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6-бөлім
ҚЫЛМЫСТЫҚ ҚҰҚЫҚ ЖӘНЕ КРИМИНАЛИСТИКА

Раздел 6
УГОЛОВНОЕ ПРАВО И КРИМИНАЛИСТИКА

Section 6
CRIMINAL LAW AND CRIMINALISTICS

МРНТИ 10.79.37

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Задержание как мера процессуального принуждения в уголовном процессе

В статье рассматриваются особенности задержания подозреваемого в совершении уголовного правонарушения, предусмотренные уголовно-процессуальным законодательством Республики Казахстан. Выявляются основные черты, цели и порядок задержания как меры процессуального принуждения. Освещаются проблемные вопросы законодательства о сроках задержания, пределах применения силы при задержании, об основаниях признания задержания незаконным и необоснованным. Формулируются предложения по совершенствованию норм УПК РК в целях надлежащего обеспечения прав личности при задержании.

Актуальность данной статьи обусловлена тем, что в уголовно-процессуальной науке есть проблемы, которые связаны с обеспечением прав личности при производстве процессуальных действий с применением средств уголовно-процессуального принуждения, поскольку при этом в большей степени затрагиваются конституционные права и свободы участников уголовного судопроизводства.

Целью данной статьи является рассмотрение порядка задержания подозреваемого как мера процессуального принуждения, применяемая органом дознания, дознавателем, следователем или прокурором на срок не более 72 часов с момента фактического задержания лица по подозрению в совершении преступления. Суть этой меры заключается в кратковременном лишении свободы лица, подозреваемого в совершении преступления, в целях выяснения его личности, причастности к преступлению и решения вопроса о применении к нему меры пресечения - как правило, содержание под стражу.

Автор, считает, что задержание подозреваемого – это кратковременное ограничение свободы. Основания для осуществления этого действия, внесенные в протокол, одновременно выступают в качестве фактических данных, обстоятельств, имеющих доказательственное значение. Но, целью задержания является лишение лица, подозреваемого в совершении уголовного правонарушения, возможности оказать неправомерное влияние на процесс расследования, противодействие установлению истины по уголовному делу, скрыться от органов дознания, следствия и судебных органов, продолжить противоправную деятельность. Таким образом, следует, что необходимо из практики работы правоохранительных органов должны быть исключены факторы необоснованных задержаний и средств, незаконного привлечения к уголовной ответственности.

Ключевые слова: задержание, уголовное преследование, мера процессуального принуждения, уполномоченные лица, срок задержания, порядок задержания, процессуальный прокурор, уголовный процесс.

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Қамауға алу қылмыстық іс бойынша процессуалдық мәжбүрлеу шарасы ретінде

Бұл мақалада Қазақстан Республикасының қылмыстық іс жүргізу заңнамасында көзделген қылмыстық іс қозғауда сезікті күдіктіні ұстау ерекшелігі қарастырылады. Іс жүргізудің мәжбүрлеу шарасы ретінде ұстаудың негізгі ерекшеліктерін, мақсаттарын және тәртібін анықтау. Қамауға алу шарттары туралы заңнаманың проблемалық мәселелері, қамауға алу кезінде күш қолдану лимиттері және қамауды заңсыз және негізсіз деп тану негіздері қамтылады. Ұсталған кезде адамның құқықтарын тиісті түрде қамтамасыз ету мақсатында Қазақстан Республикасының Қылмыстық іс жүр гізу кодексінің нормаларын жетілдіру бойынша ұсыныстар жасалады.

Осы баптың өзектілігі қылмыстық іс жүргізу ғылымында қылмыстық іс жүргізудің мәжбүрлеу құралдарын пайдаланып, іс жүргізу әрекеттерінде адамның құқықтарын қамтамасыз етумен байланысты проблемалар бар екендігіне байланысты, себебі бұл жағдайда қылмыстық іс бойынша қатысушыларға конституциялық құқықтар мен еркіндіктер көп әсер етеді.

