

G.B.Sultanbekova, M.T.Abzalbekova

*Ye.A.Buketov Karaganda State University
(E-mail: gulia-sultan@mail.ru)*

Investigating judge — new party to a proceeding in criminal justice of the Republic of Kazakhstan

Article examines the issues of establishment and development of judicial control in the Republic of Kazakhstan, introduction of new party to a proceeding in criminal justice of Kazakhstan — investigating judge. There are issues, related to future expansion of powers of investigating judge, about place and role of judge, who executes the operative judicial control; issues are examined, related to legal nature of investigating judge. Here are also examined the issues on authorization of investigating judge for sanctioning of non-public investigatory actions.

Key words: investigating judge, judge for introductory investigation, operative control of pre-trial procedure, optimization of pre-trial procedure in criminal justice of the Republic of Kazakhstan, legal status, judicial control of observance of rights, freedoms and interests of people in criminal justice.

One of the main ways to improve the criminal justice system, according to the developers of the project of Criminal procedural code of Kazakhstan, should be the introduction of investigating judge. Position of investigating judge became a legal fact in the criminal trial of a number of CIS and Baltic countries, such as, for example, Latvia, Lithuania, Republic of Moldova, Ukraine. During the visit of the delegation of Kazakhstan to Ukraine, much attention was paid to the problematic issues of the new Criminal procedural code of Ukraine, introduced in 2012. Members of the delegation were interested in innovative performance. According to the ex-chairman of the Supreme Court of the Republic of Kazakhstan Beknazarov B.A., the new Code of Criminal Procedures of Kazakhstan will be ninety percent similar to the Ukrainian Code. Ways of reforming the procedural law of Ukraine and Kazakhstan, according to Beknazarov B.A., are pretty similar. Ex-chairman of the Supreme Court of the Republic of Kazakhstan paid particular attention to such new procedural institution as investigating judge.

On the question of Ukrainian journalist about the necessity of judicial authorization of covert investigative actions, the former head of the entire judicial system of the Republic of Kazakhstan said: «According to the newly introduced Code, the court shall authorize only the arrest and a number of activities that have little effect on the course of investigation. Therefore, the experience of Ukraine in solving off these procedural issues is very important for us. Here I am once again convinced that Ukraine has made significant steps to protect the rights of citizens. Not those of governmental and law enforcement bodies, but the citizens'» [1; 2].

Beknazarov B.A. expressed his confidence that the judicial control over the pre-trial proceedings in Kazakhstan will be improved, emphasizing the fact that the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 includes the prospect of further expansion of judicial control over the pre-trial proceedings. Scientists also support the practices, they hope that in the future investigating judge will be endowed with additional powers that allow him to protect fully the constitutional rights of citizens [2; 83]. We would not be so optimistic, as we recall, that at the introduction of the jury we also had high hopes for the further expansion of the powers of this court. The Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 as an effective criminal policy of the State provides the gradual extension of the categories of criminal cases, examined by jury. However, in practice, in the newly adopted Criminal procedural code of the Republic of Kazakhstan of 07.04.2014, in Part 1 article 631 Jurisdiction of jury, we find that this court will consider the case of crimes for which the death penalty or life imprisonment are provided by criminal law. And earlier, according to Criminal procedural code of the Republic of Kazakhstan of 13.12.1997, the Jury examined the cases of extremely serious crimes, and there was provided the further expansion of the powers of jury up to its examination of all categories of serious offenses.

That is the very thing that we would like to pay attention to. It is too early to talk about the effectiveness of new procedural institutions in the Baltic States, CIS, where our legislator borrowed the new rules. These procedural institutions are not enough approved by practice. As Suleimenova G.Zh. noted: «References to the alleged positive experience of such countries as Italy, Spain, Russia, Georgia, Tajikistan, Uzbekistan, based on the example of certain provisions of the Criminal procedural code of these States do not hold water,

because in these countries search for the most optimal model of the criminal process is still going on». «Reforms carried in the Republic convince that it is unacceptable to use foreign legal institutions, no matter how attractive at first glance they are, as well as their mechanical transfer in Kazakhstan's legal environment, without taking into account certain objective factors. These reasons are the sort of barriers that prevents their overcoming and creation of structure modeled on foreign countries, due to the specific socio-economic opportunities of the republic, national peculiarities, human resources — social structure, religion, level of legal awareness and legal culture, traditional mentality and its socio-cultural characteristics, etc.» [3].

