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Comparative analysis of the status of a victim of a criminal offence in Kazakhstan, Russia, and Germany

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Abstract

Relevance. The relevance of the study lies in the examination of the status of a victim of a crime, the protection and enforcement of their rights, the consideration of the victim institution in different countries, in particular in the Russian Federation, the Republic of Kazakhstan, and Germany.

Purpose. The purpose of the research is to examine the features of the victim's status and conduct their legal analysis in various states, to study and ensure the interests and rights of the victim, which are violated during the pre-trial investigation and trial.

Methodology. The methods by which the research of the given subject is conducted include dialectical, legal, formal legal, hermeneutic, logical-legal, structural-functional, analysis and synthesis, induction and deduction, etc.

Results. The results of this study include the establishment of a definition of the term victim. The essence and content of the status of the victim are determined. A list of legal regulations is provided, which forms the basis for regulating the victim institution in criminal proceedings. A legal analysis of the status of the victim in different countries, specifically Russia, Kazakhstan, and Germany, is conducted. The experiences of these countries highlight both the negative and positive aspects of the regulation of this institution.

Conclusions. In the course of the study, a legal analysis and comparison of the common and distinctive features inherent in the victim institution in criminal proceedings were conducted. Recommendations on the effective protection and enforcement of the rights of victims were included. The provisions enshrined in this study are of practical value to citizens and all persons whose rights may be violated by a criminal act, as well as to state bodies whose powers are aimed at ensuring the protection of the rights of crime victims.

Keywords: victim's rights; enforcement; criminal proceedings; procedures; interests.

Introduction

In the modern world, millions of people become victims of criminal acts annually. However, despite such statistics, a much smaller number of people request assistance from law enforcement agencies. The reason for this may be distrust and doubt about the effectiveness of law

enforcement agencies. The ineffectiveness of the activities of persons authorised to protect the rights of people can be explained by the disadvantages that arise when regulating the criminal procedural investigation, which begins from the moment of reporting the commission of a crime against the victim. It is also can be caused by the difference

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between the interests of the victim and the person authorised to protect the rights of such a victim, and the ineffective protection of the rights of the relevant persons.

In different countries, there is a large list of rights of crime victims, but despite this list of rights, in practice, the exercise of such rights is somewhat different. Firstly, this is due to the fact that citizens lose faith in protecting their violated interests since it takes a lot of time and effort, and the fact that the services of a lawyer are very often inaccessible from a material standpoint [1]. In every legal and democratic society, the purpose of the criminal process is not only to punish the perpetrators of the crime but also to protect the victims of criminal acts. Therefore, the primary stage of the investigation should be organised in such a way that information about an upcoming or committed crime promptly receives the correct legal evaluation. The regulation of the stage of opening criminal proceedings does not allow fully accessing justice and the exercise of the right to conduct a trial within a reasonable time [2].

International cooperation of states on various issues and the adoption of positive experience in regulating the status of a crime victim help to improve this institution to effectively protect the rights of these persons. A victim is a person to whom material, moral, or physical harm is caused by a criminally unlawful act. The victims of the committed crime can be individuals and legal entities. An important condition for the restoration of the rights of the victim is their maximum protection. In protecting and enforcing the rights of the victim of a crime, the victim, law enforcement agencies, and persons directly authorised to protect the rights of victims should take part. State bodies should create conditions in which the rights of victims will be effectively exercised [3]. The majority of disadvantages in the regulation of the status of the victim are in the implementation of pre-trial investigation and judicial review of a criminal case. Thus, in most countries of the world, including the former countries of the Soviet Union, the implementation of criminal proceedings, investigation, and consideration of the case is not a reliable mechanism for crime victims to protect their rights.

Various researchers who have studied the sphere of protection of the rights of crime victims expressed their opinions differently. A. Stremoukhin [4] noted that the protection of the rights of the victim is, firstly, the activities of state authorities, which are aimed at creating guarantees, the effect of which extends to the protection of the rights of relevant persons, and the means of their exercise. In turn, M.A. Rostovshchikov [5] indicated that the protection of the rights of victims mainly consists in creating favourable conditions for the exercise of such granted rights during the pre-trial investigation and judicial review of the case.

