УДК 343.1
МРНТИ 10.79

SAGYMBEKOV BAKHYTZHAN ZHASSAMURATOVICH[1]
[1]Academy of Law Enforcement Agencies under General Prosecutors Office of the Rebublic of Kazakhstan
Astana, Rebublic of Kazakhstan

BUPEZHANOV DANIYAR ORYNBASAROVICH[2]
[2]The Main military Prosecutors Office of the Rebublic of Kazakhstan
Astana, Rebublic of Kazakhstan

ON SOME ISSUES OF IMPLEMENTING AND STRENGTHENING RIGHTS STANDARDS IN CRIMINAL PROSECUTION

Түйін. Аталған мақалада авторлар қылмыстық қудалау саласындағы құқықты қорғау стандарттарды күшейтудің және енгізудің мәселелері қарастырған. Авторлар қылмыстық процестегі адам мен азаматтардың құқықтарын қорғау саласындағы халықаралық актілерді және шетел мемлекеттердің тәжірибесін зерттеген. Талдау нәтижесінде ұлттық заңнамада заңнамалық реттеуді қажет ететін бірқатар кемшіліктер анықталған. Атап айтқанда, авторлар құқық бұзушыны жеткізу, алып келу, ұстау, қамауда ұстау мерзімдері, көріну міндеттемесі, жақындауға тиым салу мәселелерін көтерген. Анықталған мәселелер негізінде, авторлар қылмыстық іс-жүргузі заңнамасына өзгерістер ұсынды. Аталған ұсыныстар қазақстандық жетекші ғалымдардың қатысуымен «Қосшыдағы пікір алмасу» криминологиялық форумында талқыланған.

Түйінді сөздер: халықаралық стандарт, қылмыстық процесс, мәжбүрлеу шаралары, жәбірленуші, айыпталушы, сот, прокурор.

Аннотация. В данной статье авторами рассмотрены проблемы внедрения и укрепления правозащитных стандартов в Республики Казахстан. Авторами изучены международные акты и опыт зарубежных стран в сфере защиты прав человека и гражданина в уголовном процессе, на основе которого был проведен анализ национального законодательства на предмет соответствия международным

нормам. Анализ показал, что в национальном законодательстве имеются ряд проблемных вопросов, требующих своего законодательного урегулирования. В частности, авторы указывают на проблемы, связанные с доставлением, задержанием и приводом лица, сроками содержания под стражей, обязательства о явке и запрета на приближение. На основе выявленных проблем авторами предложены соответствующие изменения в уголовно-процессуальное законодательство. Кроме того, указанные предложения были озвучены в рамках криминологического форума «Дискуссии в Косшы» с участием ведущих казахстанских ученых.
Ключевые слова: международные стандарты, уголовный процесс, меры принуждения, потерпевший, обвиняемый, суд, прокурор.

Annotation. In this article, the authors consider the problems of introducing and strengthening human rights standards in the Republic of Kazakhstan. The authors have studied international acts and the experience of foreign countries in the field of protecting human rights and citizens in the criminal process, on the basis of which the analysis of national legislation was carried out in order to comply with international norms. The analysis showed that in the national legislation there are a number of problematic issues requiring a legislative solution. In particular, the authors point out the problems associated with bringing, detaining and driving a person, the terms of detention, the obligation to attend and the prohibition on approaching. Based on the identified problems, the authors proposed the relevant changes in the criminal procedure legislation. In addition, these proposals were voiced in the framework of the criminological forum “Discussions in Koshy” with the participation of leading Kazakhstani scientists.
Key words: international standards, criminal process, coercive measures, victim, accused, court, prosecutor.

Introduction

In accordance with paragraph 93 of the National Action Plan for the implementation of the Message of the Head of State to the people of Kazakhstan dated 10.01.2018 «New Development Opportunities in the Conditions of the Fourth Industrial Revolution» [1] approved by the Decree of the President of the Republic of Kazakhstan, the Prosecutor General’s Office and other interested bodies were instructed to make proposals for the implementation and strengthening of human rights standards in the field of criminal prosecution.

Problem discussion

By definition, a standard is a normative document in which rules, characteristics or general principles that affect various activities are defined.

As known, the standards are divided into international, regional, national and sectoral.

Since 1955, the United Nations Congress on Crime Prevention and Criminal Justice has adopted appropriate standards.

They are united in the Compendium with 4 sections, which contain standards related with:

– treatment of prisoners;
– juvenile justice;
– alternatives to imprisonment;
– torture, the death penalty and other issues. [2]

As we can see, the spectrum of standards is extensive and their outlines can expand depending on the need.

The Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice is

developed on the basis of the guidelines of international documents.