Осы баптың мақсаты қылмыс жасады деген күдікпен адамның іс жүзінде ұсталған кезден бастап 72 сағаттан аспайтын мерзімге тергеу органы, тергеуші немесе прокурор қолданылатын процессуалдық мәжбүрлеу шарасы ретінде күдіктіні ұстау тәртібі туралы болып табылады. Әдетте қамауда - бұл шараның мәні, оның жеке басын анықтауға, қылмысқа тарту және бұлтартпау шарасын қолдану шешу мақсатында қылмыс жасады деген күдікпен бір адамды бас бостандығынан қысқа мерзімді айыру жатыр.

Автор, күдіктіні ұстау - еркіндіктің қысқа мерзімді шектеуі, деп санайды. Хаттамаға енгізілген осы іс-шараны жүргізудің негізі бір мезгілде нақты деректер, дәлелді мәнге ие мән-жайлар ретінде әрекет етеді. Қамауға алу мақсаты қылмыстық іс бойынша күдікті адамнан бас тарту, тергеу үдерісіне теріс әсер етуге, қылмыстық іс бойынша шындықты орнатуға қарсы тұруға, тергеу, тергеу және сот органдарына жасырынуға, заңсыз әрекеттерді жалғастыруға мүмкіндік бермеу. Осылайша, негізсіз ұстау және қылмыстық жауапкершілікке заңсыз келу фактілері құқық қорғау органдарының тәжірибесінен алынып тасталуы керек.

Түйінді сөздер: ұстау, қылмыстық қудалау, рәсімдік мәжбүрлеу шаралары, уәкілетті адамдар, ұстау мерзімі, ұстау тәртібі, іс жүргізу прокуроры, қылмыстық процесс.

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Detention as a measure of procedural coercion in criminal proceedings

The article discusses the features of the detention of a suspect in a criminal offense, provided the criminal procedural legislation of the Republic of Kazakhstan. Identify the main features, objectives and order of detention as a measure of procedural coercion. The problematic issues of the legislation on the terms of detention, the limits of the use of force during detention, and the grounds for recognizing detention as unlawful and unreasonable are covered. Suggestions are made to improve the norms of the Code of Criminal Procedure of the Republic of Kazakhstan in order to properly ensure the rights of the individual during detention.

The relevance of this article is due to the fact that in criminal procedure science there are problems that relate to ensuring the rights of the individual in the process of procedural actions using the means of criminal procedural coercion, since in this case the constitutional rights and freedoms of participants in criminal proceedings are more affected.

The purpose of this article is to consider the procedure for detaining a suspect as a procedural coercion measure applied by the inquiry body, investigator, interrogator or prosecutor for a period not exceeding 72 hours from the moment of actual detention of a person on suspicion of committing a crime. The essence of this measure is the short-term deprivation of liberty of a person suspected of committing a crime in order to ascertain his identity, involvement in a crime and to decide on the application of a preventive measure to him - usually detention

The author considers that the detention of a suspect is a short-term restriction of freedom. The grounds for carrying out this action, entered in the protocol, simultaneously act as factual data, circumstances having evidentiary value. But, the purpose of the detention is to deprive a person suspected of committing a criminal offense, to have the opportunity to exert an undue influence on the investigation process, to resist the establishment of truth in a criminal case, to hide from the bodies of inquiry, investigation and judicial bodies, to continue unlawful activities. Thus, it follows that it is necessary in law enforcement work practice factors unjustified detention should be excluded and money, unlawful criminal responsibility.

Key words: detention, criminal prosecution, coercive procedural measure, authorized persons, period of detention, procedure for the detention, procedural prosecutor, criminal process

The relevance of the study is due to the fact that in criminal procedure science there are problems associated with ensuring the rights of the individual in the process of procedural actions using the means of criminal procedural coercion, since in this case the constitutional rights and freedoms of participants in criminal proceedings are more affected.

In the system of natural and inalienable human rights, freedom and personal inviolability occupy a special place. The Constitution of the Republic of Kazakhstan bears in itself inalienable human rights, security and legal protection of the individual (https://online.zakon.kz/Document/?doc_id=1005029: 1).

