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The Issues of Legal Status of a Witness under the Legislation of the Republic of Kazakhstan

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Abstract

This article discusses the preliminary investigation problems related to the presence of witnesses in the course of the investigation. At present, the institution of witnesses exists only in the legal system of post-Soviet states and in foreign countries, in order to secure the progress and results of investigative activities the technical means are used for a long time. Historical analysis of the emergence of witnesses in criminal proceedings suggests that the institution of the witnesses has existed since the Middle Ages, to this date, it is not a special significance, as in the past century, and is a relic of an outdated legal system. In writing this report, the author pursued the following objectives: to examine and analyze contemporary issues in the post-Soviet institution of witnesses; based on the experience of law enforcement agencies of foreign countries, as well as several works of scientists justify the possibility of replacing of witnesses in the investigation with the use of technical fixation means; to make an analysis of the rules of criminal legislation of the Republic of Kazakhstan regulating the legal status of a witness, and to formulate suggestions for the improvement of these rules. As a result of the research, the author has come to the following conclusions: in the practice of criminal prosecution bodies of the Republic of Kazakhstan and a number of neighboring states there have been accumulated a lot of problems associated with the presence of witnesses in the conduct of investigative activities; in order to eliminate these problems we need to make a number of amendments and additions to the Criminal Procedure Code: Article 86 of the Criminal Procedure Code of the Republic of Kazakhstan is necessary to specify the time of legal status gaining by a witness, as well as to differentiate the responsibility for his/her failure within procedural obligations; in order to prevent violations of the constitutional rights of citizens, it is necessary to provide a legislative involvement of witnesses to participate in the investigation only with their consent; given the experience of foreign countries, in future, Kazakhstan legislator needs to gradually withdraw from the witnesses' participation in the conduct of investigative actions, replacing it with the use of technical evidence fixation means.

Keywords: a preliminary investigation, the investigative actions, a witness, a legal status of the witness, the technical fixation means

1. Introduction

For a long time the institution of witnesses in criminal procedural law is the subject of academic discussions in Kazakhstan and other post-Soviet states. The relevance of the numerous studies on the subject is based on the fact that at all times in a criminal procedure, there were many problems associated with introducing the witnesses to the production of the investigative actions.

To date, pre-existing problems of the institution of witnesses are not solved in full, and therefore the study conducted is fairly important. Among scientists and practitioners of law enforcement agencies, the need for the witnesses in modern criminal trial is discussed quite often and everywhere. Participation of witnesses in investigative actions lost its relevance existed in the last century. Currently, in most countries of the world, the technical means instead of witnesses' participation are used to secure the progress and results of investigative actions. The using of technical means greatly simplifies and speeds up the detection and seizure of evidence of the conducted crime. In addition, the using of these means, as opposed to the participation of witnesses, mostly

ensures compliance with the rules of criminal procedure law by either an investigator or an inquirer in the production of investigative action. The above facts indicate the need for the abolition of the institution of witnesses, and the application of technical fixation means in the production of all investigative actions under the criminal procedural legislation of the Republic of Kazakhstan.

It should be noted that the problems of the institution of witnesses was previously studied in the works of scientists, such as R. S. Belkin, A. N. Ahpanov, T. A. Khanov, A. L. Khan, V. A. Sementsov, A. Kalugin, I. N. Kozhevnikov, A. V. Belousov, M. Vander, V. Isayenko, B. Kicheev, V. T. Tomin, M. Seleznev & V. M. Bykov, V. G. Ulyanov, A. Mikhailov, G. S. Zarovnevaya, S. E. Kiseleva, A. T. Eshengaliev, V. K. Afonin, V. V. Scharoun, O. V. Khitrova, F. N. Bagautdinov, A. Petrov, A. Y. Shaposhnikov, I. J. Foinitsky and others.

The main discussion point in the writings of the above scholars is the need for the existence of a witness in a criminal trial. We can say that academic society is divided into two branches: the "for" and "against" the existence of the institution of witnesses in the criminal law. Supporters of preserving the institution of the witnesses in the criminal law are such scholars as I. N. Kozhevnikov (1997, p. 22), M. Vander, V. Isaenko (1996, p. 2), F. N. Bagautdinov (2012, p. 50), M. Seleznev (1998, p. 36), V. M. Bykov (2002, p. 74), V. G. Ulyanov (2012, p. 1096), A. N. Ahpanov, A. L. Khan, T. A. Khans (2003, p. 95), R. S. Belkin (1993, pp. 139-140).

Other scholars, by contrast, have questioned the appropriateness of this institution's existence in the criminal law. They are A. V. Belousov (2001, p. 110), B. Kicheev (1990, p. 34), I. J. Foinitsky (1996, .p. 259), V. T. Tomin (1991, pp. 193-194), N. N. Zagvozdkin (1999, p. 59).

However, despite the large number of studies on the problems of the institution of witnesses in criminal proceedings, in Kazakhstan science, questions of legislative regulation of the legal status of a witness have never been observed. In this article, these issues are discussed for the first time, which confirms the scientific novelty of this research.

In the practice of the law enforcement bodies of the Republic of Kazakhstan, today there is a controversial issue regarding the participation of witnesses in the investigation. Most often, investigators, detectives, administrative police officers, involving citizens to participate in the investigation, do not quite correct interpret criminal procedural legislation of Kazakhstan to these citizens. According to the majority of law enforcement officers, citizens' participation as witnesses during the investigative actions is their duty, not a right. But this interpretation of the rules of criminal procedure law is not entirely correct. To resolve this issue, we should analyze the various rules of legislative acts regulating the participation of witnesses in the investigation.

