DOI 10.31489/2021 L4/97-103

UDC 343.13

L.K. Kusainova[1*], L.S. Shoshaeva[1], A.B. Sopykhanova[2]

[1]*Karaganda University of Kazpotrebsoyuz, Kazakhstan*
[2] *Karaganda University of the name of Academician E.A Buketov, Kazakhstan*
(E-mail: klarisa_777@mail.ru, Scopus Author ID: 0000–0002–8208–6623, keukonf2012@mail.ru, sopyhanova09@mail.ru)

Problematic aspects of improving property measures of criminal procedural restraint under the legislation of the Republic of Kazakhstan

The article analyzes the points of view of various scientists, as well as legislation regulating the legal status of the application of property-related preventive measures. The purpose of the research work is to study the effective application of these preventive measures and the problematic aspects arising from their use. The methodological basis of the study is the modern doctrine of the measures of procedural restraint in criminal proceedings. General scientific methods such as comparative legal, logical, systematic methods have been applied in the work. The novelty of the article lies in the fact that for the first time it is proposed to introduce another measure of restraint — a property surety, as an alternative to another measure of restraint currently used in criminal proceedings — bail. In this regard, the problematic aspects of criminal procedural measures of restraint of a property nature existing in national legislation were examined, the application of these measures of restraint and ways to improve them were analyzed. Particularly, the specification of the conditions and grounds for the application of property preventive measures, the introduction of a specialized state deposit financial institution for the reception of valuables deposited to ensure the fulfillment of obligations, claims and monetary guarantees, as well as collateral amounts. The authors proposed to set deadlines for the deposit of the collateral amount and the necessary documents to ensure a property surety from the moment of the decision on the chosen measure of restraint in the form of a pledge or property surety. It was concluded that introducing a new measure of criminal procedural restraint — property surety, as the most effective in modern times is necessary.

Keywords: property of a measure of restraint, property guarantee, pledge, responsibility, humanity, terms of use, accused, severity of the crime, factual background.

Introduction

The modern period is characterized by vigorous activity of many countries to improve their criminal laws.

In this regard, we study the experience of foreign countries carried out various reforms in the criminal law field, update of the Concept of Legal Policy.

According to the lawyer V. Tumanov, the study of international law "opens up new horizons of attorney, allows to learn more about his country's right, because the specific features of this law is clearly identified in comparison with other systems. A comparison can equip the lawyer with ideas and arguments that can not be obtained even with very good knowledge of only its own right" [1; 38].

The present time is characterized by the modernization of public administration and sensible public policy. Fundamental changes have taken place in the political, economic, and ideological spheres of life demanded that, in turn, understanding the problems of compliance of national legislation, in particular criminal procedure, recognized international standards. International legal instruments reflect the idea of a more developed democratic principle in all areas, noting that human rights and freedoms — these are universal legal values, which are characterized by the establishment of common international legal standards for the protection of individual rights. S.K. Zhursimbaev considers that level of human rights is a key indicator of democratic and civilized society, so the independence of Kazakhstan with much more active implementation of the basic provisions of the Declaration and recognized legal standards for the protection of human rights in national law [2; 17].

*Corresponding author's e-mail: *klarisa_777@mail.ru*

Experimental

The methodological basis of the study is the modern doctrine of the interaction of economics and the environment, constitutional provisions in the field of nature management and environmental protection.

In the work, general scientific methods were used: comparative legal, logical, systematic and historical methods.

For formulating the theoretical principles, the works of domestic and foreign leading legal scholars in the field of the general theory of law, environmental science, and administrative law were examined. In addition, the works of ecologists, economists, representatives of other branches of knowledge, who studied environmental problems were also analyzed.

When conducting the study, the authors were guided by the provisions of the Constitution of the Republic of Kazakhstan, the current environmental legislation, legislation on tourism, reviews, generalizations, and statistical reporting documents on recreational nature management were also applied.

Results

Defending the idea of deepening democratic principles in the criminal process, it seems appropriate to consider the rights, freedoms and interests of not only the victim of a crime subject, but also the perpetrator of the crime.

