

Juridical Personality of a Defense Lawyer in the Context of International Contractual and Other Obligations of the Republic of Kazakhstan in Criminal Practice

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Abstract: This article views international documents regarding human rights and legal assistance in criminal cases, ratified by Kazakhstan. These documents were classified and their role was shown in the legal system and criminal proceedings in Kazakhstan. Also was done their analysis in order to identify the criminal procedure forms of participation of the defender - a lawyer in criminal proceedings and were provided recommendations to improve the legislation.

Key words: Legal assistance • International treaty • Criminal proceedings • Principles of criminal procedure • Stage of criminal proceedings • Participants of criminal proceedings • Criminal case • Defender • Lawyer • Representative • Party of the defense • Accused • Prosecutor • Party of the prosecution

INTRODUCTION

Paragraph 1 Article 1 of the Constitution of the Republic of Kazakhstan declares the Republic of Kazakhstan (the RoK) as a law-governed state where the highest value is a human being, human life, rights and freedoms. This is a general provision of Section I of the Constitution which means an irreversible process and intention of Kazakhstan to consistently recognize and guarantee rights and freedoms of a human being and a citizen in accordance with the Constitution [1].

For development of such national process the Constitution states that rights and freedoms of human being and citizens predetermine the content and application of laws and other regulatory and legislative instruments (p.2 Art.12), it is also prohibited to restrict certain constitutional rights and freedoms in any case whatsoever (Art.10,11,13-15, p.1 Art.16, Art.17, Art.19, Art.22, p.2 Art.26).

It is unconditional that the existing constitutional rights and freedoms of human beings and citizens, protection from violation of lawfulness need a qualified legal support.

In this connection the RoK Constitution, in accordance with paragraph 3 Article 13, attaches the right for such qualified legal assistance to every person.

Therefore, a topical aspect of the legal system in Kazakhstan's society which should be permanently improved is advocacy.

Over the years of state independence, in this legal sphere, Kazakhstan legally regulated the fundamentals of organization and activity of the country's advocates considering the inherited experience of advocacy of the past century.

On December 5, 1997 a special law "On Advocacy" was passed that is being periodically corrected to enhance human rights potential of the country's advocates [2].

Aspects of advocate activity were substantially regulated by a number of interrelated provisions of the Criminal Procedure Code of the RoK effective dated December 13, 1997 [3].

The right of an accused person for defense including the use of powers of a defending lawyer in criminal proceedings is a key subject of a number of regulatory resolutions of the RoK Constitutional Council [4], the RoK Supreme Court in charge of clarification of judicial practice [5].

No doubt that the list will be incomplete without international contractual and other obligations of the Republic, which form an integral part of the existing laws of Kazakhstan, comply with constitutional

provisions and contain certain provisions on a judicial personality of the defending lawyer in criminal proceedings.

The Main Part: Independent Kazakhstan ratified almost all fundamental international documents that refer to the rights of a human being in the area of criminal proceeding.

Hypothetically they can be divided into three big groups:

- Universal international documents [6];
- regional international documents [7];
- bilateral international documents where one of the parties is Kazakhstan [8].

First of all, based on the results of the above stated and other international documents, one should note that the majority of them, to a greater or lesser degree, is intended to enhance the types of activity of defending lawyers in criminal proceedings.

It is interesting to consider those provisions that give possibilities to involve national or foreign advocates in criminal proceedings of another country.

Beyond all doubts the high human rights potential of advocates is provided for in international documents on human rights that have a universal nature.

Here, the Universal Declaration of Human Rights sets the pace as a universal international document which was adopted by the OUN on December 10, 1948; Articles 1-12 of the Declaration are intended for the understanding of the essence and application of these rights as well as for their protection by all lawful means and methods.

As an example one can set paragraph 1 Article 11 of the Universal Declaration which states that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The second universal international document which reflects standards on the participation of the defending lawyer in criminal proceedings is the UN Covenant on Civil and Political Rights adopted on December 16, 1966 and ratified by the Kazakhstan law dated November 28, 2005. A number of Articles of the Covenant regulate an aggregate of human rights which require their protection in the criminal proceedings sphere (Art. 9,10,11,14 -17, 26 and other).

In particular, provisions of the Covenant attach the right of any accused person: to have adequate time and facilities for the preparation of his defence and to

communicate with counsel of his own choosing (sp.b p.3 Art.14); To be tried in his presence and to defend himself in person or through legal assistance of his own choosing; if he does not have legal assistance - to be informed of this right; and to have legal assistance assigned to him when the interests of justice so require and without payment by him in any such case if he does not have sufficient means to pay for it (sp.d p.3 Art.14).

