

## Participation of a Representative of a Foreign Country in the Procedure of the Legal Proceedings in the Republic of Kazakhstan

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### ABSTRACT

The paper deals with the problem of foreigners' rights and freedoms protection during the criminal procedure in The Republic of Kazakhstan. The comparative analysis of national and international legal framework shows that principles of legal defend of foreigners' interests do not have a practical application. Examining the content of requests on legal assistance received by the General Prosecutor's Office of the Republic of Kazakhstan in 2012-2015 the authors determine that about 20% of the orders relate to the admission of representatives of the competent authorities of foreign states. The study also proposes the amendments to the determination of rights and duties of a representative of a foreign state. The practical value is that the research can be a theoretical basis for further development of effective legislative mechanisms of the foreign citizens' interests' protection in Post-soviet countries and other states referring to the Romano-Germanic legal system.

### KEYWORDS

International legal assistance, foreigners' rights and freedoms protection, criminal proceedings, attractiveness of legislative service, The Republic of Kazakhstan

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### Introduction

The Republic of Kazakhstan occupies a special position, both in the former Soviet region area and internationally (Nazarbaev, 1994; Assanova, 2015). Can note, the number of registered arrivals in the country in 2015 has accounted for more than 8 000 (Tarr, 2015). In this regard, it is necessary to pay greater attention to guarantees of foreigners' interests protection. As the world jurisprudence experience has fixes the frequent abuse of legal norms (Svensson, 2013; Ronning, 2012; Urinboyev & Svensson, 2013), especially the rights and freedoms of foreigners during the proceedings must be investigated.

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The world community has already developed a mechanism for protecting the interests of citizens, subjected to procedure compulsion measures (Drobjazkina, 2015). Thus, Article 3 of the Vienna Convention on Diplomatic Relations, adopted at a meeting of the United Nations (1963), provides the function of a diplomatic mission for the protection in the receiving state the interests of the sending state and of its nationals, within the limits permitted by international law.

This provision is also reflected in the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted at the 2202 plenary meeting in New York (1973). In accordance with Article 6, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. In such a case, any person regarding whom the aforementioned measures are being taken shall be entitled to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights (Dolzer, 1987).

Mentioned legal mechanism for the protection of its citizens in a foreign country is also fixed in the Constitution of the Republic of Kazakhstan (1995), where Article 11 provides that the Republic guarantees protection to its citizens and wardship outside its boundaries.

However, despite the ratification of the international statutory instruments on diplomatic relations, the principles of protection of interests of foreign citizens by consular or diplomatic representatives of foreign countries do not have a practical application on the territory of Kazakhstan, which is inconsistent with international standards of criminal procedure (Sluiter et al., 2013; Cryer et al., 2014).

### Literature Review

Scholars agree that in the context of global integration processes the maintenance of foreign nationals legal protection can improve the country's legislative space, as well as to increase its investment appeal (Boguslavskij, 1996; Barrios, Görg & Strobl, 2005; Carayannis & Grigoroudis, 2014).

Consequently, one of the most urgent issues is the cooperation of the competent law enforcement agencies of foreign states in the investigation of crimes of international character, which determines the need for improvement of criminally-remedial provisions (Werle & Jessberger, 2014; Fan, 2014).

As T. Bajmahanov and D. Bajmahanova (2009) noted, international-legal means, in many cases, are the bearers of a more progressive and liberal tendencies, unlike the domestic human rights regulation means.

We adhere to the definition of international legal assistance in criminal cases as a form of cooperation. It represents the realization of investigating actions or other measures of proceedings compulsion, ensuring the appearance of people, renewal of documents and information by the competent authorities of one State on request (on instruction, on application) of competent authorities of another State or international judicial bodies (Swire & Hemmings, 2015).

As practice shows, the reason of improper execution of commission is often the incompetent and unscrupulous attitude of foreign workers of law

enforcement agencies to the execution of commissions (Volevodz, 2001), as well as the lack of information, reflecting the circumstances of a crime and full information on the investigated criminal matter, or on available evidences (Ustinov, 2014).

Therefore, there is a need to study the mechanism of implementation of international instruments relating to the protection of foreign nationals' interests in the practice of judicial proceedings in Kazakhstan.

### **Aim of the Study**

The purpose of the research is to examine the role of foreign countries representatives in protection of rights and freedoms of foreigners during the criminal procedure in the Republic of Kazakhstan.

### **Research questions**

The research questions were as follows:

What are the features of the intervention of foreign states representatives in the provision of legal assistance to the foreigners? How does the implementation of the aforementioned proceedings may affect the attractiveness of the Republic of Kazakhstan?

