

GENDER RESEARCH AND VIOLENCE AGAINST WOMEN

Kazakhstan.

The Feminist League has been carrying out the gender expertise of the legislation of Kazakhstan.

The new Criminal Code and Criminal Code of Practice entered into force since 1 January 1998 were examined by the group of experts as well. These laws together with the Constitution are regulating the entire criminal legal proceedings on the territory of the Republic of Kazakhstan.

In the aggregate, the both Codes contain more than 10 articles which are discriminative on the grounds of sex. A half of these articles cause a drastic worsening of the protection of women against rape and other sexual crimes. However, that was done, in our opinion, not deliberately, but as a result of an evident legislative mistake, and oversimplified process of creation of legislation, which currently excludes all required expertise.

Findings of the analysis of practical application of the Criminal Code RK and Criminal Code of Practice RK for one year and a half show a serious contradiction between these two Codes. We speak now, in particular, about rape as a crime provided by the article 120 of the Criminal Code RK.

The article 120 part1 of the Criminal Code RK states: *“Rape, i.e. a sexual intercourse, done with violation or threaten to apply violation to the victim, or to the other persons, or using helplessness of the victim, – comes under imprisonment for the term of three to six years”.*

In the article 10 of the Criminal Code RK all acts provided by the Code are, in accordance with the character and degree of the public damage, divided into the categories: crimes of low grave, middle grave, grave crimes and extremely grave crimes.

The crimes of low grave are the deliberate acts punishable as a maximum to a term of imprisonment not exceeding two years in accordance with this Code, and the acts of carelessness, punishable as a maximum to a term of imprisonment not longer than five years in accordance with this law.

Consequently, **the crimes of middle grave** are the deliberate acts with a maximal punishment as five years of imprisonment, careless acts with punishment of more than five years of imprisonment as maximal, **grave crimes** are the deliberate acts with maximal punishment not more than twelve years of imprisonment, **extremely grave crimes** - are the deliberate acts with punishment as imprisonment for the term longer than 12 years or capital punishment.

Within the above classification, the **rape falls into the category of the grave crimes.**

In the article 67 of the Criminal Code of RK, an absolute discharge is provided for on the condition of reconciliation with the victim: *“The person, who has committed a crime of low or middle grave for the first time may be absolutely discharged from amenability, if the person had reconciled with the victim and made amends (of the damage) to the victim”.*

Thus, in the case of rape there is no such an opportunity for an absolute discharge from amenability, as the rape in accordance with the article 10 of the Criminal Code of RK falls into the category of grave crimes.

These norms of the Criminal Code of RK are in contradiction with the norms of the Criminal Code of Practice of RK.

Article 32 of the Criminal Code of Practice of RK distinguish criminal cases into the cases of private, private-and-public and public prosecution:

“Dependently on the character and grave of the committed crime, criminal proceeding and prosecution in the court shall be carried out in private, private-and-public, and public order.

The cases of the crimes specified in the article 33 of this Code, are considered as cases of private prosecution, proceeding initiated in none other case than on information of the victim, and shall be terminated on the grounds of reconciliation of him with the accused”.

Article 33 of the Criminal Code of RK contains the list of the crimes for which the criminal prosecution may be carried out in private order. This list includes the articles 120 (part one), 121 (part one) and article 123.

Thus, rape, amenable according to the article 120 part 1 of the Criminal Code of RK, is considered, in accordance with articles 32, 33 of the Criminal code of Practice of RK as a case of private prosecution, and, in contradiction with articles 67, 10 of the Criminal Code of RK shall be terminated on the grounds of reconciliation of the (female) victim with the accused.

The same is applicable to the other sexual crimes provided by the articles 121 and 123 of the Criminal Code of RK.

At the same time the article 32 part 3 of the Criminal Code of Practice provides for termination of the cases of private-and-public prosecution in connection with reconciliation of the victim with the accused only in the cases provided by the articles 67 of the Criminal Code of RK, i.e., only in that case if the person who had committed a crime of low or middle grave for the first time, reconciled with the victim and made amends.

Since the article 32 part 2 of the Criminal Code of Practice of RK containing provisions for termination of the cases of private prosecution does not contain reference to the article 67 of the Criminal Code of RK, so the case of rape committed by the person, who had committed crimes before, and who did not make

amends of the damage made to the victim, shall be terminated on the base of an only application of the female victim on her reconciliation with the accused.

