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Review project of the Concept of the Republic of Kazakhstan: Ten Steps to Reduce the Prison Population¹

The present report reviews the *Concept of the Project on the Ten Steps to Reduce the Prison Population (in the remits of the plan to ensure that Kazakhstan no longer appears among the top 50 leading States in terms of their prison population)* (hereinafter: Prison Population Reduction Project) prepared by the High Court of the Republic of Kazakhstan, the Office of the Prosecutor General of the Republic of Kazakhstan and the Ministry of the Interior of the Republic of Kazakhstan.

The report firstly presents overall evaluation of the Prison Population Reduction Project, noting its strengths and highlighting areas where it could be further developed. It then proceeds to examine each of the ten sections of the Project, summarising what the Project proposes and, where appropriate, offering a short comment of detail.

Introduction: Overall evaluation of the Prison Population Reduction Project

The introductory part to the Prison Population Reduction Project is well developed in that it describes the current situation in Kazakhstan in terms of its prison population and, by drawing on statements by various governmental stakeholders, underscores the need and rationale of the Project. The section benefits from good statistical data covering years 1991-2012 and has good examples of practice in other countries around the world. It then moves on to present ten areas which the Project proposes to concentrate upon in order to reach the set aims.

Throughout these ten thematic sections there is a good use of country examples and statistics however this is not done comprehensively or consistently- there are some sections which do not have any statistical data or country examples at all. Therefore it feels that parts of the Project have been developed by different agencies and there is considerable difference in detail that different sections offer. Thus, for example, the section on the alternative dispute resolution process (section 5) is rather exhaustive whereas the section on gaps in the existing legislation (section 1) appears to lack the requisite level of detail.

Equally, throughout the ten thematic sections a lack of concrete, practical steps on how to address the problem at hand can be observed; no short-, mid- and long-term priorities are identified.

¹ The present review has been undertaken at the request of the Legal Policy Research Centre (Kazakhstan).

It is unclear whether there has been any consultations carried out with the relevant stakeholders, especially the civil society, in the Prison Population Reduction Project; it is crucial however that due effort is directed in gaining public support for the proposed reforms.²

Overall, the Prison Population Reduction Project takes a rather legalistic approach as it primarily focuses on legislation and less on practical measures of its proper implementation. As such, the present Prison Population Reduction Project is fairly comprehensive review of how to reduce the scope of imprisonment, develop fairer sentencing policies, to ensure more widespread use of alternatives to imprisonment, reduction of pre-trial detention and assisting with social reintegration. However there are areas that are left out of the project such as the need to review imprisonment applied to certain categories of individuals (like women, children and persons with disabilities); improving the efficiency of the criminal justice system by, for example, building the capacity of criminal justice actors and improving cooperation between criminal justice agencies; access to legal assistance and legal aid. This leads to the conclusion that the Prison Population Reduction Project cannot be said to represent a comprehensive, evidence based strategy to reduce the prison population in Kazakhstan. It is however a good start in the direction of the aim set and with further development of other areas as identified above, could make a significant contribution the achievement of the aims set.

1. Gaps in the current legislation and its improper implementation.

The Prison Population Reduction Project proposes to address this issue separately in the remits of a planned project by the Office of the Prosecutor General of the Republic of Kazakhstan.

Comment:

The UNODC in cooperation with the ICRC in their recent Handbook on Strategies to reduce overcrowding in prisons argue:

‘Governments are encouraged to develop *comprehensive* national strategies that are evidence based, respond to local circumstances and needs, and which foresee an alternative response to crime, with imprisonment being seen as a measure of last resort in line with international standards’. (emphasis added)³

The approach adopted by the Prison Population Reduction Project under this first heading seems counterproductive in the light of this recommendation by the UNODC and ICRC as it takes the discussion about the existing gaps in the legislation and difficulties with its implementation at least partially away from the discussion that would surround the discussion of the Prison Population Reduction Project. This indicates a fragmented approach as opposed to a comprehensive and holistic approach called for by the UNODC and ICRC.

2. The repressive approach currently adopted by the criminal law

2.1. Long sentences

The Prison Population Reduction Project notes that currently the penalties for certain crimes in Kazakhstan are excessive, making comparisons with experiences of European countries and proposes lowering imprisonment terms and/or substituting these with alternatives to imprisonment.