In the system of criminal procedure legislation of Kazakhstan, provisions of the Constitution of the Republic of Kazakhstan dated August 30, 1995 are priority. The Constitution has supreme legal force with respect to all other laws and regulations of the Republic of Kazakhstan. Chapter Two of the Constitution of the Republic of Kazakhstan is named "Man and Citizen" and contains rules that define the basic rights, freedoms and duties of citizens of Kazakhstan, as well as foreigners and stateless persons residing in the territory of the Republic of Kazakhstan. If we proceed from the provisions of the Constitution governing criminal procedure in Kazakhstan, it can be concluded that the participation of citizens in criminal proceedings as witnesses is their right, not an obligation. This is evidenced by the content of Article 39 of the Constitution of the Republic of Kazakhstan, which states that the rights and freedoms of man and citizen may be limited only by laws and only to the extent that this is necessary in order to protect the constitutional order, public order, human rights and freedoms, public health or morals. Logical analysis of this provision makes it clear that any restriction of the rights or freedoms of the person is only allowed in cases where he has committed any offense or is complicit in its commission, which cannot be said about the witnesses that are not related to the commission of the offense.

Second place in the hierarchy of the Kazakh criminal procedure law on legal force is occupied by the universally recognized norms and principles of international law, ratified in the Republic of Kazakhstan. As an example, we can specify such as the Universal Declaration of Human Rights of 1948 and the French Declaration of Human Rights of 1789. These declarations, as well as in the Constitution of the Republic of Kazakhstan, say that the rights and freedoms of man and citizen may be limited in order to redress in the case of infringement of the rights and freedoms of another person. These limits are once again point out that the participation of citizens as witnesses in investigative activities is their right but not an obligation.

Criminal Procedure Code of the Republic of Kazakhstan dated December 13, 1997 #206-I in the system of criminal procedure legislation of Kazakhstan is the third legal force after the Constitution and rules of international law. This legal act in comparison with the rest of the most detailed ones regulates social relations in the field of criminal justice. However, it should be noted that the participation of witnesses is resolved not to the full by the rules of the Criminal Procedure Code of Kazakhstan. In addition, the content of this legal act includes

the conflicting rules, in particular concerning the participation of witnesses in criminal proceedings. These rules simultaneous fix both the right and duty of citizens to be understood in the criminal proceedings at the request of law enforcement officials.

Administrative Offences Code of the Republic of Kazakhstan regulates certain part of the public relations arising in the course of the investigation of crimes and further proceedings on these crimes as well. This Code contains a list of administrative offenses (Chapter 29), associated with failure or improper performance of proceedings parties of their procedural obligations. These offenses include: contempt of court, failure to appear before the prosecutor, investigator, in the body of inquiry, failure to appear in court to serve as a juror, the violation of personal guarantee of appearance of the accused or the suspect, as well as the obligation to ensure the appearance of the juvenile accused or suspect. It should be noted that the above chapter of the Administrative Offences Code of the Republic of Kazakhstan does not provide administrative liability for failure of citizens to participate in the investigation as witnesses. This again points to the fact that participation in the investigation as witnesses is a civil right, not an obligation.

Given that to date the legislation of many post-Soviet states in part is similar to each other, the author has studied the Criminal Procedure Codes of number of the border and neighboring states to Kazakhstan.

Criminal Procedure Code of the Russian Federation of December 18, 2001 #174-FL regulates public relations arising in the course of the pre-trial investigation of crimes and criminal proceedings in Russia. In contrast to the Kazakh criminal procedure law, Russian criminal procedural law does not have a dual norms establishing both the right and duty of citizens to attend as witnesses in the production of any investigative action. Russian legislator has provided the citizens of Russia voluntary participation as witnesses in criminal proceedings, as well as the right to refuse such participation in the case of their unwillingness, no responsibility for such refusal is not legally stipulated.

On the territory of the Republic of Belarus, the actions of the Court and the prosecuting authorities for the implementation of justice and the preliminary investigation are governed by the rules of the Criminal Procedure Code of the Republic of Belarus of July 16, 1999 #295-3. The provisions of this legal act, like the rules of Russian criminal proceedings do not oblige citizens to attend as witnesses in investigative actions, and provide citizens with the right to participate as witnesses, while providing the right to refuse such participation. Criminal procedure legislation of the Republic of Belarus obliges the citizen to perform the duties of a witness only after the citizen has given his consent to participate in the investigative action, and has acquired the legal status of a witness.

Criminal Procedure Code of the Kyrgyz Republic of June 30, 1999 #62 is the legal basis of the organization and order of the preliminary investigation and criminal proceedings in the territory of the Kyrgyz Republic. The participation of witnesses in criminal proceedings are governed by the rules of this legal act. Law enforcement bodies of the Kyrgyz Republic have the right to bring citizens as witnesses to participate in the investigative actions only on one condition: in the case of giving citizens of their consent to participate in the investigative actions as witnesses.

Criminal Procedure Code of the Republic of Uzbekistan of September 22, 1994 #2013-XII, as well as in the criminal procedure legislation of Kazakhstan, contains provisions that provide both the right and duty of citizens to participate in the investigative actions as witnesses. In other words, citizens residing in the territory of Uzbekistan, on the one hand, have the right to participate in the investigative actions as witnesses, and on the other hand, at the request of law enforcement officials, they must be present during the investigative actions as witnesses. Such regulation of the legal status of a witness indicates the ambiguity of the rules of the Criminal Procedure Code of the Republic of Uzbekistan, and their conflict with each other.