The research aims to define the essence of the term "victim" and examine the development of the victim institution over a long period. It seeks to identify and study the general procedure for enforcing victims' rights in pre-trial proceedings and during the trial. The study includes an analysis of the victim institution in criminal proceedings in various countries, including Russia, Kazakhstan, and Germany, and conducts a comparative analysis of these systems. Additionally, it analyzes legal gaps in the

regulation of a crime victim's legal status and formulates proposals for improving criminal procedural legislation.

Materials and Methods

This research is based on a systematic approach, conditioned by the specific features of the subject under study and associated with the use of general scientific and special scientific methods. General methods define philosophical and ideological approaches that express the most universal principles of research, in particular dialectical and phenomenological methods, using which the status of the victim of a crime is analysed. The basis of this research is a dialectical method aimed at the cognition of changing socio-legal processes in connection with other phenomena requiring consideration in their continuous development.

The provisions of the general theory of law, criminal law, criminal procedure, criminology, psychology, logic, and other sciences allowed identifying the essence and features of the rights of the victim in pre-trial criminal proceedings and court proceedings. The historical method allowed studying the development of the institution of the status of the victim over a long period. Statistical and comparative legal methods were used to identify areas for improving the legal framework aimed at protecting and enforcing the rights of victims. As private scientific methods, Aristotelian methods were used, which consist in identifying and analysing the elements that constitute the concept and essence of the category victim; a statistical method that includes the collection and analysis of data on the number of crime victims.

Such theoretical and logical methods as deduction, induction, a systematic approach, analysis, synthesis have been widely used, which allowed obtaining reliable knowledge about the role of the victim during the pre-trial investigation and trial. In addition, for a more complete and effective study of this subject, the following methods were used. Hermeneutic, to cover the essence of the term victim and its status in various states. Analysis, which allowed dividing object of research into its component parts for their independent study and helped to connect individual legal phenomena that were the subject of analysis into a logically structured legal reality. Analogies, which establish similarities among some signs of legal phenomena and in legal relations; also, upon using this method, knowledge about objects and phenomena is achieved provided that they have similarities with others.

For a more detailed study of this subject, the semantic method was also used as a tool for clarifying the content of the basic concepts of research through the semantic side of linguistic units. The theoretical-prognostic method allowed formulating conclusions and proposals, the means of their implementation, and became the basis for determining the feasibility and prospects of the given proposals.

The legal analysis was used to study the relevant provisions of criminalistics, criminal procedural and criminal legislation, departmental regulations on issues that arise in governing the status of a victim of a crime. The theoretical basis of this research is the studies of national and foreign researchers from various branches of legal science, devoted to issues related to the protection of the rights of the victim.

The above methods were used by the author to examine the problems under study. Upon using them, the author defined the basic concepts and provisions specified in this study and made recommendations for improving this area.

Results and Discussion

The introduction of European models for the protection of the rights of people, including victims of criminal acts, into the Russian legal system, which is generally aimed at ensuring imperative relations of the "power-subordination" type, entails erroneous ideas about the status of a victim of a committed crime. In Russia, human security is a kind of *ultima causa*, that is, it is often addressed, but rarely investigated, similarly to the creation of a unified system for regulating human protection, including the victim. Only minor amendments are made to legal regulations, the effect of which is aimed at governing these problems. The main legal regulations in Russia governing the sphere of protection of the rights of crime victims are the Constitution and the Criminal Procedure Code of the Russian Federation [6; 7]. According to the Constitution of the Russian Federation, the rights of crime victims are protected by law. In turn, the Criminal Procedure Code of the Russian Federation regulates the protection of the rights and legitimate interests of victims, compensation for damage caused by a criminal act committed, and defines and ensures access of all citizens to justice.