Since gaining the Republic of Kazakhstan state independence, on the scale of history it is just a moment, a clot of time, during which it is quite difficult to form a qualitatively new model of the development of the state. The processes taking place in society are by nature inertial, and the change in the political and economic system, social values, life-styles are dragged on for decades. The unprecedented dynamism of development, a sharp change of landmarks gave rise to a wide range of assessments of the state of affairs in the country. So, the criminal situation continues to remain extremely tense. As is known, in our Republic legal reform is being carried out, certain steps are being taken to improve the situation that has developed in our society. In the development concept of the Republic of Kazakhstan for the period until 2030 it is noted that the renewal of the economic system of the republic, the contradiction and difficulties of the social, spiritual and other spheres of public life, the weakening of discipline and responsibility is accompanied by the growth of offenses.

Legislation has been introduced to enforce the protection of the rights of citizens in criminal proceedings, and reduce its repressiveness (http://www.akorda.kz/: 2).

New forms of against-rights activity have developed, criminal professionalism is increasing, and crime is becoming organized. The international links of criminal groups are spreading, their merging with corrupt officials occurs.

The government made significant changes in the structure of law enforcement bodies in order to strengthen the fight against organized forms of crime, as well as prevent and suppress corruption. At the present time, the new Criminal and Criminal Procedural Codes of the Republic of Kazakhstan are adopted and are beginning to work.

It should be noted that during this period the issues of combating crime and violations of law become extremely important, serve the strictest observance of laws, strengthen the guarantees of the rights and freedoms of citizens. In this regard, new criminal procedure legislation is of great importance. In it, issues related to preventive measures are more thoroughly and clearly worked out.

In the criminal process, in order to better implement the tasks of justice, preventive measures, which are measures of state coercion, are applied. The correctness of the choice of preventive measures is in fact guaranteed by the precise indication in the law of the conditions that allow their application by the presence of a certain procedural order, the supervision of the prosecutor for observing the conditions and procedure for applying preventive measures by the bodies of preliminary investigation.

From the practice of law enforcement agencies should be excluded factors of unreasonable detention and funds, against - rights prosecution.

All proceedings in a criminal case must be carried out in such a way that will maximize citizens' sense of respect for the law, the need for strict and unswerving compliance with it, and the accused - a sense of illegality and the public danger of his actions, awaken in him the desire to correct and accede to socially useful work.

Taking into account the requirements of the modern complex historical stage, criminal justice today must be an effective means of combating crime, contribute to further strengthening the rule of law and order in the Republic of Kazakhstan. Justice in the Republic of Kazakhstan is carried out only by the court. This provision is fixed in Art. 75 of the Constitution of the Republic of Kazakhstan and is reflected in Art. 1 of the Constitutional Law of the Republic of Kazakhstan "On the judicial system and the status of judges" (http://online.zakon.kz: 3). The importance of this provision is great, since without a well-constructed, well-functioning justice system, it is impossible to talk about a legal, democratic state, to the creation of which we aspire.

The humanization of the criminal policy of the state is directly aimed at criminal and criminal procedural legislation.

The tendency to apply more humane treatment to citizens, including those who violated the criminal law, invariably entails the application of more humane preventive measures, not related to detention.

The modern period of time is characterized by a change in procedures that protect the rights of the individual. A state whose mission is to protect the interests of its citizens, first of all, should not cause unnecessary suffering of citizens, especially those who have not yet been found guilty by a court verdict that has entered into legal force.

In the conditions of the formation of the rule of law in Kazakhstan, the process of rethinking the place and role of the state in the life of society and the individual, its correlation with law, civil society and other parts of the political system of society is underway.

The object of the study are the public relations that develop during applying procedural coercion measures provided for by section 4 of the Criminal Procedure Code of the Republic of Kazakhstan containing elements of criminal procedural coercion in the stage of pre-trial investigation.

The subject of the study are the theoretical provisions of the criminal procedure science devoted to procedural coercion, as well as the norms of international legal acts, the Criminal Procedure Code of the Republic of Kazakhstan, regulating the grounds and conditions for the application of criminal procedural coercion.

The aim of the research was to develop recommendations for the disclosure, suppression and investigation of criminal offenses through the institution of measures of procedural coercion.

The methodological basis of the research was made up of dialectical and private-scientific methods: historical, formal-logical, comparative-legal, sociological and statistical, contributing to the achievement of the research goal.

Main part.