On January 18, 2012, the Law of the Republic of Kazakhstan #547-IV "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Criminal Penal System" was adopted, according to which extensive legal reform was undergone, aimed at the abolition of the participation of witnesses in almost all investigative actions. If previously, participation as witnesses was mandatory during 10 investigative actions under the Criminal Procedure Law, after the enactment of the Law, participation of witnesses became mandatory in only three investigative actions, and during the rest application of technical fixation means became mandatory. The adoption of this law has greatly simplified the procedure for the conduct of investigative actions and become the progress of Kazakhstan's criminal trial.

In December 2012, the President of the Republic of Kazakhstan NA Nazarbayev addressed the people of Kazakhstan with his message "Kazakhstan-2050" Strategy": New State Political Course." Later, the document was published in the media of Kazakhstan. In his message, the President of Kazakhstan identified priority

activities of state bodies until 2050, relating to many areas of government activity, including criminal justice. The head of state spoke about the need to simplify the administration of justice, deliverance from unnecessary bureaucratic procedures, as well as the active introduction of new information technologies. These progressive reforming directions of Kazakhstan's criminal procedure once again point to the need to gradually exclude the presence of witnesses in the production of all investigative actions, and replace them with the use of technical fixation means.

Problems associated with the presence of witnesses in the investigative actions, has been discussed in the Commonwealth of Independent States, not only at the legislative level, but also in the media, including print media. As an example, federal issue of "Rossiyskaya Gazeta" #5310 of 10/13/2013. This edition has an article entitled "Misunderstood Wintesses", which discusses the question of whether the existence of witnesses concept in criminal proceedings. Russian correspondent points to the need to replace the participation of witnesses in criminal proceedings with he application of technical fixation means. He substantiates his argument with interview with foreign lawyers and law enforcement officials of foreign states, during which they discussed ways of investigation process fixation in these states. The results of the interviews reveal that in a criminal law proceedings of some developed countries, such as the UK, USA, France, Germany, Canada, Japan, China, Institute of witnesses does not exist at all, and law enforcement officials record the progress and results of investigative actions by technical means. The experience of law enforcement bodies of these countries confirms the possibility of exclusion of witnesses of Kazakhstan criminal procedural law.

It should be noted that in the preparation of this article as a source, we also use the information service of the Committee on Legal Statistics and Special Records of the General Prosecutor of the Republic of Kazakhstan. This service contains extensive annual information on the state of crime in the territory of Kazakhstan, the results of the prosecuting authorities and the courts, the number of excited, discontinued, terminated criminal cases, as well as the results of the administrative police of Kazakhstan. Among the listed information on that site, there is also information about the number of offenses committed by the proceedings parties during the preliminary investigation and trial. These offenses are non-performance or improper performance of the proceedings parties of their procedural obligations. The article presents the data on number of specified offenses committed in the Republic of Kazakhstan for the last five years.

Thus, all the above problems of the preliminary investigation in the Republic of Kazakhstan set by the author and connected with the participation of witnesses in the course of the investigation have gave rise to the conduct of this research.

2. Methods

The theoretical basis of the research is scientific works of Kazakhstan and Russian scientists concerning problematic aspects of the participation of witnesses in the conduct of the investigative actions.

The empirical base of the research is the statistics of the Legal Statistics Committee and Special Records of the General Prosecutor of the Republic of Kazakhstan on the facts of falsification of evidence, committed over the past five years by law enforcement officials, as well as the facts of non-compliance of procedural obligations by the persons participating in criminal proceedings, including witnesses.

The research uses materials of periodical press (Russian Newspaper), where the issues of the participation of witnesses in criminal proceedings have been discussed.

The author has conducted a comparative legal analysis of criminal procedural legislation of the Republic of Kazakhstan and some countries of the Commonwealth of Independent States (hereinafter – CIS), which are the Russian Federation, the Republic of Belarus, the Kyrgyz Republic, the Republic of Uzbekistan. Analysis was applied to the legal rules governing the participation of witnesses in the investigative actions, as well as their legal status in the criminal law of the States concerned.

Based on the investigative practices of law enforcement agencies in the UK, Germany and China, the necessity of the abolition of the institution of witnesses in criminal proceedings of the Republic of Kazakhstan, and the application of technical fixation means in the production of all investigative actions under the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter – CPC) are being proved.

3. Results

Results of the study suggest that the involvement of witnesses to participate in the investigative actions raises many problems for law enforcement bodies of the Republic of Kazakhstan. Imperfection of criminal procedure rules governing the legal status of a witness leads to the fact that during the preliminary investigation by the authorized officials the constitutional rights of citizens are violated, as well as there are the facts of deviation by

the witnesses from their procedural obligations. These circumstances suggest the need to improve rules of the CPC of the Republic of Kazakhstan concerning the legal status of a witness.

