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Comparative Legal Analysis Of Issues Of Enforcement Of Rights Of Individuals In The Criminal Proceeding Of The Republic Of Uzbekistan And Republic Of Kazakhstan

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ABSTRACT

The article provides a comparative analysis of the development of ensuring the rights of individuals in two post-Soviet republics; it also gives distinctive features and trends in the development of guarantees of rights in criminal proceedings. The issues of participation of prosecutors and lawyers in the criminal process, the role of public control over the criminal process are considered by the author.

KEYWORDS

Criminal procedure, witness's lawyer, right to defense, criminal law statistics, criminal case.

INTRODUCTION

The relations of friendship and cooperation that connect the countries of Central Asia have a great significance in ensuring the peace and stability in the region. Our history is measured for centuries. Obtaining the

independence in the end of the last century mark the beginning of a new stage, a new time when our nations began to expand, visiting the independent states. Consequently, this has given to our legal systems some

peculiarities. As of today, Uzbekistan put forward the goal of strengthening the existing cooperation between the states of Central Asia, including the institutions of law, which are based on enforcement and protection of human rights and interests. In this regard, the relations between Uzbekistan and Kazakhstan are the most important aspect of interstate relations in Central Asia. In this article, I would like to provide the comparative legal analysis of issues of enforcement of human rights in the criminal proceedings of Uzbekistan and Kazakhstan.

The Republic of Uzbekistan and the Republic of Kazakhstan have in many instances the common historical heritage in the legal sector. This concerns not only the Soviet period and the current period as well. It is worth noting that the legal schools of Uzbekistan and Kazakhstan for a long time enriches each other. One of the great biys, the authors of the Code of Laws “Jety Jarga” (Seven Codes), Ayteke Biy studied at the madrasahs in Samarkand and Bukhara, and he was buried in Nurata district of Navoi region of Uzbekistan. Another great biy - Tole Biy lived and found his eternal peace in Tashkent region. Even though the conventional rules were dominated in the courts of justice of Biys, at the same time the Shariah rules were as the basis of this law. As you know, the sources of Shariah are the Quran, Sunna, Izhma, Kiyas and Adat (native legal customs of nations). In particular, the Islamic sharia, the science which was developed in Mawarannahr influenced on the “Jety Jarga”, and it could not have been otherwise. The legislation of our nations was developed under the rules of Islamic law until the end of the XIX century and beginning of XX century.

The outstanding feature of this period was the lack of sustainable state function of criminal prosecution. There was no powerful law enforcement system. Upon very large level of generalization, from the point of view of theoretical classification, we can say that in Uzbeks and Kazakhs at that time was dominated the accusatory form of criminal proceeding. The criminal proceeding was started from the appeal of the affected party, in the point of fact, the lawsuit. It could also be terminated by his will. Therefore, in practice were often applied the indemnification agreements of parties; the fulfillment of which, in fact, was the liability for crime. In this situation, of course, quite conditionally, we can talk about the restorative nature of such justice. For example, an interesting fact is that on the territory of plains there were practically no prisons per se.

At the end of the XX century, the policy of expansionism of Russia in the territories of Central Asia, establishment of colonial governance, led to some activation of state bodies in criminal prosecution. There were created the serious law enforcement structures. At the same time, it's worth to note that in the imperial period, for the indigenous population of Central Asia was allowed to live according to their own laws and customs, and the imperial administration did not interfere in local criminal cases, except for the cases where criminal prosecution was not directed against the national liberation movement.

In the Soviet period, for combating the national liberation movement was also imposed the legal ideology of the proletarian dictatorship. All this together dramatically

transformed the accusatory criminal process into an inquisitional. On the one side, it was required to fight against the forces striving for independence, and on the other side, against class enemies unfamiliar to the proletariat. The courts of the Kazias and Biys were abolished. In 20-30s of the last century there were emerged that problems in ensuring the rights of individuals in criminal proceedings, which we are trying to solve nowadays. Of course, you we cannot say that everything was bad. Nevertheless, the Soviet school of criminal procedural law was far from being the last in the world. However, there was a number of systemic shortcomings in legislation and law enforcement practice. For the most part, that was expressed in the following.

