INTERNATIONAL STANDARDS AND PRINCIPLES, FOREIGN LEGISLATIVE EXPERIENCE OF JUDICIAL CONTROL IN THE INVESTIGATION STAGE

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ABSTRACT

Objective: The article develops the idea of the need to implement the norms of international legal acts into national legislation, borrowing positive foreign experience in implementing the norms regulating judicial control. At the same time, it is noted that the introduction of international standards and principles into national legal mechanisms is possible only taking into account the peculiarities of the legal system and the legal system of the state.

Theoretical framework: A selective analysis of the implementation of judicial control in foreign countries (France, Germany, Austria, etc.) was carried out, similarities and differences from a similar system in the Republic of Kazakhstan were revealed. The author, exploring the control powers of the court at the international level, tried to determine the importance of international standards and principles in ensuring the rights and legitimate interests of participants in criminal proceedings in the Republic of Kazakhstan.

Method: In the course of the research, a set of the following special methods was used: systemic-structural, formal-legal and logical analysis of the problem; expert assessment of the relevant norms of national legislation and practice of its application; interpretation of legal norms; comparative legal research; constructive-critical analysis of conceptual approaches to the problems under study; legal modeling of risks and costs of election as a prosecutor and the authorization by the investigating judge of measures of criminal procedural coercion.

Results and conclusion: Based on the comparative legal study of the norms of the criminal procedure legislation of Kazakhstan, France, Germany, England, Italy and Spain, it seems possible to note that judicial control has both similar and distinctive features. What unites these or other models is that the main purpose of judicial control is the protection, protection and restoration of the rights and freedoms of subjects of legal relations at the pre-trial stages of the criminal process.
Originality and value: One of the important signs of the rule of law, the construction of which is proclaimed by the Constitution of the Republic of Kazakhstan, is the exercise of judicial control over the preliminary investigation. Most of the member countries of the Organization for Economic Cooperation and Development (OECD) adhere to this vector of development of criminal procedure legislation. Currently, international standards and principles governing the protection, protection, restoration of human rights and freedoms accumulate the most progressive, successfully tested legal concepts, which were the natural result of the tendency to strengthen guarantees of the rights of participants in criminal proceedings. The article is devoted to the problems of legal regulation of judicial control at the stage of preliminary investigation related to compliance with international standards.

Keywords: criminal procedure, pre-trial proceedings, judicial control, investigating judge.

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NORMAS E PRINCÍPIOS INTERNACIONAIS, EXPERIÊNCIA LEGISLATIVA ESTRANGEIRA DE CONTROLE JUDICIAL NA FASE DE INVESTIGAÇÃO

RESUMO

Objetivo: O artigo desenvolve a ideia da necessidade de implementar as normas dos atos jurídicos internacionais na legislação nacional, aproveitando a experiência estrangeira positiva na implementação das normas que regulam o controle judicial. Ao mesmo tempo, nota-se que a introdução de normas e princípios internacionais nos mecanismos jurídicos nacionais só é possível tendo em conta as peculiaridades do sistema jurídico e do sistema jurídico do Estado.

Enquadramento teórico: Foi realizada uma análise seletiva da implementação do controlo judicial em países estrangeiros (França, Alemanha, Áustria, etc.), foram reveladas semelhanças e diferenças de um sistema semelhante na República do Cazaquistão. O autor, explorando os poderes de controle do tribunal a nível internacional, tentou determinar a importância das normas e princípios internacionais na garantia dos direitos e interesses legítimos dos participantes em processos penais na República do Cazaquistão.

Método: No decorrer da pesquisa foi utilizado um conjunto dos seguintes métodos especiais: análise sistêmica-estrutural, formal-jurídica e lógica do problema; avaliação especializada das normas pertinentes da legislação nacional e da prática de sua aplicação; interpretação das normas jurídicas; pesquisa jurídica comparativa; análise construtivo-critica das abordagens conceituais dos problemas em estudo; modelação jurídica dos riscos e custos da eleição como procurador e autorização pelo juiz de instrução de medidas de coação processual penal.

