NICKOLAI KOVALYOV[1]

**JUDICIAL AUTHORIZATION OF ARREST IN KAZAKHSTAN:
COMMENTS ON THE DRAFT LAW OF THE REPUBLIC OF KAZAKHSTAN
"INTRODUCING CHANGES AND AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF THE REPUBLIC OF KAZAKHSTAN REGARDING THE APPLICATION OF ARREST AS A MEASURE OF RESTRAINT"**

Introduction

According to the amendments introduced in Article 16 of the Constitution of the Republic of Kazakhstan "arrest and custody detention will be allowed only in cases provided for by the law and with court authorization, with the arrested person being given the right to appeal".[2] The Constitution also states that "without judicial authorization an individual can only be subjected to detention for a period of not more than seventy two hours".[3] Although these constitutional provisions have not been put into practice yet, at present the Senate of the Parliament of the Republic of Kazakhstan is looking into the draft law, which will transfer the powers to authorize an arrest from the prosecution to the court. This will be one more step down the road of transforming the criminal justice system from its Soviet model to a model having a more adversarial character. However, the draft law proposed by the Government of Kazakhstan is substantially different from the norms adopted in democratic countries without which the institute of judicial authorization of arrest will not be an efficient guarantee against unreasonable arrest. The author of these comments has repeatedly voiced his opinion regarding the draft law, which has been discussed by the Parliament of the Republic of Kazakhstan, and in particular, within the framework of the Round Table held in the Mazhilis of Parliament on 11th

[1] Dr. Nickolai Pavlovich Kovalyov is a research associate with the Centre for European, Russian and Eurasian Studies, University of Toronto (Canada); PhD in Law (Institute of criminology and criminal justice, Belfast Royal Institute, the United Kingdom of Great Britain and Northern Ireland); MA in Law, Indiana University (USA) and a graduate of the law school, Western Kazakhstan State University. Dr. Kovalyov is an OSCE expert, and he was commissioned to write this article by the OSCE/ODIHR.
[2] Article 1 of the Law of the Republic of Kazakhstan "Introducing changes and amendments in the Constitution of the Republic of Kazakhstan" 21/05/07, No 254-III.hem
[3] Ibid.

December 2007. These comments are additional to and are to be considered together with the comments of 17th September 2007.

The purpose of this article is to draw the attention of the members of the Senate of the Parliament of the Republic of Kazakhstan to serious contradictions between the provisions of the draft law and the norms adopted in democratic countries as well as international commitments of Kazakhstan in the area of human rights. This is especially important in the run-up to Kazakhstan's Chairmanship of the OSCE.

The body responsible for the authorization of arrest

The Constitution restricts itself only to stating that authorization of arrest should be issued by "the court", not specifying which court and what judge exactly should have the powers to do so. The draft law by the Government of the Republic of Kazakhstan proposes to transfer the powers of arrest authorization to judges of the district (city) courts and equivalent courts, and, in cases of appeal or protest against the court order of authorizing arrest as a measure of restraint or refusal to issue an authorization of arrest – to oblast courts. The draft law does not preclude the judge who decided the issue of arrest authorization from further participating in the legal proceedings including the trial of a case on its merits. It should be noted that a group of Parliament Mazhilis members (D.V. Klebanova, B.A. Bekzhanov, P.K. Sarpekov, Z.K. Duisenbaev, N.S. Sabilyanov, etc.) were proposing to preclude the judge, who had authorized the arrest, from participating in trying a case on its merits. Unfortunately, their proposal was not adopted by the Mazhilis.

There is a great degree of risk that a judge who has granted the request of the prosecution to arrest the suspect (the accused) as a measure of restraint, will not be able to remain impartial in trying the case on its merits, since he will develop a bias against the accused prior to the hearing. It is for this reason that a number of European countries, including Germany, France and Italy, have introduced in recent years the office of a special judge who decides the issues of arrest and oversees the compliance with the individual's rights and freedoms during the preliminary investigation. Thus, in Germany such a judge is called *Ermittlungsrichter* or *a judge of preliminary investigation*, in France – *juge des libertés et de la detention* or *a judge on rights and custody pending trial,* in Italy – *giudice per le indagini preliminari* or *a judge of preliminary investigation*.[4] In these European countries such a judge does not participate in trying cases on their merits, that is, in deciding whether the defendant is guilty or innocent.

