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Problems of applying and realization of preventive measures in the form of detention concerning persons, suspected and accused in the commission of the act of terrorism and crimes of extremist nature

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Abstract

The main content of the article focuses on the substantive aspects of criminal offences of terrorist and extremist right. Special attention is paid to the application of preventive measures related to isolation from society as for persons who have committed crimes of this category. According to the authors opinion, the implementation of the position will enhance the effectiveness of measures of criminal-procedural control over the behavior of persons in the target group that will create the necessary legal safeguards to meet the challenges of criminal justice in the investigation and trial of criminal cases in this category.

Key words: terrorism, extremism, detention, crime, society.

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Problemas de aplicación y realización de medidas preventivas en forma de detención de personas, sospechosos y acusados en la comisión del acto de terrorismo y delitos de naturaleza extremista

Resumen

El artículo se centra en los aspectos sustantivos de los delitos de terrorismo y derecho extremista. Se presta especial atención a la aplicación de medidas preventivas relacionadas con el aislamiento de la sociedad en cuanto a las personas que han cometido delitos de esta categoría. Según la opinión delos autores, la implementación de la posición mejorará la efectividad de las medidas de control penal-procesal sobre el comportamiento de las personas en el grupo objetivo que crearán las garantías legales necesarias para enfrentar los desafíos de la justicia penal en la investigación y juicio de casos penales en esta categoría.

Palabras clave: terrorismo, extremismo, detención, crimen, sociedad.

1. INTRODUCTION

At the present stage of societal development the status and prospects for realization of the rights and freedoms of the person and citizen, considering the accumulated international experience in the globalization process, requires from each state further improvement of the legal system and reforming of its basic institutes and their progressive development. The international terrorism and extremism, as a global problem, involve various negative consequences in social

and economic and political spheres that make serious threat of national security of the state. At the same time, today, one of vital issues is a sharpening of the social tension in society which is in a direct causal relationship with the state and dynamics of crime in the country. It should be noted that in recent years, it is observed a certain growth of quantitative indices of crime, change of qualitative structure on criminal offenses, and the terrorist and extremist crimes belong to the number of the most dangerous (Alekseeva and Chernov, 2017). According to the data submitted by the International prison reform, total number of criminal offenses of the specified category, which were committed in Kazakhstan, is characterized by the following data: terrorist crimes - for 2014 were made – 24, in 2015 – 124, and in 2016 – 227. The registered criminal offenses, connected with extremism, were made for 2014– 130, in 2015 – 193, and in 2016 – 327. Proceeding from the provided data, it is traced the accurate tendency of growth on this type of crimes (Penal Reform International, 2017).

The act of terrorism is differenced seriously from other crimes of violent orientation. This criminal phenomenon is the reason of mass fear which destroys physical, material and moral values. The specified crimes cannot be equated to murder, violence and to other criminal actions which are differenced in the increased public danger; they are the reason of fear but have no so large-scale character peculiar to terrorism and extremism. The act of terrorism is the most dangerous crime, encroaching on the bases of public safety, as it leads to destabilization of the political system, generates political and economic

contradictions in the country or even between the countries (Sekyere and Asare, 2016).

In modern literature “terrorism” (from Latin “terror” - fear, horror) designates the violence or threat of applying of violence against separate, individual groups or the political, economic, ideological stable organization and also the achievement of other purposes, pursued by terrorists (Kukhianidze, 2016).

Terrorism is described by terrorist and extremist groups on both sides as tactics and strategy, crime and a holy duty, reasonable reaction to oppression and inadmissible actions (Okriashvili, 2017). In the criminal legislation of many countries, the act of terrorism is legally designated from the criminal acts, committed in the different purposes (Dare and Arowolo, 2013).