Common in the criminal process is the fact that such a preventive measure, as the arrest is the most effective and carries a greater extent of the problem of criminal proceedings. According to a survey of practitioners, a measure of restraint in the form of arrest use is 100 % of the respondents on parole and good conduct — 84 % of investigators, 66 % of the judges, 54 % of prosecutors.

The effective use of other preventive measures, specifically property, ensures the proper conduct for the accused (suspect) such as arrest or house arrest. All of this is characterized by economic stability and progressive physical facilities of the population, compared to previous decades define a particular interest in the property rights and material benefits. Interest of the participants involved in the sphere of criminal proceedings, in particular the accused (suspect) is to maintain its ownership interest through appropriate conduct and appearances on the challenges to the authority conducting the criminal process.

For equal basis with the pledge, we offer another measure of restraint in the form of guarantees of property, which is also a measure of a material nature. The essence of the guarantee of property is to incorporate only the third part of any property to ensure the proper conduct of the accused and his appearance on the challenges in the criminal proceedings.

In connection with this, we identified the characteristics of mortgage and property guarantees:

1. Preventive measures are more humane character of the accused (suspect), as compared with the arrest that commonly used in security measure.

2. Main idea of compliance and achieving the objectives stated in Article 139 Code of Criminal Procedure [3], the application of preventive measures is a property interest in the estate as depositors, guarantors, and the accused (suspect).

3. They have influence and moral-psychological elements. The element of morality is manifested in the trust mortgagor, guarantor accused (suspect) that it does not violate these obligations owed by the criminal proceedings, as well as to justify the confidence of the accused (suspect) before the mortgagor, the guarantor, that is, people who believe in Him. Compliance with this obligation, the accused (suspect) can be regarded as a fact of awareness of the offense of the criminal acts arising out of his remorse and the cessation of further criminal activity. The element of psychology is the loss of property mortgagor, guarantor of the collateral or the guarantee of property in case of evasion of the accused (suspect) data from its obligations. However, any chance of property loss can be minimized due to the awareness of the accused (suspect) that this preventive measure a material nature will replace him on a more rigorous on the arrest.

4. It should be noted that in our criminal procedure law, all measures of restraint grounds and conditions are common, whereas in the Anglo-Saxon system of criminal procedure law for the election of preventive measures in the form of surety bond or property, there are certain characteristic to them, the reasons and conditions. Thus, the application of these preventive measures is possible in such cases when a person detained by police is suspected of less serious crimes or solved the problem of abandonment of his pre-trial detention, or released from custody. Nevertheless, the main focus in the application of these preventive measures to the accused (suspect) is the probability of hiding the accused (suspect) from justice. That is, the probability of guilt of the accused (suspect) directly related to the settlement or cancellation of bond, or sure-

ty has no property. Also, considering the facts such as hiding from justice, impeding the criminal investigation, putting pressure on witnesses, there is a specific reason to prohibit the application of these institute preventive measures. Anglo-Saxon system of law enforcers put forward a number of other conditions that prohibit their use: if one has applied previously and, therefore, had no positive impact on the accused (suspect) in the presence of previous convictions of the accused (suspect), especially for murder or rape, when the arrest is necessary to protect the accused (suspect). The laws of foreign countries are not described in detail that the provisions under which the arrest is a defense for the accused in this connection will allow to assume more of these options: it might be taken into account the mental state of health of the accused (suspect), which can lead to suicide or by any other unfortunate consequences; or obvious fact, which resulted in the observed effects on the accused (suspect) any person from criminal gangs or involved in criminal act committed by individuals, the consequences of which can be a tragic outcome. Therefore, we see it appropriate that the nomination of certain reasons and circumstances do not assimilate the ambiguity of any provision.

5. In the Criminal Code of the Republic of Kazakhstan there is only one limitation on the mortgage — it is his non-use against persons accused of committing serious crimes. This discrepancy in the time is indicated in T.A. Khanov's thesis "Legal and organizational matters of property security measures in criminal proceedings of the Republic of Kazakhstan" [4; 23].

6. It must be noted that this restriction applies only to such preventive measures as collateral. This suggests that other preventive measures can be applied to persons who committed crimes of any severity. The hierarchy of preventive measures prior to arrest bail is defined as the measure of punishment milder than the arrest, but compared with other preventive measures, it is estimated more severe. Therefore, his provision is controversial.