In the Russian Federation there are held active discussions on the necessity of introduction of figures of «court investigator» or «investigating judge» to criminal proceedings of Russia. Some researchers advocate the need to introduce the abovementioned public persons to Russian criminal proceedings, and others do not see a special need to do this, and foresee the negative consequences of such innovations [4; 15]. But, the majority of scientists and practitioners tend to proposal for the introduction of investigating judge (Muratova N.G., Nikolyuk V.V., Derishev Yu.V., Demidov I.F.).

In contrast to the neighboring republic, where the discussion is not finished and new Criminal procedural code of the Russian Federation is not adopted, in the Republic of Kazakhstan on January 1, 2015, a new procedural figure — investigating judge will appear in criminal proceedings. Despite this, however, on the pages of scientific publications, conferences, round tables the discussion of novets of the criminal procedure law still continues, the issues of introducing of the institution of investigating judge, questions about the nature, place and role of investigating judge in criminal proceedings of the Republic of Kazakhstan are still being debated. In Ukraine, where, according to the ex-president of the Supreme Court of the Republic of Kazakhstan Beknazarov B.A., up to 90 % of innovations related to investigating judge are borrowed up, despite the fact that the institution of investigating judge has worked since 2012, there is still debate about the legal nature of the investigating judge. There are researchers who believe that the content of control function of the court is to protect the constitutional rights of citizens (Tumanyants A.R.). Skrypina Yu.V., Tishchenko S. believe that judicial control is aimed to: 1) protection of human rights and freedoms, which is «prevention», i.e. the prevention of unlawful and unjustified restrictions on human rights; 2) protection of human rights and freedoms, namely, their restoration in case of violation [5; 163].

In Kazakhstan, the investigating judge, in the exercise of its powers in the course of pretrial proceedings, will, like other state bodies, be guided by the objectives of the criminal process. These tasks are described in Article 8 of the Criminal procedural code of the Republic of Kazakhstan [6; 30]. The objectives of the criminal process is the prevention, impartial, prompt and full disclosure, investigation of criminal offenses, expose and bringing to justice of those who have committed them, a fair trial and the correct application of the criminal law, the protection of individuals, society and the state from criminal offenses. The legally defined procedure in criminal cases must ensure the protection from unwarranted prosecution and conviction, unlawful restriction of the rights and freedoms of man and citizen, and in case of illegal prosecution or conviction of an innocent — his immediate and complete rehabilitation, as well as the possibility to strengthen the law and order, prevent the criminal offenses, form the respect for the law.

The main task of investigating judge, in our opinion, should be the protection of constitutional rights, freedoms and legitimate interests of citizens in pre-trial proceedings. Introduction of investigating judge in Kazakhstan, according to some scientists, will contribute to the efficiency of the administration of justice and fair trial, complete and objective disclosure of crimes [7; 178]. Supporters of the introduction of this institution consider that such a procedural figure (judge for preliminary investigation) — may impartially and independently carry out the function of judicial control over the procedural activities of the preliminary investigation bodies, the prosecutor, and, as well, help the lawyer to become a full participant in the process of proving in pre-trial proceedings [2; 83]. Meanwhile, there are those who believe that the prospects of this institution still look very vague. In their opinion, powers of introduced investigating judge are very limited. «It upsets the stronger, when it is known that most of functions, provided to this subject of Criminal procedural code (for example, authorizing the arrest and examinations of complaints of trial participants), is already is the competence of the judiciary for a long time. It turns out that the whole force of loudly announced reform of judicial control is really just «a thing of the horn», — said a member of the Presidium of the Republican Bar Association Daniyar Kanafin [8].

The lawyer complained that the real powers of investigating judge in sphere of control and human rights protection are limited to decorative condition. According to the new Criminal procedural code of the Republic of Kazakhstan, authorization of the most right-limiting investigation (including «covert») actions that restrict the fundamental rights of the individual, as now, is the responsibility of the prosecution bodies.

We have heard a lot about inefficiency and bias of prosecutor's supervision in this area. The conflict between the functions of the Prosecutor's Office, which, on the one hand supervises the legality, and on the other organizes the investigation and maintenance of charges in court, leads to the fact that investigative and accusatory component in its activities unnecessarily often suppresses a supervisory, regulatory and right-providing components. The lawyer believes that these functions should be taken by the investigating judge.

In Russia, there are advocates of the position that judicial control should look only like appeal actions of the criminal prosecution. With this approach, it will actually be reduced to a duplication of prosecutorial supervision. This approach looks like unacceptable, since at such construction of pre-trial investigation, arbitration method of legal regulation inherent to competitiveness, is not implemented in full. Petruhin I.L. in this regard said: «With a well staged judicial control, prosecutorial control in some ways becomes superfluous. There is no need to share the same control functions among different bodies» [9; 12].