Resultados e conclusão: Com base no estudo jurídico comparativo das normas da legislação processual penal do Cazaquistão, França, Alemanha, Inglaterra, Itália e Espanha, parece possível notar que o controlo judicial tem características semelhantes e distintivas. O que une estes ou outros modelos é que o objetivo principal do controle judicial é a proteção, proteção e restauração dos direitos e liberdades dos sujeitos das relações jurídicas nas fases pré-julgamento do processo penal.

Originalidade e valor: Um dos sinais importantes do Estado de direito, cuja construção é proclamada pela Constituição da República do Cazaquistão, é o exercício do controle judicial sobre a investigação preliminar. A maior parte dos países membros da Organização para a Cooperação e Desenvolvimento Económico (OCDE) adere a este vetor de desenvolvimento da legislação processual penal. Atualmente, as normas e princípios internacionais que regem a proteção, proteção e restauração dos direitos humanos e das liberdades acumulam os conceitos
jurídicos mais progressistas e testados com sucesso, que foram o resultado natural da tendência de fortalecimento das garantias dos direitos dos participantes em processos penais. O artigo é dedicado aos problemas de regulação jurídica do controle judicial na fase de investigação preliminar relacionada ao cumprimento das normas internacionais.

**Palavras-chave:** processo penal, instrução pré-julgamento, controle judicial, juiz de instrução.

### 1 INTRODUCTION

Nowadays the law and enforcement practice in the Republic of Kazakhstan follows the trends on strengthening the role of judicial functions for providing safety and right protection, freedom and privacy in the process of pre-trial stage of the criminal proceedings. In addition, one of the key directions of judicial-legal reforms is still remaining for further improvement by the Judicial Control Institution.

Judicial Control is one of the functions of judicial authority, the main aim the Judicial Control includes both the strengthening and implementation the legal security of the constitutional rights and freedom in the process of pre-trial stage, as well as the identification of the constitutional laws on the basis of systematic control in order to guarantee the legitimacy and legality in the judgment of the pre-trial proceedings.

A.N. Akhpanov and A.L. Khan confirms the definition about the Judicial Control as a particular form of the implementation of the justice (Akhpanov, 2006).

As reported by V. A. Azarov and I. Yu. Tarichko the main purpose of the action of the Judicial Control is the acceptance of legal power comprising the testimony of criminal cases, the prevention of the violence of the rights and the legitimate interests of the parties to the criminal proceedings. (Azarov, Tarichko, 2004).

The Judicial Control Institution keeps requiring further reform and solution of problematic issues despite the doctoral researches and a great number of changes and supplement to the current criminal procedural legislation of RK.

### 2 RESEARCH METHODS

The methodological basis of this study was the dialectical method of scientific cognition as the main method of objective and comprehensive analysis. Consequently, the research object and subject were considered not in isolation from each other but in conjunction with other legal and social phenomena within general patterns of development judicial control and measures of criminal procedural suppression. Special methods were selected on the basis of the dialectical method of cognition.
In the course of the research, we used the following special methods: system-structural, formal-legal, and logical analysis; the expert assessment of relevant national laws and their application; the interpretation of legal norms; comparative-legal research; the constructive-critical analysis of conceptual approaches to the issues under study; the legal modeling of risks and costs related to the election of a prosecutor (the person conducting an investigation), authorization by the investigating judge of such preventive measures as detention, home confinement, and bail.

3 RESEARCH AND RESULTS

It should be stated, in the Republic of Kazakhstan a series of important international instruments were ratified concerning human right, guarantees for right and freedom during pre-trial investigation. In spite of basic foundation, judicial and investigative experiment have indicated that within the implementation of the international instruments existing gaps and contradiction have an impact on the level of the safety of suspected and accused person’s rights and freedom in the process of pre-trial criminal procedures.

Referring to the history of foundation and development of the control judicial discretion it should be pointed out, that basic ideas about the monitoring criminal investigation by the judicial control were experienced in Magna Charta Libertata in 1215 (Petrushevskij, 1918).

