

## **On judicial practice on application of Article 6 of the Penal Code of the Republic of Kazakhstan**

### *Unofficial translation*

Normative decision of the Supreme Court of the Republic of Kazakhstan dated December 22, 2016 № 15.

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In order to ensure a correct and uniform judicial practice on application of Article 6 of the Penal Code of the Republic of Kazakhstan (hereinafter – the PC), the plenary session of the Supreme Court of the Republic of Kazakhstan

#### **resolves:**

1. Retroactive effect of the penal law established by article 6 of the Penal Code shall be based on the requirements of subparagraph 5) of paragraph 3 of article 77 of the Constitution of the Republic of Kazakhstan (hereinafter- the Constitution), also article 15 of the International Covenant on Civil and Political Rights (New York, December 16, 1966, ratified by the Law of the Republic of Kazakhstan dated November 28, 2005 No. 91-III, enforced for the Republic of Kazakhstan on April 24, 2006).

According to constitutional requirements, laws that establish or strengthen liability, impose new duties on citizens or worsen their situation do not have retroactive effect. If, after committing an offense, the liability for it is cancelled or mitigated by law, a new law shall be applied.

2. The courts, when applying article 6 of the Penal Code, shall strictly comply with the requirement that the law eliminating the criminality or penalty of an action, mitigating liability or punishment or otherwise improving the situation of the person who committed a criminal infraction shall have a retroactive effect, in other words, shall be applied to the persons who committed the relevant act before enactment of this law, including the persons serving a sentence, as well as those who have served a sentence, but have a conviction. The law establishing the crime or penalty of an action, enhancing responsibility or punishment, and also otherwise aggravating the situation of the person who committed this action, shall not have a retroactive effect.

3. The law on which a separate act previously regarded as a criminal infraction is excluded from criminal actions shall be recognized as being the law eliminating crime or penalty of an action. This can happen by complete exclusion of a provision from the PC.

Less stringent is the law, which provides for a more lenient penalty, and the maximum term or amount of the sanction of which is lesser in its same form. In the equal maximum

amount of penalty, less stringent shall be deemed the law, the minimum term or amount of penalty of which is more lenient or has an alternative sanction.

In any other way, the law that mitigates the rules for sentencing, conditions for exemption from criminal liability or punishment, reduces the terms of expiry or expungement of a criminal record shall be recognized as improving the situation of the person who committed a criminal offense.

Laws mitigating responsibility or penalties shall be the laws in which:  
the penal provision was changed towards mitigation;  
alternative form of a more lenient sentence was introduced in the penal part of the article;  
additional punishment in the penal part of the article is excluded.

4. If the new penal law establishes the same sanction as the previous law, and does not improve in any way the situation of the person who committed a criminal offense, then it has no retroactive effect and shall not be subject to application. In this case, the provision of article 5 of the PC shall be applied, providing that criminality and penalty of an action shall be determined by the Law, effective at the time of commission of this action.

5. Decriminalization of an action can be effected by amending the disposition of the penal law provision and partial decriminalization of the action by including or excluding additional constituent elements of a criminal offense already existing in the disposition, also by amending the provisions of the General Part of the PC.

If the new criminal law eliminates the criminality of an act (decriminalization of a criminal offense), the person convicted of such an act shall be recognized as not having a criminal record, and the fact of his conviction shall not entail penal consequences and shall not be taken into account when determining the recurrence, recidivism of crimes, and sentencing.

6. The pre-trial investigation body, courts of trial, appeal and cassation shall directly apply the retroactive law in the criminal proceedings. And, if the new criminal law eliminates the criminality and punishability of the action, then in accordance with paragraph 6 of part 1 of Article 35 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter - the CPC), the case shall be terminated on these grounds at any stage.

The effect of the criminal procedure law in time shall be regulated by Article 5 of the CPC.

The courts of trial, appeal and cassation may harmonize previous verdicts in relation to persons subject to the terms of article 6 of the PC, if these verdicts were not reviewed in the execution order (article 476 of the CPC).

7. The reference that more lenient is the law, which improves position of the person held criminally liable shall also apply to the rules on recognition of recidivism, mitigating and aggravating circumstances of criminal liability or punishment, statute of limitation for criminal prosecution, parole, expiry and expungement of criminal record and so on.