According to the point 47, Article 7 of Criminal procedural code of the Republic of Kazakhstan of 04.07.2014, investigating judge — judge of the Court of First Instance exercising powers, provided by Criminal procedural code of the Republic of Kazakhstan during pre-trial proceedings. According to law, investigating judge is a judge of the district and equivalent court exercising the powers provided by the Code during the pre-trial proceedings.

Thus, this definition establishes the legal status of the investigating judge as equal with the other judges of the country, the level of court (district, city or specialized) and the power to administer justice, limited by pre-trial stage of criminal proceedings. The latter provision indicates that the investigating judge would not have the right to examine criminal cases on the merits in the main proceedings, as well as civil ones, administrative and others that go beyond the criminal pre-trial proceedings, and will focus exclusively on the implementation of the operational judicial control of the criminal prosecution bodies. The current Criminal procedural code of the Republic of Kazakhstan of 13.12.1997 already contains such a rule that limits the possibility of participation of the judge in a criminal trial in which he was involved in authorizing a procedural decision.

At presentation of project of new edition of Criminal procedural code of the Republic of Kazakhstan in December 2013, General prosecutor's office, among other novels, touched the issue about investigating judge.

According to the supervisory authority of the country, a figure of investigating judge is entered to the Kazakh criminal proceedings in order to enhance the judicial control over the pre-trial proceedings.

The powers of the investigating judge will include the consideration of applications for authorization of preventive measures in the form of detention, house arrest and the extension of their terms, forced placement of person, who is not under arrest, to a medical institution for forensic psychiatric examination, exhumation of the corpse, seizure of property, international search, placement of minor to a specialized institution

In addition to authorizing of certain investigative actions his responsibilities will also include the examination of complaints and petitions of the parties at the stage of pre-trial proceedings.

Expanding of the limits of judicial control, along with the procurator's control, according to the General Prosecutor's office of the Republic of Kazakhstan, will provide an efficient two-stage mechanism of the state protection of the constitutional rights and freedoms of citizens during the pre-trial proceedings.

With the aim of prompt respond to the facts of the application of illegal methods by criminal proceeding body, the procedure for responding of judge to messages on torture is regulated [10].

For a more widespread use of alternative preventive measures, which are not connected with isolation from society and reduce the prison population index, by analogy with the Criminal procedural code of Ukraine the Project fixes the rules, which make investigating judge to determine the size of the lien, which can be made at any time, to release the person from custody, when authorizing remand in custody, except the cases of extremely grave crimes.

As well, lien will not be applied for people, who committed the actions, caused the death of the complainant; actions being the member of criminal group; terroristic and extremist actions; as well as for those, who breached the lien before.

Let us get acquainted with powers of investigating judge, defined in the article 55 of Criminal procedural code of the Republic of Kazakhstan, entering into the legal force on January 1, 2015.

1. During the pre-trial activities, investigating judge examines the following issues in cases, provided in the Code:

- 1) sanction of imprisonment;
- 2) sanction of home arrest;

- 3) sanction of suspension;
- 4) sanction of prohibition on imminence;
- 5) sanction of extradition arrest;
- 6) prolongation of terms of imprisonment, home arrest, extradition arrest;
- 7) application of lien;
- 8) sanction of sequestration;
- 9) compulsory positioning of person, who is not under the imprisonment, to the medical organization for execution of forensic psychiatric and (or) forensic medical expertise;
- 10) at definition of fact of mental affection, about the transfer of person, for whom the imprisonment was applied, to special medical organization, which renders the psychiatric assistance, suitable for taking of patients to strict isolation;
- 11) exhumation of corpse;
- 12) announcement of international search of supposed criminal, accused.

2. In cases, provided by this Code, investigating judge:

- 1) administers the complaints for activity (inactivity) and decisions of investigator, investigation body, interrogation officer and prosecutor;
- 2) administers the issues on application of material evidences, which are quickly damaged, or whose long storage up to solving of criminal case, requires significant material expenses;
- 3) during the pre-trial procedure, consigns the evidences of victim and witness;
- 4) imposes the monetary redress to persons, who do not execute or poorly execute the procedural liabilities in pre-trial proceedings, except lawyers and prosecutors;
- 5) considers the issue on collecting of court costs subject to criminal case, under the presentation of prosecutor;
- 6) under the motivated prayer of the lawyer, participating as defender, considers the issue on vindication and inclusion into criminal case of any information, documents, things, important for criminal case, excluding the state secrets, in case of rejection of execution of request, or absence of decision for it in three days;
- 7) under the motivated prayer of the lawyer, participating as defender, considers the issue on expertise, if the criminal investigation body rejects the satisfaction of such prayer with no reasons, or no decision was made in three days;
- 8) under the prayer of the lawyer, participating as defender, considers the issue on compulsory attachment of prior examined witness to body, executing the criminal process, if the appearance of witness for presentation of evidences, is difficult;
- 9) executes other powers, provided by this Code.