Firstly, in a pre-judicial stage of criminal proceedings there appeared the “superbodies” and officials with very wide and almost unlimited powers. In particular, they were the prosecution office, special security services. They completely drive out the judicial control from the Soviet criminal process. Thus, the Criminal Procedure Codes of the Soviet Union republics, which were adopted in 1920s, in one form or another specified judicial authorization of procedural actions. In the 30s, the courts lost not only the whole control over pre-trial proceedings, but also they turned into the subject of this control. For example, the prosecutors got the right to suspend the execution of sentences, demand the sentences for supervision and make protests against them. The period from the middle of 20s to the middle of 30s is the most difficult period in our history. Instead of the court, a centralized and uncontrolled investigation becomes as a priority body. During this period, were established the

extrajudicial bodies (Special Troika, Special Deuces and Special Council under the NKVD of the USSR (People's Commissariat for Internal Affairs)), whose activities were contrary to the Constitution of the USSR in 1936, but their decisions had the force of a court verdict.

Secondly, the defensibility and the role of advocacy were minimized. For example, the admission of counsel or lawyer for participation in the criminal case was carried out only from the moment of filing accusation . At the same time, the defensibility on collecting the evidence itself and taking appeals on actions of persons responsible for pre-trial proceedings was extremely limited.

In certain categories of cases, the defender by force may not be allowed to perform his duties. Moreover, the advocatory formations were the governmental. The Statute about Defense Attorney 1922 prescribed the organization of Bar Councils on criminal and civil cases, which were established on the basis of self-government under the management of state agencies on rendering the legal assistance to the population.

Thirdly, public control over the criminal process was nominal. The participation of people's assessors in consideration of all categories of cases in the court led to the fact that people's assessors were forced to make decisions in cases of particular complexity, along with the professional judge, which was a cause for contradiction between the powers that were granted to the people's assessor and his ability in practice to perform his duties of a judge . People's assessors, even though had a great powers on paper, they could not use them. Due to the lack of real publicity (transparency) and independent mess media, the court trials, even if they were disclosed,

but were from one-sided. Cases of violation of human rights and freedoms at the pre-trial stages were generally suppressed.

With such kind of impediments, our countries approached the independence and started to elaborate their own acts on criminal proceedings. Within 29 years of independence was performed a great job in both countries which was generally directed to correction of above listed shortcomings of the Soviet criminal proceedings. So, Uzbekistan adopted its Criminal Procedure Code in 1994. It was one of the first Codes of Criminal Procedure on the space of the CIS. Today it remains in force even though it was amended 91 times. It shows the active reforming of this sector. If we look at the Republic of Kazakhstan, in the history she adopted two Codes of Criminal Procedure one by one, in 1997 and 2014. Into which were also made the large amount of amendments.

Upon making a comparative study of the CPC of our countries, we conclude that in general terms they are quite similar. However, there are some significant differences too. Let's turn our attention to trends of development of criminal procedure law.

Let's view, firstly, the issues of involvement of lawyers in criminal proceedings. So, according to the "Defense Attorneys Act" of the Republic of Uzbekistan only the citizens of the Republic of Uzbekistan can be as the lawyers in our country. Foreign lawyers cannot work in Uzbekistan. However, the Clause 66 of the Criminal Procedure Code of the Republic of Kazakhstan allows the participation of foreign lawyers, but specified that such activity should be performed based on the international

treaty ratified by the Republic of Kazakhstan. However, not all the problems arising in implementation of rights by foreign lawyers have been resolved at the international level.