Among the legal regulations governing the status of the victim, Federal Law No. 432-FZ of 12/28/2013 [8] can be outlined. "On amendments to certain legal regulations of the Russian Federation to improve the exercise of the rights of victims in criminal proceedings", the essence of which is to expand the rights of the victim in protecting their interests. One of the main disadvantages of this Law is that it regulates exclusively the protection of the rights of victims who are natural persons. The crime rate in Russia is high, 2,024,337 registered criminal acts were recorded in 2020, which is 32,805 more than in 2018. The detection rate of such crimes, in 2020, was only 54.8% of the total number of registered crimes. That is, it can be stated that almost half of the crimes committed remain unpunished, which ultimately leads to a violation of the rights of persons affected by the criminal offence [9].

In addition, one of the considerable disadvantages in the protection of the rights of victims is a large number of violations on the part of the bodies conducting the pre-trial investigations of the committed illegal acts. Thus, only in 2019, the prosecutor's office cancelled and did not adopt 2,035,927 decisions to refuse to initiate a criminal case and 26,156 decisions to terminate a criminal case (criminal prosecution) [9]. A considerable number of complaints from the affected persons were filed against the actions and inaction of investigators, bodies of inquiry, and inquirers during reception and registration, consideration of reports on a criminal offence, issues of inquiry and investigation.

The interests of the victim are also violated during the judicial review of a criminal case. Thus, during the operation of the concept of adversarial parties and the absence of the requirements of the law on the establishment of the truth, restrictions for the court in the examination of evidence, the victim's defence cannot be enforced without the active role of the prosecution. However, the imposition on the prosecutor's office of the

obligation to press the charges in cases of private-public and public prosecution leads to the fact that in the consideration of some cases, prosecutors who do not have sufficient experience and who do not have enough time to prepare for the trial take part. There is an established practice of the prosecutor's refusal to charge a person suspected of committing a criminal act which, in turn, leads to the impossibility of defending the victim's point of view and, accordingly, to adequately protect their rights.

Considering all the above-mentioned problems in enforcing the rights of the victim and establishing their status as a participant in the judicial process, it can be stated that the rights of victims from criminal acts are not guaranteed and are not protected at the proper level in the criminal process. The issues of protecting the rights of victims have been the subject of reports of the Commissioner for Human Rights of the Russian Federation for several years.

One of the important issues in the scientific doctrine of the criminal law of the Russian Federation is the granting of the right to the crime victim to defend their rights by independent criminal prosecution of persons suspected of committing it. This issue was the object of research back in the 19th century when there was the preparation and adoption of judicial statutes. The regulations made at that time intensified the participation of the victim in the criminal prosecution of a person suspected of committing a crime. The Criminal Procedure Code of the Russian Federation [7] establishes a provision according to which the victim has the right to "take part in the criminal prosecution of the accused, and in criminal cases of private prosecution – to lay and press the charge".

The legal status of the victim in the Russian Federation is somewhat similar to the legal status of the victim in the Republic of Kazakhstan, but there are still differences in their legal regulation. As an example, Paragraph 3 of Part 3 of Article 42 of the Criminal Procedure Code of the Russian Federation [7] can be used, which establishes the right of the victim to testify against oneself or their relatives or loved ones. If the victim does give evidence, they should be informed that their testimony can be used as evidence in a criminal case. The Criminal Procedure Code of the Republic of Kazakhstan [10] does not contain this provision, since the legislator considered it unnecessary when adopting the Code, since the principle of criminal procedure, enshrined in Article 28 of the Criminal Procedure Code of the Republic of Kazakhstan (Exemption from the obligation to testify), states that "no one is obliged to testify against oneself, their spouse and close relatives, the circle of which is defined by this Code".

The Criminal Procedure Code of the Russian Federation [7] has secured for the victim the right to take part in the consideration of their case in the court of the first, appeal, and cassation instance, and to take part in cases provided for by law, when considering a case that involves the execution of a sentence. When considering criminal cases, especially those crimes that are committed against a person, the opinion of the victim is considered, which is a fair administration of justice, one of the fundamental principles of the criminal process.

