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**Functions of the checks and balances of the investigative judge in a criminal trial**

In this article the author reveals features of activities of the investigative judge at a stage of pre-judicial investigation. Feature of activities of the investigative judge as major factor of system of controls and counterbalances is revealed. The task of the investigative judge in implementation of judicial control without acceptance on itself functions of criminal prosecution reveals. The practical importance of such legal proceeding as deposition of indications is determined. It is determined powers of the investigative judge by control of pre-judicial production.

**Key words:** investigative judge, criminal procedure, subject of criminal trial, sanction.

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**Қылмыстық іс жүргізу аясында тергеу судьясының тепе-теңдік және тежеу функциялары**

Бұл мақалада автор сотқа дейінгі тергеп-тексеру сатысындағы тергеу судьясының қызметінің ерекшеліктерін қарастырады. Осы жерде тергеу судьясы тепе-теңдік және тежеу факторы ретінде қызметі ашылады. Сонымен қатар соттық бақылау қызметін жүзеге асыру мәселесі қарастырылады. Осы жерде айғақтарды сақтауға қою сияқты процессуалдық әрекеттің тәжірибелік маңызы ашылып кетеді. Тергеу судьясының сотқа дейінгі тергеп-тексеруді бақылау барысындағы өкілеттіктері ашылады.

**Түйін сөздер:** тергеу судьясы, қылмыстық процесс, қылмыстық сот өндірісінің субъектісі, санкция.

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**Функции сдержек и противовесов следственного судьи в уголовном процессе**

В данной статье автор раскрывает особенности деятельности следственного судьи на стадии досудебного расследования как основного фактора системы сдержек и противовесов. Раскрывается задача следственного судьи в осуществлении судебного контроля без принятия на себя функции уголовного преследования. Определяется практическая значимость такого процессуального действия, как депонирование показаний. Определяются полномочия следственного судьи по контролю за досудебным производством.

**Ключевые слова:** следственный судья, уголовный процесс, субъект уголовного судопроизводства, санкция.

**FUNCTIONS OF THE  
CHECKS AND BALANCES  
OF THE INVESTIGATIVE  
JUDGE IN A CRIMINAL  
TRIAL**

Entering of institute of the investigative judge in criminal trial demonstrates commitment of Kazakhstan to the commonly accepted international standards in ensuring more complete implementation of the principle of equality and competitiveness of the parties, increases in efficiency of protection of the rights and freedoms of citizens.

The concept of policy of law of the Republic of Kazakhstan for the period from 2010 to 2020 an important task determined further development of the principle of competitiveness of the parties of accusation and protection in criminal procedure which is promoted by activities of the investigative judge in criminal trial which is the certain subject of the criminal trial [1].

In February, 2007 the Head of state in the Message to the people of Kazakhstan has expressed the basic decision on transfer of powers to court on arrest authorization that has put the beginning to introduction of new model of the Kazakhstan legal proceedings.

Entering of judicial authorization of arrest and house arrest in Kazakhstan since 2008 was a progressive step in development of the national legislation as human right and the citizen on freedom and security of person paramount value has, and their observance and respect is one of the main tasks of the constitutional state.

In line with development of optimum model of legal proceedings with adoption of law of RK «About Modification and Additions in Some Legal Acts of the Republic of Kazakhstan concerning Application of Measures of Restraint in the form of Arrest, House Arrest» which is put into operation since August 30, 2008 for the first time in Kazakhstan authorization of arrest was transferred to courts.

Delegation of power on issue of the sanction for detention from prosecutor's office to courts was the evidence of development of policy of law of Kazakhstan according to international standards in the field of human rights. In particular, a legal process of authorization of arrest is provided by regulations of the International Covenant on Civil and Political Rights of 1966 ratified by Kazakhstan.

Priority of the criminal procedure law determined by the Concept of policy of law of the Republic of Kazakhstan for the period from 2010 to 2020 is further consecutive implementation of the fundamental principles of criminal trial directed to protection of the rights and freedoms of the person.

Effective implementation of judicial control at a stage of pre-judicial production and the valid creation of a complex of proper procedural guarantees of the rights and personal freedoms in criminal procedure is objectively inconceivable without institute of the investigative judge.

The head of state N. A. Nazarbayev, speaking at the VI Congress of judges of November 20, 2013, noted that regarding development of judicial specializations we are only in the beginning of a way. Entering of institute of investigative judges will raise a role of courts in control of pre-judicial production. Besides the circle of the investigative actions authorized by court will extend [2].

The institute of the investigative judge with these or those features exists in France, Belgium, Spain, Latvia, the Netherlands, Switzerland and other countries. A number of the powers characteristic of investigative judges is carried out by local judges in Germany.