Among the universally recognized international legal norms concerning the criminal process, the following legal acts should be included:

1. The Universal Declaration of Human Rights – a document recommended for all UN member states adopted by the UN General Assembly by resolution 217 A (III) on December 10, 1948;

2. International Covenant on Civil and Political Rights, adopted on December 16,1966 (hereinafter – ICCPR);

3. The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on December 10, 1984;

4. Convention for the Protection of Human Rights and Fundamental Freedom adopted on November 04, 1950;

5. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, approved by the UN General Assembly No. 43/173 on December 09, 1988;

6. European Convention on Extradition adopted on December 13,1957;

7. CIS Convention on Human Rights and Fundamental Freedoms of adopted on May 26,1995.

The listed universal standards are aimed at protecting human rights in the criminal process.

Legal development of Kazakhstan has always been aimed to comply with international standards, norms and rules. This is confirmed by the President's instruction to ensure work on the implementation of the best practices and recommendations of the OECD countries.

In this regard, we turn to international standards and foreign experience, which have been fully realized in domestic law. For example, we have adopted amendments related to the criminalization of torture, the reduction in the length of detention, the transfer of authorization to the court and much more.

But there are a number of problems related to the implementation of international standards.

Institute of delivery (voluntary or unforced escort of the person to the police office or court).

The institute of delivery (article 129 of the Criminal Procedure Code of the Republic of Kazakhstan), which had not existed in the Criminal Procedure Code (hereinafter – CPC) before, was established in 2015.

The new norm is aimed to legitimize the arrival of individuals to the building of the criminal investigative agency for the purpose to verify their involvement in the commission of a criminal offense within 3 hours.

In accordance with the regulatory decision of the Constitutional Council (No. 2 of 13.04.2012) and article 7 of the paragraph 29 of the CPC, the delivered person is considered to be detained, since he is limited in his rights for a personal freedom.[3]

The time of actual detention is calculated from the moment when the restrictions became real, regardless of giving the detainee any procedural status or performing formal procedures.

At the same time, article 129 of the CPC lacks the procedure for the procedural registration of the delivery, particularly there is no provision for preparation of a report on delivery. This report should include the data about delivered person, information on explanation of rights, information about health condition, a place of drafting report and who delivered, as well as the time of actual detention.

Thus, the person is unaware about his involvement in criminal case that he is being charged, and from what time he is considered to be detained.

In addition, he does not have any the status, as well as rights to protect himself and medical examination.

This issue needs to be carefully studied. Since 2015 (2015 – 640, 2016 – 143, 2017 – 697, August 2018 – 499), there were 1979 cases of torture have been investigated, of which 52 were sent to court (2015 – 12, 2016 – 11, 2017 – 13, August 2018 – 16). [4] Among them there are facts when torture was committed after person delivery.

To resolve this issue, we have studied the experience of the OECD countries. As a result, it was found that there is no separate institute for delivery in none of the OECD countries.

This coercive measure in these countries is associated with detention in the form in which we introduced this institution into our criminal procedure legislation and delivered person has a set of rights similar to our detained person.

In this connection, it seems necessary to give the delivered person similar rights that the detainee uses and determine his procedural status.

A lot of issues in law enforcement practice are exists when person delivered by force (Article 157 CPC).

Article 157 of the Criminal Procedure Code determines who can be delivered by force, on what grounds and what authority deliver person by force.

However, despite the fact that the procedure for the application of forced delivery is described in the CPC, the legislation does not regulate the mechanism for its implementation. For example, taking into account our geographical and climatic conditions, the forced delivery can be carried out for several days. However, conditions (place, food intake and other living conditions) for persons who perform it and citizens for whom it is applied are not provided.

In this matter, the experience of Russia deserves attention, where the order of forced delivery is reflected in the special construction.

In such circumstances, it seems necessary to revise article 157 of the CCP, which will refer to a legal act (for example, a joint order). In this act we suppose to provide: the forced delivery protocol, where the date, time and type of transportation will be indicated.

Problems of detention of citizens in accordance with article 128 of the CPC.

According to the statistical data, since the new Criminal Procedure Code come into force up to date, 49,778 persons have been detained (2015 – 14534, 2016 – 16029, 2017 – 11278, 2018 – 7237), 2 000 of 513 persons or 5% of which have been released by police (2015 – 1015, 2016 – 1199, 2017 – 189, 2018 – 110).

The given statistics testify the facts of detentions of citizens by police in the absence of objective necessity to do it. It is not excluded that detention in such cases is used as a means of obtaining illegal evidences. In addition, it can create grounds for corruption and other abuses, as the officials of the criminal investigative agency detain the person and release him (using a preventive measure that is not related to detention or even without it).

At the same time, detainees, as a rule, do not complain, because after their release they consider their rights restored.

This is evidenced only by 288 (0.7%) of the complaints of illegal detention examined by the prosecutor's office, while in pre-trial stage of the criminal process, more than 200 000 complaints have been examined (200 909).

Given the consistent approach of all law enforcement agencies to the status of the prosecutor as the head of the pre-trial investigation and the planned assignment of responsibility for making key decisions in the case, we believe that the procedural detention should be carried out only on the basis of the prosecutor's decision, and in urgent cases should be confirmed with him – within 24 hours.