Furthermore the development of the international norms about Judicial Control was obtained at the institution of the Habeas Corpus Act, that had initially existed as part of Common Law. Thereafter in adoption of Act about for a better security of freedom of filed and prevention of maritime detention in 1679 by Parliament of England was considered as part of legislation (Statute Law). In compliance with the norms of Habeas Corpus Act the citizens were allowed to appeal against unlawful detention at the court, for its part the court was independent of the Royal power and it was entirely elected by the population (Habeas Corpus Act, 1979). One of the earliest and positive strides of the Republic of Kazakhstan was adoption of Habeas Corpus Act to the national legislation. This has resulted in Law dated July 5, 2008 № 65-IV «Law on amending and supplementing to certain legislative acts of RK on issues about the application of pre-trial detention and home detention» The criminal procedural code of the RK (CPC RK)
has been supplemented with the norms, and under the norms the responsibility for the arrest has been transferred from prosecutor’s office to the court (2008).

Among the first international documents, setting out standard laws for all states in the area of security and protection individual rights and freedom, remains Universal Declaration of human right has been focus of human values gained with the global community and it identifies the minimum threshold of legal state civilization.

Particularly, the norms of the International Pact Article 9 enshrine inherent right for those who have been detained or arrested for a criminal case to being taken to a judge or another authorized with the position to exercise judicial power legally, to trial in a reasonable period, to release arrest (International Covenant on Civil and Political Rights, 1966).

In opinion by D.K. Kanafin «The provisions of International Pact Article 9 basically are contemporary embodiment of the procedure Habeas Corpus Act…

The debate about legal nature of Habeas Corpus remain relevant the former-Soviet criminal proceedings that this procedure considerable adopted in the former-Soviet criminal proceedings with particular specific features» (Kanafin, 2006).

We agree with the view of A.N. Akhpanov, a member of the Scientific Consulting Council Supreme Court RK, about the implementing the regulations of the international legal acts into the national legislation that highest court has the power to provide a clear and detailed interpretation of the International Pact Article 9 about the civil and political rights in order to endow the criminal prosecution authorities with the responsibility for presenting a detainee to the investigating judge, including the cases without choosing the measures of restraint concerning the restriction of personal freedom (detention, home detention, bailing) (Akhpanov, 2018).

The first paragraph of Article 151 CPC RK considers the primary term of the arrest could be no longer than 2 months; further prolongation could be done by investigator’s reasoned application after consultation with the prosecutor.

We suggest considering asymmetric norms, with this mechanism the lifting (changes) of preventive measures as detention identified by the investigating judge would be provided for the part of the defendant before the end of the term. After all, according to the set out orders this possibility is provided in CPC RK. In our view the implementation of the specific rule, regulating the order of the release from the detention by the suspected and his defendant will increase the guarantee of the inviolability of the
person at the pre-trial investigation process. Such kind of modernization of the criminal procedural legislative norm will meet better judgment for instance: in the case of changing situations (illness, damage to the health, the proved evidence about torture etc.) and correspond to the principle № 32 Set of the Principles of protection for all persons who are detained and imprisoned adopted by General Assembly UN in 1988 (1988).

With the purpose of the further increase of the Judicial Control over ensuring rights and legal interests of detainees worthwhile to consider the computation of the initial permanent term of custody and prolongation of periodical terms. It should be stated the terms of detention, established in Article 151 CPC RK, are considered disproportionality prolonged with the position of international law and computation of the term of the arrest in months in professor S.A. Pashin’s opinion would be “… Unreasonably great. The Magistrate for the Law of England checks the legality and appropriateness of the application of arrest in relation to the suspect every 8 day (Pashin, 2010). In Thailand kingdom the primary term of the arrest contains 12 days and each time this term will be prolonged for 12 days, in total – no more than 84 days. In a similar way we suggest to set in CPC RK the primary term of the detention as a preventive measure – a month, which can be prolonged for a month within the maximum terms at the pre-trial process so the same term could be prolonged in a criminal trial by the judge.

However, the second paragraph of Article 56 CPC RK in the resolution of the given issue doesn’t make holding the trial compulsory by the investigating judge and it doesn’t emphatically point to parts 9 and 10 of the first paragraph in Article 55 CPC RK. The Paragraph of Part 2 in Article 56 CPC RK is discretionary and optional for the investigating judge and the parts. Such kind of regulation of the law and the absence of the judicial interpretation of the given norm makes the reason consider in a sole and incomplete way by the investigating judge without holding a trial, the issue about using coercive measure. On this issue we agree with the opinion of Doctor of legal science, Professor S.P. Sherba, who pints out «the procedure of replacement to the psychiatric clinic must be judicial. As the thing is about a considerable restriction of the universally accepted rights and freedom of the suspected (accused), probably who is not able protect his rights as a result of the psychiatric illness. He must be provided with the special procedure of the replacement to the psychiatric clinic no matter if he is arrested or not» (Sherba, 1975).
Particular importance in the development of the national legislation was Minimal standardized rules of UN, on the measures which were not connected with imprisonment (Tokyo Rules), the norms implemented in the domestic criminal procedure legislation (1990). One of the methods of the implementation of the norms was the adoption of the new type of the criminal procedural coercive in the system in 2015 – prohibition against the approaching authorized by the investigating judge.

