

They say that every nation reveals for itself a certain secret of human history, paying for it by considerable sacrifice, sometimes even by downfall. Is not phenomenon of justice such a secret? Is not it why Immanuel Kant considered the death penalty so necessary and obligatory for the society that it must today execute a murderer, even if tomorrow the end of the world comes? Over ages, judicial systems of the overwhelming majority of States not only arranged their activity based upon exactly such comprehension of law, but also implanted corresponding perception of law and justice in the minds of citizens of their countries.

However, today the world has changed considerably. Intrinsic and inalienable human rights and liberties are the engine of the progress in it. Rapprochement of legal ideas and notions of civilised nations and States, with a human being as a main denominator, takes place steadily on the basis of these rights and liberties by the means of international law. However, one cannot claim that this process goes on without strain. According to a United Nations' report published in November 2007, 146 States refused to use the death penalty as a criminal punishment, but in 51 countries it is still in use. Despite the fact that the number of States, where the death penalty is applied, is significantly less if compared with their total number, only 30 per cent of the population of our planet reside in those countries, where the death penalty is abolished finally. Altogether in the world there are some 20 thousand people, who have been sentenced by court of law to capital punishment and who are on the death row. However, academic studies do not support the opinion that the death penalty is more efficient for reducing the crime rate if compared with other forms of criminal punishment. Thus, a study conducted upon the request of the United Nations in 1988 and updated in 2002 analysed correlation between application of the death penalty and the number of committed murders. Scholars came to a conclusion that «<...> it would be wrong to accept a hypothesis that the death penalty has an effect on reduction of the number of murders significantly larger than the risk and application of a less severe (at a first glance) penalty: life imprisonment»<sup>2</sup>.

On 15 November 2007 the United Nations General Assembly adopted a resolution calling upon nations to introduce moratorium on the death penalty. The proposal to introduce the moratorium was supported by 99 States, while 52 States voted against it, and 33 States abstained from voting. Russia approved of introduction of the moratorium. Of course, this resolution by the United Nations General Assembly has no binding force; however it is a powerful call upon all world leaders to take immediate steps to abolish the death penalty. Also the European Court of Human Rights



## RUSSIA WITHOUT DEATH PENALTY

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repeatedly held in its case-law that human right to life is of utmost importance and prevails over other rights, for all other human rights and liberties are only to provide for the quality of the human life itself.

Larger is the target, easier is to hit it. In Russia, the issue of the death penalty was brewing and expanding for a long time, involving jurists, politicians, businesspeople, people of culture, workers and housewives, and very different individuals in the whirl of discussions. It became just impossible not to take notice of the problem, ignore it, not to be privy to it. Attitude to the death penalty in the Russia's society is far from being unambiguous though. Thus, according to

different public opinion polls conducted in the 90s of the last century and at the beginning of the 2000s 60–65 per cent of citizens spoke in favour of keeping the death penalty. Every two out of five respondents suggested applying it more often than was provided then by the criminal law<sup>3</sup>. According to recent sociological polls conducted by Russian polling organisation «Levada-Centre» 37 per cent of respondents stood for application of the death penalty, while 16 per cent of respondents even wished to expand its application. And it was only 14 per cent of individuals who stood for complete abolishment of this capital punishment. At the same time, the number of individuals who found difficulty in replying to the question has increased. Sociologists note that elderly or low-income people with low level education prevail among proponents of the death penalty. They live in such time when, as they believe, they, their children and close relatives face constant threat coming from the criminal underworld. People feel it themselves; mass media and representatives of the State inform them about it every day. People view the death penalty as a simple and apprehensible measure, which does not require much time or costs or special efforts; it deprives a criminal of an opportunity to cause harm once and for ever. They consider death of the culprit as a tit-for-tat retaliation, as a redemption, as a cleansing of a moral evil.

In such a situation it is quite difficult for politicians and law-makers to assume moral and political responsibility for abolishment of the death penalty in spite of dominant populist state of public opinion. Thus, on 14 September 2007 Mr Vladimir Putin at the meeting with participants of the international discussion club «Valdai» said:

«<...> My position is not popular with the overwhelming majority of Russia's citizens. The overwhelming majority <...> stands for restoration of the death penalty <...>. I believe that the death penalty is meaningless and counterproductive <...>. Stiffening of punishment, as such, right up to the death penalty is not a panacea; it

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<sup>2</sup> See: Hood R. *The Death Penalty: A World-Wide Perspective*. Oxford: Clarendon Press. Third edition, 2002. P. 230.