² UNODC in cooperation with the ICRC *Handbook on strategies to reduce overcrowding in prisons* New York (2013); at pp. 41-43.

³ *Ibid*; at p. 39.

Comment:

As argued by the UNODC and ICRC:

‘The starting point for reform is most often a legislative review to ensure that domestic legislation complies with international standards, and in particular with principles in those standards and norms that encourage the use of imprisonment sparingly and recommend the use of non-custodial measures and sanctions, instead of deprivation of liberty, as far as possible’.⁴

This echoes the approach of the so-called Tokyo Rules,⁵ Rule 1.5 of which recommends that States rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender. Rule 2.7 further requires that ‘[t]he use of noncustodial measures should be part of the movement towards depenalisation and decriminalization instead of interfering with or delaying efforts in that direction’.

In the light of these points, the Prison Population Reduction Project appears to fail to make a distinction between *decriminalisations* of certain offences (i.e., removing of a conduct or activity from the sphere of criminal law whereby different kind of sanctions are imposed (like administrative sanctions) or the sanctions are abolished all together); and *depenalisation* (i.e., a relaxation of the penal sanction exacted by law for s specific offence). The former is absent from this section of the Project and this may be a shortcoming as instead of scrutinising the appropriateness of certain acts remaining as criminal acts, the Project only focuses on the relaxation of the sanctions. While depenalisation is also undeniably important, given the need for comprehensive approach towards the reduction of the prison population, it would be advisable that a review of existing criminal offences would be carried out in order to determined whether there are possibilities for decriminalisation of any of these.

Furthermore, this section of the Prison Population Reduction Project does not discuss two important further measures:

- (i) The removal of mandatory minimum sentencing provisions; and
- (ii) Restricting the use of life sentences

As to the former, it must be noted that Rule 3.3. of the Tokyo Rules requires that:

‘Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law’.

This corresponds to the concern raised by the Human Rights Committee that mandatory minimum sentencing can lead to the imposition of punishments that are disproportionate to the seriousness of the crimes committed, raising issues of compliance with various articles of the ICCPR;⁶ similar concerns have also been raised by the Committee on the Elimination of Racial Discrimination.⁷ The UNODC and ICRC report that various studies have found that mandatory minimum sentences are not an effective sentencing tool but rather, they constrain judicial discretion without offering any increased crime prevention benefits.⁸

⁴ Ibid, p. 44.

⁵ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. Res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

⁶ Concluding observations of the Human Rights Committee: Australia. UN Doc (2000) A/55/40, paras. 498-528.

⁷ Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia. UN Doc (2000) CERD/C/56/Misc. 42/Rev.3, para 16.

⁸ Supra note 2, pp. 48-49.

Therefore it would be useful if the Prison Population Reduction Project would review the appropriateness of maintaining the minimum sentencing provisions in Kazakhstan.

As to the latter point, the restricting of the use of life sentences, while the international law *per se* does not impose a prohibition on the application of the life imprisonment, there are certain restrictions encapsulated most notably in the provisions of the ICRC. These, as argued by the UNODC and ICRC:

‘ (...) underline[s] that the essential aim of the penitentiary system is the reformation and social rehabilitation of the prisoner, which would imply that the elimination of the possibility of release would contravene this principle’.⁹

Moreover, in the light of such recent judgements by the European Court of Human Rights as in the case of *Vinter and Others v United Kingdom*,¹⁰ it is now clear that sentencing without the possibility of release is an affront to human dignity and those subject to life imprisonment have a fundamental right to have a prospect of release.

Consequently it would be useful if the Prison Population Reduction Project would examine the current use of life sentences in Kazakhstan and review their application in the light of most recent developments of international law in this area.

2.2. Deficiencies in the classification of crimes

This section of the Prison Population Reduction Project examines the classification of crimes in categories of their severity and proposes a number of measures to improve the current approach.

2.3. Harshness of punishment in case of repeated offending

This section of the Prison Population Reduction Project addresses the current approach towards repeated offending, notes its harshness and proposes a number of measures how to mitigate this harsh approach.

3. Deficiencies in sentencing by the Courts

3.1. Imprisonment as the main penalty imposed by the Courts

This section of the Prison Population Reduction Project reviews the practice of the Kazakh Courts and argues that imprisonment represents by far the most ‘popular’ form of sanction with every second person coming before the criminal courts of Kazakhstan being sent to a prison. In order to address the prevailing ‘preference’ of the courts to impose imprisonment, the Project proposes to recommend reviewing and revising the normative regulation No 1 of 30 April 1999 ‘*On the observance of legitimacy during the sentencing process by the courts*’ by the High Court of the Kazakhstan. This review would include explanation and direction to the courts on the appropriate use of the imprisonment.