7. In our opinion, this gap in the national criminal procedure law is subject to adjustment in terms of differentiation of preventive measures. Accordingly, it suggests a comparative analysis of Criminal Procedure Codes of the Republic of Kazakhstan and the Russian Federation [5; 63], which showed the restriction to a security measure due to the fact that the commission of serious crime was not observed in the application of any measure of restraint, and even more collateral.

8. It is possible to specify conditions for the use of property of preventive measures. We consider it necessary to note that the mortgage and property security are useful in cases of crimes against property, crimes in sphere of economic activity, crimes against the interests of service in commercial and other organizations, i. e. those, that result was caused by property, not physical damage, and the identity of the accused has no criminal stable orientation. It is assumed that option — the use of proprietary security measures to those first-time offenders, and to have committed crimes of negligence. Thus, L.I. Danishina offers to limit the application of preventive punishment in the form of arrest for crimes committed by negligence [6; 12].

9. In order to modernize the institute of preventive measures and bring it into conformity with the Constitution of RK adopted the Law of the Republic of Kazakhstan "On making amendments" and some legislative acts of the Republic of Kazakhstan on the use of preventive measures in the form of arrest, house arrest.

It should be recognized debatable question of the subject property measures of restraint which in part we have taken the example of collateral. Today, in the Article 148 Criminal Procedure Code of the RK collateral is marked, which consists in money and with the permission of the prosecutor may be taken as other assets and real estate.

Discussion

In the legal literature on the subject of the pledge there is a different opinion. Thus, a pledge is defined as monetary value (not withdrawn from civil law property), buildings and other real estate, foreign currency for foreign citizens [7; 47], the author expands the CPC pledge: these are not only money, securities, but also things and mortgages. This significantly expand the use of bail as a preventive measure. Also, the pledge includes money, jewelry and other things [8; 69–74]. T.A. Khanov emphasizes the need to specify and allocate pledge as collateral than money and securities [4; 25].

A clear specification of the collateral and the corresponding proposal to the restoration of the old Russian institution of property bail, will avoid the difficulties in making, storing and returning the subject property of preventive measures, thus developing a more acceptable mechanism of collateral and property guarantees which, in our opinion, strengthen their application.

In this connection, we propose the creation of a specialized agency in Kazakhstan similar to the Cashier deposits and guarantees that exists in France. Cashier deposits and guarantees — special state depository in-

stitution that holds cash and other valuables made to ensure the fulfillment of obligations, claims and cash collateral, collateral amounts [9; 207]. It also produces a distribution for a reimbursement. The advantage of the functions of the institution lies in the question of acceptance of collateral and the amount of property to address the subject of the guarantee at the legal level, meaning that the paperwork subject property guarantees will facilitate the work of law enforcement officers for the production of a criminal case, and at the same time, the adoption agencies investigating this amount prevent the abuse of office, forgery.

The list of circumstances set forth in Art. 141 of the Criminal Procedure Code of the Republic of Kazakhstan (taking into account our recommendations). For example, the fact that the accused has a family and dependent children or other family members who have committed a crime by negligence also reduces the likelihood of his evasion from the investigation and trial, which is a positive sign regarding the use of property restraint measures in these cases.

Considering the question of depositing a property amount to the state deposit by the accused (suspect) himself, the pledger or the guarantor, we would like to note that it is possible to trace some inaccuracies in the application of the bail, if it is paid by the accused (suspect) himself. First, the posting of a bail requires that the person should be at large or have a representative at the disposal of this bail amount. To do this, it is necessary to draw up a power of attorney to transfer certain rights to that person, in the absence of such a document, the accused is deprived of the opportunity to pay a certain amount. This option is possible in civil proceedings, but bail in criminal and civil proceedings are completely different types of obligations, as we have already indicated above. In the case of civil proceedings, the debtor can either independently pay the security deposit, or pay with the help of third parties (Article 305 of the Civil Code of the Republic of Kazakhstan). This method seems to us problematic when applied in criminal proceedings.

Secondly, due to the ambiguity of the wording, in the practice of preliminary investigation, there are various approaches in the procedure for accepting bail: 1) the security amount is accepted by the investigator himself and then transferred to the court's deposit; 2) the investigator accepts from the pledger a bank document on the acceptance of the pledge on the court's deposit. At the same time, there is a violation of the wording of the law, which says about the transfer of the bail amount directly by the suspect himself, the accused person, and, as we meet in practice, it is accepted by the investigator.