### **Method**

Theoretical methods were used in this study. Firstly, the analysis of the legislative framework of the Republic of Kazakhstan in the sphere of international cooperation on criminal matters was carried out.

The statistical method was used to determine the number of considered requests for legal assistance rendering of the appropriate authorities of foreign states in the period of 2012-2015 (Khusainova, Shilova & Curteva, 2016). Furthermore, a qualitative analysis of the content of the abovementioned requests has been conducted.

The second stage of work involved the comparative analysis of the provisions of bilateral international statutory instruments, which were signed by the Republic of Kazakhstan and the concern the protection of the interests of foreign nationals during the legal proceedings.

In addition, based on the analyzed literature, as well as national and international legislative framework the conceptual framework was created, which would help to describe the rights and responsibilities of a foreign representative.

### **Data, Analysis and Results**

General Prosecutor's Office of the Republic of Kazakhstan is the authorized agency of the country in the field of international cooperation in criminal matters. According to statistical data of the General Prosecutor's Office, requests for legal assistance rendering of the competent authorities of foreign countries were reviewed in the amounts of 605 – in 2012, 635 – in 2013, 513 – in 2014, 538 – in 9 months of 2015.

At the same time, the prosecution authorities of the Republic of Kazakhstan have referred requests in foreign states for legal assistance rendering taking



into account the investigation of criminal cases in the amounts of 599 – in 2012, 845 – in 2013, 805 – in 2014, 469 – in 9 months of 2015.

The study of the content of requests for legal assistance rendering received from competent authorities of foreign countries to the Prosecutor General's Office of the Republic of Kazakhstan showed that about 20% of the requests contain an application for the admission of representatives of the foreign competent authorities executing requests. Moreover, it is one of the ways to comply with the law, protection of human rights and freedoms.

Regulations of the majority of bilateral international agreements concluded by the Republic of Kazakhstan, provide the right to the presence of foreign interested person during the execution of a request for legal assistance rendering in accordance with the legislation of the requested Party (Treaty between the Republic of Kazakhstan and the Islamic Republic of Pakistan..., 1995; Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Kazakhstan, 1994).

The article 135 of the new Criminal Procedure Code of the Republic of Kazakhstan, adopted in 2014 (CrPC RZ), provides only a procedure for notification of a state, of foreign detainee. In this case, CrPC RK does not guarantee a foreign citizen the right to protect his interests by diplomatic or consular representative of his country, as his participation in the criminal process is not regulated (Akparova, 2006). Such contradictions in the legislation make the procedure of protection of foreign nationals on the territory of Kazakhstan more complicated, and it has a negative impact on the overall level of its competitiveness.

In Chapters 7, 8, 9 and 10, as well as in Chapter 53 of CrPC RK of 1997, the procedural status of the representative of the competent institution of another state was absent; competence, rights and responsibilities of this person were not defined.

In other words, during the procedure of legal proceeding on the international request, the representative of a foreign state had no right to put questions to participants of the investigative or judicial proceedings. In addition, he was not allowed to draw their attention to circumstances associated with the execution of request, to learn the protocol of the investigative action in his hearing, to make subjected to placing in the protocol notes over the completeness and correctness of the fixing process and results that have been made with his participation, and to perform other actions.

The abovementioned actions could be declared illegal, inconsistent with the requirements of CrPC RK of 1997 in the case of:

- participation of a representative of a foreign state in carrying out investigative and other legal proceedings with foreigners, which includes the framework of execution of the request for legal assistance by putting questions to examinants;
- representing requests and recusations;
- familiarization with materials of case;
- provision of testimony on the factual background;
- filing of application and comments.

As a result of their fulfillment, obtained evidences may be considered inadmissible. This gap in the law can leave a foreign citizen alone against the mechanism of prosecution of a foreign country.

In order to fulfill adopted provision the Consular statute of the Republic of Kazakhstan was ratified by the Presidential Decree of the Republic of Kazakhstan dated September 27, 1999 N 217. Paragraph 37 of Chapter 9 is binding the consuls to see if the law of receiving country and international treaties are complied to detained (arrested) citizen of the Republic of Kazakhstan, or detained suspected of committing a crime or subjected to other measures restricting the freedom of the citizen, or serving a sentence of imprisonment.

At the same time, the consul is obliged, to visit citizens of the Republic of Kazakhstan, in places of detention at the request of interested parties and on its own initiative, and to find out the conditions of their detention. The consul is obliged to make sure that citizens are kept in conditions that meet sanitary and hygiene requirements and are not subjected to cruel and degrading treatment (Consular statute of the Republic of Kazakhstan, 1999).