<sup>3</sup> See: Дубин Б. Россияне о смертной казни. «Тюрьма». Интернет-приложение к журналу «Индекс» // <http://index.org.ru/turma/sk/ro/020506-1.htm>. 14 декабря 2009 г.

is not the most effective tool in the fight against crime. Lawyers will understand me, they are aware that the most effective tool in the fight against crime is unavoidability of punishment (it is all well known to everyone), and not its severity. This is the first point. Secondly, I am deeply convinced that in applying the death penalty against its own citizens, even if they are criminals, the State breeds cruelty in other its citizens and engenders cruelty again and again in citizens with respect to one another and with respect to the State itself. And it is also harmful and counterproductive. In order to effectively fight against crime we need balanced efficient economic policy, efficient social policy, competent and modern civilised operation of the penitentiary system, of all law enforcement agencies. It is difficult to do; it is more difficult than to introduce the death penalty. But I think we should not follow this populist path <...><sup>1</sup>.

It would be wrong to think that the issue of non-application of the death penalty in Russia was raised only now. In principle, since 1993, when the Constitution of the Russian Federation was adopted, the issue has already acquired quite specific vector. Pursuant to Article 20 of the Constitution everyone has the right to life, which is recognised in the Russian Federation as a fundamental and inalienable right to be enjoyed by everyone since birth. Death penalty is referred to in the Constitution only as a provisional and exceptional penalty, which is to be abolished when appropriate conditions mature; until that time the law may envisage it only for especially serious crimes against life, provided that a defendant is secured the right to jury trial. That is, the death penalty was initially considered by the current Constitution only as an exceptional penalty of purely temporary nature.

There were many important events happening after adoption of the Constitution of the country. On 28 February 1996 the Russian Federation signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, and already on 5 May 1998 the Convention took legal effect throughout the territory of our country. Moreover, on 23 February 1996 Russia joined the Council of Europe; on 16 April 1997 Russia signed Protocol No. 6 to the Convention concerning the abolishment of the death penalty in peacetime. The intention of the Russian Federation to set moratorium on execution of death sentences and to take other measures with a view to abolish the death penalty was one of the substantial grounds for our country to be invited to join the Council of Europe pursuant to Opinion by the Council of Europe Parliamentary Assembly No. 193, 25 January 1996, on Russia's request for membership of the Council of Europe (Paragraph 10, Subparagraph ii) and Resolution (96) 2 by the Council of Europe Committee of Ministers. And Russia has accepted the invitation, having statutorily formalised her joining the Council of Europe by adoption of federal laws of 23 February 1996 «On Accession of the Russian Federation to the Statute of the Council of Europe» and of 23 February 1996 «On Accession of the Russian Federation to the General Agreement on Privileges and Immunities of the Council of Europe and the Protocols Thereto». Having acceded to the statutory instruments of the Council of Europe, the Russian Federation thus reaffirmed her assurances and obligations, fulfilment of which was the condition for extending invitation to Russia for membership of the Council of Europe. Abolishment of the death penalty was referred to

as a «serious commitment» of Russia also in the Address by the President of the Russian Federation before the Federal Assembly of the Russian Federation of 30 March 1999.

Therefore, Russia internationally refused in fact to apply the death penalty and assumed obligation to introduce moratorium on the death penalty and, within three years after signing the Convention, to ban the death penalty, having ratified Protocol No. 6 to the Convention. On 6 August 1999 a draft law on ratification of Protocol No. 6 to the Convention was introduced by the President of the Russian Federation in the State Duma together with a draft law stipulating abolishment of the death penalty and introducing relevant amendments to criminal legislation, legislation on criminal procedure and penal legislation of the Russian Federation.

However, in February 2002 the State Duma of the Federal Assembly of the Russian Federation adopted an appeal to the President of the Russian Federation, which concerned the matter of prematurity of ratification. In doing so, the State Duma believed that as soon as the people of our country mostly support the death penalty, its final abolishment might turn out to be extremely unpopular measure. At the same time, the presidential draft law was not voted down by the State Duma and therefore from the legal point of view it is still considered to be pending in the State Duma.