Science and legal practice are faced with the questions to what extent and in what form, under what circumstances in the present conditions the state and its bodies are competent to apply coercion. Obviously, coercion, whatever form it takes, will always remain an indispensable attribute of the state. It is necessary at least to ensure that all the power of the state apparatus to ensure the implementation and compliance with legal norms by those persons who do not wish to do so voluntarily.

In modern conditions, the measures of state coercion acquire a clearly expressed dual character. On the one hand, they can undoubtedly restrict the rights and freedoms of the individual and citizen, the rights and legitimate interests of legal entities, and on the other - are aimed at protecting these rights, freedoms and legitimate interests. The measures of state coercion are quite diverse and can be classified on various grounds: by the nature of the impact, by the branches of law and by the connection with legal responsibility. The last of these grounds for the classification of measures of state coercion made it possible to identify a special group of measures of state coercion - preventive measures.

Measures of procedural coercion are, first of all, the preventive measures specified in the law, applied by the investigator, the investigator within the limits of his powers or by the court (Sarsenbaev T.E., 2000: 4, p.110).

Like any other procedural coercion, preventive measures should be applied in strict observance of the norms, first of all, the Constitution of the Republic of Kazakhstan, international norms, criminal and criminal procedural law of the Republic of Kazakhstan, which primarily regulate the guarantees of observance of human and civil rights and freedoms, compensation of losses caused by illegal actions of law enforcement agencies, etc.

M. A. Cheltsov-Bebutov speaking about the measures of procedural coercion in general, indicates that they are by legal nature "... should not be considered as punishment for the offender, but as a restriction of the citizen's rights, because until the moment of sentencing the accused cannot still be considered a criminal". The difference between the measures of procedural coercion and punishment M. A. Cheltsov-Bebutov sees that "... their sole purpose is to prevent the possibility of non-fulfillment of procedural obligations" (Cheltsov-Bebutov M.A., 1995: 5, p. 500).

Effective organization of criminal prosecution is possible only if there are measures of state coercion at the disposal of law enforcement agencies. Procedural coercion, applied in concert with other procedural measures, acts as an important system-forming factor in preventing and suppressing criminal activity of accused persons (suspects), contributing to the successful conduct of preliminary investigation and trial.

Undoubtedly, the use of criminal procedural coercion is dictated by objective circumstances. But in each case of their application, the axiological basis of the decision and action to be taken is necessary. A person subjected to state coercion in the sphere of criminal proceedings must be aware of his duty to follow the prescription or enforcement of the law and to imagine how much they correspond to moral principles. At the same time, an authority must understand the necessity and moral justification of such an impact, not only the legal but also the moral correctness of his actions (Moskal'kova T.N., 1996: 6, p. 35).

In the Criminal Procedural Code of the Republic of Kazakhstan, the Criminal Procedural Legislation contains a whole section devoted to procedural coercive measures (Section 4), which consists of three chapters: Chapter 17, "Detention of a Suspect," Chapter 18, "Preventive Measures," Chapter 19 "Other measures of procedural coercion" (https://online.zakon.kz/Document/?doc_id=31575852: 7). On the one hand, the legislator has put an end to some theoretical disputes regarding the attribution of certain criminal procedural institutions to measures of procedural coercion (for example, the issue of whether detention is related to investigative actions or coercive measures is resolved lawfully). On the other hand, many procedural actions and decisions that are clearly compulsory (for example, placement in a medical or psychiatric hospital) or which contain elements of criminal procedural coercion (for example, a search that in a number of cases foreign countries by the degree of coercion is equivalent to the arrest of a person (Kartashkin V.A., 1998: 8, p.24) or listening to telephone conversations, examination, etc.).

Most of the so-called other measures of procedural coercion provided for by the head of the 19 th CPC RK, as well as procedural and investigative actions containing elements of criminal procedure coercion, are applied not only to suspects and accused, but also to other participants in criminal proceedings, without any procedural status. There is a situation where every citizen is potentially a person who can be involved in the criminal process. His general duty is that he must endure such encumbrances, the necessity of which can later be called into question. We believe, like other authors, that this duty excludes any compensation for the use of coercive measures and their consequences (Kuhne N.N., 1978: 9, p.112-113).