Comment:

There are two issues that the Prison Population Reduction Project could benefit from in this section:

⁹ Ibid; p. 50.

¹⁰ Application Nos 66069/09, 3896/10 and 130/10, Merits, 9 July 2013.

- (i) Considering ways how the above-mentioned normative regulation could be effectively implemented. At this stage, it is unclear how a mere revision of this instrument would lead to practical, tangible changes on the ground. While it is understood that the courts in Kazakhstan would be bound by the direction given by the High Court, it is reasonable to expect that the practical implementation may take time and there might be confusion among the courts as to how this normative regulation is to be applied. It might therefore be useful to consider further measures that would ensure proper implementation, like education seminars for judges.
- (ii) Incorporating the importance of alternatives to imprisonment in the said review in a clear and comprehensive manner. At this stage,¹¹ the Prison Population Reduction Project only notes that the review of the normative regulation would underline the importance of considering less stringent punishment allowed by the law but does not make direct mention of alternatives to imprisonment. It is however important that the legislation is reviewed to allow for a sufficient number and variety of non-custodial measures and sanctions available to the courts and that these alternatives to imprisonment are duly considered by the courts.

Moreover, given that alternatives to imprisonment appear to be relatively under-utilised in Kazakhstan (for example, in 2009 there were 1764 fines and 1212 community services imposed while in 2010 these figures were at 1643 and 1864 respectively; this should be considered against the backdrop 39 391 guilty verdicts pronounced in 2009, 18 788 of those carrying prison service; in 2010 there were 31 968 guilty verdicts and of those 12 030 carried prison service.),¹² it may be required that educational seminars for judges on the application of alternatives to imprisonment are carried out. Equally, it is crucial that the alternatives to imprisonment are made practically available/possible.

3.2. The prevailing retributive approach inherited from the Soviet times

This section of the Prison Population Reduction Project describes the impact left by over 50 years of Soviet criminal justice approach which was characterised by severe retributive and punitive approach. It suggests to 're-orientate' both the prosecutors and judges away from such an approach.

Comment:

The retributive approach of the criminal justice system is one of the main obstacles in reduction of prison population in all post-Soviet area. It is commendable that the Prison Population Reduction Project recognises this as an important factor; however it is unclear what would such 're-orientation' of both the prosecutors and judges entail; what practical measures are proposed. The section therefore lacks concreteness.

3.3. The existing means of measuring the effectiveness of the work of prosecutors and judges

The Prison Population Reduction Project acknowledges that the measures currently in place on measuring the effectiveness of the work of the prosecution service and the courts inadvertently lead to further cases of imprisonment and therefore proposes to revise the ways the effectiveness

¹¹ It must be noted that the Project discusses the use of alternatives to imprisonment in more detail in Section 4 (see below).

¹² LPRC 'Сокращение тюремного населения в Казахстане' (2011), Almaty, p. 89 and 97.

is measured. This is highly commendable albeit yet again the Project lacks details on how exactly this is to be achieved.

4. Inadequate use of alternatives to imprisonment

4.1. Arrest (pre-trial detention) as the main measure during the pre-trial stage

The Prison Population Reduction Project notes that arrest is by far the most popular means of restraint and this has significant impact upon the overall numbers of the prison population in Kazakhstan. It notes that in 2012 there were 13 689 requests for pre-trial detention and of those, 94.4% were granted.

The Project notes that there is an increase in the possibilities to use of alternatives to pre-trial detention in the new Code of Criminal Procedure; however it is also suggested to use arrest (pre-trial detention) as a measure of last resort. Moreover, in this section the Project also provides some details as to how this is to be carried out by noting that the investigatory bodies, prosecutors and courts would be 're-oriented' towards the use of alternatives to pre-trial detention and that a new service to implement the house arrest would be established.

Comment:

It is entirely in line with the international standards that the Project requires the application of pre-trial detention as a measure of last resort. Indeed, the Human Rights Committee has argued that pre-trial detention should be used only where it is lawful, reasonable and necessary and has agreed it may be necessary in the following circumstances:¹³

- to prevent flight;
- to prevent interference with evidence;
- to prevent the recurrence of crime;
- where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner.