3. Decree of investigating judge may be appealed and protested according to the article 107 of Criminal procedural code of the Republic of Kazakhstan.

As can be seen, many of the above proceedings are not widespread in practice and do not cover the entire spectrum of issues, limiting the constitutional rights and freedoms of citizens, which are subject to judicial review.

As for the issues of authorization of detention, house arrest and their extension, the current Criminal procedural code is already assigned such powers to the court, as we pointed out above. At the same time, the bill provides the possibility of cancellation or modification of these preventive measures authorized by investigating judge, prosecuting authority, with the consent of the prosecutor; this rule is contained in part 5, Art. 153 of the project. Under the legislation in force, this decision is impossible without judicial review.

In addition to the power to authorize a number of the abovementioned proceedings, the competence of the investigating judge is offered to include the following: considering of complaints against actions (inaction) and decisions of the investigator, investigation body, the interrogator and the prosecutor (the analogue of Art. 109 of Criminal procedural code of the Republic of Kazakhstan); the Prosecutor's applications for forfeiture of property, obtained by illegal means, before the sentencing; the depositing of testimonies of persons during the pre-trial, if there is a reason to believe that their later questioning may be impossible due to objective reasons or in order to avoid the psychotraumatic impact on them during the interrogation in the main proceedings; imposing of monetary penalties on individuals, who do not execute or poorly execute the procedural obligations in the pre-trial proceedings; considering of the issue on the recovery of procedural costs in a criminal case on the proposal of the body conducting the criminal trial.

In the new Criminal procedural code of the Republic of Kazakhstan a whole chapter is devoted to the newly introduced covert investigation actions. It would be logical to lay the sanctioning of the covert investigative actions, such as the secret control, audio and video surveillance of the person or place, interception and collection of information, secret obtaining of information about the connections between users, a secret control of mail and other sending, tacit penetration and site survey and others on the investigating judge. However, according to the newly introduced code it is possible only with the sanction of a prosecutor, not a judge.

Lots of scientists, practitioners and legal society do not agree with such situation.

In this regard the experience of Ukraine is remarkable, which was one of the first among the CIS countries who votes for of a radical reform of the criminal procedural law and a significant expansion of the powers of the court at the pre-trial stage of the criminal process. For example, in Ukraine, where in 2012 a new Criminal procedural code was adopted, the competence of investigating judges to authorize covert actions affecting the constitutional rights and freedoms of citizens is applied.

In the Criminal procedural code of the Republic of Moldova of 13.03.2003, significant modifications were made, providing the competence of the investigative judge to issue permits for execution of a number of important special investigative measures, including inspection of the house and installation of the audio, video, photo and cinematographic equipment for surveillance and recording, monitoring of the housing, tapping and recording of conversations, monitoring of connections related to the wire and electronic communications, collection of information from providers of services of electronic communications and others (Art. 132–2 of Criminal procedural code of Moldova).

According to Criminal procedural code of the Russian Federation dated 18.12.2001, a house-check, the seizure of postal and telegraph mailing, their inspection and seizure in post offices, control and recording of conversations, as well as obtaining of information about the connections between users is possible only upon the base of court solution.

Position of these countries regarding the legislative consolidation of powers to authorize the covert investigative activities to courts reflects the understanding of the necessity of real protection of constitutional rights and freedoms of citizens in criminal proceedings and a serious expansion of judicial control at the pre-trial stage of criminal proceedings.

Basing upon the experience of these countries, in new Criminal procedural code of Kazakhstan it would be logic to transfer the sanctioning to investigating judge fully, but not partially.