Article 2 of the Optional Protocol to the Covenant on Civil and Political Rights adopted by the UNO on December 19, 1966 and ratified by the RoK law on February 11, 2009 provides vast possibilities to defend rights of a person in court proceedings outside the national jurisdiction include the use of the counsel's competence. The Article states that if a member state violates any of the rights indicated in the Covenant and provided that all internal legal remedies are exhausted, the persons who insist on that might submit their written information to the UN Committee for consideration.

With this regard the following declaration was made in the RoK law: "The Republic of Kazakhstan, in accordance with the Article 1 of the Optional Protocol, recognizes the competence of the Human Rights Committee to accept and consider applications of certain persons falling under the jurisdiction of the Republic of Kazakhstan related to actions and inactions of state power authorities and acts or decisions taken by them after the date of enactment of the Optional Protocol for the Republic of Kazakhstan."

In terms of treatment of arrested or non-convicted defendants, the Minimum Standard Rules of Treatment of Prisoners are considered to be principal and practical provisions that have been approved by Resolutions of the UN Economic and Social Council on July 31, 1957 and May 13, 1977 respectively. Unfortunately they have not been fully integrated with the standards of the effective legislation of the Republic of Kazakhstan.

First of all, according to the above Rules persons under investigation are considered as innocent and require appropriate treatment (p.2 Art.84). Moreover, the Rules establish that persons under investigation, for the purposes of their defence, must have the right to apply, where possible, for no-charge legal advice, receive a legal advisor who assumed the defence in the place of imprisonment, prepare and make confidential instructions. Further on the Rules dictate to provide them with written instruments upon their request. At the same time the Rules oblige to arrange meetings of a prisoner with his legal advisor in front of but out of hail of the police or prison officers.

An important contribution into the defence of human rights with involvement of the defending lawyer was made by the Body of principles of defence of imprisoned or arrested persons approved by the UN Resolution dated December 9, 1988. Standards of this document must also be adopted in the effective legislation of the Republic of Kazakhstan.

According to Principle 17 a detained persons has the right for legal assistance from the part of an advocate. Soon after the arrest this person shall be informed on his right by a competent authority and provided with reasonable possibilities for the execution of this right (p.1). If the arrested person has no legal assistance of his choosing, in any cases when the interests of justice so require, he/she shall have the right to use advocate's services assigned to him by judicial authorities without payment if he does not have sufficient means to pay for it (p.2).

Principle 18 regulates relationships with the arrested or person in detention in more details. This concerns the right to communicate and consult with the advocate (p.1); right to get necessary time and conditions for consultation with the advocate (p.2); right for advocate's visits, communication and consultations without protraction or censuring and in conditions of complete confidentiality (this right might be legislatively restricted) (p.3). At the same time meetings with the advocate can be held in conditions allowing law enforcement officers seeing them but not hearing (p.4). In addition, the communication of the suspect with his advocate cannot be used as evidence against him if it has no connection with a crime being committed or planned (p.5).

Standards on the advocate's right to apply to a judicial or other body with requests or petitions in favor of the arrested or person in detention with regard to his medical examination, lawfulness of arrest, treatment of such person are provided for in Principles 25,32,33 of the Body of principles.

Insufficiently implemented in the existing legislation of Kazakhstan are the UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) adopted by the UN Resolution dated December 14, 1990. Paragraph 3.7 of these Rules emphasizes the necessity to appropriate machinery that shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights in the process of adopting, defining and taking of non-custodial measures.

To develop the Universal Declaration of Human Rights and International Covenant on Civil and Political

Rights, in order to increase efficiency of the fight against torture and other cruel, inhuman or degrading types of treatment and punishment, the OUN adopted an appropriate Convention, on December 10, 1984 that was ratified by a RoK law dated June 29, 1998. Provisions of this Convention should be considered as an important legal remedy available to the advocate in order to perform his function i.e. to prevent torture of the defended persons.

Amongst universal international documents, a special importance is attached to Beijing Rules or UN Standard Minimal Rules of Juvenile Justice adopted by the OUN on November 29, 1985 which is worth to complement the effective legislation of Kazakhstan.

Section 7 part 1 of these Rules recognizes the right of minors for a defender as one of the principal guarantees which realized at all stages of judicial proceedings (p.7.1.). Moreover, part 2 of the said Rules contains Section 15 "Advocate, parent and guardians", which provides for the right of an under-aged person to be represented by an advocate during the entire court proceedings, as well as the right for free-of-charge legal assistance is the legislation of the country provides for such assistance (p.15.1.).

In the list of universal international documents, it is worth to mention the UN Convention against Transnational Organized Crime that was adopted in Palermo on December 13, 2000 and ratified by Kazakhstan on June 4, 2008. Among measures preventing transnational organized crime the Convention recommends the States to develop codes of conduct for representative of relevant professions, in particular for advocates (p.2 Art.31).

