was a sufficient decrease of such crimes in comparison with the previous year (by 86). But the number of capital sentences rose by 7. This example shows once again the impossibility to trace links between homicide dynamics and the number of death penalties.

The Constitutional Court also took into consideration the fact that the Second optional protocol to the International pact of civil and political rights wasn't ratified by the Republic of Belarus, neither was decided the issue of our membership in the Council of Europe, thus the European Convention on Human Rights wasn't signed and ratified together with related protocols. These circumstances free Belarus from

obligations to follow the countries member-states of the Council of Europe. But the possibility to deepen Belarusian integration into European direction and the perspectives to enter the Council of Europe will stipulate Belarusian decision on capital punishment, adequate to European approach.

When accepting the conclusion on capital punishment the Constitutional Court considered also public opinion which, according to the Referendum in 1996 and to sociological research shows that 70% citizens still support capital punishment as a deterrent. The reports of different state agencies also showed that the abolishment of capital punishment in 2004 would be premature.

We think that Belarus is on its way to abolish capital punishment and possibly a moratorium can be the first step. Exclusions may be, as we see it, only for terror cases entailing numerous casualties (such crimes are not committed in Belarus). Unfortunately, Belarus did not pass such heinous crimes. Terrorist attack in April 2011, which killed and maimed dozens of citizens of our country, rightly caused a surge of public opinion in favor of the death penalty for terrorists. Although, strangely enough, and at that time in local polls held by mass media, absolute position on this point was not found. The main doubt in this part of the assumption is the possibility of judicial error.

Undoubtedly, the moratorium should be preceded by a complex system of preparatory measures including the formation of public opinion. Such a decision demands thorough investigation of criminogenic situation.

It's worth mentioning that the House of Representatives of the National assembly adopted recommendations for ministers and agencies on «Political and legal issues of the abolishment of death penalty in the Republic of Belarus» on 13 July 2002. The Council of Ministers of the Republic of Belarus was recommended to study the issue of capital punishment in the country considering the possibilities of gradual transition to moratorium on certain types of crimes, then moratorium on capital sentences and to further abolishment of capital punishment. This recommendation showed the readiness of representative and legislative organs of the Republic of Belarus to adopt positive decision on this issue. This is also proved by the fact that the Parliament addressed the Constitutional Court in 2003 asking to check constitutional norms of crime legislation, admitting capital punishment.

It is also important to note that even after the adoption of the Conclusion of The Constitutional Court, Parliament turned to a discussion of the death penalty. For example, the House of Representatives of the National Assembly of the Republic of Belarus in cooperation with the Department for capacity-building and human rights of the Secretariat of the Council of Europe organized a seminar on the topic «The way towards the abolition of the death penalty in Belarus,» the meeting of which was held September 23, 2010 in Minsk and there was an opportunity for many of its members (representatives of various departments) to express their opinion in favor of abolition of the death penalty and against it.

According to clause 24 of the Constitution of the Republic of Belarus the decision on this issue is in the competence of the head of state and the Parliament. This fact was mentioned in the Conclusion of the Constitutional Court.

All in all we consider that the abolishment of capital punishment by a legislative organ is more acceptable in terms of law. When it is done by constitutional courts it gives way to doubt about legitimacy of previous sentences passed on the basis of the Constitution and the acts of current legislation. There should be absolute legislative basis in such a serious issue as life deprivation. Exactly for this reason originally there were 2 ideas in clause 24 of the Constitution of the Republic of Belarus: 1) acceptability of capital punishment according to law and sentence; 2) its temporary character.

Г. А. ВАСИЛЕВИЧ, Э. А. САРКИСОВА

**О НАКАЗАНИИ В ВИДЕ СМЕРТНОЙ КАЗНИ:
РЕСПУБЛИКА БЕЛАРУСЬ И ЕВРОПЕЙСКИЙ ОПЫТ**

Резюме

Проанализированы конституционное и уголовное законодательство, а также правоприменительная практика по вопросу смертной казни в Республике Беларусь. С учетом европейского опыта авторы предлагают пути решения проблемы о поэтапной отмене смертной казни в нашей республике.