References

- 1 *Закаблук М.* Новый УПК Казахстана почти на 90 % будет похож на украинский кодекс // Закон и бизнес. — 2013. — № 25 (1115). — С. 2.
- 2 *Сулейменова Г.Ж.* Правовой статус санкционирующего судьи // Специализированный ежемесячный журнал «ЮРИСТ». — 2008. — № 4. — С. 82–83.
- 3 *Сулейменова Г.Ж.* Заключение научно-правовой экспертизы Концепции проекта Уголовно-процессуального кодекса Республики Казахстан. — [ЭП]. Режим доступа: <http://pravo.zakon.kz/4520192-zakljuchenie-nauchno-pravovojj.html>
- 4 *Ковтун Н.Н.* О понятии и содержании термина «судебный следователь» (следственный судья) // Российский судья. — 2010. — № 5. — С. 15.
- 5 *Тищенко С.* Правовая природа следственного судьи в уголовном процессе Украины // *Leges Si Viata*. — martie 2014. — С. 163.
- 6 Уголовно-процессуальный кодекс Республики Казахстан: Практик. пособие. — Алматы: Норма-К, 2014. — С. 30.
- 7 *Шамишурова С.М.* Перспективы закрепления правового статуса следственного судьи // Международный научный журнал «Наука и мир». — 2014. — Т. 2. — № 3 (7). — С. 178.
- 8 *Радловский Я.* Верховный суд разъяснил полномочия следственного судьи в Казахстане. — [ЭП]. Режим доступа: http://tengrinews.kz/kazakhstan_news/verhovnyiy-sud-razyyasnil-polnomochiya-sledstvennogo-sudi-v-kazahstane-264585/
- 9 *Петрухин И.* Прокурорский надзор и судебный контроль за следствием // Российская юстиция. — 1998. — № 9. — С. 12.
- 10 Презентация Проекта новой редакции Уголовно-процессуального кодекса Республики Казахстан (г.Астана, Служба центральных коммуникаций при Президенте РК, 18 декабря 2013 г.). — [ЭП]. Режим доступа: <http://m.prokuror.kz/rus/novosti/press-releasy/prezentaciya-proekta-novoy-redakcii-ugolovno->

Г.Б.Сұлтанбекова, М.Т.Абзалбекова

Тергеу судьясы — Қазақстан Республикасының қылмыстық өндірісінің жаңа процессуалдық тұлғасы

Мақалада Қазақстан Республикасындағы соттық бақылаудың қалыптасуы мен дамуы, Қазақстанның қылмыстық сот өндірісіне жаңа процессуалдық тұлға — соттық судьяның енгізілуі сұрақтары қарастырылды. Сонымен қатар болашақта тергеу судьясының өкілеттіктерін кеңейту сұрақтары, тергеу судьясының жедел соттық бақылауды жүзеге асыруға байланысты құқықтық табиғатына, оның орны мен ролі туралы мәселелер де қозғалған. Тергеу судьясына жасырын тергеу әрекетін санкциялау өкілеттіктерін беру сұрақтары да назардан тыс қалмаған.

Г.Б.Султанбекова, М.Т.Абзалбекова

Следственный судья — новая процессуальная фигура в уголовном судопроизводстве Республики Казахстан

В статье рассматриваются проблемы становления и развития судебного контроля в Республике Казахстан, введение в уголовное судопроизводство Казахстана новой процессуальной фигуры — следственного судьи. Затронуты вопросы, связанные с расширением в будущем полномочий следственного судьи, о месте и роли судьи, осуществляющего оперативный судебный контроль. Авторами показана правовая природа следственного судьи, отмечено наделение следственного судьи полномочиями по санкционированию негласных следственных действий.

References

- 1 Zakabluk M. *Law and business*, 2013, 25 (1115), p. 2.
- 2 Suleiyменова G.Zh. *Specialized monthly magazine «LAWYER»*, 2008, 4, p. 82–83.
- 3 Suleiyменова G.Zh. Conclusion of scientific and legal expertise of Concept of project of Criminal procedural code of the Republic of Kazakhstan, <http://pravo.zakon.kz/4520192-zakljuchenie-nauchno-pravovojj.html>
- 4 Kovtun N.N. *Russian Lawyer*, 2010, 5, p. 15.
- 5 Tishchenko S. *Legea Si Viata*, 2014, martie, p. 163.
- 6 *Criminal procedural code of the Republic of Kazakhstan*, practical guide, Almaty: Publishing house «Norma-K», 2014, p. 30.
- 7 Shamshinurova S.M. *Science and world*, International scientific magazine, 2014, 2, 3 (7), p. 178.
- 8 Radlovskiy Ya. *Supreme court explained the powers of investigating judge in Kazakhstan*, http://tengrinews.kz/kazakhstan_news/verhovnyiy-sud-razyyasnil-polnomochiya-sledstvennogo-sudi-v-kazahstane-264585/
- 9 Petrukhin I. *Russian justice*, 1998, 9, p. 12.
- 10 Presentation of project of new edition of Criminal procedural code of the Republic of Kazakhstan (Astana city, Service of central communications at the President of the Republic of Kazakhstan, December 18, 2013), <http://m.prokuror.kz/rus/novosti/press-releasy/prezentaciya-proekta-novoy-redakcii-ugolovno->