In the conditions of the accruing negative tendencies of social and public destabilization and the amplifying mass terrorist and extremist threats to society, the world community and certain states conduct the hard work on the development of the effective counterterrorist measures and preventive mechanisms, promoting prevention and effective control of the offenses on the considered type. Normative and organizational basis of the solution of problems in the sphere of counteraction to terrorism and religious extremism are: International convention for the suppression of the financing of

terrorism accepted on December 9, 1999; International convention against the taking of hostages adopted by the United Nations General Assembly on December 17, 1979; A convention for the suppression of unlawful seizure of aircraft adopted in the Hague on December 16, 1970; Convention on the physical protection of nuclear material adopted in Vienna on March 3, 1980; Protocol for the suppression of unlawful acts of violence at airports serving international aviation signed in Montreal on February 24, 1988; Protocol for the suppression of unlawful acts of violence at airports serving international aviation, adopted in Rome on March 10, 1988; International convention for the suppression of terrorist bombings adopted by the United Nations General Assembly on December 15, 1997; the global counter-terrorism strategy accepted by the United Nations on September 8, 2006 and others. Proceeding from it, according to the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020, the state, public institutes, non-governmental organizations and expert circles carried out hard work on preparation of normative and legal base and the programs, promoting to the uniting efforts in the fight against the crimes, encroaching on bases of public safety. Within realization of the considered provisions there were adopted the Law RK of July 13, 1999 #416-1 "On countering terrorism", the Law RK of February 18, 2005 "On countering extremism and other normative acts, directed to counteraction to terrorism, the emergence of radicalization of society and militant extremism". Besides, there was approved the State program on counteraction to religious extremism and terrorism in the Republic of Kazakhstan for 2013-2017 by the Decree of the President of Kazakhstan.

The provisions stated above, on the one hand, characterize the raised degree of public danger of crimes of this group and complexity in their detection, investigation and prevention; on the other hand, they reflect attention of the legislator in questions of the legal regulation of fight against terrorist and extremist crimes. In our opinion, except development of material and legal institutions, special attention should be paid to the further development of criminal procedure mechanisms of court procedure on cases and concerning persons of the considered category. Extremely important is the procedural order in general, where observance is the main condition for the solution of tasks of criminal procedure. However, it is paid more attention to the need of more detailed legal regulation of procedural provisions, connected with the application of preventive measures and other measures of procedural coercion concerning separate categories of suspects and accused (https://eujournal.org/index.php/esj/article/viewFile/6905/6624).

2. METHODOLOGY

This research was based on the materials, formulated in doctrinal and legislative sources of the international level and the Republic of Kazakhstan. Besides, comprehensive study of the problem on international terrorism and extremism at the international level allowed to carry out the deep analysis of law-enforcement activity of the bodies participating in the fight against crime, development of scientifically based suggestions for improvement of the legislation in the sphere of the criminal procedure legislation and Law of the Republic of Kazakhstan "On procedures and conditions for the custody

of persons in special temporary detention facilities". The methodological basis of the research consists in the application of the dialectics methods and system method of cognition as general scientific methods of cognition and also a number of private and scientific methods: formal-legal, method of comparative jurisprudence, system analysis. Taking into account gravity of the specified crimes, the increased public danger of the identity of persons committed them, as well as following from there the difficulties in the detection, investigation and judicial review of criminal cases of this category, to the subjects facing criminal prosecution, as a rule, there is applied the preventive measure in the form of detention. In this regard, they are very relevant and demand more detailed studying the organizational and procedural aspects of applying of the preventive measure in the form of detention concerning persons, who are suspected and accused in the commission of the acts of terrorism and extremism.

3. DISCUSSION AND RESULTS

It should be noted especially that the corresponding contingent of subjects of the criminal offense, being in the investigatory isolation ward, in every possible way makes attempts to affect the internal environment or even a situation in penal institutions. Especially actively this contingent (the persons under investigation) uses pseudo-religious ideology as the effective instrument of influence. Confirmation of this position is the conducted social survey by Kazakhstan's Institute of Social and Economic Information and Prognostication (KISEIP), where it is found out that the dominating

factor, determining the coming to faith, is the contacts and conversations (37,1%). The second, in importance, is the independent way: studying of the religious literature (25,3%), influence of the friends – 12,6%, family traditions – 11,2% and ethnic origin (6,5%), so they were considered as less significant (Penal Reform International, 2017).