Introducing such an office helps, first of all, to rule out the possibility of the biased attitude of a judge towards the defendant, if the former had taken part in deciding the issue of arrest in the course of preliminary investigation; secondly, some judges will become specialized in the issue of ordering authorization of arrest; thirdly, this will rid the judges, trying criminal cases on their merits, of an additional function; fourthly, in the near future this will allow the transfer of other functions on authorizing investigative actions restricting constitutional rights of citizens (search warrants, telephone tapping, etc.) from the prosecution to a special judge. The author of these comments has already recommended the legislator to consider the issue of introducing the office of a special judge authorizing measures of restraint and other investigative actions at the stage of preliminary investigation including the arrest, who would not participate in trying cases on their merits. Similar proposals were also put forward by other Kazakhstani academics and law practitioners, such as Professor G.Z. Suleimenova, Associate Professor D.K. Kanafin and representatives of the public foundation "The Forum of Defence Lawyers ". In particular, "The Forum of Defence Lawyers"

[4] Delmas-Marty, M. and Spencer, J.R. (eds.) (2005). European Criminal Procedures. Cambridge: Cambridge University Press.

proposes the introduction of the office of an inter-district judge who would not sit on the bench of a district court trying the case on its merits.[5] However, these proposals were not taken into consideration both by the law drafters and members of the Mazhilis of RK Parliament.

The necessity to allocate finances is a major argument used by the opponents of the office of a special judge who would carry out the functions of an organ overseeing investigation and prosecution bodies at the stage of preliminary investigation, including authorization of arrest, and the same argument is used against precluding a judge, who decided the issue of authorization, from trying a case on its merits. In particular, at a session of the Commission on legislation and judicial reform of the Mazhilis of RK Parliament of 11th December 2007 representatives of the RK Supreme Court said it would be inexpedient to preclude the judge who dealt with an issue of arrest authorization from participating in trying a case on its merits because in some regions of Kazakhstan there are two-member courts, that is courts with only two judges. Such prohibition will make it impossible sometimes to try cases on their merits in the area where an offence has been committed. In our opinion, this line of argument is not only weak but it also contradicts the principles of criminal proceedings and the Constitution of the Republic of Kazakhstan. The Constitution of the Republic of Kazakhstan declares **an individual, his life, rights and freedoms** to be supreme values of the state; the state should do everything possible to secure the rights of an individual to fair trial, objective and impartial court and to expand the number of judges amongst other things – moreover that in any case the transfer of the powers of authorization of arrest will increase the judges' work load substantially. Practice in other states including the neighbouring Kyrgyz Republic is moving in that very direction.[6]

Grounds for authorization of arrest

The provisions of the draft law of the Republic of Kazakhstan do not comply with the requirement of paragraph 4 of Article 9 of the International Covenant on Civil and Political Rights (hereinafter ICCPR) which says: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the **lawfulness of his detention and order his release if the detention is not lawful**". Since this document has been ratified by the Parliament of the Republic of Kazakhstan the provision that the court should decide on the lawfulness of a person's detention, is part of the current law of the Republic of Kazakhstan. In other words, ICCPR guarantees the detained person his/her right to trial in the course of which the judge should establish **the lawfulness** of his/her detention by law-enforcement bodies. It appears that this provision of the international legislation should be reflected in the criminal procedure legislation of the Republic of Kazakhstan. However, neither the Government nor the Mazhilis introduced the appropriate changes in the draft law "Introducing changes and amendments in certain legislative acts of the Republic of Kazakhstan regarding the application of arrest as a measure of restraint" during its discussion in the lower chamber of the Parliament. It appears that this gap in the work of the drafters of the law has to be filled in at the stage of its discussion by the Senate. Otherwise, the procedure of authorization of arrest will turn into a mere formality since the judge will be only confined to the need to establish the existence of formal grounds for arrest (that is when choosing the arrest as a measure of restraint, he will be guided exclusively by its expediency): (1) a person regarding whom the issue of arrest is decided, is accused of committing an offence punishable by law by deprivation of liberty for a term of more than two years (with regard to pre-meditated offences) or more than three years (with

---

[5] Channel 31. The right to authorize: how do you do it right? 28 February 2008. http://www.31.kz/31channel/print.php?uin=1103077523&chapter=1204219967.