At the forefront there is the responsibility of government agencies and officials for compliance with the requirements of the criminal procedure law. However, for the successful conduction of the criminal process, the responsibility of other persons involved in the sphere of criminal proceedings is also important.

This problem, as was sharply controversial, remains so until now, despite the fact that many problematic issues were analyzed in the work of the scientists-processivists. Nevertheless, the importance of her research for clarifying the mechanism of criminal procedure regulation is beyond doubt. An analysis of the different views on this problem will contribute to the development of a coherent, coherent concept of criminal procedural responsibility and coercion.

In particular, there is no clarity in delineating the measures of criminal procedural responsibility from other measures of procedural coercion. Although it is obvious that in one case the measures of criminal procedural coercion are preventive-protective, and in the other - they are applied only in connection with the commission of an offense as a criminal procedural sanction.

Solving problem situations and controversial issues will make it possible to ensure more careful development of guarantees of the rights of citizens in the application of criminal procedural coercion, in the process of procedural actions, which has not only theoretical but also practical significance, since violations of law in the activities of law enforcement bodies associated with the use of unlawful methods of investigation, with illegal detention, with disregard for the rights of participants in the process, are not isolated.

In all laws and orders, without exception, there are two forms of restricting a person's freedom as two measures of procedural coercion: 1) short-term detention (Chuvilev A.A., 1982: 10, p. 28); 2) long detention. In all legal orders between them there is a fundamental difference: detention is by nature a police measure, i.e. implementation of police functions; detention is by nature a judicial measure, i. implementation of judicial functions. In our legislation, the first of these forms (police) is denoted by the concept of "detention", and the second (judicial) - the concept of "detention".

Legally, in accordance with modern constitutional and international legal imperatives, any restriction on a person's physical freedom and his placement in custody requires judicial intervention, i.e. are allowed only on the basis of a court decision. However, in fact, this is not always possible, because as a rule, not real courts are faced with real manifestations of

criminal activity, but the police, which performs the function of maintaining public order and forced "on the spot" to respond to violations of the criminal law (to come on citizens' calls, to stop crimes during patrolling of streets, etc.). Of course, such a problem arises only in cases when the police not only state a criminal act, but also face a person allegedly committed it (an actual suspect), which is "in the hands" of the police.

Thus, between the physical suppression of criminal activities of a certain person (the task of the police) and the real possibility of legalizing (realizing) this situation (drafting the necessary documents, resolving the issue of the legal qualification of the act, bringing a person who deserves to be detained, etc.).) there is an inevitable time interval, from which, with all the desire, no legal system can get rid of, for absolutely objective reasons. There is only one way out here: to design a special criminal procedural institute (the institution of detention), which occupies a special place in the system of criminal procedure law and is the only way to overcome the problem of the actual gap between police suppression of a criminal (hypothetical) activity of a certain person and bringing this situation to the mainstream ordinary procedural decisions, actions, etc. Otherwise, the police would have to withdraw the activities of the police to suppress criminal acts and restrict physical freedom of suspects beyond the limits of criminal procedure regulation, which could lead to massive violations of individual rights and which no legal system can afford.

The special (unique) place of the institution of detention in the system of criminal procedural law and its special (severely restricted) functional load make it possible to identify several universal essential characteristics of this institution.

First, detention is limited to hours (usually several decades hours), as this is enough to ensure that the situation has acquired normal procedural features and entered the required legal channel.

Secondly, detention does not imply the possibility of adopting any preliminary procedural decision, as it is a procedural form of responding to actual circumstances.

Thirdly, the procedural registration of detention occurs after the detention has been carried out, i.e. unlike other procedural actions, the grounds and motives for detention are set forth post factum - in an act (protocol) that is not compiled before, but after detention.

Fourth, detention is the only measure of procedural coercion, which is generally applied only before the pre-trial investigation.

Fifthly, detention is the only permissible case of restriction of a person's physical freedom made without a court decision.

Sixthly, criminal procedural detention as an action, generating a number of legal consequences, should be documented. Without this, detention will not be considered a procedural act, a legal fact will not be generated (Abdrakhmanov R., 2003: 11).