Based on the subject of this study, it is necessary to track the experience of becoming a victim of a criminal offence in Kazakhstan, and the main features, signs, and

characteristics of this participant in the trial. In the Republic of Kazakhstan, every person is guaranteed the rights and freedoms established in the Constitution. If such rights are violated by a third party, then such an offender must bear the responsibility established by law, and the victim, accordingly, can apply to the court for protection of their rights. State authorities are obliged to protect the rights of all persons from any unlawful encroachments if a criminally punishable act is committed against the interests of such persons.

In Soviet times, the interests of the state were the priority interests of the criminal process in Kazakhstan, and the issues of the criminal, the crime itself, and the reaction of state bodies to the criminal act committed were important for the criminal process. The victim of a criminal act was assigned only an auxiliary role, that is, such a role was assigned to ensure the public interest in the punishment of the person who committed the crime, therefore, at that time, the victim was considered only from the standpoint of qualification and criminalisation [2]. At that time, no attention was paid to the interests and rights of victims of criminal acts. These provisions were enshrined in the criminal legislation of Kazakhstan primarily because of the conformity and fulfilment of the tasks of the socialist state, in which collective rights and interests were prioritised, not individual ones.

Today, the key tasks are to overcome this approach and to strengthen the victim as a separate individual, to pay attention to the real needs and problems of such persons, and to change priorities from the primary punishment of the perpetrator to the restoration of the violated rights of the victim of the crime. For that reason, in many countries of the world priority is given to the so-called "restorative justice". The Declaration of the Basic Principles of Justice for Victims of Crimes and Abuse of Power of November 29, 1985, adopted based on UN General Assembly Resolution No. 40/34 [11], is aimed at drawing the attention of public authorities to the problems and interests of crime victims and in every way contribute to compensation for the harm caused to them as a result of the commission of a criminal act.

In Kazakhstan at the present stage of development, the victim is a central figure in the pre-trial investigation and judicial review of the case. In 2019, 200.796 criminal acts were registered there, which were committed against individuals. To fully clarify the circumstances of the case, the causes and conditions of the commission of the crime, it is necessary to consider the identity of the victim, since there are cases when a crime is committed due to the unjustified actions of the victims. The criminal procedure of Kazakhstan should ensure a certain balance between the numerous novelties of the criminal procedure and procedural provisions designed to ensure the observance of the principle of adversariality and equality of the parties to the prosecution and defence. According to the Constitution of Kazakhstan [12] and the above principle, the parties to the criminal process are endowed with equal rights to defend their interests and protect their rights.

To fully cover the status of a victim of a criminal act in the Republic of Kazakhstan, the history of the development of this institution should be investigated. For a long time, the main source of Kazakh law was considered custom, that is, *adat*. *Adat* considered the totality of oral customs

and norms of the behaviour of people in various life situations. The development of the national Kazakh law is associated with the development and establishment of the Kazakh statehood, namely from the moment of the development of the Kazakh Khanate by the sultans Janibek and Kerei in 1465-1466. During that time a set of oral legal customs took place and through the efforts of the Kazakh khans, the first monuments of Kazakh law were created – the code "Qasym hannıń qasqa joly" (The shining path of Kasim Khan), "Esimhannıń Eski joly" (The Ancient, Primordial path of Yessim Khan), and "Zheti Zhargy" of Tauke Khan. Only Zheti Jargy has reached present days. Zheti Zhargy consisted of seven parts and regulated various spheres of public life: disputes over kunas, inter-family disputes, land lawsuits, responsibility for crimes, ensuring national security, disputes over widows, parenting and marital relations [13].

S. Zimanov [14] explained the essence of customary law in Kazakhstan as "the law that is as close as possible to the people and which fully conveyed the interests and way of their life". Criminal proceedings arose there if a lawsuit was filed, that is, the trial could not begin without a corresponding statement from the victim or a member of the community, who personally had to declare a violation of their rights and thus initiate the case. Consequently, under ordinary law, the initiation of criminal prosecution and consideration of a criminal act could not begin only based on the discovery of a criminal act committed but began after the claim of the person concerned.