[6] In conformity with the Decree by the President of the Kyrgyz Republic of 4 May 2007 the number of judges was increased by 48 in order to spread evenly their work load when trying cases in connection with the transfer of powers of the prosecution on authorization of investigative actions in criminal cases. http://www.24.kg/community/2007/05/04/51799.html

regard to negligent offences); (2) when there are reasonable grounds to believe that the accused will disappear prior to interrogation, preliminary investigation or court, or will obstruct objective investigation and trial in court, or will continue to be engaged in criminal activities; (3) the necessity to secure the execution of the sentence. Thus, virtually in every criminal case the judge will have the full right to authorize arrest. In other words, it appears that the draft law in its present version will hardly ever prevent the established practice of unjustifiable and illegal arrests by the bodies of investigation and interrogation and guarantee the right of an individual to freedom arising from the Constitution and international commitments of the Republic of Kazakhstan.

Furthermore, it is recommended that a provision be added to the list of grounds for using arrest as a measure of restraint stating that a judge should make sure that "there are sufficient grounds to believe that the offence took place and that it was committed by the defendant". By no means will this provision undermine the principle of presumption of innocence. First of all, the judge deciding to choose a measure of restraint does not take a decision as to whether the facts of committing the offence and its commitment by the detainee have been proved. He is only making the assumption that most likely an offence has been committed and most likely it was committed by the detainee. In other words, when deciding an issue of authorization of arrest the judge might have doubts regarding those two issues, which, at the moment of adjudicating upon a case, should be interpreted in favour of the accused. Therefore, the criterion of proof of those two elements of the crime at the moment of deciding the issue of authorization of arrest will be substantially weaker than at the moment of passing a sentencing judgement. Secondly, the judge, authorizing arrest, will not be deciding the issue of guilt of the arrested person, a major issue involving the principle of presumption of innocence.

The necessity to have a legislative provision, according to which the judge will have to decide the issues of whether there are sufficient reasons to believe that the offence was committed and that it was committed by the detained person, is explained by the following. First of all, it is important to secure the rights of the arrested person not to be subjected to the unjustifiable deprivation of freedom, for example in cases where the judge may come to the conclusion that it was not an offence but an accident, or that the arrested person did not commit an offence. Secondly, in cases where there are no sufficient grounds to believe that a detained person was involved in the committed offence, his release from detention will prevent or at least reduce the cases of using torture, violence and other illegal methods of investigation and interrogation with regard to the arrested. Thirdly, many countries have a provision in their legislation according to which the court when passing a decision of keeping the detained person (the suspect, the accused) in custody, should consider the issue of whether the detainee committed an offence he is suspected or accused of. For example, according to Article 503 (3)(a) of the Criminal Code of Canada, if the judge is not convinced that there are reasonable grounds to believe that the arrested is that person who supposedly committed an offence, he/she should release him/her from custody. In Germany the judge before deciding the issue of arrest or of keeping the arrested in custody, should establish whether there is strong suspicion that that person committed the offence (Articles 112 and 128 of the Criminal Procedure Code of Germany). The Italian legislation prescribes that a preliminary investigation is possible only when serious proof (*gravi inidizi*) of guilt is established and not just mere suspicion, against a person with regard to whom a judge is choosing a measure of restraint.

The procedure of judicial authorization of arrest

According to the draft law (Article 150, part 4 of the Criminal Procedure Code) the decision of the prosecutor to support the request by the investigator (the interrogation body) about authorization of arrest and materials substantiating its propriety have to be submitted by the prosecutor to the court not later than 12 hours prior to the expiration of the period of detention, that is not later than **two and a half days** after the detention! The consideration of the issue of authorization itself has to be carried

out with the involvement of the detained person and other parties to it within eight hours from the moment the materials have been received at the court. In other words, before the detained person appears in front of the judge he might spend in custody more than 60 hours. It seems that this period is unjustifiably long. According to Article 9 (3) of the International Covenant on Civil and Political Rights: "Anyone arrested or detained on a criminal charge **shall be brought promptly before a judge** … and shall be entitled to trial within a reasonable time or to release".[7] Although international norms on human rights do not mention specific terms of detention of the suspect or the accused before bringing him/her to court, the UN Commission on Human Rights questioned the reasonableness of an even shorter period (namely 48 hours) of detaining the suspect without granting him/her the right to appear before a judge.[8]

A number of European countries provide for a lesser maximum period of detention of the suspect prior to the moment he has to appear in court, than the one proposed in the draft law. In particular, in Germany the police should bring the detained before a judge promptly, in any case not later than the next day after he has been detained, that is within 48 hours. In Italy the prosecutor should obtain an authorization for arrest from the judge (GIP) within 48 hours, otherwise the detention will become illegal. In France the police may detain the suspect for a period of not more than 24 hours to interrogate him/her. A prosecutor or an investigating judge (*juge d'instruction*) can extend the period of detention up to 48 hours. On expiration of this period the suspect should be either released from custody or kept in custody according to the decision of a *judge of preliminary detention* (*juge des libertés et de la detention*).