The noted characteristics of the institute make it possible to understand why detention is not part of preventive measures. These characteristics are not only incompatible with the concept of preventive measures, but also directly opposite to it, as the measures of restraint are applied only after the beginning of pre-trial investigation, for a relatively long period, on the basis of a reasoned preliminary ruling, etc. In such a situation, detention cannot remain a measure of procedural coercion of a special kind (sui generis). The noted universal characteristics are reflected in the criminal procedure law, to the analysis of which we pass.

In Art. 128 of the CPC RK contain an exhaustive list of grounds for detaining a person suspected of committing crimes. In our opinion, some grounds may lead to abuse by law enforcement agencies. Thus, we can give an example of clause 2, part 2, article 128 of the Code of Criminal Procedure of the Republic of Kazakhstan, the suspect can be detained when in the materials of the RDD, counterintelligence activity and (or) secret investigative actions received in accordance with the law, there are reliable data on the person who is committed or is preparing crime. In our opinion, this ground (the provision) can be too widely interpreted by law enforcement officials. In addition, the reliability of the materials of the RAN (https://online.zakon.kz/: 12) or secret investigative actions in the event of detention is not subject to preliminary verification by the judicial authority.

One of the few legal states, the police, before detaining a particular person, should contact the judge before the suspect's detention, and before he became aware of the intention of the police to detain him. If the police convinces the judge of the need for detention, they receive a warrant for this and detain them. But our Kazakhstan legislation does not contain such a provision and any detention is carried out by the police without preliminary permission from the court. Instead, the law provides for detention as a preventive measure, usually after the person has already been detained. We believe that this practice is contrary to international standards for the protection of human rights and encourages the use of illegal investigative methods to collect the necessary evidence to authorize arrest. Out of this, two different procedures should be envisaged. The first procedure should concern the judicial authorization of detention on the warrant of the court, in which the court makes a decision to detain the person, pending his actual detention. The second procedure should be applied in cases where a person was detained without a court decision in cases of detention at the scene of the crime (https://www.zakon.kz: 13).

The necessity to introduce an institution of detention on a court order in the RK. This is due to a number of reasons, one of which there is the possibility of using unreasonable detention by the police prior to the sanction of the court to obtain confessions even in cases where there is no confession or there are no serious grounds to suspect the detainee of the crime. Often, in order to obtain confessions and to disclose the crime, the police grossly violate the criminal procedure legislation, by using torture, intimidating and deceiving detainees. Often such statements are recognized by the court as admissible, tk. It is extremely difficult for a defendant to convince a judge that he was subjected to unlawful methods of investigation and inquiry, that his confessions were involuntary. The Institute of Detention on a court order will reduce cases of unreasonable detention of a person by the police in order to "knock out" confessions.

The institution of detention on a court order will increase the responsibility of the investigative authorities to the judiciary.

Nowadays, the "Miranda" program is in force in accordance with which when a person is arrested on suspicion of committing a criminal offense, the official of the criminal investigative body orally declares to the person his procedural rights (art. 131 CCP), but does it act, is this a question?

The law "Miranda" - warning is a legal requirement in the United States of America that, during detention, the detainee must be notified of his rights, and the detainee of law enforcement must obtain a positive answer to the question whether he understands what has been said.

The Miranda rule arose from the historic "Miranda vs Arizona" case and was named after the accused Ernesto Miranda, whose testimony was excluded from the case file as received in violation of the fifth amendment. Miranda was nevertheless convicted on the basis of other case materials (https://kapital.kz: 14).

There is a possibility that law enforcement officials will be able to abuse their powers and not inform suspects about their rights at the time of actual detention, and also incorrectly record the time of actual detention in order to illegally extend the admissible term of detention. Yes, nowasays, law enforcement officers use audio, video recording at the time of detention, but our view should apply audio, video recording continuously from the moment of detention and until interrogation at the police station.