In order to reduce the use of pre-trial detention, the UNODC and ICRC recommend the inclusion of the following:¹⁴

- removing the obligation for pre-trial detention for any offence, ensuring that pre-trial detention decisions are not based on the offence committed, but on an objective evaluation of factors, which may justify pre-trial detention;
- prohibiting the use of pre-trial detention for certain offences, which carry short prison sentences;
- requiring the judicial authority to give reasons for its decision regarding detention, based on the facts of each individual case;
- increasing possibilities for bail and setting fairer bail amounts;
- introducing other alternatives to pre-trial detention, such as release on personal recognizance supervision, house arrest or other restrictions.

The Prison Population Reduction Project unfortunately does not discuss the details of various alternatives to pre-trial detention and this is a shortcoming- as noted above (see Comment on Section 3.1. above), the use of alternatives to imprisonment in Kazakhstan is very low.

¹³ Human Rights and Pre-Trial Detention. *A Handbook of International Standards relating to Pre-Trial Detention, Professional Training Series no. 3* (New York: United Nations, 1994), pp. 14–15.

¹⁴ *Supra* note 2; p. 96.

The establishment of the system supervising the implementation of house arrest as noted in the Project is commendable. However in relation to the second measure, the Project yet again lacks detail on the former proposition on 're-orienting' the investigatory bodies, prosecutors and courts towards the use of alternatives to pre-trial detention. How is this to be achieved in practice? Moreover, this section of the Project also does not address the so-called pre-charge period: period of time that an individual can be held and questioned by police prior to being charged with an offence. The UNODC and ICRC report that:

'Suspects will sometimes be held in police or pre-trial detention facilities without being charged for months or even years, or will be held on the basis of a so called "holding charge", which can be repeatedly renewed while an investigation is, apparently, undertaken'.¹⁵

Such a situation can contribute significantly to the overall prison population and the Kazakh authorities ought to examine whether this is the case in Kazakhstan.

4.2. Failure to use the system of electronic monitoring (tagging)

In this section the Prison Population Reduction Project notes that despite the legislation of 18 January 2011 established the requisite legal basis for the system of electronic monitoring, to date the system remains non-operational. The Project proposes to speed-up the practical implementation of the said legislation and setting up the system of electronic monitoring which would thus allow for alternative measure for pre-trial detention.

Comment:

The UNODC and ICRC make the following comment on the pros and cons of using electronic monitoring:

'In some countries the experience of electronic monitoring has been positive and is seen as an effective way of keeping track of offenders in the community, thereby providing the confidence that judges require to apply non-custodial measures and sanctions. However, concerns have also been raised in relation to the use of electronic monitoring. These include the fact that the technology is expensive and therefore this method of supervision may not be suitable for many low-resource countries, where using human beings to supervise offenders may be much more cost effective. A further and more fundamental concern is that the use of electronic bracelets adds an additional layer of supervision and restriction on the offender, sometimes where not justified, thereby infringing excessively on the privacy and human dignity of the offender. Such considerations need to be carefully weighed before introducing the use of electronic monitoring, especially in low-resource countries'.¹⁶

It is therefore recommended that the Kazakh authorities consider carefully the requisite balance between then public safety and the privacy and human dignity of the suspect offender when implementing the system of electronic monitoring in the country. Of particular relevance here is the recently adopted Recommendation of the Council of Europe Committee of Ministers to member States on electronic monitoring¹⁷ which sets out in detail the way electronic morning must be implemented and considers both the human rights and ethical aspects of the use of the electronic monitoring.

¹⁵ Ibid; p. 92.

¹⁶ Ibid; p. 111.