The new Criminal Code of Practice ranks rape and other sexual crimes with careless damage to the health (111), slander (129), insult (130), divulging of a medical secret (144), and violation of traffic regulations (296). In accordance with articles 32 part 2, 33 of the Criminal Code of Practice of RK these are the cases of private prosecution.

The cases of private-and-public prosecution include such crimes as deliberate causing great damage to health (103), deliberate causing middle-grade damage to health (104), procuring of one's abortion (117), rape with aggravating circumstances (120, part 2), arbitrariness (327).

The resolution on initiation of private-and-public and public prosecution shall be issued by the inquirer, the inquiring board, the chief of the investigative office, the investigator, the prosecutor (art. 186 of the Criminal Code of Practice of RK). Article 183 of the Criminal Code of Practice in relation to these categories of cases provides for obligatoriness of the criminal proceeding board to accept and consider the applications and information related to the committed crime. Carrying out a preliminary investigation is compulsory for these cases, it shall be carried out by the investigators from the National Security Committee, internal affairs boards and tax police.

From the three categories of cases, i.e., of private, private-and-public and public prosecution, only the cases of private prosecution are separated into a special chapter # 45 of the Criminal Code of Practice of RK. Only for this category of cases, a special order of proceeding is established.

In accordance with the article 390 of the Criminal Code of Practice of RK, a criminal case of private prosecution shall be initiated by lodging of a complaint to the court to institute criminal proceedings against the person. In the case of handing the claim to the organ of inquiry, to an investigator or a prosecutor, it shall be transferred to court as well. The claim shall contain the name of the court in which it is handed in, description of an event (crime), place and time when it was committed, with attraction of evidences, data on the person who is brought to trial, list of the testators to be call to testify. The claim shall be handed in to the court with a number of copies according to the number of those persons the private prosecution is initiated against. From the moment of acceptance of the claim to the court, to its proceedings, the person handed in the claim is considered as a private prosecutor.

Private prosecutor is also the victim in the cases of the private and private-and-public prosecution, who independently support the prosecution in the court, in the case of refusal of the public prosecutor to carry on prosecution. The latter accurately equalizes the state of the person who handed in the claim to the court in the case of private prosecution with the state of the victim in the cases of the public and private-and-public prosecution, who was left without support from the public prosecutor. The victim in the case of private prosecution is also left without support of the public prosecutor. The public prosecutor, in full accordance with the chapter #45 of the Criminal Code of RK refused from prosecution in the cases of this category.

In accordance with the article 392 of the Criminal Code of Practice of RK, the person, who has handed in the claim about the committed crime, shall point out in it - what may testify in the court to the circumstances of the crime described in the claim, and to the guilt of the person suspected of the crime. Objects and documents shall be submitted to the judge who has accepted the claim. The judge shall provide support to the sides in collecting evidences on their pleading.

Such attitude from the side of the State to defence of the female victims in the cases of rape, in the new Law of the Republic of Kazakhstan (the Criminal Code of Practice) ranked as private prosecutors, does not conform to the article 17 of the Constitution of the Republic of Kazakhstan:

"1. Dignity of a man is inviolable. 2. No one shall undergo tortures, violation, other treatment or punishment which is cruel or humiliating the human dignity", and to the article 2, p. g) of the Convention on the Elimination of All Forms of Discrimination Against Women: "States Parties condemn discrimination against women in all its forms, agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake:

g) To repeal all national penal provisions which constitute discrimination against women".

Some 15 years ago proceedings in the cases of rape were within the terms of references of the prosecution office exclusively, together with cases of homicide and robbery. That was a short list of the cases, the preliminary investigation of which was carried out by the investigators of prosecution office, but not by the investigators from the Internal Affairs bodies. However, after having adopted the new Law on prosecution, the function of investigation was excluded from the actions of prosecution. The State Investigative Committee carried on the proceedings in the cases of rape, and after reorganization - the Internal Affairs departments. And only after the Criminal Code of Practice of RK had come into force, the new order for proceeding was established related to the cases of rape – these became the cases of private prosecution. That means, in accordance with the new Criminal Code of Practice, the public prosecutor does not have the right to support prosecution in the cases of rape, and the victim of rape is called now not a victim, but a private prosecutor, and actually plays the complicated role of the (professional) public prosecutor.