Types of preventive measures

In the comparative legal framework, two possible approaches to the types of preventive measures should be distinguished first: 1) the Anglo-Saxon approach is based on the absence of an exhaustive list of preventive measures in the usual sense; in fact, there is only one measure of restraint - detention in custody, as well as the right of the court not to place the accused in custody if certain conditions are met (and sometimes without conditions at all) put forward by the court in each case; this kind of alternative to imprisonment is covered not just translated into English by the English concept of bail, which means not only

a pledge or a surety, but also any other conditions that allow the judge not to place the accused in custody even if there are grounds for doing so; while the concrete alternative is most often determined not by the law, but by the judge himself, based on the circumstances of the case; 2) the continental approach, according to which the criminal procedure law should contain an exhaustive list of preventive measures, i.e. the judge in such a situation can only choose a measure of restraint from the list proposed to him by the legislator, without having the right to independently develop (create) the appropriate legal limitations for each specific case.

The continental model, in turn, breaks down into two variants that can be conditionally designated as French and Russian: 1) the French version assumes that all preventive measures not related to imprisonment are combined within the overall complex concept of "judicial control" (judiciaire), therefore, when deciding on judicial control, the person conducting the proceedings in the case has the right to simultaneously select several preventive measures complementary to each other, some then to cancel, some to replace, some add, etc., i.e. all alternatives to imprisonment preventive measures are not mutually exclusive, but complementary (Golovko L.V., 2017: 15, p. 997); 2) our legislation considers every measure of restraint as autonomous, which makes it possible to use only one of them - simultaneous application of several preventive measures is excluded.

Thus, the current criminal procedure law grants the investigator, investigator or court the right to apply only one of the seven preventive measures provided for in Art. 137 CCP RK.

In accordance with Art. 137 of the CCP RK, preventive measures are divided into several types. This classification starts with the most liberal measure (a written undertaking not to leave the place and proper behavior) and ends with the most burdensome or restrictive measure for the rights and freedoms of citizens (detention).

What do we see in practice!

In practice, such actions are carried out when individuals can be initially identified to such crimes (as particularly serious crimes), then he is given a preventive measure in the form of detention, its duration is prolonged more than 8 times, all appeals, accompanied by indications of overstatement, unsuccessful. And after a year and a half of being in custody, a person is convicted of a crime (of moderate severity) (http://online.zakon.kz/document/?doc_id=31575252: 16), according to which the extension of the period of detention over 6 months by law is not allowed at all.

In our opinion, such a practice will exist until the court begins to analyze the preliminary qualification of the temporary crime to confirm it, at least with evidence that is convincing at first glance.

Again, if for example, the investigating judge must apply the least onerous measure of restraint for the suspect if the prosecution did not convince the judge the need for a more restrictive measure. For example, the investigating judge must apply on bail if the prosecutor would not be able to convince the judge that the interests of justice can only be achieved through the use of collateral or a more restrictive measure. Also, the judge must apply the bail if the party cannot convince the judge of the need for home arrest. For example, in Canada, it is called a ladder approach when applying measures of restraint of varying severity and limitations. This approach is aimed at ensuring the rights of citizens such as the right to the presumption of innocence (art. 77 of the Constitution of the Republic of Kazakhstan) and the right to be released from custody pending trial.

Often, in order to leave the suspect, the accused in custody, the investigator or the inquirer, it is enough simply to list the grounds provided for in Article 128 of the CCP RK, or to bring on duty the words about the gravity of the incriminated act, the need to conduct investigative actions and the person's lack of social ties. The latter - even in cases where the accused in the absence of officially registered marriage and children, for example, have parents with whom normal relations are maintained. (As one of the employees said: "We do not take him into the army to take into account his marital status"). However, at the same

time, an extensive analysis of the evidence supporting specific facts of the impact on witnesses and victims, the destruction of evidence or evidence of the availability of the accused's intentions, is almost never given.

Detention

Concerning the significance of the severity of the punishment, the European Court of Human Rights (ECHR) (https://www.zakon.kz: 17) maintains the position that "the existence of a significant suspicion of a person's involvement in a serious crime, although relevant, but in itself cannot justify a long period of detention"(Khavronuk N.I., 2016: 18).

According to the provision of part 3 of article 147 of the Criminal Procedure Code of the Republic of Kazakhstan, the right to initiate solicitation of a preventive measure as a preventive measure belongs to the person conducting the pre-trial investigation. We believe that the function of initiating a solicitation and maintaining it in court must be in the exclusive competence of the prosecutor, since it is he who represents the interests of the state in court, and also he has the function of maintaining public prosecution. On the other hand, the role of the investigator should be limited to the implementation of the investigation in a criminal case and the initiation of an application for choosing a preventive measure in the form of detention should not be within his competence. At the same time, it is obvious that the prosecutor will have to initiate and support motions on the basis of materials collected by the investigator and operational personnel.