¹⁷ Recommendation CM/Rec(2014)4 of the Committee of Ministers to member States on electronic monitoring (adopted by the Committee of Ministers on 19 February 2014, at the 1192nd meeting of the Ministers' Deputies)

5. Weaknesses in employing the alternative dispute resolution process system

As an introductory comment to this section, it must be noted that the UNODC and ICRC note the benefits of diversion to an alternative dispute resolution process as follows:

‘There are many advantages inherent in the process of diversion. For the offender, he or she may avoid a criminal record and its negative consequences, benefit educationally particularly from the programmes designed to prevent reoffending, or be able to make direct amends to the victim and, through this, may develop empathy and a sense of social responsibility. In restorative justice processes, victims often express higher levels of satisfaction with the results. The prosecution service and courts benefit as well, since resources are freed to address more serious or complex cases and, where diversion programmes are effective, the likelihood that the defendant will offend in the future is reduced’.¹⁸

It is thus positive to see that the Kazakh legal system allows for this mechanism and the section of the Prison Population Reduction Project devoted to this system is fairly detailed in examining both the existing legislation, the potential impact of the new draft legislation currently under consideration as well as obstacles to the effective implementation of the system in practice.

5.1. The prevailing approach of the investigative bodies to ‘get cases to the court’

The Prison Population Reduction Project recognises the prevailing tendency among the investigative bodies to get as many cases as possible to courts which thus precludes effective use of alternative dispute resolution processes. Since one of the key reasons for this is the attribution of the quality score of the work of the investigative services, the Project proposes that the key element for assessing the quality ought to become their productivity like disclosing the crime and effectiveness like witness protection. This is very prudent and commendable as removes wrongly placed ‘initiative’.

5.2. Lack of knowledge by the parties of the way the system of alternative dispute resolution process operates

The Prison Population Reduction Project acknowledges lack of proper knowledge of the system of alternative dispute resolution process as one of the obstacles in proper implementation of this measure. It notes that the Criminal Procedure Codes does not oblige the investigative authorities to facilitate the process of alternative dispute resolution and therefore rightly suggests that the new Criminal Code and the Criminal Procedure Codes duly detail the elements of this process and oblige the investigative authorities to facilitate the usage of this system.

5.3. Dismissal of the cases on the basis of alternative dispute resolution process by the investigative bodies or courts

The Prison Population Reduction Project notes the statistics on the use of alternative dispute resolution: during the pre-trial stage it grew from 22% in 2010 to 37% in 2012 while at the trial stage these figures stood at 39.2% in 2010 and 47.2% in 2012. This indicates steady improvement in the use of the system; the Project proposes further measures how this can be strengthened.

5.4. Indefinite periods of appeal for the application of alternative dispute resolution process by the investigative bodies

The Prison Population Reduction Project recognises that currently the decision of the investigator to close the case on the basis of alternative dispute resolution process can be overridden by a

¹⁸ Supra note 2; p. 102.

prosecutor at any time, without any limitation. The situation will be rectified with the new Criminal Procedure Code where there will be strict time limits imposed for appeals of such decisions taken by the investigators.

5.5. Lack of precise procedure for alternative dispute resolution process and its documentation

The Prison Population Reduction Project notes the lack of precise legislative basis that would regulate the way to formulate the documentation required for the alternative dispute resolution process. The Project thus proposes both legislative amendments as well as sample documentation to be produced.

6. Obstacles to the wider use of the early conditional release

6.1. Prohibition to use the early conditional release for certain categories of crime

In this section the Prison Population Reduction Project examines the existing legislation and restrictions it envisages for the use of the early conditional release and notes the forthcoming changes in the existing system which would come into force with the adoption of the new Criminal Code.

6.2. Taking into account the views of the victim when considering the early conditional release

The Prison Population Reduction Project here notes the necessity to amend the existing normative regulation No 10 (of 25 December 2007) '*On the early conditional release and substitution of the remaining imprisonment sentence with less stringent measure*' with an explanation that the views of the victim of the crime in question must not be given the main priority but rather taken into consideration cumulatively with other criteria.

Comment:

Similarly to the comment made under section 3.1. , also here it is unclear how a mere amendment of the normative regulation would lead to the envisaged results. It is expected that the courts are accustomed to giving high weight to the views of the victims when considering early release and therefore, while of course the normative regulation would be binding upon all courts in Kazakhstan, it may take time for the new practice to establish. It might consequently be necessary to accompany the said amendments with some sort of educational campaigns for judges.

6.3. Failure to take measures to restore damage caused by the crime

The Prison Population Reduction Project acknowledges that of about 42 000 prisoners, about 13 000 of them have outstanding claims against them for the restoration of the damages caused by the crime they have committed; the situation is further exacerbated as only about quarter of these prisoners are employed. The Project therefore not only underscores the changes forthcoming with the adoption of the new Criminal Code but also proposes that should the prisoner be able to prove to the court that s/he has a profession (or has obtained one during the imprisonment) which would allow her/him to obtain employment upon release and thus allow to restore the damaged caused, the court is at the liberty to employ early conditional release.