At the same time, normatively fixed procedural guarantees of protection of the rights, freedoms and legitimate interests of the personality at choosing of the appropriate preventive measures, which are especially connected to isolation of the person from society, equally are extended on offenders of the given category.

According to the International covenant on civil and political rights (1966) it is said that No one shall be subjected to arbitrary arrest or detention. No one is to be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law.

It is provided in article 16 of the Constitution of the Republic of Kazakhstan the Constitution of RK (2017) that Arrest and detention shall be allowed only in cases stipulated by law and with the sanction of a court with the right of appeal of an arrested person.

Today, in the existing Code of Criminal Procedure of CCP RK (2017), article 147 provides application of the preventive measure in the form of detention, if the suspected (the accused or the defendant) is accused in commission of the crimes for which criminal punishment is provided not less than five years of imprisonment, then the person who carried-out pre-judicial investigation issues the decree on initiation of the petition before court for making the sanction for applications of detention. Criminal prosecution authorities in the absence of the specified basis apply detention in custody at the presence of the following conditions:

1) He has no permanent residence in the territory of the Republic of Kazakhstan;

2) His personality is not identified;

3) He violated earlier chosen a preventive measure or coercive procedural measure;

4) He tried to disappear or disappeared from criminal prosecution authorities or court;

5) He is suspected of crime commission as a part of organized group or criminal community (the criminal organization);

6) He has criminal record for earlier committed serious or especially serious crime;

7) There are data on continuation of criminal activity by him (CCP RK, 2017).

The analysis of the procedural content of the preventive measure in the form of detention confirms the maximum restriction of freedom of the suspected or accused, restriction of his rights and for this reason, demands the corresponding theoretical judgment. Detention in custody is directly connected with isolation from society and it is most strict preventive measure where the purposes of criminal procedure coercion are the most accurately shown.

According to the Doctor of law, Professor, the Honored worker of the Higher School of the Russian Federation: "Detention in custody is the strictest preventive measure, accompanied with additional guarantees of respect for the rights of citizens, additional conditions of its application. A detained person is physically isolated from society and kept under guard" (Ryzhakov, 2004: 19).

According to Cesare Beccaria, the great Italian humanist and the reformer of the criminal law of the XVIII century: "Pre-trial detention has to be severe only as much as necessary in order to prevent the escape or concealment of crime evidence" (Harcourt, 2013: 14). Great humanists of that time understood that the preventive measure in the form of detention, sometimes developed into one of the types of criminal penalty, considering the conditions and the regime of the imprisonment place.

From the formal legal side, the preventive measure is chosen concerning the suspected when there are not still insufficient pieces of evidence to issue the decree on the involvement of this person as an accused. The absence of an accusation (decree on the involvement of the person as the accused) means that there is no precise legal assessment of the act – qualifications which at initiation of case have preliminary character. Therefore, it is difficult to control observance of all conditions of legality of the application of the preventive measure concerning the suspected (Smirnov and Kalinovsky, 2008).

Considering the developed procedural conditions in Kazakhstan, in this regard, the relevant data of rather a representative character is formed. In 2016-2017 investigatory isolation wards kept in custody 6376 persons, concerning whom was chosen the preventive measure in the form of detention. In 2015 their quantity was 6023 persons that in comparison with the subsequent period is more than 0,9%. It should be noted that for the same periods the provided statistical data by the Committee on Legal Statistics and Special Records of the Prosecutor General's Office of RK CLS&SR PGO RK (2017) show that courts authorized the preventive measure in the form of detention concerning 11038 (10631) persons, were refused – 511 (474). In the subsequent, the prosecutors protested 16 (23) court decisions on refusal to issue the sanction for detention from which were satisfied – 15 (9). Besides, for the last 2017 across all Kazakhstan the total number, chosen by the criminal prosecution authorities, of the preventive measures in the form of detention was made – 15689 of them by investigating

authorities – 14496, and bodies of inquiry – 1193 according to the report of (CLS&SR PGO RK, 2017).