8. In the event of sentencing a person, held criminally liable within the upper limits of the sanction of the Special Part of the PC and reduction by the new law of this upper limit, the rules provided for in Article 6 of the PC shall apply.

If an act committed by a person escalates into a more indictable offense or otherwise aggravates the situation of the person who committed the criminal infraction, then the new penal law shall not have a retroactive effect.

9. The courts shall bear in mind that when applying the rules on the retroactive effect of the penal law, selective application of the rules of both the new and the old penal law on the same issue that improve position of the person held criminally liable shall not be allowed, and only that rule shall apply, which entails favorable legal consequences for him/her.

10. In cases when the penal law has been changed several times between the day the criminal offense was committed and the day the sentence or judicial act of the court of appeal was passed, the most favorable penal law shall be applied to the person held criminally liable, including the intermediate law.

11. If, at the time a new criminal law is enacted, there is an enforceable court judgement, retroactive application of the criminal law shall be made under the provisions of paragraph 15 of Article 476 of the Code of Criminal Procedure in the manner of enforcement of the judgement. At the same time, issues of dismissal of the case, exemption from punishment or mitigation of punishment, reclassification of the act committed by the convicted person, reduction of the sentence and recidivism of crimes shall be considered. Pursuant to part one of Article 477 and part three of Article 478 of the Code of Criminal Procedure, such issues shall be resolved by the district or equivalent courts in the place where the sentence is being served , apart from the case referred to in part 3-1 of Article 478 of the Code of Criminal Procedure, and, in the absence thereof, by a higher court at the request of the convicted person or on the application of the institution or body serving the sentence.

**Footnote. Paragraph 11 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall come into force from the date of its first official publication).**

12. When considering issues related to the sentence enforcement, the court shall have the right to apply retroactive effect of the penal law by changing the qualification of a person's actions in accordance with the article of the new penal law to a less serious criminal offense and reducing the penalty within the sanction of this article, non-application of additional penalty.

At the same time, it shall not be entitled to review the court verdict in the part of evidence assessment, resolving a civil lawsuit in criminal proceedings and other issues not provided for in Article 476 of the CPC.

**Footnote. Paragraph 12 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall be promulgated from the date of its first official publication).**

13. When applying part 2 of Article 55 of the PC at the sentence enforcement stage in cases where the conviction is sentenced to the convict with reference to extenuating or aggravating circumstances not recognized by the court as such, or when the verdict does not indicate mitigating circumstances, although their presence in the case is apparent, the courts, shall bear in mind the following:

if the verdict does not indicate the presence in the case of the circumstances mitigating or aggravating the criminal liability and penalty or that one or another circumstance referred to in Articles 53, 54 of the PC is taken into account by the court when sentencing, then the court shall not be entitled to recognize and indicate the existence of such circumstances;

if in the sentence, the court, when sentencing the convicted person, did not recognize the circumstances mitigating the criminal liability and penalty, but actually took these circumstances into account by listing them, then in the sentence enforcement order the court shall have the right to infer that such circumstances exist in the case.

14. Under parts 2 and 4 of Article 58 of the PC, on cumulative criminal offences of little and average gravity, and also if the cumulative criminal offences comprise at least one especially grave crime and criminal infraction for which a fine was levied, the final punishment shall be imposed only by absorption of less severe punishment by more severe.

In this regard, if, prior to the enactment of this rule, a person was convicted of cumulative criminal offences of little and average gravity, as well as of especially grave crime and criminal infraction, for which a fine was levied, and the punishment was assigned to him by partial or full cumulation, then in the sentence enforcement order the court shall rule absorption of less severe punishment by more severe.

15. In part 3 of Article 58 of the PC, an additional rule is provided on cumulative sentencing on criminal offenses by absorption of less severe punishment by more severe.

In this regard, if prior to the enactment of the new penal law, a person was convicted of cumulative offences, comprising at least one grievous or particularly grave crime, and the punishment was assigned to him by partial or full cumulation, then in the sentence enforcement order the court shall not be entitled to apply the rule of absorption of less severe punishment by more severe and reduce the sentence of the convict.

16. When a person is convicted of criminal offenses, which before enactment of the law were classified as grievous or particularly grave, and the punishment was assigned to him for cumulative offence by partial or full cumulation, then in the sentence enforcement order the court shall apply the rules of absorption of less severe punishment by more severe if these acts are attributed by law to criminal infractions or offences of little and average gravity.