Comment:

While the said proposal is valuable, it is yet again unclear how this would be implemented in practice. Would this be in the form of a normative regulation to the courts or some other measure? The proposal made lacks concrete steps of implementation.

6.4. Failure to use other means to employ the early conditional release

In this section the Prison Population Reduction Project acknowledges the limitations imposed by the current legislation which does not allow for wider use of the early conditional release. It notes that the situation is likely to improve with the coming into force of the new Criminal Code but also proposes to adopt the practice of European countries like France and Spain. In order to implement this, the Project suggests drafting of the concept note on the specialised penitentiary courts or specialised judges who would handle cases on the implementation of punishment.

Comment:

This section is well thought-through as it not only examines the existing legislation and highlights the gaps, but also takes note of how some of these gaps will be addressed with the coming into force of the new Criminal Code. Moreover, it looks beyond the legislation and examines the practice of other countries and makes concrete suggestions how such practice can be implemented in Kazakhstan. The suggested concept note on either specialised courts or judges is an example of concrete measure; albeit it is clear that establishing one or other of these options in practice will require time so it would be prudent to view this as a long-term aim and it may be necessary to think of an interim measure.

7. Restrictions in replacement of a principal penalty with an alternative penalty

7.1. Distinction between the early conditional release and the replacement of a principal penalty with an alternative penalty

In this section, the Prison Population Reduction Project notes that in both the current and the new Criminal Code there are instances when the applicable time scales for the early conditional release and the replacement of a principal penalty with an alternative penalty coincide which has led to the situation whereby the replacement of a principal penalty with an alternative penalty is applied about ten times less frequently than the early conditional release (example given: in 2012 out of 12 618 released, 5262 (42%) were released under the early conditional release while only 507 (4%) had their punishments (imprisonment) substituted with an alternative penalty).

The project notes that in case of the replacement of a principal penalty with an alternative penalty there is a need to revise the applicable time scales so that this measure would be made possible at an earlier stage. Pragmatically the authors note that this aspect however needs further examination and suggests examining the practice of other countries.

7.2. Failure to apply replacement of a principal penalty with an alternative penalty to those sentenced for serious crimes

The Prison Population Reduction Project highlights that in both the current and the new Criminal Code there are no stipulations that would allow using the replacement of a principal penalty with an alternative penalty in relation to those who have been sentenced for serious crimes. The Project therefore suggests that this blanket approach should be mitigated and the possibility of the

replacement of a principal penalty with an alternative penalty should be allowed with the exception of three categories of sentenced persons.

Comment:

The Project does not contain any detail on how this will be achieved in practice. It is presumed that the authors will seek to implement these changes in the new draft Criminal Code albeit it is not explicitly stated so in the Prison Population Reduction Project.

8. The spread of prison sub-culture

8.1. The use of barrack-type institutions

The Prison Population Reduction Project notes that the criminal justice system in terms of the accommodation for the prisoners continues to exist in the old Soviet-style mode which was dominated by very large, colony-type institutions (whereby in 50-100 people would be held together in the same dormitory). However the Project acknowledges the forthcoming change of the development programme of the Criminal Justice System for 2012-2015 which envisages the reconstruction of the two existing institutions to individual cell-type accommodation institutions. Equally, in the remits of this programme fundamental repairs and rebuilding works are being carried out in 59 other institutions; there are plans for similar fundamental update of SIZO institutions.

8.2. Lack of effective individual rehabilitation process

The Prison Population Reduction Project recognises that currently, in part due to the existing colony-type accommodation for the prisoners, there is lack of individualised approach to the rehabilitation process of the prisoners. The Project once again refers to the development programme of the Criminal Justice System for 2012-2015 which details a number of initiatives on how to address this.

Comment:

The three initiatives listed from the development programme of the Criminal Justice System for 2012-2015 all are likely to make a significant contribution in addressing the issue of lack of individual rehabilitation process. However what remains unclear from the current draft of the Project is how these measures will be implemented, which will be the responsible authorities and how these measures will be funded (as it is clear that there will be financial implications to some, if not all: see, for example, the proposal to introduce a post of senior instructor on employment and psychologists).