As the analysis of judicial and investigative practice shows, the employees of preliminary investigation bodies often considered the questions of the chosen of the preventive measures, connected with isolation of the person from society, without detailed analysis of the facts of the case, including, data on the identity of suspected and accused.

The conducted research of the Doctor of law, Associate Professor Khanova (2010), concerning the specified actions of pre-trial inquiry bodies, led to the following conclusions:

> Many interrogators and investigators accurately do not know when this preventive measure must be applied. From among the interviewed respondents – 65,2% consider that the investigator always after indictment is obliged to choose the preventive measure – 34,7%, indicated for the need of the existence of the corresponding bases. Together with it, the respondents consider that the bases for application of the preventive measures are: 41,3% - existence of the indictment; 40% - existence of evidences for indictment (2010: 28).

Professor Radchenko (2003)touches on the problem of the concept "special complexity" which claims that "the developed earlier law-enforcement practice showed that it is possible to refer to this category the group cases, when the crime is committed in various regions by the persons, accused in the commission of the number of

crimes when they are appointed and carried out difficult and long expertise in the case, etc.". In this case, the social indicators of terrorist or extremist activity have crucial importance.

As professor Brown considers:

> The main social features can be taken as the radicalization process observation facility which in most cases develops into dangerous extremism. Though, there is no correct way, at the same time knowing that any personality becomes radicalized and, as a result, they turn into the criminals making violent extremist acts … (Edward and Cass, 2009: 45).

Today, the new tendencies were accurately designated. There is an active process of adaptation of the modernized terrorist tactics which is helped by access to new technologies, communications and information systems. The Internet became the undesirable amplifier in the form of the illegal use in spite of the fact that its lawful use in various questions, including in the questions of the fight against crime and safety, gives big advantages (Navarro and Villaverde, 2014).

As practice shows, quite often the bodies of pre-judicial investigation make mistakes at the qualification of the act of the accused or at choosing of the preventive measure. For example, it can be noted that at the qualification of crime of terrorist character, except article 255 of CCP RK (2017), mistakes are made on corpus delicti. For example, according to the articles 256 (propaganda of terrorism or public calls for commission of the act of terrorism), 257 (creation, the management of terrorist group and participation in its activity), 258

(financing of terrorist or extremist activity and other complicity to terrorism or extremism), 259 (recruitment or preparation, or arms of persons for the organization of terrorist or extremist activity), 260 (passing of terrorist or extremist training), 261 (the hostage taking), etc.(CCP RK, 2017). Besides, there are difficulties at the qualification of the crimes, committed by the group of persons, transnational organized group, transnational criminal community, in particular, when it is traced the criminal activity of this organization at the international level.

It is interesting, in the considered context, the opinion of Kurochkin who wrote:

> Practice shows that criminal cases, where the preliminary investigation is ended within 3 months, are seldom met. It speaks as big-time expenditure on collecting of the evidences exposing in crime, studying of the identity of the guilty person, checking of the arguments of the accused connected with the case, sending the case to the prosecutor and court in time, sufficient in order that the last had an opportunity to make the decision on the existence or lack of the bases for further application of detention at judicial stages of proceeding (2008: 32).

In our opinion, this moment is very important as collecting evidentiary base takes considerable time, thereby there is a risk of infringement of the rights of persons, concerning whom the criminal legal proceedings are conducted. The European Court of Human Rights repeatedly noted that preservation of reasonable suspicion of the detained person in commission of crime is an indispensable

condition of legality for extension of detention term, but after certain time only this condition is already insufficient. The additional "essential" and "sufficient" bases for extension of detention term are necessary. Extension of detention term should not anticipate punishment in the form of imprisonment (Lupinskaya, 2009).