Moreover, one more extremely important factor should be specially emphasised: fulfilment of international obligations assumed by a State rests on the State as a whole. Proceeding from the principle of separation of powers, fulfilment of international obligations should be secured by not only legislative branch but by other branches of power as well (Article 10 of the Constitution of the Russian Federation). This is *conditio sine qua non* to preserve this or that element of the Russia's legal system within the framework of relevant constitutional and international law bounds.

There is no doubt that as of today sufficient legal grounds to refuse to apply the death penalty have ripened.

Firstly, the last execution of death sentence in Russia took place in August 1996. Since September of that year the moratorium on execution of death sentences practically has been in force. During preparation to sign the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol No. 6 thereto, which provided abolishment of the capital punishment, Mr Boris Yeltsin requested the members of the Pardon Commission to urgently review all pardon petitions of those who had been sentenced to death. From then on, the moratorium was kept effective by way of use by the President of his prerogative to pardon those who had been sentenced to death; the prerogative is based upon Article 89 (B) of the Constitution of the Russian Federation.

Secondly, on 2 February 1999 the Constitutional Court of the Russian Federation, by its judgment No. 3-P, adopted upon the request by the Moscow City Court and upon complaints of several individuals, forbade to apply the death penalty in a situation when jury trial was inaccessible to criminal defendants at least in one region of Russia; the Court reasoned that the defendant's right to jury trial was, according to Russian Constitution, a special criminal procedure safeguard of judicial protection of everyone's right to life, and all citizens were equally protected by the law and court<sup>2</sup>. That is, moratorium on application of the death penalty has been in force in Russia for more than thirteen years in total.

There are also other valid reasons for unacceptability of application of the death penalty. It was as far as in 1969 that

<sup>1</sup> Official website of the President of Russia: // <http://archive.kremlin.ru/>.

<sup>2</sup> See: *Collection of Laws of the Russian Federation*. 8 February 1999. No. 6. Section 867.



our country ratified the Vienna Convention on the Law of Treaties. Article 18 of this instrument states that prior to ratification of a treaty a State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty. As it follows from the meaning of Article 1 of Protocol No. 6 to the Convention, the object of the Protocol is complete abolishment of the death penalty in the time of peace. Consequently, retention of the death penalty in the legislation, continuation to apply it or to execute death sentences, as well as recognition that practice of application of the death penalty may be resumed after introduction of jury trials in all regions of Russia, would mean deprivation of Protocol No. 6 of its object and purpose. Thus, Russian criminal-law practice is absolutely bound by the above legal instruments.

Finally, there exist also more profound socio-political grounds to remove the capital punishment from the armoury designed to combat crime. Modern Russia, including her political class and the overwhelming segment of the society, is aimed at entry into Europe, at constructive participation in European affairs. Russia's breaches of major international commitments are quite undesirable from the standpoint of the long-run State interests of our nation.

In other words, in Russia today there formed an irreversible legal situation, which is a part of the specific historical and legal context and is reinforced by a sequence of legally meaningful steps already taken. As a whole it entails the need to adopt a quite definitive final decision. The task of the Constitutional Court is exactly to defend and protect the current Constitution, which comprises comprehensive whole together with political legal strategic regime of constitutionalism formed on its basis. To all practical purposes, we deal here with prolonged comprehensive moratorium (which, however, initially was supposed to be a short-term transition to complete abolishment of the death penalty) based upon a system of legal sources: provisions of the current Constitution, international-law obligations of Russia, provisions of domestic legal system fixing moratorium on application of the death penalty. There are grounds to assert that a special constitutional legal regime, which includes stable guarantees of non-application of the death penalty, has been formed in Russia both *de facto* and *de jure*. Let us stress once again that the provision, upon which this moratorium was initially based, is stipulated by the Constitution; it creates a mandatory algorithm for further legal actions; therefore not to annul the death penalty in such conditions would mean to clash with the Constitution itself.

It should be noted that a quite difficult moral choice has to be made, for it is known that the majority of population of many countries of the world, as a rule, stands for the death penalty. However, tactics of persuasion and attempts to reach public consensus in the matter seems to be doomed. We here deal with that rare occasion when law-makers and judicial bodies must not be tied to the chariot of people, having in mind people's own long-run and objective interests. In essence, such approach is based upon natural history comprehension of fundamental and inalienable human rights and liberties originating in worldview of humanism, the right to life being the core of those rights and liberties.