8.3. The low employment rate among the prisoners

The Prison Population Reduction Project notes that over the past decade, the employment rate among the prisoners has never risen above 50% and once again looks to the development programme of the Criminal Justice System for 2012-2015 since this programme puts the responsibility upon the administration of each individual penitentiary institution to create conditions conducive towards raising the level of employment among the prisoners. Equally, the said development programme also envisages the opening of new work places/entities on the count of the financial support of the programme 'Enbek' which would allow placing of the State tenders to such entities. This would allow education of the prisoners as well as them gaining the vital work skills.

The Project thus proposes to use the employment rate of the prisoners (in paid employment) as the key factor for evaluating the development programme of the Criminal Justice System for 2012-2015 and development of further employment opportunities in the remit of this development project.

Comment:

While the measure proposed in the remits of 'Enbek' programme appears concrete, what remains unclear is how the prison authorities are expected to fulfil the responsibility levied upon them in terms of ensuring employment among the prisoners. It would be therefore helpful if the Project would lay out detailed and realistic steps that the administrations would be practically able to carry out.

To this end, the recommendations by the UNODC and ICRC may prove useful:

'There are many initiatives that prison administrations can take to improve the employment prospects of prisoners on release. The starting point is to ensure that prisoners have access to professional skills training programmes and workshops in prisons, which correspond to market needs and, as far as possible, to the wishes of the prisoners themselves. Such initiatives are all the more productive if links are established with job providers outside, who might provide training and eventually job placements for prisoners'.¹⁹

The UNODC and ICRC also suggest such initiatives as cooperating with NGOs and facilitating peer training/education by skilled prisoners.²⁰

8.4. Inadequate preparation of prisoners for release

The Prison Population Reduction Project acknowledges that currently those sentenced for very serious crimes are released side-stepping the period of adaptation in the living-in colonies (колонии-поселения) which makes the re-socialisation of these prisoners very difficult.

The Project however notes that the development programme of the Criminal Justice System for 2012-2015 envisages a trial stage in one of the existing living-in colonies (колонии-поселения). On the basis of European example, those sentenced for very serious crimes will spend 6-12 months in this institution so as to ease their transition from the imprisonment.

8.5. Lack of prison facilities that would correspond to the requirements of modern international standards

The fact that since the independence of Kazakhstan not a single new prison, corresponding to the requirements of modern international standards has been built is recognised in this section of the Prison Population Reduction Project. The Project however notes the forthcoming changes envisaged in the development programme of the Criminal Justice System for 2012-2015 such as single-occupancy cell accommodation, increase in the living space allocated to individual prisoners, special accommodation for people with disabilities and changes in the way institutions are called, depending on the level of the restrictions imposed upon those held in such facilities.

¹⁹ Ibid; at p. 152.

²⁰ Ibid; at p. 153.

Comment:

It is crucial that the living conditions of the prisoners are duly addressed as sub-standard living conditions not only violate internationally accepted human rights standards, but also negatively impact the reintegration process of prisoners in the society after they have been released.²¹

9. Failures in the post-prison rehabilitation work**9.1. Absence of centres for social rehabilitation and adaptation**

The existence of only two centres in the whole of Kazakhstan for social adaptation and rehabilitation for those released from penitentiary institutions is acknowledged in this section of the Prison Population Reduction Project as clearly insufficient. It is therefore suggested that such centres are established in all regions of the country, as directed by the Chairperson of the (protocol instructions to the heads of the Presidential Administration) on 11 February 2013.

Comment:

It is hard to deny the necessity for such centres throughout Kazakhstan; however from the current draft of the Project it is unclear how this direction of the Chairperson will be carried out; what will be the financial implications and who will bear them. Moreover, it is clear that establishment of such centres throughout the country will take time, which means that there may be a need to think of an interim solution.

9.2. Difficulties in obtaining the employment after the release

In this section the Prison Population Reduction Project notes that out of 13 000 prisoners who were released in 2012, only 3866 were able to find employment subsequently which is about 30%; of those about 28% were employed by akimats.

The Project proposes that in order to address the current situation, the effectiveness of state authorities must be assessed on the basis of the quality of social assistance rendered to prisoners who have been released. Equally, the Project suggests quota system to be introduced in order to raise the employment rate among those released or having early conditional release.