So, for example, under the Code of Criminal Procedure of Latvia functions of the investigative judge are aimed at providing constitutional rights and personal freedoms in criminal procedure, but not on collecting of proofs and preparation of evidences for court.

When forming proofs only by the party of accusation legal equality of the parties can't be provided. The task of the investigative judge consists in implementation of judicial control without acceptance on itself functions of criminal prosecution. Investigative judges are called to provide equal opportunities of the parties of process, judicial protection of constitutional rights of the personality, protection against insubstantial accusation and condemnation, from illegal restriction of the rights and freedoms of the person and the citizen, since a pre-judicial stage of criminal case.

When entering authorization of arrests by court in 2008 the chairman of the Supreme Court K. A. Mami, estimating transfer of the sanction to courts as the most important certificate of commitment of the state to follow the conventional standards in the field of human rights protection, noted that annually the sanction for detention was issued by prosecutors concerning about twenty one thousand people from whom to the punishments connected with imprisonment only the third part of them were condemned that speaks about detention in a pre-judicial stage of criminal procedure of a certain part of persons without such need. Kayrat Abdrazakovich expressed opinion that under the new law of such people will be much less as this the issue, important for destiny

of the specific person, will be resolved by court is transparent.

So, judicial authorization of arrest is considered publicly, with participation of the parties of accusation and protection and therefore only in this case the principle of competitiveness of the parties in legal procedure is implemented more fully and the role of the lawyer as the parties at a stage of pre-judicial production raises. Publicity and competitiveness of the parties promotes effective protection of the rights of participants of process and is additional guarantee of observance of the rights of citizens.

Control legal process in case of pre-judicial production promotes more effective protection of the rights and freedoms of citizens as the court, being the body separated accusation and protection, not connected by accusatory installation and departmental interests is capable to realize protection of the rights and freedoms of citizens on the basis of the principles of equality and competitiveness of the parties. The investigative judge doesn't determine questions of validity or guilt. Activities of the investigative judge are aimed at providing implementation of the rights of participants of criminal procedure in a pre-judicial stage.

The investigative judge has the right to charge to the prosecutor conducting check of arguments of the statement of the suspect for application of the unlawful methods of investigation (inquiry), observance of the rights of participants of process, in case of identification of the allowed violations of the law, the investigative judge has the right to raise a question of bringing the guilty persons to the corresponding responsibility pronouncement of the private resolution.

Thus, already at a stage of pre-judicial trial the right of participants of process to implementation of the major principle of legal proceedings – the principle of competitiveness is affirmed.

Entering of institute of the investigative judge belongs to one of stages of consecutive development of criminal trial in Kazakhstan.

For the first time in Kazakhstan at the legislative level determination of the status of this new subject of legal proceedings which is fixed in part 3 of article 54 Code of Criminal Procedure is given.

The investigative judge is the judge of the district or equated to him court (except for specialized interdistrict juvenile courts, specialized interdistrict criminal court judges, specialized interdistrict public vessels on criminal cases) to which powers the judicial control of observance of the rights, freedoms and legitimate interests of persons in criminal trial appointed from among judges by the chairman

of this court with the right of its reassignment is referred.

The concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 has provided creation of conditions for expansion of application of other measures of restraint, except arrest, in particular pledge which has found the realization in the new Code of Criminal Procedure.

The criminal procedure legislation of Kazakhstan is directed to the constrained and weighed relation to application of a measure of restraint in the form of detention as in the new criminal code given opportunities of application of punishments, alternative to imprisonment, are given.

So, the legislator provided an obligation of the investigative judge in part 8 of article 148 Code of Criminal Procedure, along with authorization as a measure of restraint of detention, to determine also the amount of pledge. According to Art. 145 of the Code of Criminal Procedure, the amount of pledge is established on cases on suspicion of making of crimes of small, average weight or serious crime. The suspect, the defendant or any person has the right to post at any time bail in the amount of, established in the resolution of the investigative judge on authorization of detention. The exception of this rule is constituted only suspected (defendants) in making of especially serious crimes and on the bases specified in part 9 of article 148 Code of Criminal Procedure. The category of persons to which pledge as a measure of restraint isn't applied has the exhaustive list. About acceptance of pledge the relevant protocol with an explanation to the pledger or the suspect and the defendant of their obligations is constituted. Pledge is applied as providing an appearance of the suspect accused in body of pre-judicial production and in case of the corresponding bases returns to the pledger.

Thus, the legislator created preconditions for broader application of pledge as alternatives to more severe looking of preventive measures. Moreover, proceeding from the personality, a family, material condition of the suspect (the defendant, the defendant) the law provided the right of the body conducting criminal procedure to reduce the amount of pledge.