In practice, it looks like that: the women who had undergone rape, shall as soon as possible apply to the Raion (local) court at the location of committed crime (article 294 part 1 of the Criminal Code of Practice of RK). At the court she shall write a claim in full accordance with the rules of the above mentioned article 390 of the Criminal Code of Practice, she could hardly aware of. In the claim she shall give information about the criminal who committed rape, may be she does not know him, what evidences may prove the circumstances of crime in the court and guilt of the criminal (article 392 of the Criminal Code of Practice of RK). The claim shall be submitted with the copies, one copy - to the court, the other - for the criminal. She should transfer to the judge the objects and documents - her own things, including her underwear, and the underwear of the criminal, or other objects, things, which may testify to the case of rape. The woman should present a petition to appoint a forensic medical examination to reveal if she had bodily injuries, and to provide a biologist expert examination, for the latter a vaginal smear and the criminal's sperm shall be presented for analyses, as well as her own and the criminal's underwear. Due to the fact, that the criminal may be unknown, which means he is to be found and caught, such a claim will have a zero chance for consideration.

This is an aspect of theory of a woman's actions after she has undergone rape, established by the national Law, – the Criminal Code of Practice of the Republic of Kazakhstan. In reality, a raped woman is greatly stressed, and she must go to the Raion court, to the judge on duty, reception hours - only two per a day, from 9 to 11 o'clock, to stand in a line, as these hours are mainly for the citizens with the civil suits. She can hardly be aware of how and in what number of copies she is supposed to write her claim, how to prove the case of the rape and guilt of the criminal, how and when to submit petitions. More likely, the woman who has undergone rape will get additional stress when she aware her own helplessness, and vulnerability of her life and health both unprotected by the State.

As an example of other approach to another problem - cruel treatment of animals, it should be noted, that there is an appropriate article in the Criminal Code (276), according to which cruel treatment of animals is defined as a criminal venture against health of the population and morality as well. This crime belongs to the cases of public prosecution; i.e., the bodies of Internal Affairs carry out the inquiry on the case, the criminal proceedings are instituted, at the end of inquiry the inquirer compiles the protocol of prosecution to be confirmed by the Head of the inquiring body, and then the protocol of prosecution together with the materials on the case is submitted to the Prosecutor's office to be further transferred to the court (art.285-289 of the Criminal Code of Practice RK). So, as far as cruel treatment of animals is concerned, the persons involved into the criminal procedure are: an inquirer and the Head of the Internal Affairs body; supervision for the inquiry is to be carried out by the Prosecutor, and only after that the materials of inquiry are to be transferred to the court. And, speaking about the case of rape, the woman - victim could not be supported by the above officials, she is alone.

Article 8 of the Criminal Code of Practice of RK states: "The criminal proceedings are aimed at prompt and complete exposure of crimes, conviction of criminals, and instituting criminal proceedings against the individuals who committed the crimes, at fair trial, and correct application of the Criminal Law".

In this case, the Criminal Law is the Criminal Code RK, which puts the crime of rape, as provided by the article 120 part 1 of the Criminal Code of the RK into the category of the grave crimes. At the same time, the Criminal Code of Practice of RK in relation of the rapes does not reach the objectives of the criminal proceedings to promptly and completely expose the crimes, convict the criminals, institute the criminal proceedings against the individuals who committed crimes. The Criminal Code of Practice of RK shifted all those tasks onto the shoulders of the victim of the crime, onto the shoulders of the woman who had undergone a rape.

In accordance with the article 8 part 2 of the Criminal Code of Practice of RK: "the order of criminal proceedings established by the law shall ... facilitate strengthening of legality, law and order, prevention of crime, formation of respect towards law". Current situation with the cases of rape does not meet the objectives of the criminal proceedings. Crime of rape will grow, and not only certain citizens will suffer, but also legality, law and order in the country.

All above is equally related not only to rape, but also to new body of the crimes, provided by the Criminal Code of RK: forced actions of sexual nature (art.121 of Criminal Code of RK) and compulsion to sexual intercourse, sodomy, lesbianism or other acts of sexual nature (art. 123 Criminal Code of RK).

To bring this situation into accordance with the Criminal Code of RK, the Constitution of RK, and with ordinary and eternal things as justice, legality, protection and punishment, the Law of the Republic of Kazakhstan shall amend the existing Criminal Code of Practice of RK: the article 33 part 1 - to exclude the following words: "120 (by the part one), 121 (by the part one), 123", and the article 34 part 1 after the words "117 (by the parts one and two)" and before the words "135, 139" to set forth in the following wording "120 (by the parts one and two), 121 (part one), 123".