Problems related to the terms of detention up to 18 months (Article 151, part 4 of the CPC).

Since 2015 only 21 persons were detained for 12 to 18 months in one criminal case (2017). During 8 months

of 2018 the number of people detained for 9 to 12 months is 47 persons (2015 – 20, 2016 – 13, 2017 – 35). In unfinished cases – 2 persons (2015 – 0, 2016 – 17, 2017 – 23). This indicates that the extension of detention up to 18 months is applied in exceptional cases. The extension of detention up to 12 months (49 persons) is used more widely.

We believe that the legislator initially set a detention extension up to 18 months, taking into account the need for long-term examinations and the implementation of procedural actions in large volumes. At the same time, we forget about the rights of citizens that this is not permissible.

According to article 14 of the Covenant, everyone is entitled to be tried without undue delay. Today, following the experience of OECD countries, we have already shortened the terms of detention, but the maximum period of detention has not changed.

For example, in Italy, the period of detention can be from 3 to 12 months, in Estonia no more than 6 months, in France no more than 4 months. Of course, in these countries, there are different approaches and opportunities for the criminal process, so we believe that the maximum period of detention should not exceed 12 months.

Problems in applying the obligation of appearance (Article 156 of the CPC).

If the ban on leaving the place of residence does not cause any problems, the obligation of appearance without a regulatory requirement not to leave the place of residence can lead to misunderstanding.

When applying to the suspect and the accused the measures of procedural coercion in the form of an obligation to appear, their obligations to report a change of residence to the investigator are stipulated, but as we see there is no prohibition to leave the place of residence.

Therefore, it is proposed to provide such a limitation in article 156 CPC or even to exclude it due to the existence of ban to leave the place of residence.

The application of the prohibition on approximation (Article 165 of the CPC).

The measure of coercion in the form of a «ban on approaching» should be considered as psycho-compulsory measures.

This measure is not connected with isolation from the community and is applied on the written application of the victim or other person subject to protection without a specific deadline.

In OECD countries, the order of application of the prohibition on approximation is in line with our process.

For example, in the United States, Germany and Finland, this measure of procedural coercion is applied as well as in our country using court order to prevent violations and crimes.

However, in spite of the fact that the order on prohibition on approach is handed over to the public prosecutor, suspect, accused, defender and controlling body, there is absolutely no order of its execution.

Therefore, we propose in article 165 of the CPC to include a reference rule to a legal act (for example, a joint order), in which the prohibition of proximity will be detailed. For example, the preparation of reports on its implementation with the fixation of time, the responsibility of the controlling person, as well as the procedure for the actions in case of violation of the obligation by the person.

Such an approach will allow real control over the implementation of the ban on approaching and will be aimed to prevent violations of citizens' rights.

Also, we believe it necessary to introduce official statistical data on the number of persons delivered, as well as persons for whom the forced delivery was applied, the obligation to attend,

and the prohibition on approach, since compulsory and approved digital data will allow the most clear picture of regions and the Republic as a whole regarding the state of application of these measures of procedural coercion.

Conclusion

Thus, the study of international human rights standards and the analysis of national legislation for compliance with international requirements show that the criminal procedure legislation has a number of problems requiring settlement. Summarizing the above problems, we propose the following:

– it is necessary to give the delivered person the same rights as the detainee uses and determine his procedural status.

– it is necessary to revise article 157 of the CPC, which will refer to a legal act (for example, a joint order).

– procedural detention should be carried out only on the basis of the prosecutor's decision, and in urgent cases should be agreed with him within 24 hours.

– provide a limitation in article 156 CPC in the form of a ban to leave the place of residence, or exclude this rule due to the existence of ban to leave the place of residence

- in article 165 of the CPC include reference norm to a legal act, in which the prohibition of proximity will be detailed.

List of sources:

1. Message of the President of the Republic of Kazakhstan N.Nazarbayev to the people of Kazakhstan «New opportunities for development in conditions of the fourth industrial revolution» approved by the Decree of the President of the Republic of Kazakhstan on January 10, 2018 [Text] // (http://www.akorda.kz/ru/addresses / addresses_of_president / poslanie-prezidenta-respubliki-kazahstan-n-nazarbaeva-narodu-kazahstana-10-yanvarya-2018-g) – the internet sources.

2. Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice [Text] // (https://www.unodc.org/unodc/ru/justice-and-prison-reform/compendium.html) – the internet sources.

3. Normative Resolution of the Constitutional Council of the Republic of Kazakhstan of April 13, 2012 No. 2 "On the official interpretation of the Constitution of the Republic of Kazakhstan on the calculation of constitutional terms" [Text] // (https://online.zakon.kz/Document/?doc_id = 31158393) – the internet sources.

4. Information service. Statistical reports of the Committee on Legal Statistics and Special Records Republic of Kazakhstan. [Text] // (http://qamqor.gov.kz/portal/page/portal/POPageGroup/Services/Pravstat) – the internet sources.