In practice, there are some facts of falsification of legal documents in the law enforcement agencies of the Republic of Kazakhstan, where because of the difficulty of witnesses' attracting to participate in the investigative action, the investigator or the inquirer makes a record of any investigation the names of alleged witnesses who did not participate in the conduct of investigative actions. As a rule, those are most often citizens have repeatedly participated as witnesses in the production of other investigative actions, or friends and acquaintances of law enforcement officials, the so-called "ferro witnesses." Statistics of the Legal Statistics Committee and Special Records of the General Prosecutor of the Republic of Kazakhstan justify on the facts of falsification of evidence during the preliminary investigation, according to these documents in the Republic of Kazakhstan, for the last five years there 258 criminal cases under Article 348 of the Criminal Code (hereinafter – CC) occurred, which provides for criminal responsible for the falsification of evidence and the operational-search materials. Moreover, the above statistics indicates the annual growth in the number of crimes, as follows: in 2010, under Article 348 of the CC of the Republic of Kazakhstan 25 criminal cases were opened; in 2011, there were 29 criminal cases; in 2012 – 37 criminal cases; in 2013 – 99 criminal cases; within 6 months in 2014 – 68 criminal cases (Information service of the Legal Statistics Committee and Special Records of the General Prosecutor of the Republic of Kazakhstan).

Participation in an investigative action gives a lot of inconvenience to the witnesses themselves, as they are often in a hurry about their business and are looking forward to the end of the investigative action to sign the protocol as soon as possible and continue to go about their business. As a result, they do not perceive their environment, and thus their presence cannot guarantee compliance with the rules of criminal procedure law by the investigator or the inquirer.

Many citizens attracted to participate in the investigative action as witnesses generally shirk their procedural obligations stipulated by the Criminal Procedure Law. To these violations we can take into account such actions as a manifestation of contempt, failure to appear at the prosecutor, the investigator or the inquirer's, violation of the order in investigative actions, and etc. Over the past five years the law enforcement agencies of Kazakhstan opened 7 criminal cases under Article 342 of the CC of the Republic of Kazakhstan for contempt, which was summed up in insulting a judge, juror, or other participants in the proceedings. Under Article 513 of the Administrative Offences Code of the Republic of Kazakhstan (hereinafter – AOC) "On Contempt of Court" for this period, 1608 cases of administrative violations were instituted, as a result of judicial review where the perpetrators were imposed administrative fines in the amount of 7,580,396 tenge. 530 offenders has been applied an administrative penalty in the form of administrative arrest. For failure to appear at the prosecutor, the investigator, in the body of inquiry, the bailiff, the sergeant (Article 521 of the AOC) over the past 5 years, 4683 cases concerning an administrative offense were initiated, and as a result of their consideration, the offenders were imposed administrative fines in the amount of 11,460,796 tenge (Information service of the Legal Statistics Committee and Special Records of the General Prosecutor of the Republic of Kazakhstan).

The roots of the institution of witnesses come out of the distant past, it has been existed for around 365 years. Firstly, participation of witnesses was legally enshrined in the territory of the Russian Empire in the Council Code of 1649, with the aim of preventing abuse by officials. According to the text of this Code, at the time witnesses were outsiders who could be trusted: "Outside people, who are kind, who can be trusted" (Council Code of 1649 by Tsar Alexei Mikhailovich). We have to admit that in that distant time investigative actions without the participation of the witnesses was impossible, as there was no other way to fix the actions of officials in the implementation of these actions. However, in today's world, scientific and technological progress is growing rapidly, which makes it possible to use the latest technical equipment at the collection of evidence, and so every year the participation of witnesses in criminal proceedings has lost its significance. On this occasion, we can agree with A. Mikhailov, who called the witnesses as "archaic of Russian criminal justice system" (Mikhailov, 2003, p. 29).

President of the Republic of Kazakhstan, the Leader of the Nation NA Nazarbayev in his Letter to the People of Kazakhstan "Kazakhstan-2050 Strategy": New state political course" has pointed to the need to simplify the administration of justice, ridding it of unnecessary bureaucratic procedures. The President noted that, with the introduction of new information technologies it is easy to be made (Letter of the President of the Republic of Kazakhstan, 2012).

Another factor that confirms the ability of law enforcement agencies to do without the participation of witnesses in criminal proceedings is the fact that in some developed countries such as Japan, China, Germany, the UK,

USA, France, Canada and others, a witness as a participant of the criminal process does not exist at all (Semennikova, 2012). In these states, law enforcement officers use the capabilities of modern technical fixation means for capturing ongoing investigation.

There are interesting arguments about the lack of institution of witnesses in the criminal law of China, Germany and the UK, which are in the Russian Newspaper issue of October, 2013. Chinese experts attribute this to the inadmissibility of interference of other persons in criminal proceedings. To the question of the reporter if there are any witnesses in Germany, lawyer Torsten Hippe answered with the question as he did not understand what was meant. To call neighbors to look at the corpse would not occur to any one German policeman. To allow anyone at the scene is strictly forbidden: important traces may disappear. The modern conditions of the investigation, in which each hair is important, dictate the following: the strangers are at the scene before the arrival of specialists, the less – the better. Otherwise, important material information of DNA may permanently abyss for the analysis. Before, for the search of the premises in the absence of the owner it was recommended to attract witnesses. Thus, the suspects were protected from abuse of power. However, this requirement gradually gave way to the law on protection of personal data and privacy, respectively. No one would be nice if the apartment was run by strangers. And what if the owner is not guilty? Then he has the right to sue the police.

The question of the witnesses addressed by the London reporter of "Russian Newspaper" to the Ministry of Internal Affairs of Great Britain, as well as to London police surprised those and the others. In both departments, officials did not immediately get the essence of the requested comment: to harness to one wagon both a search at the suspect's home or his arrest and a presence of civilians as witnesses. How's that? The answer was clear: no witnesses are used by the police in the UK. Both the search and arrest are conducted exclusively by the police officers themselves (Misunderstood witnesses d/d 13/10/2013).