It is absolutely unclear what the motives of the law drafters were when they chose the maximum period of detention of 60 hours before forwarding the materials of the criminal case to court. It appears that if this law provision stays as it is drafted, there exists a risk that the police will abuse their powers and use this time to its full in order to collect the requisite evidence to justify the detention and arrest, including obtaining confession statements from the detainee.

Since the Republic of Kazakhstan ratified the ICCPR in January 2006, the requirement of Article 9 of the Covenant which states that "anyone arrested or detained on a criminal charge **shall be brought promptly before a judge**…" takes priority over the laws of the Republic of Kazakhstan (RK Constitution, Article 4, paragraph 3). Therefore, it is recommended that members of the Senate amend the RK Criminal Procedure Code (CPC) by introducing a provision with wording similar to the language of Article 9(3) of the ICCPR, namely, that a detained person should be promptly brought before a judge, in any case not later than 48 hours from the moment of his/her actual detention.

In addition, in order to exclude the written character of the court hearing it is recommended that a provision of the draft law be deleted according to which the judge has access to the materials of the criminal case before the hearing begins. It is important that the judge does not have knowledge of any materials in the case prior to the court hearing, and that all materials are presented in court by the prosecutor in the presence of the defence party in a verbal form only. This will promote the principle of the adversarial character of the trial, as well as the principle of the oral nature of judicial proceedings in the best possible way.

According to the draft law the procedure of ordering arrest as a measure of restraint regarding the detainee consists of four stages: (1) an investigator or an interrogating body will pass a decision to

---

[7] The International Covenant on Civil and Political Rights was adopted by Resolution of the General Assembly 2200 A (XXI) of 16 December 1966. It came into effect on 23 March 1976. <http://www.un.org/russian/documen/convents/pactpol.htm>. The Republic of Kazakhstan ratified the ICCPR on 24 January 2006.

[8] Official Records of the Human Rights Committee 1989/90 Volume I, para 41, 50.

apply to court for authorization of arrest; (2) the investigator's decision will be submitted to the prosecutor for his/her consent (to support the request) not later than 18 hours before the expiration of the detention period; (3) the prosecutor's decision about supporting the request will be submitted to the court not later than 12 hours before the expiration of the detention period; (4) the procedure of authorization. Therefore, the drafters of the law have introduced a stage of coordinating the decision of the investigator with the prosecutor, which can be called an initial authorization of arrest. Although this intermediate procedure may serve as a filter for sifting out unlawful and unreasoned decisions by the investigator or an interrogating officer, the drafters are recommended to reconsider the following.

Firstly, since the international commitments of the Republic of Kazakhstan require that a detainee be brought before a judge **promptly**, it is important to provide for a rule dictating that the materials in the case and the detainee himself/herself be brought before a prosecutor within 24 hours and before a judge within 48 hours from the moment of the detention.

Secondly, it is important to mention in the draft law that questioning of a detainee by the prosecutor should be carried out only in the presence of the defence lawyer of the suspect or accused.

Thirdly, it is important to delete a provision from the draft law according to which the refusal of the prosecutor to give his/her consent to arrest can be appealed by the investigator or an interrogating body to the superior prosecutor. Giving the investigator the right to appeal the decision of the prosecutor of refusal to support the investigator's request is illogical since it is the prosecutor and not the investigator or an interrogating body who should justify the necessity to authorize this measure of restraint in court. In case the legislator still intends to keep this provision in the draft law it is important to introduce a provision according to which, where the prosecutor does not agree to support a request of authorization of arrest, the detainee should be promptly released from detention. Otherwise this will violate the constitutional right of citizens to personal freedom and will undermine the status of prosecution bodies as a state organ overseeing the lawfulness of detective activities, interrogation and investigation.[9] This will also create a contradiction with another provision of the Law "On the prosecution",[10] according to which the appeal against the requirements and acts of the prosecutor **does not suspend their execution**. In other words, if a prosecutor notices a breach of law in the actions by the investigator and the interrogating body and demands that a person be released from custody, the investigating and interrogating bodies must obey these requirements by the prosecutor.