Given the above context it is quite interesting to consider standards and provisions of international documents of regional nature that were ratified by laws of Kazakhstan. Their analysis proved poor regulation of issues related to the personality of the defender in criminal cases.

First of all this remark refers to the Convention on Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases adopted in Minsk on January 22, 1993 and ratified by the Supreme Council of the RoK on March 31, 1993. This Convention does not provide for specific standards on procedural forms of participation of the advocates in criminal proceedings.

The right for defense with involvement of an advocate was not fully reflected in the Convention on Legal Assistance and Legal Relationships in Civil, Family and Criminal Cases signed in Kishinev on October 7, 2002

and ratified by the RoK law on March 10, 2004. Granting of the right for defense, as one of measures, is stipulated only in Article 76 of the Convention. According to its provisions persons under arrest (detained) have the right for defense in the territory of each of the Negotiating Parties in compliance with its legislation including the application of claims against the arrest or prolongation of the arrest by applying the claim to the court or other competent institution of the Requesting Party by their defenders.

According to the Convention on Transfer of Sentenced for Further Punishment dated March 6, 1998 signed in Moscow ratified by the RoK Law on July 16, 1999, the defender is an active participant in the implementation of the sentenced person right for summoning in order to be extradited to the country of his citizenship or to a territory where he permanently resides (if he is a stateless person) (Art.3-4).

Concern on safety of the defender is the subject of the Agreement for the Protection of Criminal Justice signed in Minsk on November 28, 2006 and ratified by RoK law on June 17, 2008. According to this Agreement one of the participants of legal proceedings is the defender of the accused person (p.b Art.1).

Finally, a big document package is a group of international documents where one of the parties is the Republic of Kazakhstan, requires a separate analysis as well.

Such international documents mainly refer to the issues of legal assistance including assistance in criminal proceedings and are signed between Kazakhstan and certain CIS countries and outside CIS.

Random analysis of 18 documents showed absence of one or another standards and provisions on the function of defenders in providing legal assistance in its various forms in criminal cases.

Whereas, according to p. 7 of regulatory resolution of the Supreme Court No.26 dated December 6, 2002 "On the Practice of Application of the Criminal and Procedural Legislation Regulating the Right for Defense", foreign advocates may act as defenders only on the basis of a mutual international treaty between the RoK and respective foreign state. Authorities of the foreign advocate performing his activity must be confirmed by identity card, document establishing the status of advocate and the agreement on legal assistance between the advocate and the suspect, accused, person on trial and convicted.

It is obvious that the participation of the defending lawyer, within the scope of such international bilateral

documents, in no event can be excluded. As a rule it is based on internal legislation of the Negotiating Parties. However, this issue should be given due regard taking into consideration the importance of regulation of the common principle "respect and observance of human rights of a person involved in the sphere of such documents and processes regulated by them.

It is fair to say that the one-of-a-kind Treaty between Kazakhstan and the Republic of India on Mutual Legal Assistance in Criminal Cases ratified by the RoK law on May 17, 2000, where Article 8 "Collection of Evidence from the Party in Question" permits, in compliance with the legislation of the Party in question, special authorized persons, other officials and persons interested in procedural acts taken in the Party in question to be present during the collection of evidences from the Party in question and participate in the obtaining such documents (p.2).

At the same time the right to take part in the collection of evidences include the right of the advocate to be present in order to ask questions. Persons being present when legal assistance is being provided may get a permit to record verbal statements of procedural acts and use technical appliances (p.3).

CONCLUSION

Thus, in conclusion the following should be noted:

- As a whole the role and assignment of a defender got a statutory recognition in international legal documents on human rights.
- Extended definition of the rights for defense with use of advocate's authorities starting from the time the accusation was presented is a subject of separate standards of universal international documents on human rights. However, there is no separate international document of this level which would be devoted to personality of the defending lawyer in a criminal case.
- Functions of the advocate in a criminal case are poorly or insufficiently defined in international documents of a regional level, mainly in those that have been adopted by members of the Commonwealth of Independent States (CIS). In this connection it is suggested to introduce special sections in the Minsk and Kishinev Conventions which will indicate procedural forms ensuring the right for defense of the accused person with involvement of a defender.

- Bilateral international documents almost do not reflect the advocate's function in criminal cases which is inadmissible and requires insistence in this issue from the part of competent state authorities and officials of the Republic of Kazakhstan as one of the negotiating parties to such agreements. It should be a rule to be followed in bilateral international documents i.e. to officially recognize standards referring to the participation of the defender in collecting, examining, evaluating and using evidences when providing legal assistance in criminal cases in the territories of the negotiating parties.

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