These arguments inevitably suggest that over time in a criminal trial of the Republic of Kazakhstan, the practice of witnesses' attract to participate in the investigation will become obsolete, and an alternative to it will be the use of special technical fixation means. We can say that the Kazakhstan legislator has already made the first innovation in this direction. On January 18, 2012, the Law of the Republic of Kazakhstan #547-IV "On introducing amendments and additions to some legislative acts on the correctional system of the Republic of Kazakhstan" was adopted. Legislative amendments considered then a number of legal acts of Kazakhstan, including the CPC. The issues of the witnesses' participation in investigative actions have not gone unnoticed. List of investigative actions carried out with the obligatory presence of witnesses, have been significantly reduced, as follows: from previous ten to date there are only three. These are the inspection of premises, search and personal search (unless it is conducted during the arrest or custody of the person). During the rest of the investigative actions, technical means for fixing the progress and results of investigative actions are to be used (Law of the Republic of Kazakhstan #547-IV d/d 18/01/2012). This kind of reform of the criminal procedure law has eliminated a lot of years of accumulated problems involving witnesses, and thereby greatly facilitated the work of law enforcement officers and life of citizens involved in conducting of investigative actions. One would think that after such total legislative amendments, previously existing problems concerning the participation of witnesses in criminal proceedings would be completely eliminated, and further research of the institution of witnesses is now irrelevant. However today, there are still some problems left unattended by legislator. Those problems are related to the legal status of a witness in a criminal trial. So, we proceed to observe them.

As is well known, the basic components of the legal status are the rights, duties, and responsibilities for the failure to meet those responsibilities. According to criminal procedure law of our state, the term, the rights and duties of a witness are set out in Articles 86, 93 of the CPC of the Republic of Kazakhstan. In accordance with Article 160 of the CPC of the Republic of Kazakhstan for non-compliance of its procedural obligations, the witness may be imposed a monetary penalty (Criminal Procedure Code of the Republic of Kazakhstan, 2014). Article 160 of the CPC of the Republic of Kazakhstan is a blanket rule and refers to the norms of the Administrative Offences Code of the Republic of Kazakhstan on (hereinafter – AOC). Articles 513, 521 of the AOC create an administrative liability for failure without a valid reason on request for summons, as well as at the prosecutor, the investigator's to testify (Code of the Republic of Kazakhstan, 2014).

A Witness according to the Kazakhstan criminal procedure law is a disinterested in the case and independent of the criminal prosecution bodies capable adult who has been attracted by the prosecuting authority to certify the fact of the investigative action, its progress and results. According to paragraph 4 of Article 86 of CPC, the witness has the right:

- To participate in the conduct of investigative action;

- To make over the investigative action statements and notes to be included in the report;

- To examine the protocol of investigative action in which he/she was involved;

- To appeal the actions of the criminal prosecution;

- To receive compensation for costs incurred during the criminal proceedings;

- To declare the application for the adoption of safety measures.

Paragraph 5 of Article 86 of the CPC provides the duties of a witness in criminal proceedings, which are the following:

- To appear via subpoena by the criminal prosecution;

- To take part in the conduct of investigative actions;

- To certify with his/her signature in the record of the investigative action the fact of this action, its progress and results;

- Not to disclose the materials and information on preliminary investigation without the permission of the inquirer, investigator, prosecutor;

- To comply with the order in investigative activities (Code of Criminal Procedure of the Republic of Kazakhstan, 1997).

The analysis of the witness's rights and duties immediately raises the question, if the presence of witnesses in an investigative action is his/her right or duty. The provisions of Article 86 of the CPC contain a twofold answer to this question: Paragraph 4 of Article provides the right of a witness to participate in the conduct of investigative action, as the next Paragraph 5 obliges him/her to participate in the course of the investigative actions. It is very unclear whether the witness is obliged to participate in the conduct of investigative actions since his/her first invitation, or only after a subpoena to the prosecuting authorities, when he/she has previously certified the fact of an investigative action by his/her presence.

The study also analyzes the law of other states, which also have an institution of witnesses in their criminal proceedings. The analysis found that in the Russian Federation, the participation of witnesses in conducting of investigative actions is their right, not a duty (Criminal Procedure Code of the Russian Federation, 2001). In the Kyrgyz Republic, the witnesses also do not have to take part in the course of the investigative action, and are involved in carrying out these actions with their consent (Criminal Procedure Code of the Kyrgyz Republic, 1999). Article 64 of the CPC of the Republic of Belarus requires a witness to certify the fact of investigative action, its progress and results with his/her signature in the record of this action. This Article does not mention a duty of a witness to take part in the conduct of the investigative action (Criminal Procedure Code of the Republic of Belarus, 1999). In the Republic of Uzbekistan, as well as in our country, the participation of witnesses in the conduct of the investigative action is both the right and the duty (Criminal Procedure Code of the Republic of Uzbekistan, 1994).

It also seems very interesting moment that the rules of CPC of the Republic of Kazakhstan do not specify the time of gaining legal status of a witness by a citizen, these cannot be said about the rules governing the legal status of other participants in the criminal process, such as a suspect, accused, victim, civil plaintiff, civil defendant. As an example, the content of certain provisions of the criminal procedure law may be revealed.

In accordance with Paragraph 1 of Article 68 of the CPC of the Republic of Kazakhstan (hereinafter – RK), the person is considered a suspect since the initiation of criminal proceedings against him in connection of suspicion in having committed a crime, or there is a decision on the recognition of his suspect, or his detention or application in respect of a preventive measure before arraignment.