Professor Akhpanov and Nasyrov (2005)in a joint research claimed that Art. 110 of CCP RK (2017) in this part needs in adjustment for consideration of complaints. In this regard, it is represented to more successful the edition of Art. 220-2 of the Code of Criminal Procedure of the Russian Soviet Federative Socialist Republic 1960 where it was provided: "In case at the meeting the materials confirming legality and validity of application of the imprisonment are not presented, the judge issues the decree on the cancellation of this preventive measure and on release of the person from custody" (Akhpanov and Nasyrov, 2005: 21). This opinion is convincing as we believe that as the legislator needs to realize and accept this important fact at developing the legislation, and to the law enforcement official, in the process of its realization. At the same time, consideration of the matters which happens out of connection with realization of the preventive measure in the form of detention of suspected and accused in the commission of the act of terrorism or extremist crimes. Special interest is the foreign experience in this matter.

Procedural terms of detention of detainees in criminal proceedings of the USA do not exceed 100 days (as an exception – 130 days). Non-compliance with terms attracts cancellation of criminal prosecution. In England “the Habeas Corpus” procedure provides that the court, at the request of the arrested person, must issue an order to the chief of the place of imprisonment about the delivery of this arrested person to the court to verify the legality and validity of the arrest (Radchenko, 2003).

In Kazakhstan, the detention terms and an order of their extension are provided by article 151 CCP RK (2017) where the maximum term at the extension of detention is allowed over 12 months, but no more than 18 months and it is allowed only "in exceptional cases concerning the persons, suspected in the commission of especially serious crimes, as a part of criminal group and also other terrorist and (or) extremist crimes". In this case, the detention term is prolonged by the investigative judge according to the motivated petition of the head of the investigative division from the central office of criminal prosecution authority, or the prosecutor who accepted criminal case.

In many countries the special judicial structures for the efficiency of consideration of the questions about sanctionare even created and worked, they are specialized in consideration of the questions about human rights and legality of detention and arrest, and

also about sanctioning of the specified actions by bodies and officials, conducting the criminal procedure. For example, in Germany it is appointed the judge's position on preliminary investigation, in France – judges on the rights and preliminary investigation, in Italy – judges for preliminary investigation, In England – it is made by magistrates. It is not necessary to find out the examples. Kyrgyzstan's courts have 70 additional judges who will be specialized in consideration of the specified questions in connection with transferring of arrest sanction (Yurchenko, 2009).

At the same time, the experience of Kazakhstan's criminal justice in this direction attracts attention. Synthesis of the law-enforcement practice of investigative judges in district court #2 of Almaty area, in district court #2 Esil area and in district court #2 Saryarka area of Astana city shown that with the petition about sanctioning for extension of detention in 2015 there were 205 addresses, from them it is refused in one case, in 2016, 516 corresponding petitions are considered, from them 2 were withdrawn, totally satisfied - 514, but for the first half of the year 2017,379are considered and satisfied. The stated above gives the grounds for the conclusion that the most cases at consideration of the petition for extension of detention by the investigative judge are satisfied, owing to the achievement of overall objectives of criminal legal proceedings from courts and criminal prosecution authorities that, perhaps, reduces the general level of objectification of the decisions made by courts in this direction.

It should be noted the existence of more softened procedural conditions, applied concerning separate categories of subjects, in particular minors that is shown as in the content of the preventive measures connected to isolation of the person from society and in procedural order at their choosing. Suspected and accused minors have the more comfortable material living conditions during stay in the investigatory isolation ward and they are regulated by the Law of the Republic of Kazakhstan of March 30, 1999 #353-I "On procedures and conditions for the custody of persons in special temporary detention facilities".