The proposed right of the foreign representative only put questions to examinant is very narrow competency. In this regard, we believe that it is not necessary to limit the list of proceedings that may involve representatives of a foreign state, as well as a list of their competencies.

The article 572 "Presence of representatives of the competent authorities of the requesting State" of current CrPC RK also are not clearly regulates the procedural status of the representative of a foreign state. In the second part of the article is said that representatives "have the right to be present during the proceedings, to apply and make comments on the order of their execution, to put questions, and take notes with the permission of investigator, inquiry officer, procurator or court, including the usage of technological means".

At the same time, Article 110 of CrPC RK establishes the obligation to clarify the rights and responsibilities and to enable their implementation by the persons, who participating in criminal procedure. In particular, "every person involved in criminal procedure has the right to know his rights and responsibilities, the legal consequences of his chosen position, and to get an explanation of the meanings of proceedings with his participation and the content of the file of criminal investigation. The body conducting the criminal proceedings should explain to each person who is involved in criminal matter his rights and responsibilities".

Article 525 of CrPC of 1997 settled an order of execution of requests on procedural actions, where paragraph 4 established that with the permission of the official, stated in Article 523 of this Code, in the cases provided for international treaty, when execution of the request, a representative of the competent institution of another country may be present.

This provision was one of the most effective measures for effective international cooperation, as well as comprehensive, complete and objective investigation of the circumstances necessary for the proper adjudication of a case. It was successfully included into the specified legal act by developers of international convention.



However, the implementation of provision on the participation of a representative of the competent authority in the executing of the request for legal assistance by every member of the international convention, treaty or agreement is on condition of reciprocity is the essential point. Otherwise, in the absence of these provisions in domestic law, at the referring the request by one of the states, executive party would not be able to have a representative or his participation would be illegitimate

### Discussion and Conclusion

Almost all countries of the European Union participating in the execution of the request for legal assistance are guided by the European Convention on Mutual Assistance in Criminal Matters (1959), which provides only the presence of a representative. Additionally, in article 4 of the same document is indicated the following: on the express request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.

We suppose that this interpretation is only advisory and from a political point of view is used in order to avoid subversion of the sovereignty of the States Parties, as independent conduction of any proceedings by the criminal justice authorities in a foreign country is prohibited.

The legal framework of the Republic of Kazakhstan, along with such countries as Austria, France, Germany, Switzerland, Russia, and many others, belongs to the Romano-Germanic legal system, reflecting the close relationship of the principles of justice (Lezhe, 2011).

It is pertinent to point out that section 83 of Act on International Cooperation in Criminal Matters of the Federal Republic of Germany (1982) determined that the representatives of the requesting Member State may be present at the interrogation upon the request. However, this provision of international legal act is not fully implemented in the criminal procedure legislation of the Republic of Kazakhstan.

Similar problems are also recorded in other post-Soviet states. Thus, inasmuch as the legal system of Russia (RF) has no institution of compulsory judicial representation, representatives of foreign citizens in the court could be any Russian or foreign citizens who have a letter of attorney executed for a proper purpose (Ustinov, 2014).

This aspect is considered in detail by E. Feoktistova (2010). She indicates that the CrPC RF provides only the very possibility of the participation of these persons in the execution of a request for legal assistance. It does not specify the procedural formalities of their involvement in the legal proceedings.

In this regard, the author proposes to supplement Chapter 53 of the CrPC RF with a new Article "The representative of a foreign state", which would reflect the scientific definition of the representative of a foreign state and set the amount of his rights and responsibilities.

We share this position only with regard to necessity of the introduction in the Criminal Procedure Act the definition of the rights and responsibilities of the representative of a foreign state. Namely, "a representative of a foreign country is a public official who is present in the procedure of certain investigative and other legal proceedings on the basis of a request for legal assistance".

As a result, we can state that principles of legal defend of foreigners' interests do not have a practical application in the Republic of Kazakhstan. This is confirmed by the content of considered requests for legal assistance rendering of the appropriate authorities of foreign states in the period of 2012-2015, as well as the lack of a national law about procedural formalities of the participation of these persons in the commission of legal proceedings.

We consider the transformation of the formal presence of a representative of a foreign state in the provision of legal assistance in real participation as a way to increase the efficiency of execution of the order for the implementation of judicial tasks, as well as a method to increase the attractiveness of the state in the international arena.

### Implications and Recommendations

The submissions can be useful in the current practice of legislative regulation of the foreign citizens' interests in Post-soviet countries and other states referring to the Romano-Germanic legal system. Furthermore, research findings can serve as basis of future investigations on the implementation of international legal acts regulating the diplomatic intercourses.

### Disclosure statement

No potential conflict of interest was reported by the authors.

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