Paragraph 1 of Article 69 of the CPC of the RK establishes the time of recognizing a person accused in a criminal case, as follows: by indictment, preparation and approval of a charge or trial proceedings report by the head of the inquiry body, as well as the preparation of trial proceedings report by the investigator.

According to Paragraph 3 of Article 75, Paragraph 2 of Article 77, Paragraph 2 of Article 78 of CPC of the RK, a person is considered as a victim, civil plaintiff, civil defendant in a criminal trial from the time of the issuance of the relevant resolutions to be recognized as those (Criminal Procedure Code of the Republic of Kazakhstan, 1997). But the moment of recognition of the citizen as a witness in the criminal process is not legally secured. This gap leads to a subjective interpretation of this issue, both on the part of law enforcement officials, and by other persons participating in criminal proceedings. Some believe that a person acquires the legal status of a witness from the time of the invitation to participate in the investigative action, the other think it starts from the moment of giving them permission to participate. Portrayed as the opinion that a person becomes a witness since

the signing of the protocol of the investigative action or from the moment of subpoena to the police after he/she has previously been present during the investigative action as a witness. Such an ambiguous understanding of legal status emergence of a witness leads to conflicts in the course of the investigation, violations of participants' rights in the criminal process and complicates the whole course of the preliminary investigation.

The uncertainty of the emergence time of the legal status of a witness creates difficulties in the implementation of responsibility for the failure to comply with his/her duties. Indeed, while the citizen does not have the status of a witness, the penalties for refusing to participate in the investigative action cannot be applied to him/her.

Thus, we consider responsibility of a witness in a criminal trial of the Republic of Kazakhstan in more details, as well as problems arising in the course of its implementation. In Paragraph 6 of Article 86 of the CPC of the Republic of Kazakhstan states that a witness for the refusal or failure to appear or perform his/her duties without good reason has administrative responsibility. Article 160 of the CPC of the Republic of Kazakhstan provides the imposition of monetary penalties for witness's failure to conduct his/her procedural obligations. The imposing order of the monetary penalty is regulated by the Administrative Offences Legislation of Kazakhstan. It turns out that the witness as a participant of the criminal proceedings shall be administratively responsible for non-compliance of the procedural duties, and all formulations of these administrative offenses are contained in Chapter 29 of the Administrative Offences Code of the Republic of Kazakhstan (hereinafter – AOC), referred to as "Administrative offenses against the state institutions." However, the Chapter provides liability only for two administrative offenses committed by witnesses during the investigation and trial, they are contempt of court (Art.513 of the AOC) and failure to appear at the prosecutor, the investigator, the body of inquiry, the bailiff, the sergeant's (Art. 521 of the AOC) (Administrative Offences Code of the Republic of Kazakhstan, 2001). For nonperformance of other duties specified in Paragraph 5 of Article 86 of the CPC of the Republic of Kazakhstan, in the Administrative Offences Legislation of the Republic of Kazakhstan the responsibility is not provided. The question arises about how to prosecute a witness for refusing to participate in an investigative action. After all, it is a well-known fact that the optionality of the law leads to the failure of these rules, and it is a very different situation for peremptory rules. In such a situation in accordance with Article 160 of the CPC of the Republic of Kazakhstan it is possible to apply the extent of procedural coercion in the form of a monetary penalty. However, this article does not describe the cost of this monetary penalty and the order of its imposition, but there is only a reference to the rules of the AOC. Therefore, the application of it in the absence of an administrative offense in a witness's actions is impossible.

These circumstances raise the question, if the rules requiring citizens to participate as witnesses in the course of the investigative actions are necessary in the CPC. In our opinion, such duty should not be, and there should be the right of citizens to participate in the investigative actions. In practice of law enforcement officials, there are times when the authorized officials, inviting citizens to participate in the investigative action, present it as a duty, the fulfillment of which they cannot refuse. Moreover, this explanation is often preceded by a verification of the documents, and then later the conduct of investigative actions is reported. In addition, many citizens are said by the guards since their invitation to participate in the investigative action, they immediately gain the status of a witness, although legally this time is not provided. And because of legal illiteracy many ordinary people perceive said as truth and regard themselves as witnesses since their invitation.

To oblige a citizen to participate in the investigative action as a witness is to some extent a measure of coercion. To oblige means to urge, force against their will. In this case, the right to freedom of action is temporarily limited, and a citizen has simply to postpone all his plans for some time, and spend his private time for participation in the investigative action. In addition, this kind of obligation contains the signs of temporary detention of a person, as from the time of invitation of the citizen and to the end of the investigative action, he loses the right to freedom of movement, and he must be in one place all this period of time. These circumstances reveal a violation of personal rights to freedom of movement under Article 21 of the Constitution of the Republic of Kazakhstan (the Constitution of the Republic of Kazakhstan, 1995). At first glance, these reasons can be refuted by invoking Article 39 of the Constitution of the Republic of Kazakhstan, which sets out that the rights and freedoms of a person and citizen may be limited only by laws and only to the extent that this is necessary in order to protect the constitutional order, protection of public order, human rights and freedoms, health and morals. However, in this case we are talking about restricting of the rights of the person who violated, or may violate, by his actions the rights and freedoms of others, or cause any damage to the state and society. It is mostly applicable to the suspect, accused or convicted, but not to the witness. In support of this we would like to quote scientists G.S. Zarovneva and S.E. Kiseleva, "Witnesses are the citizens who do not have any relation to the crime committed, or an investigated criminal case, and in the case of non-fulfillment of their civic duty, they,

unlike many other participants can be replaced, and so application of procedural compulsion measures to this category of persons is impractical and is not morally justified" (Zarovneva & Kiseleva, 2011).