Various additions and changes in CPC RK were adopted after the implementation of the project «Judicial authorization in RK» sponsored by the Bureau of the Democratic Institution and Human Rights(BDIHR) OSCE facilitated by the Supreme Court and General Верховного суда и Генеральной Prosecutor’s office RK (Analytical report, 2011).

We support S.M. Yagapharov’s position on «international norms and standards of the human rights protection – natural result of the globalization with the aim of formation of the society, built on respect for personal interests, construction of the optimal organization of the criminal process, based on the security of personal right» (Yagofarov, 2005).

Researching the given institution, it is useful to make comparative legal analysis of the foreign legislation on the judicial control that can help to bring out successfully proven experience and adapt it into the national legislation in the purpose of consolidation of the procedural position of the investigating judge in RK.

In the first place, attention should be drawn to the States of continental Europe that have accumulated enormous historical experience in the implementation of the institution of the judicial control.

According to the renowned Professor L.V. Golovko, «the strengthening of guarantees of the individual’s rights and legitimate interests in French criminal proceedings has had the greatest impact on the content of the pre-trial stages» (Golovko, 2015).

Fundamental changes in the institution of judicial control in France have taken place with the accession to European legislation and the simultaneous decisions of the European Court of Human Rights and the recommendations of the Council of Europe. Before it the judicial control of France had been criticized several times for violation during pre-trial proceedings.
These included the length of detention of suspects and pre-trial detention, specifically legal authority that allowed for the restriction of freedom of individuals before the considerably.

The main parts of feedback was on the investigating judge as a powerful official of the pre-trial criminal proceedings of France, who had a focus investigating and judicial authority, and he could work isolated and autonomously. In this case the notions «examining judge» and «judicial judge» are confused.

Finding a new balance between criminal investigating and judicial defense Поиск led to the idea of creating a new procedural control - a judge for preventive detention and custody, whose function included the judicial control over the procedures connected with the pre-trial detention. The Law dated June 15, 2000 «On the protection of the presumed innocence and rights of victims» for first time made a supplement to CPC of France about the introduction this official (The French Law, 2000).

The Procedure of the sanctioning of the detention includes several stages: investigating judge, before making a decision he previously sends a request to the prosecutor about his judgment, after the prosecutor requests pre-trial detention before a judge. Correspondingly a judge receives the requests with two applications, where the detailed reasons for decisions of the investigating judge and the prosecutor are given. A similar procedure is provided for prolongation of the length of detention (French Code of Criminal Procedure, 1958.).

In comparison with France there is no concept of preliminary investigation in Germany since 1974 in understanding of Kazakhstan criminal proceedings structure. Special judge (ermittlungrichter) executes judicial control on respecting universally recognized rights and freedom. Professor L.V.Golovko says: “there is a judicial control on the prosecutor- police inquest there, which is realized depending on the workload of judges either by the ordinary judge who simultaneously performs other functions in a court (investigation of criminal and civil cases) or again another ordinary judge whom the chairman of the court “put” on purpose to investigate the issues” (Golovko, 2015).

Judge’s (ermittlungrichter) authority is not limited with above mentioned powers. He can use alternative measures of procedural coercion against the suspect to warn the subsequent escape and he can demand obligation to appear, also not to leave place of residence without permission or the definite area, to demand payment of a fine (Golovnenkov and Spica, 2012).
One of the positive features of criminal procedural code norm of Germany is that detained must be taken to a judge immediately for questioning. Delivery time is within 48 hours. If in the process of questioning, the judge either clarifies the facts of unjustified detention or finds out that reasons for detaining are not applicable no longer, then it is the judge who must release the detained immediately. Such a practice exalts the status of judicial control on the preliminary investigation and in this regard we suppose that it is necessary to adopt such positive legislator practice of Germany in Kazakhstan, including current legal situation of detainees.