In terms of the right to defense, the experience of the Republic of Kazakhstan in introducing into the process the stature of a witness having a right to defense is interesting. According to the Clause 78 of the Criminal Procedure Code, if a person is referred to in the statement of claim and in the report of criminal offence as a person who has committed it or is testified against by a witness participating in the criminal trial, but the procedural detention has not been applied towards this person or the decision has not been made to recognize him as a suspect, he acquires the status of a witness entitled to counsel.

In Uzbekistan, according to the same criteria, a person shall be recognized as a suspect. We understand the logic of the legislator of Kazakhstan, who thus solved the long-standing problem of interrogation of suspects and accused as the witnesses with the threat of criminal liability for refusing to give a testimony and for making a false statements. In our country, this task was decided to be carried out by introduction of such participant, such as the witness's lawyer (Clause 66-1 of the CPC). He has a right to know in which criminal case the person whose rights and legitimate interests he defends is summoned; to participate in hearing of a witness, as well as in other investigative actions conducted with his participation; to give him brief consultations; to ask the questions with the permission of person who conducts the hearing; to state in accordance with the procedure established by law, the

challenge of interpreter participating in the hearing of the witness; at the end of the hearing, to make the statements about violations of the rights and legitimate interests of the witness, which should be recorded in the protocol of interrogation. At the same time, the witness shall not be obliged to incriminate himself or his close relatives.

In this context, the Decree of the President of the Republic of Uzbekistan dated August 10, 2020 “On measures of further strengthening the guarantees for protection of rights and freedoms of persons in legal investigative activities” is interesting. The head of our state imposed a ban on hearing of a person as a witness in case of availability of grounds for his involvement as a suspect or accused. The exceptions are the cases when it is required to conduct an expert testimony in the court or audit. The testimonies of such a witness will be declared inadmissible if they were given before the clarification of procedural rights of the suspect or accused. It is also forbidden to call to the law enforcement agencies and question the close relatives of the detained suspect or accused if there are no any grounds for their involvement as participants in the process.

Another topical issue, in our opinion, in ensuring the rights of persons in the criminal process is the creation of effective mechanism for appealing against the actions and decisions of the investigator, interrogator and prosecutor. According to the legislation of the Republic of Kazakhstan (Clauses 105 and 106 of the Criminal Procedure Code), the actions and decisions of the prosecutor, investigation and inquiry bodies can be appealed not only in the departmental manner, as well as directly

in the court (investigating judge). We unequivocally conceive that this is a positive achievement in strengthening the judicial control. In Uzbekistan, nowadays is ongoing the work on introducing the judicial appeals in pre-trial proceedings. The relevant legislative initiative is contained in the Resolution of the President “On additional measures of ensuring the supremacy of the constitution and law, strengthening the public control in this direction, as well as improving the legal culture in society”. At the first stage, it is assumed that an appeal to the court will be possible on decisions to initiate a criminal case, refusal to initiate a criminal case, appointment of audit, suspension of inquiry or preliminary investigation and termination of a criminal case. Here our country faced with the need of parallel solution of issue regarding creating of a staff of investigating judges.

Moreover, in Uzbekistan is ongoing the work on creation of information system - the Electronic Criminal Law Statistics. It will become as an analogue of the “Unified Register of Pre-Trial Investigations”, which functions in Kazakhstan. Thus, at the beginning of a pre-trial investigation, on the one hand, the rights of the victim are often violated as a result of the refusal to accept his statement of claim about commissioning of crime, and, on the other hand, the rights of the suspect, accused, detained are poorly protected. As the reasons for these violations, there provided the frequent cases of concealment by law enforcement officials of the facts of submission of statements by the victims or the time and place of detention of the suspect, since this circumstance is most often associated with the desire of the law enforcement body or officials to avoid a decrease in the efficiency of work

performance. In this regard, it is recommended to define the General Procurator Office of the Republic of Uzbekistan as the body who shall be responsible for implementation of this system.

These were the main points on which we would like to turn your attention in this survey paper.

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