In addition, Paragraph 2 of Article 29 of the Universal Declaration of Human Rights on December 10, 1948 states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations which are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and general welfare in a democratic society" (The Universal Declaration of Human Rights).

Article 4 of the French Declaration of the Rights of Man and Citizen in 1789 says that freedom is the ability to do anything that does not harm the others: thus, exercise of the natural rights of every human bounds with such limits that ensure to the other members of the society the enjoyment of the same rights (The French Declaration of the Rights of Man and Citizen, August 1789).

Analysis of international law lead to the conclusion that witnesses' duty enshrined in the rules in the CPC of the Republic of Kazakhstan to participate in the investigative action is contrary to these standards and significantly violates the rights of citizens involved in criminal proceedings as witnesses. It seems that such a duty remained in the CPC of the Republic of Kazakhstan as a relic of the past Soviet times, when the state's interests took precedence over human rights and people's consciousness was permeated with the ideology of Stalinism. But in modern Kazakhstan, the highest values are an individual, his life, rights and freedoms (Criminal Procedure Code of the Republic of Kazakhstan, 1994). (The Constitution of the Republic of Kazakhstan, 1995).

4. Discussions

As indicated above, the problem of the institution of witnesses have been discussed by many scientists, in connection with which, in the modern science of criminal procedural law, there are different opinions of the authors on the subject. So, we proceed to examine them.

In the writings of I. N. Kozhevnikov, the problem that is associated with invitation of witnesses to participate in the conduct of investigative actions. As the author notes, there is a necessity to tearfully beg citizens to attend as witnesses during the inspection of five-six sets of used clothing or other "values." This inspection may take several hours. Citizens flatly refuse or require tips "on brew." Naturally, these tips come from the salary of the investigator (Kozhevnikov, 1997, p. 69). As Chairman of the Investigative Committee of the Ministry of the Interior (MI) of the Russian Federation, I. N. Kozhevnikov called witnesses "a headache" of the investigator and proposed to reduce the number of investigative activities carried out with the obligatory presence of witnesses. In his opinion, it is necessary to maintain the participation of witnesses only during the search and contactless identification (Kozhevnikov, 1997, p. 69).

According to A. V. Belousov, a serious problem is the extremely low level of participation by witnesses in the investigative actions. It is obvious that person reluctant to agree to help the investigator will refer to his duties only on paper. This witness can hardly ascertain the content and results of the investigative action, and is only able to confirm the fact of his presence in the performance of investigative actions (Belousov, 2001, p. 110).

As rightly pointed by B. Kicheev, even the most responsible witness, being a normal person with a natural reaction to what is happening, will seek to stay away from viewing the corpse which had lain for several days in a locked premises. Appeals and persuasion "to get closer and view with attention" are counterproductive and coercive measures are clearly not ethical (Kicheev, 1990, p. 34).

The author of "Criminal Proceedings Course" of Tsarist Russia I. J. Foinitsky described the witnesses as "the rest of the ancient institution of public participation in a criminal court", reborn in the "institution that ensures the authenticity of what is happening in front of the said authority and recorded in the report", "Institution of non-confidence to the police" which was supposed to eliminate with transition of the preliminary investigation to the hands of judicial investigators (Bykov, 2002, p. 259).

V. T. Tomin believes that the participation of witnesses in the conduct of investigative actions is a problem of the proceeding practitioner, unknown to many theorists. Complexity begins with the very people who agree to take on these responsibilities. In his opinion, it is appropriate to make a request on the participation of witnesses in the investigation less categorical, to find it effective alternatives (Tomin, 1991, pp. 193-194).

The arguments of N. N. Zagvozdkin are also quite interesting, they are about the morality of participation of the witnesses in the course of the investigative actions. The author in his article asks the reader a series of rhetorical questions, which cast doubt on the need for the witnesses in the criminal law: "Is it moral to force ordinary citizens to look at all the details of a tortured corpse, the view of which causes squeamishness even of the seasoned professionals? What does raped woman feel, when her body is the subject of the survey and the vision

of two strange women (in addition to the investigator and the doctor)? Whether the investigator has the right to endanger the health and life of witnesses, fixing a personal search of the apprehended criminal? Whether the investigator is entitled to demand from the "people on the street" to non-disclose the information about the private life revealed in a search? Is it not replaced in these cases, "a keen interest in justice" with interest of a layman and onlooker?" (Zagvozdkin, 1999, p. 59).

It should also be noted that along with the opponents of the institution of witnesses there are its supporters offering to either leave witnesses involved in the investigative action without changes or revise the number of investigative actions with the presence of witnesses, or to convert the institution of the witnesses in the criminal law.

Scholars such as M. Vander and B. Isayenko advocate for the preservation of the institution of witnesses unchanged, emphasizing its function of identification in proving (Vander & Isayenko, 1996, p. 2).

F. N. Bagautdino reveals sufficiently strong arguments in his article pointing to the need to safeguard the institution of witnesses in the criminal law. Scientist rightly notes that the use of technical fixation means in investigative activities does not guarantee compliance with the law by law enforcement officials, as, thanks to the achievements of modern scientific and technological progress, the produced video can be easily falsified, or just pause a video in the right place, and then continue it after a certain period of time (Bagautdinov, 2012, p. 50). However, these arguments can be challenged because now, along with the emergence of various methods of video forgery, video and phonographic inspection means are rapidly developing to identify signs of editing or other changes during the video, or after its completion. And the facts of any video recording stop in conducted investigative action can be prevented by making additions to the Criminal Procedure Law: it is necessary as a mandatory condition of the application of technical video fixation means in investigative actions to provide the continuity of the video of these actions since the beginning of their holding up to the end.