Comment:

Indeed, the comparative data available mainly from the countries of the Organisation for Economic Co-operation and Development (OECD) indicate that increased investment in social welfare is associated with lower imprisonment rates and there is clear evidence that the root causes for many offences can be found in economic and social inequalities and the perpetrators' socio-economic status.²² It is thus commendable that the Prison Population Reduction Project devotes attention to this aspect.

The UNODC and ICRC to this end recommend that:

‘Cooperation with social, health care, employment and housing agencies in the community should be actively encouraged and formalized with agreements. They should accept shared

²¹ Ibid; at p. iii.

²² Tapio Lappi-Seppala, *Causes of Prison Overcrowding, paper submitted to the Workshop on Strategies to Reduce Overcrowding in Correctional Facilities*, Twelfth United Nations Congress on Crime Prevention and Criminal Justice (Salvador, Brazil, 12-19 April 2010).

responsibility for the successful social reintegration of ex-offenders and be provided with adequate resources to fulfil this responsibility'.²³

The UNODC and ICRC further argue that there is a need for this issue to be addressed at the overall prison management level and it is thus recommended:

'To put in place policies and mechanisms for cooperation with ministries and agencies responsible for education, vocational training, employment, health care, social welfare and probation to ensure that joint responsibility is taken and joined-up strategies developed to ensure that prisoners are given the support and assistance to help them rebuild their lives following release'.²⁴

The wording of the Prison Population Reduction Project however does not suggest any practical, concrete ways of how authorities in Kazakhstan are to implement the task levied upon them. Moreover, it is unclear how a system of quotas would operate in reality and whether and how would this impact private business and whether there have been any consultations carried out with the relevant stakeholders about this measure.

Finally, the UNODC and ICRC also note that:

'More specifically, and based on available research, four issues are of key importance to the successful resettlement of prisoners following release: (a) family support; (b) employment; (c) education; and (d) housing'.²⁵

Unfortunately the Prison Population Reduction Project only examines one of these key factors, the employment.

9.3. Absence of probational control and electronic monitoring for those on early conditional release and under administrative oversight

The Prison Population Reduction Project notes the success rate of the probational control (as opposed to probation alone) and the failure to implement the legislation of 2011 in relation to the electronic monitoring in Kazakhstan.

It is however noted that the new legislation will introduce post-penitentiary probation in relation to further categories of persons and also strengthen the use of electronic tags. The Project suggests that the practical implementation of these measures is expedited and that an automatic (electronic) register of those under administrative oversight and early conditional; release is established.

Comment:

It has already been noted earlier that there is a need to carefully consider the way Kazakhstan implements electronic tagging in practice- see Comment under section 4.2. above.

10. The inclusion of colonies in the count of places of imprisonment by the International Centre for Prison Studies when calculating the prison population rating of the country in question

In this section the Prison Population Reduction Project notes the unusual types of places of imprisonment that currently exist in Kazakhstan and how this impacts the overall assessment of

²³ Supra note 2; at p. 125.

²⁴ Ibid; at p. 160.

²⁵ Ibid; at p. 149.

the prison population in Kazakhstan by such international stakeholders as the International Centre for Prison Studies. The Project suggests excluding the educational colonies (воспитательная колония) and living-in colonies (колонии-поселения) from the list of correctional institutions and replacing them with educational centres and reintegration/re-socialisation centres (respectively).

The Project also suggests introducing restriction of liberty as a separate form of punishment to those who would be confined to these newly established educational centres and reintegration/re-socialisation centres.

Comment:

It is crucial that when considering this point the authors take note of the obligations arising for Kazakhstan from its ratification of the Optional Protocol to the UN Convention against Torture (OPCAT) and especially Article 4 which defines 'deprivation of liberty' as follows:

'(...) deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority'.

This definition suggests that any place under a public authority which a person is not at a liberty to leave, irrespective of the degree of the restriction or deprivation of liberty, would fall under Article 4 of OPCAT. The UN Subcommittee on Prevention of Torture, the treaty body established in accordance with the terms of OPCAT, has also made it clear:

'The State should allow the NPM to visit all, and any suspected, places of deprivation of liberty, as set out in Articles 4 and 29 of the Optional Protocol, which are within its jurisdiction'.²⁶

It would therefore be appropriate for the Kazakh authorities to re-consider whether the steps suggested under this section would lead to the outcomes desired.

²⁶ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Guidelines on national preventive mechanisms. UN Doc CAT/OP/12/5 (2010); at para 24.