In Italy, as in the Republic of Kazakhstan, police officer and prosecutor have a right to detain the suspect for a period not exceeding 48 hours. Further a preventive measure in the form of detention must be authorized by a court. The judge of preliminary investigation (giudice per le indagini preliminari) realizes judicial control in Italy.

Unlike abovementioned European countries, detention in Italian law is classified into 2 types. The first type is called “arresto”, which is carried out in case of detention at the scene by police. Here it is important that the crime, for which detention is occurred, would be willful and the term of punishment for him was at least 5 years (Barabanov, 2019). The second type of detention is called “fermo”, it is used when there are real reasons to believe that the suspect in committing crime will hide from the court and investigation, herewith the police must have strong evidence of suspect’s guiltiness, not refer to groundless suspicions.

The main feature of judicial control of England on the preliminary proceedings is the absence of investigating judge, in that sense, in what it is accepted to understand in the frame of international norms. But this doesn’t testify to complete absence of judicial control in English criminal proceedings. Magistrate carries out functions of a judge, gives authorization for arrest and other preventive measures.

He seats in courts of magistrate and may not have a special education in jurisdiction. In its own way this is a model of people’s participation, it shows that English jurisdiction is similar with a jury trial.

The distinctive feature of English criminal- procedure legislation norms in comparison with European countries and Kazakhstan is that detention is possible for a period not exceeding 36 hours, prolongation its deadline by magistrate each time for a period not exceeding 36 hours, and total period of detention must not exceed 96 hours.
When prolonging period of detention, the suspect must necessarily be taken to magistrate, or he can instruct representation at judicial hearing for this reason to his advocate.

Authorization procedure of further preventive measures choice is held by the magistrate at the open judicial hearing. Judicial sitting is held in the form of adversarial process, where each side of defence and accusations must provide arguments and proof. According to the law “About bail” of 1976 the suspect is given the right to change bail arrest, “if the side of accusation is not able to prove that there is a ground which prevents a judge to use preventive measures in regard to a suspect in the form of bail” (The Bail Act of England, 1976).

In our opinion, such formulation of law norms in England testifies a high respect for the right and human freedom in the country, when law enforcers are recommended to prove impossibility of using softer preventive measures.

In Spain investigating judge realizes judicial control on measures of procedural compulsion, examines complaints about decision and actions of pre-trial proceedings organs. But it should be noted that investigating judge in Spain is not autonomous as in the Republic of Kazakhstan. Spanish investigating judge besides judicial control also investigates complicated criminal cases which in further are passed to courts on criminal cases or territorial courts, and minor offences are also authorized to reexamine magistrate’s decisions. Though investigating judges in Spain are part of judiciary, but at the same time they are not entitled to participate in judicial proceedings investigated by them criminal cases.

Organizational structure of investigating judges can be attributed to two-stage. In Spanish capital several central investigating courts functions, the powers of which are applied to all the territory of the state. Their decisions can be appealed in the National court. Provincial courts work at the regional level, in which the functions of investigating judge are combined. Besides, the position of an investigating judge is provided in the courts of the first instance, who also conducts an investigation, examines complaints on the decisions of pre-trial investigation organs regarding to the category of cases, triable for the given court. Decisions of judges of the first instance courts are appealed in the provincial courts (Rule of Law Report Country Chapter on the rule of law situation in Spain, 2021).
4 CONCLUSIONS

On the basis of conducted comparative legal research of the criminal – procedure norms of Kazakhstan, France, Germany, England, Italy and Spain legislation, it seems possible to note that judicial control has both similar and distinctive features.

Hence, we can state by the examples of above mentioned European countries that real implementation of international standards and principles in legislative format and applying them in practice often causes difficulties, firstly, because of laconic features of norms. If implementation does not present difficulties for European countries in view of legislation unification, in connection with acting specialized European court on human rights, that gives official judicial explanation of norms and provisions of pacts, conventions, then for the universal complex standards there is no such mechanism of procedure in Kazakhstan. Consequently, other countries have their own subjective vision and explanation of the norms of international standards in the frame of national legislative system and systems of law.
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