Vague regulation of the procedure for the application of a pledge leads to such procedural violations as an untimely delivery of a pledge to the court's deposit, storage of pledged amounts in service offices, etc. Thus, out of the number of respondents interviewed, 77 % believe that the deposit of the amount on the court deposit is carried out through the bank, 8 % — through the tax committee, 15 % — noted otherwise, thereby, showing the lack of understanding about the court deposit, one respondent noted that the payment is made through the court administrator. In this regard, we consider it expedient to propose the creation of a specialized institution in Kazakhstan, similar to the Cashier of Deposits and guarantees, existing in France. Cashier of deposits and guarantees is a special state depository institution. This institution stores monetary and other valuables contributed to ensure the fulfillment of obligations, claims, and financial guarantees, collateral.

Conclusions

We suggest to consider the validity period of these property restraint measures, about which nothing is stipulated in the legislation, in particular, about the validity of the pledge. However, as a general rule, non-custodial measures of restraint apply to the accused throughout the entire duration of the investigation and trial, unless they are changed or cancelled. In relation to the suspect, the period of validity of the bail as a preventive measure should not exceed, according to Article 136 of the CCP, 72 hours. After the specified time if the suspect has not been charged, the measure of restraint must be cancelled. After the issuance, in the manner prescribed by law, of a decision on bringing a person as an accused, a new figure appears in the criminal process — the accused, and the preventive measure chosen in relation to the suspect becomes a preventive measure unless a decision is made to cancel or change.

It is also possible to set time limits for the payment of a pledge amount and the necessary documents for securing a property guarantee from the moment the decision is made on the chosen measure of restraint in the form of a pledge or property surety. For example, according to the Law of Peter I “On the Form of the Court” of November 5, 1723, the following procedure was applied: “If the defendant did not have so much movable and immovable property to provide for the amount of the claim, then bail on it was collected within a week...”. Thus, we see that the legislation established a weekly deadline for the submission of the amount.

Concurrently, the time intervals during which the pledger should provide the required amount and the surety required list of documents should be different. It seems appropriate to take into account the fact that when requesting confirmation of documents, for example, on the right of ownership, a certain time is also required according to the period established in civil proceedings. So, in case of failure to provide a pledge amount or the necessary documents confirming the right of ownership, for reasons depending on the pledgers or guarantors themselves, the investigation bodies need to decide on the replacement of property restraint measures with another.

However, the difficulty and challenge of introducing such institutions lie in the fact that the content itself of the institution and staff who work there, requires an additional expense of the republican budget.

It is necessary to draw attention of our legislators to the duration of the data property of preventive measures, which the law does not stipulate in particular, about the duration of the pledge, its making and the necessary documents for property bail after a ruling on the chosen measure of restraint in the form of collateral property or surety.

In conclusion, we note that by applying preventive measures of material nature under certain conditions, which we mentioned above, the state frees himself from his duties on the content of defendants in pretrial detention, which will, in turn, use the free funds to improve prison of the other accused, which can not be applied preventive measure, not of the arrest.

It is understandable that these preventive measures did not find application in Soviet times since they contradicted the essence of the Soviet system. Nevertheless, considering the current economic situation, the development of the country's legislative base, modern life requires dramatic and operational changes, thereby, the use of preventive measures of a property nature.

The main motive for ensuring the proper conduct of the accused (suspect) is economic interest. The economic motive prompts the pledger or surety to supervise the behavior of the accused (suspect) in order to eliminate the possibility of his escape or evasion, and the accused (suspect) himself is interested in preserving the preventive measure applied to him in the form of bail or property surety, since having lost, he can be a subject to more severe coercion.

References

1 Туманов В.А. Сравнительное правоведение: учеб. для вузов / В.А. Туманов. — М.: Юристъ, 2005. — 38 с.

2 Журсимбаев С.К. Актуальные проблемы защиты прав и свобод человека и гражданина на досудебных стадиях уголовного судопроизводства: автореф. ... канд. юрид. наук / С.К. Журсимбаев. — Алматы, 2000. — 37 с.