Besides, also consideration of the petition of the defender for purpose of examination belongs to powers of the investigative judge if by criminal prosecution authority it was unreasonably refused satisfaction of such petition or if the corresponding petition of the defender in pre-judicial production isn't considered within three days.

In case of the solution of a question of purpose of examination, according to Art. 272 of the Code of Criminal Procedure, the investigative judge finds out questions of branch, including the expert, suggests the party of protection to provide in writing questions, listens on them to opinion of participants of process. Besides, the participant of process at the initiative of which examination is appointed has the right to provide objects, documents which the investigative judge can exclude the motivated resolution as objects of an expert research. The lawyer also has the right to petition before the investigative judge for appointment of specific experts, presence in case of examination production. The described procedure of permission of the petition of the lawyer for purpose of examination by the investigative judge shows implementation of equality and competitiveness of the parties clearly.

Consideration of a question of authorization of arrest on property by the investigative judge is also directed, first of all, to observance of the rights of the persons involved in an orbit of criminal trial. Court practice shows that there were facts of imposing by criminal prosecution authorities of arrest on property only on the basis of assumptions of interrelation of a source of property acquisition with criminal acts of the perpetrator. Tell statistical data on consideration by vessels of all for the 6th 1157 petitions of month for property attachment about the importance of inclusion of permission of this question in powers of the investigative judge. With transfer of authorization of property attachment to powers of the investigative judge, the parties have an opportunity in judicial session to produce the evidence in confirmation of the arguments concerning justification of property attachment. The investigative judge researches the bases confirming legality of the specified action, observance of the rights of the parties and the third parties whose interests were infringed in connection with property attachment.

It is also necessary to note the practical importance of such legal proceeding as deposition of testimonies of the victim and witness by the investigative judge. Especially in court practice on cases of human trafficking interrogation of the victims in court represents big complexity as many of them, being citizens of other states, leave even before consideration of the case in court on these or those arisen life situations. It belongs also to seriously ill persons which have no opportunity to leave medical institution, to juveniles and minors which interrogation taking into account specifics of psychophysical features of their development and the psych injuring influence of an investigative

and judicial situation also represents a certain complexity.

By the general rule, in case of deposition of indications according to part 3 of article 217 Code of Criminal Procedure RK interrogation by the investigative judge is made in the presence of the prosecutor, the suspect, his lawyer, the law allows participation and other participants of process [3].

Deposition of indications can be performed also without participation of the suspect who isn't called for questioning if presence of the suspect on interrogation threatens safety of the victim, the witness.

The criminal procedure law gave many opportunities of implementation of interrogation of the victim, witness with preserving confidentiality and ensuring their safety, often applied by consideration of the criminal cases made as a part of criminal group which allows participation suspected (charged) in carrying out interrogation and provide observance of the rights of the suspect accused about interrogation of the witnesses showing against it, stipulated in Item e) part 3 of article 14 of the International Covenant on Civil and Political Rights», ratified by the Republic of Kazakhstan on November 25, 2005.

For the purpose of safety of participants of legal proceeding in case of deposition of indications as Art. 217 of the Code of Criminal Procedure, the investigative judge has the right to make interrogation of the injured (witness) by rules of Art. 98 of the Code of Criminal Procedure without announcement of data on the identity of the protected person with use of a pseudonym, also in the conditions excluding recognition of the protected person for other attendees on a voice and external data without visual observation by its other participants of legal proceeding, including with use of technical means in the video conference mode by remote interrogation, the stipulated in Clause 213 Codes of Criminal

Procedure. In this case suspected (defendant) has the right to submit the questions to the injured (witness) in writing. Testimonies of the person interrogated in such a way are announced in the presence of all participants of process without specifying of data on the protected person. In 6 months 2015 135 petitions for deposition of indications are considered.

Judicial function on consideration and permission of procedural questions on a pre-judicial production stage gives equal opportunities to the parties of accusation and protection, guarantees reliability of judicial evidences as proofs become known to both parties in case of a competitive method of their obtaining, to decrease application of preventive measures limiting the rights and freedom of citizens there is real a possibility of «lawyer» investigation.

Powers of the investigative judge on control of pre-judicial production in the subsequent stages of development of criminal trial will extend that characterizes forward and consecutive development of criminal trial. So, transfer is capable to provide further to investigative judges of function of authorization of secret investigative actions, searches, surveys of premises justification, legality of production of the specified actions. Now these powers are conferred to the prosecutor.

Expansion of powers of investigative judges optimizations of practical activities on complex application of the regulations regulating production of the investigative actions limiting the right of citizens to security of person promote guarantees identification and elimination of violations at earlier production phases on case.

Expansion of function of the investigative judge is one of the directions on implementation of institutional reform of the Head of state NursultanNazarbayev in ensuring rule of law and to strengthening of guarantees of protection of the rights of citizens in criminal trial.

## References

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