Fourth, as discussed above, after the prosecutor has signed the request to authorize arrest within 24 hours from the moment of detention, it is necessary to introduce a provision according to which the detainee should be brought before the judge not later than 48 hours from the moment of detention. This will allow the reduction of the period of detention of suspects in cases of clearly unlawful and unjustifiable detention by the police.

Fifth, in order to provide for the principles of adversarial character and the equality of the parties the drafters of the law are recommended to introduce a provision according to which the party of the defence would have the right to submit to the court which decides the issue of authorization of arrest the evidence including that of the witnesses. If not, the court hearing on authorization of arrest will have an unjustifiably unilateral character, and the court will only be presented with the evidence collected by the party of the prosecution.

[9] Article 1, paragraph 1 of the Law of the Republic of Kazakhstan "On the prosecution" of 21 December 1995. No. 2709.
[10] Article 8, paragraph 1 of the Law of the Republic of Kazakhstan "On the prosecution".

Sixth, as was mentioned above, the court should not restrict itself to establishing the existence of formal grounds for applying arrest. In connection with this it is recommended to exclude from the draft law the provision of paragraph 7, Article 150 of the RK CPC as it is currently drafted.

Seventh, it is should be recommended to introduce a provision according to which in cases where the judge passes a decision of refusal to authorize arrest, the detainee is subject to prompt release from detention straight from the court-room even when the maximum period of detention – 72 hours – has not yet expired.

Warrant of arrest (detention)

In many law-governed states the police, when they want to detain a certain person, have to approach a judge before the arrest of the suspect and before the suspect learns of the police's intention to arrest him. In cases where the police persuade the judge that the arrest is necessary, they obtain a warrant of arrest and detain the person. However, Kazakh legislation does not have such a provision and any detention is carried out by the police without preliminary permission of the court. Such practices, in our opinion, contradict international standards in the area of human rights and promote the application of unlawful methods of investigation for collecting requisite evidence for arrest authorization.

There is a number of reasons, which necessitate the introduction of the institute of arrest by judicial warrant in Kazakhstan.

Firstly, the police often use the opportunity to unjustifiably detain a person before judicial authorization (at present, authorization by the prosecutor) for a period of up to 72 hours in order to obtain confession statements even in cases where there are no serious grounds to suspect a detainee of committing an offence. Quite often in order to obtain confession statements and solve a crime the police grossly violate the criminal procedure legislation by using torture, intimidation, blackmail and deception of detainees. Not infrequently such statements are recognized by the court as admissible since it is extremely difficult for the defendant to persuade the judge that unlawful methods of investigation and interrogation were used towards him/her and that his/her confession statements were not voluntary. The presence of confession statements in the file often results in a judgement of conviction even in those cases where the defendant retracts his/her confession statements at the trial stage and there is no direct evidence of his/her guilt. In such cases the probability that innocent people will be convicted is very high. The institute of arrest by court warrant will reduce the cases of unjustifiable detention (arrest) of a person by the police with the purpose of "dragging out" confession statements.

Secondly, it appears that the decision of custodial detention, apart from cases of apprehension at the scene, even for a short period of up to 72 hours, is a serious limitation of human rights and freedoms. Lawfulness and propriety of such intervention by the state in the rights and freedoms of citizens must be determined exclusively by the court, a major defender of the rights and freedoms of citizens from the infringement of the state. Lawfulness and propriety of the application of arrest to the suspect have to be established, if possible, not post-factum but on the contrary, before the state violates human rights and freedoms. Otherwise the state is hardly able to repair violation of the person's rights after his/her unjustifiable and unlawful detention.

Thirdly, this will heighten the responsibility of the investigative bodies before the judiciary. Having unlimited powers to detain a person for a period of up to 72 hours the officers of the law enforcement bodies begin to believe they are above the law. This will also encourage the police to investigate offences more efficiently not only due to confession statements of the detainee but by way of a thorough criminalistical investigation of the vestiges of a crime and other material evidence. This, in

its turn, will enhance both – the professional level of the investigating and interrogating bodies and the level of community trust towards the law-enforcement organizations.

Conclusion

The draft law proposed by the Government of the Republic of Kazakhstan as it was adopted by the Mazhilis of RK Parliament and forwarded to the Senate, in our opinion, does not comply with the standards accepted in the democratic states. It appears that if the draft law is adopted as it stands, it will not bring substantial changes in the law-enforcement practices in Kazakhstan, and the institute of authorization of arrest will not serve as an efficient guarantee to protect the right of an individual to personal freedom.