3 Уголовно-процессуальный кодекс Республики Казахстан от 4 июля 2014 г. № 231–V ЗРК [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/K1400000231

4 Ханов Т.А. Правовые и институциональные вопросы мер имущественной безопасности в уголовном судопроизводстве Республики Казахстан: автореф. ... канд. юрид. наук / Т.А. Ханов. — Караганда, 1999. — 41 с.

5 Уголовно-процессуальный кодекс Российской Федерации от 18.07.2001 г. [Электронный ресурс]. — Режим доступа: https:// http://base.garant.ru/12125178/

6 Даньшина Л.И. Правовые и институциональные вопросы исполнения предварительного заключения: автореф. ... канд. юрид. наук / Л.И. Даньшина. — М., 1980. — 39 с.

7 Бондаренко И.П. Меры пресечения в системе мер процессуального принуждения / И.П. Бондаренко // Мир юридической науки. — № 1. — М.: Юрист, 2014. — С. 47–51.

8 Васильев А. Защита права на неприкосновенность жилища лицом, у которого производится обыск / А. Васильев // Законность. — 2005. — № 3. — С. 69–74.

9 Бутов В.Н. Уголовное судопроизводство в Австрии / В.Н. Бутов. — Красноярск: Изд-во Краснояр. ун-та, 1988. — 207 с.

Л.К. Кусаинова, Л.С. Шошаева, А.Б. Сопыханова

Қазақстан Республикасының заңнамасына сәйкес қылмыстық-процестік шектеудің мүліктік шараларын жетілдірудің проблемалық аспектілері

Мақалада ғалымдардың көзқарастары, сондай-ақ мүліктік сипаттағы алдын алу шараларын қолданудың құқықтық жағдайын реттейтін заңнама талданған. Зерттеу жұмысының мақсаты осы алдын алу шараларын тиімді қолдануды, сондай-ақ оларды пайдалану кезінде туындайтын проблемалық аспектілерді қарастыру. Зерттеудің әдіснамалық негізі қылмыстық процестегі

процессуалдық бұлтартпау шаралары туралы қазіргі заманғы ілім болып табылады. Жұмыста мына жалпы ғылыми әдістер қолданылды: салыстырмалы-құқықтық, логикалық, жүйелік әдістер. Мақаланың жаңалығы мынада: қазіргі уақытта қылмыстық сот ісін жүргізуде қолданылатын кепіл бұлтартпау шарасына басқа балама ретінде таңдауға алғаш рет тағы бір бұлтартпау шарасын — мүліктік кепілгерлікті енгізу ұсынылған. Осыған байланысты авторлар ұлттық заңнамада бар мүліктік сипаттағы қылмыстық іс жүргізу шараларының проблемалық аспектілерін қарастырды, осы бұлтартпау шараларының қолданылуына және оларды жетілдіру жолдарына талдау жүргізген. Атап айтқанда, мүліктік бұлтартпау шараларын қолдану шарттары мен негіздерін нақтылау, міндеттемелерді, талап-арыз талаптары мен ақша кепілгерліктерін, сондай-ақ кепіл сомаларын орындауды қамтамасыз ету үшін енгізілген құндылықтарды қабылдау үшін мамандандырылған мемлекеттік депозиттік қаржы мекемесін енгізу. Сонымен қатар авторлар кепіл немесе мүліктік кепіл түрінде таңдалған бұлтартпау шарасы туралы шешім қабылданған сәттен бастап мүліктік кепілгерлікті қамтамасыз ету үшін кепіл сомасын және қажетті құжаттарды енгізу мерзімдерін белгілеуді ұсынған. Нәтижесінде қазіргі уақытта ең тиімді болып табылатын қылмыстық іс жүргізу жолын кесудің жаңа шарасын — мүліктік кепілдемені енгізу қажеттілігі туралы тұжырым жасаған.

Кілт сөздер: мүліктік бұлтартпау шаралары, мүліктік кепілгерлік, кепіл, жауапкершілік, адамгершілік, қолдану шарттары, айыпталушы, қылмыстың ауырлығы, істің мән-жайлары.