As Sir Francis Bacon asserted, the nature of things betrayed itself more readily under the vexations of art than in its natural freedom. It has happened this time too. The judgment by the Constitutional Court of the Russian Federation № 3-P, 2 February 1999, reasoned the ban on application

of the death penalty procedurally, i.e. by absence of jury trial even in some part of the Russia's territory. However, by the present time legal potential of such reasoning has been completely exhausted: jury trials are in operation now throughout the entire territory of the Russian Federation with the exception of one region. However, pursuant to the Federal Law No. 241-FZ, 27 December 2006, in the Chechen Republic jury trials shall be established and start functioning as of 1 January 2010. In that connection the Supreme Court of the Russian Federation lodged with the Constitutional Court a request to give official elucidation of the provision of the judgment by the Constitutional Court of 2 February 1999 regarding the moratorium on the death penalty. The Supreme Court reasoned its request by the fact that after introduction of jury trials throughout the entire territory of the Russian Federation judges could raise questions concerning possibility of imposing punishment in the form of the death penalty. In other words a problem emerged, whether the ban formulated in the judgment by the Constitutional Court on sentencing to and execution of capital punishment would be still effective from 1 January 2010. On 19 November 2009 the Constitutional Court of Russia delivered a decision upon that request and the decision gave an answer to the intricate question<sup>1</sup>.

However, a certain procedural problem emerged, which, at the first glance, complicated taking a decision. Formally the Constitutional Court did not adopt a new judgment but it only clarified its earlier delivered judgment *res judicata*. The Constitutional Court was not to resolve the matter of constitutionality or unconstitutionality of a law where in the meaning of the statute (Article 83 of the Federal Constitutional Law «On the Constitutional Court of the Russian Federation») the Constitutional Court is empowered to give official elucidation of its earlier delivered decision only within the bounds of its content. However, the judgment of 2 February 1999, which had erected only procedural bar on the way of application of the death penalty, did not address the matter of substantive-law meaning of this penalty, i.e. the matter of its normative conformity with the Russian Constitution and, based on that, the matter of possibility or impossibility of further application of the death penalty. Now after last procedural bars had been removed the Court was to give the substantive answer to this main question.

However, the law itself had offered the way out from this contradiction. The thing is that the need to elucidate a decision delivered by the Constitutional Court may emerge also in connection with ambiguity of the matter of peculiarities of its execution. It is pursuant to Article 75 of the Federal Constitutional Law «On the Constitutional Court of the Russian Federation» that instructions regarding the procedure and peculiarities of the execution of a decision are the integral part of it. But execution of a court judgment is a process, which is temporally stretched and links the past with the present time. Therefore, as different from positions of the Constitutional Court, which are expressed on the main subject-matter of a decision and are a sort of «snapshot» of the previous legal situation, instructions regarding the execution of a court decision may in our life run into new, previously unknown legal conditions requiring, as the case may be, further evolving interpretation. Although the interpretation is provided with consideration of the content of legal relationships, in connection with which the Constitutional Court handled the previous case,

<sup>1</sup> Decision No. 1344-O-P, 19 November 2009, on explanation of Paragraph 5 of the operative part of the judgment by the Constitutional Court of the Russian Federation No. 3-P, 2 February 1999, in the case of review of constitutionality of provisions of Article 41 and Article 42 § 3 of the RSFSR Code of Criminal Procedure, Paragraphs 1 and 2 of the Decree by the Supreme Soviet of the Russian Federation of 16 July 1993 «On the Procedure of Enactment of the Law of the Russian Federation "On Introduction of Changes and Amendments to the RSFSR Law 'On the Court System of the RSFSR', the RSFSR Code of Criminal Procedure, the RSFSR Criminal Code and the RSFSR Code of Administrative Offences"». // *Collection of Laws of the Russian Federation*. 30 November 2009. No. 48. Section 5867.

the interpretation may contain new propositions related to a different segment of meaning, namely, whether prohibitions and permissions set by the «old» decision are to be further enforced and if they are, then why?