I also wanted to emphasize the fact that regarding the case to the judge before the hearing, this can be justified by the desire of the legislator to provide the investigating judge with an opportunity to get acquainted with the case materials before the meeting, speeding up the process of consideration in court. It is difficult to agree with this logic of the authors of the CCP RK. It seems that acquaintance of the investigating judge with the materials of the criminal case beforehand before hearing both parties can make him prejudiced against the detainee, and also can turn the court session into a formal procedure for issuing a sanction. Verifying the legality and validity of detention, the judge inevitably comes to the necessity of assessing the validity of the charge brought together by the totality of evidence in the case. Otherwise, the verification becomes a formality in the form of revealing procedural shortcomings. During solving the problem of the use of detention, the judge will, voluntarily or unwittingly, enter into a discussion of the question of the guilt or innocence of a person in the offense charged to him. However, the judge should not go into assessing the evidence of the guilt or innocent of the accused (suspect) in checking the legality or validity of the detainee (Shaukharov K., 2015: 19).

"Automatic extension" (Maxim N., 2017: 20) As a chosen measure, the measure of restraint in the form of detention is extended to 90% of cases. At the same time, the petitions of investigators and court decisions often give the same reasons as used in this case before. As time passes, the initial grounds for detention are becoming less significant, and the courts must provide other relevant and sufficient grounds requiring continued deprivation of liberty.

The extension of the sanction goes formally, often already with the prepared speech of the investigating judge and the procedural prosecutor. As a rule, according to the CCP, the defenders have the right to appeal within 3 days, after the court session on the extension of the term and when the defense counsel is invited to the hearing on his complaint, nothing changes, everything still remains. In accordance with Art. 152 of the Criminal Procedure Code of the RK states that the presence of a defense counsel is not necessary to extend the sanction. But what about the art. 67 of the Code of Criminal Procedure of the Republic of Kazakhstan, where the compulsory participation of counsel is prescribed. Perhaps according to that procedural errors are allowed. So, for example, without a lawyer, the sanction was extended with the imposition of seizure of property (an apartment, but only a part of the share) of the suspect, but as a rule, arrest of property is made if there is a probability that this property was acquired illegally. But the investigating judge and the procedural prosecutor did not take into account that at the time of the acquisition of this apartment, the suspect was 11 years old.

In conclusion, I would like to stay on the words of the Chairman of the Supreme Court of the Republic of Kazakhstan Asanov, who in his turn addressed to the investigating judges with the words "Stop stamping sanctions" and not to go on about the investigation (Asanov Zh.K., 2018: 21).

Conclusion:

1. It is necessary to create a special criminal procedural institute "Institute of Detention". This institute occupies a special place in the system of criminal procedural law and is the only way to overcome the problem of the actual gap between the police suppression of the criminal (hypothetical) activity of a certain person and bringing this situation to the channel of ordinary procedural decisions, actions, etc. Otherwise, the activities of the police to curb, identify criminal offenses and restrict the freedom of suspects would have to be completely removed from the criminal procedure, which is fraught with massive violations of individual rights and which no legal system can afford.

2. It is necessary to introduce the concept of "order" of the court for the detention of a person when the institution of detention is introduced. For this, two different procedures should be envisaged. The first procedure should concern the judicial authorization of detention on the warrant of the court, in which the court makes a decision to detain the person, pending his actual detention. The second procedure should be applied in cases where a person was detained without a court decision in cases of detention at the crime scene.

3. It is necessary to limit the role of the investigator when initiating an application for choosing a preventive measure in the form of detention, and should not be within his competence.

4. When choosing measures of procedural coercion, three mandatory requirements must be met:

a) they are elected only in the field of criminal justice.

b) persons to whom the measures of procedural coercion will be applied, the procedure and conditions for their implementation shall be regulated by law.

c) the legality and validity of the application of measures of procedural coercion are provided by the system of criminal - procedural guarantees.

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