The mechanism and the trial process itself were launched only on the initiative of the victim based on openness and adversariality. Notably, at that time (18th century), investigations and prosecution were awarded to the victim of the crime, who acted on behalf of the society, played the role of its authorised representative in such cases. That is, it can be argued that this was the direct responsibility of the victim, and not their right [2]. In ordinary Kazakh law, the victim was called *talapker* or *daulaushy*. In Kazakhstan, the laws of Tauke were in force, according to which the victim was given the right of revenge. This provision completely disappeared at the end of the 19th century due to the emergence of new legal provisions. In accordance with the new provisions, the criminal accused could pay the victim with kunas, the amount of which depended on the damage caused. Conciliation procedures were also provided to reconcile the victim with the accused.

The analysis of the Kazakh criminal law defines the victim as one of the central persons of the criminal process. In the criminal law of the Republic of Kazakhstan, an "affected person" and a "victim of a crime" are distinguished, since not any person who is harmed by a criminal act can be recognised as a victim. To recognise a person as a victim, it is necessary to have a certain number of signs, including the issuance of an order by the authorised person investigating the crime to recognise the affected person as a victim. When it comes to the deprivation of life, such a person cannot change the status, therefore, in this case, the affected person will be considered the victim.

The status of the victim in Kazakhstan is mainly regulated by the Criminal Procedure Code of the Republic of Kazakhstan [10]. Article 71 of the Code establishes that

a person who has suffered moral, material, or physical harm by a committed criminal act is recognised as a victim in criminal proceedings. Moreover, a person is recognised as a victim when the damage was inflicted on them by an insane person. A person becomes a victim after a decision is made to assign them the appropriate status. If during the trial it was established that the person is not a victim, the court by its decision terminates the participation of this person in the case as a victim. Both individuals and legal entities can be crime victims, to whom property damage may be caused by a criminal act.

In addition, in its explanations, the Supreme Court of the Republic of Kazakhstan defined the term victim. According to this explanation, a person is a victim if they suffered material, moral, or physical harm by a socially dangerous act, regardless of whether the person who committed the corresponding unlawful act was brought to justice. According to the above explanation, a person cannot be recognised as a victim if the harm was caused with their consent (for example, when giving a bribe or performing an abortion) [15].

The status of a victim is governed, in addition to legal regulations of national legislation, by international acts, namely: the Universal Declaration of Human Rights of December 10, 1948 [16] and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by the UN General Assembly Resolution of November 29, 1985, 40/34) [11]. In addition, the Recommendations of the Committee of Ministers of the Council of Europe "On the Position of the Victim in the Framework of Criminal Law and Procedure" dated June 28, 1985, NR (85) 11 [17] can be attributed to international acts that regulate the status of victims. These Recommendations act as a source of law in regulating the protection of the rights of the victim, even though the Republic of Kazakhstan is not a European state. In these legal regulations, the main provisions are the protection of the rights of the victim, which is one of the most important functions of the judicial process.

There are certain disadvantages in the regulation of the status of the victim in the Republic of Kazakhstan, including lack of knowledge of the victims of their rights and inconsistency of the provisions of criminal law. Ignorance by the victim of the charge against the perpetrator makes the victim's rights to some extent declarative. The victim does not always have access to the case materials, which in turn does not allow them to fully defend their rights.

The study of the status of the victim and the consolidation of their rights in Germany is relevant from the standpoint of introducing the experience of this country in establishing the rights of the victim in different countries, including the countries of the former Soviet Union. In Germany, there are special laws regulating the protection of the rights of crime victims, in particular, the Law On Compensation to Victims of Violent Crimes, the Law on Equality and the Prevention of Racial Persecution, etc. The efficiency of the functioning of state bodies, the active position of various public organisations, the

presence of federal specialised units in the police to help and advice victims of crime – make it impossible for the victim to be hopeless and fully protect their rights.