Thus, despite the fact that in its judgment of 2 February 1999 the Constitutional Court addressed only procedural questions related to impossibility of imposing the death penalty without simultaneously vesting citizens with the right to jury trial on the basis of principle of equality the Court nevertheless ought to determine whether it was necessary for the courts to continue to abide by the ban on the death penalty from 1 January 2010 when the above procedural blocking stipulation would discontinue its effect. That is why the Constitutional Court stated in its decision delivered upon the request by the Supreme Court that «[I]egal position justifying this or that regime of application of provisions that were the subject-matter of examination by the Constitutional Court may become the subject-matter of elucidation of the relevant judgment, *inter alia*, with consideration of the temporal operation of this judgment and also proceeding from its systemic connection with other decisions by the Constitutional Court and other laws within the legal system of the Russian Federation» (Paragraph 2.1 of the reasoning part of the decision of 19 November 2009).

It is also worth noting that under the law the Constitutional Court of the Russian Federation has to take decisions assessing not only literal meaning of an act under consideration but also the meaning attached to it by official or other interpretation or by established law-application practice, as well as proceeding from its place in the system of legal acts including international treaties entered into by the Russian Federation, which, pursuant to Article 15 § 4 of the Russia's Constitution, comprise an integral part of the legal system of the country (Article 74 § 2 of the Federal Constitutional Law «On the Constitutional Court of the Russian Federation»). It is natural that considering this factor the Constitutional Court, while elucidating its judgment of 2 February 1999, which as any other its decision has the same scope of application as to time, space and circle of persons as decisions by law-making body have<sup>1</sup>, proceeded from interrelation of the decision with effective provisions of international human rights law on non-application of the death penalty and international treaties entered into by Russia, as well as from the dynamics of regulation of relevant legal

relationships and tendencies in the world community, with our country realising itself to be a part of.

As it was noted above, the Russian Federation is bound by the requirement of Article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the object and purpose of signed Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms until or if the Russian Federation officially declares her intent not to become a Party to the Protocol. However, as long as Protocol No. 6 is not yet ratified by the Russia's parliament the Protocol *per se* may not be a ground to repeal laws providing for criminal punishment in the form of the death penalty in the Russian Federation, which, however, does not divest the Federal Assembly of its prerogatives with respect to ratification of that Protocol<sup>2</sup>.

Nonetheless, this document, taken all its importance and significance, should be regarded as only one of the elements of the established in the Russian Federation legal regulation of the right to life based upon provisions of Article 20 of the Constitution, inherent constitutional-law obligations, which stem from international-law treaties and from domestic legal acts adopted by the Federal Assembly — the parliament of the Russian Federation, by the President of the Russian Federation, and by the Constitutional Court of the Russian Federation.

Owing to this, currently stable and irreversible safeguards of a human right not to be subjected to the death penalty have been formed.

The Constitutional Court of the Russian Federation is convinced that it means that provisions of the Criminal Code regarding imposition of the death penalty cannot be applied further in Russia, even under the sentence delivered pursuant to verdict of the jury. This belief is substantiated by the Court's decision of 19 November 2009, which is statutorily final, is not amenable to appeal, takes legal effect immediately upon its pronouncement, is self-executing and requires no affirmative action by any other bodies and officials (Article 79 of the Federal Constitutional Law «On the Constitutional Court of the Russian Federation»).

At the same time, I would like to hope that this decision will facilitate directing attention of the Russia's society and the State to the complex of such measures of legal, political, economic and cultural nature that are really needed to achieve actual results in the fight against crime.

*Translation to English.*

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<sup>1</sup> See: Paragraph 4 of the reasoning part of the judgment by the Constitutional Court of the Russian Federation No. 19-P, 16 June 1998, in the case of construction of several provisions of Articles 125, 126 and 127 of the Constitution of the Russian Federation. // *Collection of Laws of the Russian Federation*. No. 25. 22 June 1998. Section 3004.

<sup>2</sup> Russia does not deny her international commitments to keep moratorium on the death penalty. Not so long ago this idea was communicated to journalists by Ms Natalya Timakova, the press secretary of the President of Russia. «The topic of repeal of moratorium on the death penalty is not now considered either by the administration of the president or by the judicial community or by the judicial bodies of power, she stated». // *Rossiyskaya Gazeta*. No. 4995 (171), 11 September 2009.