17. If the decision on imposing a specific sentence is motivated in the verdict by the circumstances specified in part 2 of Article 59 of the PC (as amended in 1997), then the court, when excluding the application of this rule from the sentence, shall deliberate on reducing or commuting the sentence taking account of the circumstances of the case, established by the court. At the same time, at the sentence enforcement stage, a new assessment of the

circumstances of the case established by this court verdict shall be unacceptable, as well as reference only to the fact that the penalty is imposed within the sanction of the article.

18. When considering a petition in the sentence enforcement order in respect of persons serving sentences in penal colonies of maximum or special security for committing a grievous or particularly grave crime, respectively, in case of recidivism or dangerous recidivism of crimes, and repeat conviction for crimes of little and medium gravity, in accordance with article 14 of the PC the corresponding recidivism shall be excluded from the last sentence.

Such persons shall continue to serve the sentence in a maximum or special security penal colony, since the term of imprisonment and the type of correctional colony shall be determined on the basis of Articles 46 and 60 of the PC.

19. The rule on retroactive effect of a new, more lenient penal law shall also apply to persons convicted and serving a sentence or having served a sentence, but having a previous conviction under a more stringent law.

When applying the rules on retroactive effect of the penal law to persons who have served their sentences, the courts shall bear in mind the following:

if the new penal law mitigates liability, eliminates criminality or penalty of acts (decriminalization), but the punishment for this criminal offense has already been served or executed and application of the new law does not entail legal consequences for the convicted person, then the new law shall not be applied. In such cases, petitions shall be dismissed;

if the person has already served the sentence and the criminal record has not been expunged, and application of the new law entails legal consequences for the convicted person, such as: reduction of the conviction expungement term, exclusion of the crime recidivism, the new penal law shall be applied.

The petition of persons who have already served a criminal sentence shall be considered by the court that passed the sentence.

A ruling denying a submission from the institution or organ executing the sentence or an application by the convicted person for exemption from punishment or mitigation of the sentence because of the retroactive application of a criminal law, or leaving such an application or submission without consideration, may be reconsidered pursuant to the procedure laid down in Chapter 49 of the Code of Criminal Procedure.

**Footnote. Paragraph 19 as amended by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 6 of 11.12.2020 (shall be enacted from the date of its first official publication).**

20. In the event of the repeated appeal of the institution or the body executing the punishment, with representation or convicted person with a petition for release from punishment or mitigation of punishment due to the issuance of a penal law with retroactive effect, when, on representation of the institution or the body that executes the punishment, or

on the petition of the convicted person, entered earlier on the same grounds, the court has already ruled to dismiss them, this representation or petition shall be returned without consideration.

If the indicated circumstance is established during consideration by the court of the representation of the institution or the body executing the punishment, or the petition of the convicted person, then the proceedings on this petition or representation shall be terminated. However, this shall not preclude filing of re-submission or a petition on other grounds.

21. When the case is under cassation proceedings on other grounds provided for in the CPC, this court shall apply Article 6 of the PC.

If the cassation petition (protest) contains only arguments on application of Article 6 of the PC, that is, the petition (protest) does not meet the requirements established by part 1 of Article 488 of the CPC, then in accordance with paragraph 1 of the first part of Article 489 of the CPC, the judge shall return this petition (protest), without consideration. In this event, the author of the appeal shall be explained that regarding the application of Article 6 of the PC, one should apply to the court at the place of the sentence enforcement in the manner prescribed by Articles 476, 477 of the CPC.

22. Normative resolution No. 7 of the Supreme Court of the Republic of Kazakhstan dated October 28, 2005 “On some issues of application by the courts of the Law of the Republic of Kazakhstan dated December 21, 2002 “On amendments and additions to the Penal, Criminal Procedure and Penal Execution Codes of the Republic Kazakhstan" shall be deemed invalid.

23. In accordance with article 4 of the Constitution, this regulatory resolution is included in the law in force, is generally binding and shall be enforced from the day of its first official publication.

*Chairman  
of the Supreme Court  
of the Republic of Kazakhstan  
Judge of the Supreme Court  
of the Republic of Kazakhstan,  
secretary of the plenary session*

*K. MAMI*