Л.К. Кусаинова, Л.С. Шошаева, А.Б. Сопыханова

Проблемные аспекты совершенствования имущественных мер уголовно-процессуального пресечения по законодательству Республики Казахстан

В статье проанализированы точки зрения ученых, а также законодательство, регулирующее правовое положение применения мер пресечения имущественного характера. Целью исследовательской работы является изучение эффективного применения указанных мер пресечения, а также проблемных аспектов, возникающих при их использовании. Методологической основой исследования является современное учение о мерах процессуального пресечения в уголовном процессе. Авторы в своих суждениях опирались на общенаучные методы: сравнительно-правовой, логический, системный. Новизна статьи заключена в том, что впервые предложено ввести еще одну меру пресечения — имущественное поручительство как альтернативу выбора другой меры пресечения, применяемой в настоящее время в уголовном судопроизводстве, — залога. В связи с этим авторами рассмотрены существующие в национальном законодательстве проблемные аспекты уголовно-процессуальных мер пресечения имущественного характера, проведен анализ применения данных мер пресечения и пути их совершенствования. В частности, произведена конкретизация условий и оснований применения имущественных мер пресечения, введение специализированного государственного депозитного финансового учреждения для приема ценностей, внесенных для обеспечения исполнения обязательств, исковых требований и денежных поручительств, а также залоговых сумм. Кроме того, предложено установить сроки для внесения залоговой суммы и необходимых документов для обеспечения имущественного поручительства с момента вынесения постановления об избранной мере пресечения в виде залога или имущественного поручительства. В результате аргументирован вывод о необходимости введения новой меры уголовно-процессуального пресечения — имущественного поручительства как наиболее эффективной в условиях современного времени.

Ключевые слова: имущественные меры пресечения, имущественное поручительство, залог, ответственность, гуманность, условия применения, обвиняемый, тяжесть преступления, обстоятельства дела.

References

1 Tumanov, V.A. (2005). *Sravnitelnoe pravovedenie [Comparative jurisprudence]*. Moscow: Yurist [in Russian].

2 Zhursimbaev, S.K. (2000). Aktualnye problemy zashchity prav i svobod cheloveka i grazhdanina na dosudebnykh stadiiakh ugolovnogo sudoproizvodstva [Actual problems of protection of human and civil rights and freedoms at the pre-trial stages of criminal proceedings]. *Extended abstract of candidate's thesis*. Almaty [in Russian].

3 Ugolovno-protsessualnyi kodeks Respubliki Kazakhstan ot 4.07.2014 goda No. 231–V ZRK [Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014 No. 231]. *adilet.zan.kz*. Retrieved from https://adilet.zan.kz/rus/docs/K1400000231 [in Russian].

4 Khanov, T.A. (1999). Pravovye i institutsionalnye voprosy mer imushchestvennoi bezopasnosti v ugolovnom sudoproizvodstve Respubliki Kazakhstan [Legal and institutional issues of property security measures in criminal proceedings of the Republic of Kazakhstan]. *Extended abstract of candidate's thesis*. Karaganda [in Russian].

5 Ugolovno-protsessualnyi kodeks Rossiiskoii Federatsii ot 18.12.2001 goda [Criminal Procedure Code of the Russian Federation]. *base.garant.ru*. Retrieved from http://base.garant.ru/12125178/ [in Russian].

6 Danshina, L.I. (1980). Pravovye i institutsionalnye voprosy ispolneniia predvaritelnogo zakliucheniia [Legal and institutional issues of execution of pre-trial detention]. *Extended abstract of candidate's thesis.* Moscow [in Russian].

7 Bondarenko, I.P. (2014). Mery presecheniia v sisteme mer protsessualnogo prinuzhdeniia [Preventive measures in the system of measures of procedural coercion]. *Mir yuridicheskoi nauki, 1,* 47–51 [in Russian].

8 Vasilev, A. (2005). Zashchita prava na neprikosnovennost zhilishcha litsom, u kotorogo proizvoditsia obysk [Protection of the right to inviolability of the home by the person who is being searched]. *Zakonnost, 3,* 69–74 [in Russian].

9 Butov, V.N. (1988). *Ugolovnoe sudoproizvodstvo v Avstrii [Criminal proceedings in Austria*]. Krasnoyarsk: Izdatelstvo Krasnoiarskogo universiteta [in Russian].