To improve the status of the victim in post-Soviet countries, it is possible to borrow from Germany the provisions of the legislation on the protection of the rights of victims and distribute various guides on protection from crimes, similar to the second edition of the alphabet of the victim of crime 2002 by the BMJV of the Federal Republic of Germany. In Germany, there is a public organisation called "White ring", which is aimed at protecting crime victims and has been operating since 1976, it includes approximately 60.000 members, has 3.000 volunteer assistants. The German society (associations) helps crime victims and "victims against violence" lands funds for helping crime victims. "Victim's Perspective" – an organisation that helps victims of right-wing extremist crimes and many others [3]. In Germany, the rights of the victim are differentiated not only by their protection but also depending on the procedural function. The victims who press the charges, the so-called co-accused, are endowed with additional rights, including the right to appeal against the order of the court, the right to challenge the judge, the right to petition to obtain evidence, the right to the assistance of a lawyer [18].

Conclusions

The victims of criminal acts are persons to whom material, moral, or physical harm is caused by a criminally unlawful act. The victim of the committed crime can be individuals and legal entities. An important condition for the restoration of the rights of the victim is their maximum protection. In protecting and enforcing the rights of the victim of a crime, the victim, law enforcement agencies, and persons directly authorised to protect the rights of victims should take part. State bodies should create conditions under which the rights of victims will be effectively exercised.

In the course of this study, the status of the victim was analysed in different states, in particular in the Russian Federation, the Republic of Kazakhstan, and Germany. Common and distinctive features in the regulation and enforcement of the rights of victims were established. Based on the Criminal Procedure Code of Kazakhstan and Russia, a detailed analysis and description of the rights of the victim during the pre-trial investigation and judicial review of the case were conducted. In addition, during this study, the author specified the basic rights of the victim, which can be used during the pre-trial investigation and trial. It is noted that, for example, in Russia, a person who has suffered from a crime can take part in the prosecution of a person who has committed a crime.

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There are none.

Conflict of Interest

There are none.

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Порівняльний аналіз статусу потерпілого від кримінального правопорушення в Казахстані, Росії та Німеччині

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Анотація

Актуальність. Актуальність дослідження полягає у вивченні статусу потерпілого від злочину, захисту та реалізації його прав, розгляді інституту віктимології в різних країнах, зокрема в Російській Федерації, Республіці Казахстан та Німеччина.

Мета. Метою дослідження є вивчення особливостей статусу потерпілого та проведення їхнього правового аналізу в різних державах, вивчення та забезпечення інтересів і прав потерпілого, які порушуються під час досудового розслідування та судового розгляду.

Методологія. Методи, за допомогою яких здійснюється дослідження даної теми, включають діалектичний, юридичний, формально-юридичний, герменевтичний, логіко-правовий, структурно-функціональний, аналізу та синтезу, індукції та дедукції тощо.

Результати. Результати цього дослідження включають встановлення визначення поняття потерпілого. Визначено сутність та зміст статусу потерпілого. Наведено перелік правових норм, які є основою для регулювання інституту потерпілого у кримінальному судочинстві. Проведено правовий аналіз статусу потерпілого в різних країнах, зокрема Росії, Казахстані та Німеччині. Досвід цих країн висвітлює як негативні, так і позитивні сторони регулювання цього інституту.

Висновки. У ході дослідження проведено правовий аналіз та порівняння спільних та відмінних ознак, притаманних інституту потерпілого у кримінальному провадженні. Включено рекомендації щодо ефективного захисту та дотримання прав потерпілих. Положення, закріплені в цьому дослідженні, мають практичне значення для громадян та всіх осіб, права яких можуть бути порушені злочинним діянням, а також для державних органів, повноваження яких спрямовані на забезпечення захисту прав потерпілих від злочинів.

Ключові слова: права потерпілого; примусове виконання; кримінальне провадження; процедури; інтереси.