According to M. Seleznev, the institution of witnesses must exist on a permanent basis, by analogy, for example, with the formation of lists of jurors by random sampling in the polls, involving citizens as witnesses for a short time, no more than once a year. Scientist justifies the proposed innovation that in practice of the law enforcement agencies, there are occasions when, sometimes persons invited as witnesses are chosen randomly without any attempt to find out their attitude to the participants of the investigative action and case under investigation as a whole, as well as people who are in a state of intoxication, a very old age, living far from the investigation site, etc. (Seleznev, 1998, p. 36).

V. M. Bykov proposes the creation of the institution of duty witnesses in each organ of inquiry and pre-trial unit, and also indicates the need for the participation of witnesses in the production of all investigative actions under the Criminal Procedure Law (Bykov, 2002, p. 74).

Professor V. G. Ulyanov considers unreasonable exclusion of compulsory participation of witnesses in carrying out such important investigative action as a crime scene examination. According to the author, it is a crime scene examination begins majority of criminal cases investigated by the investigative apparatus of law enforcement agencies. In the course of its production, there are determination, fixation and removal of the lion's share of traces and physical evidence of the investigated crime (Ulyanov, 2012, p. 1096).

According to scientists A. N. Ahpanov, A. L. Khan, T. A. Khanov, refusing of the institution in full is premature, as this may lead to the subjective discretion of the officials and the weakening of the safeguards of citizens' rights in the criminal process. The authors propose legislation to provide the participation of witnesses only when forced investigative actions, and in other cases use technical fixation means. Scientists also propose the creation at the Prosecutor of the permanent social structure, including a list of individuals who can potentially perform auxiliary functions in the criminal process (witnesses, extras, etc.) (Ahpanov, et al., 2003, p. 95).

Known representative of the national forensics R. S. Belkin rightly pointed out that the witnesses due to their incompetence cannot assess the legality, expediency and objectivity of the investigative action, do not understand the meaning of what is happening in most cases implicitly believe the investigator. Therefore, the scientist considers justified the participation of witnesses only in home search or for the protection of the investigator from slander persons involved in the investigative actions (Belkin, 2003, pp. 139-140).

Thus, in the science of criminal procedure, there are some compelling arguments in favor of preserving the institution of witnesses, and in favor of its expulsion. In our point of view, it is necessary to agree with the opinion of scientists that point to the ineffectiveness of the participation of witnesses in the investigative actions. Indeed, given challenges of law enforcement force to think seriously about the need for the existence of the institution of witnesses in the criminal law. Procedure for bringing the said persons to conduct investigative

action gives the investigator a lot of extra hassle, and sometimes even forcing him or other employees to violate the provisions of the law. For example, in the daily practice of law enforcement agencies, there are often cases where the witness is not aware of his/her rights and duties, the legal consequences of such participation in the investigative action, he/she is just invited "to attend briefly and put a signature". Such a way of inviting of witnesses is used by law enforcement officers in order to avoid the failure of citizens to participate in the conduct of investigative actions. After all, not everyone will agree on the presence, which can last several hours, so even with the future probability of repeated calls to the police.

5. Conclusions

Thus, as a result of the study, we discussed current problems of the institution of witnesses in the Republic of Kazakhstan and other countries of the Commonwealth of Independent States. The author reveals the shortcomings and contradictions of legislative regulation of the legal status of a witness in the Republic of Kazakhstan.

In order to address the above issues, taking into account the rules of international law and the laws of surrounding states, it is necessary to make adjustments to the Article 86 of the CPC of the Republic of Kazakhstan.

Firstly, we need to legislatively provide as a mandatory condition of involving citizens as witnesses on their consent.

Secondly, the time of legal status gaining of a witness by a citizen requires a detailed specification. Therefore, Article 86 of the CPC of the Republic of Kazakhstan shall include Paragraph 2-1 as follows: "A person is considered as a witness in criminal proceedings since giving him/her permission to take part in the conduct of investigative action."

Third, in Paragraph 5 of Article 86, which provides witness's duty, the phrase "To take part in the investigative action" shall be excluded, thereby not obliging witness to be involved in the investigative action against his will.

The witness's responsibility should also be differentiated for non-fulfillment of his/her procedural obligations: to indicate in a separate paragraph of the article that the witness shall be criminally responsible for the disclosure of information of inquiry or preliminary investigation without the consent of the prosecutor, investigator or person conducting the inquiry in accordance with Article 355 of the Criminal Code of the Republic of Kazakhstan. This innovation is due to the fact that the present wording of Article 86 of the CPC only mentions on the administrative liability for witness's failure to conduct his or her duties.

The proposed legislative changes will more accurately distribute the rights and duties of a witness in a criminal trial in accordance with international law, specify the time of the legal status, as well as appropriately implement the responsibility for committing an offense.

It should be noted that this research is limited to consideration of questions of witnesses' participation in the investigative actions, as well as problems of legal regulation of their legal status in the criminal law of the Republic of Kazakhstan. Given that the institution of witnesses is gradually losing its relevance and after a while, perhaps even cease to exist in Kazakhstan's criminal trial, in future it seems more prospective to research issues of legal regulation of the application of special technical fixation means in investigative actions.

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