At the same time the existing CCP RK (2017), having normatively fixed mechanisms of the legal regulation of the procedural order for choosing the preventive measure in the form of detention and other preventive measures, connected with isolation of the person from society, does not consider the stated above features, connected with the commission by suspected or accused in terrorist or extremist crimes. In particular, it is supposed expedient to develop and introduce at the level of the criminal procedure legislation the differentiated approaches to the order of choosing the preventive measure in the form of detention concerning persons of this category. It is obvious that in this case, simple differentiation on demographic and age signs is not enough. The considered contingent of persons under investigation is differenced, as a rule, inaccurately expressed antisocial orientation, steady criminal views and ideas, so it is difficultly susceptible concerning the financially legal and procedural corrective actions.

In particular, the normative requirements of ensuring isolation of persons of this category are specified in article 31 of the Law PK 353-1 of March 30, 1999 regulating the order and conditions of person detention in the specialized institutions, providing temporary isolation from society:

1. Suspected and accused persons are held in common or isolation cells, according to the requirements of separate placements provided the Law.

2. Accommodation of the suspected and accused persons in isolation cells for the term of more than one days is allowed under the motivated resolution of the head of administration of the detention place sanctioned by the prosecutor….

Apparently from the analysis of the specified norms, the current legislation does not provide in detail the differentiated conditions of keeping in penal institutions of suspected or accused persons in the commission of terrorist or extremist crimes. In our opinion, concerning this category, only the general conditions of separate keeping of persons of the part 2 article 32 is determined to whom it is applied the preventive measure in the form of detention. For example, regarding part 1 article 32, it is established the possibility of separate keeping of the smoking persons who are under investigation - from non-smoking persons, but concerning participants of criminal procedure who were mentioned above such conditions are not provided. This approach of the legislator is represented not quite reasonable, which based possibly

on the actual, organizational, material and infrastructure possibilities of the Authorized body.

The further analysis of content of article 32 of the considered Law and practice of application of its provisions, allows to draw the conclusion that persons of this category in the conditions of separate placement in a cell can be quite with other persons under investigation, for example, who committed grave or especially serious crimes. In this regard, it is possible to speak about the lack of effective obstacles for distribution among detained persons of the radical views and destructive ideology. The similar situation extremely negatively affects the activity of bodies of inquiry, preliminary investigation, prosecutor's office and court in the solution of tasks of criminal legal proceedings in cases about the commission of terrorist and extremist crimes, safety issues concerning the special contingent and the staff of penal institutions, interferes with the stay regime in investigatory isolation wards of persons to whom the preventive measure in the form of detention is applied.

4. CONCLUSION

In our opinion, proceeding from the above, it is advisable the introduction of the addition in point 2, part 2, article 32 of the analyzed Law, in the part of normative fixing of the requirement on separate keeping of the detained persons in the conditions of penal institutions as well as the suspected and accused persons in the commission of the

act of terrorism and extremist crimes to whom it is applied the preventive measure in the form of detention. The specified additions need to be stated in the following edition: suspected and accused persons in the commission of terrorist and extremist crimes.

A similar approach will form the corresponding prerequisites for the creation of the necessary conditions, ensuring the safety of participants of criminal procedure, interfering the possibility of further commission of criminal offenses, rendering of the counteraction to investigation and judicial consideration of the criminal cases, distribution of terrorist and extremist ideology, attempts to disappear from the bodies of preliminary investigation, prosecutor's office, court and also bodies, executing criminal penalty.

In our opinion, implementation of this legal provision in the corresponding conditions of practical law-enforcement activities, will considerably increase preventive influence and practical expediency of the preventive measure on the detention type, concerning suspects and accused persons in the commission of the terrorist and extremist crimes, as well as efficiency of application of other procedural mechanisms in the solution of tasks for criminal legal proceedings on criminal cases and in the relation of this category.

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