

# opción

Revista de Antropología, Ciencias de la Comunicación y de la Información, Filosofía,  
Lingüística y Semiótica, Problemas del Desarrollo, la Ciencia y la Tecnología

Año 34, abril 2018 N°

# 85

Revista de Ciencias Humanas y Sociales

ISSN 1012-1587/ ISSNe: 2477-9385

Depósito Legal pp 198402ZU45



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## **Criminal pre-trial proceedings in the Republic of Kazakhstan : Trend of the institutional transformations**

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### **Abstract**

Crime Prevention is one the basic policies in social control area. Although total experience in different policy zones of social crimes management is providing, and several theorists in the field provide theories, but in the Republic of Kazakhstan , yet the lack of a comprehensive policy in this area is felt more than ever. In this paper, it has been tried to examine the weaknesses and ambiguities of this crime prevention investigation using the documentary and library study method.

**Keywords:** the criminal proceedings, pre-trial investigation, law-enforcement practice, private investigation, special procedural methods, private detective.

## Procedimientos penales previos en la República de Kazajstán: Tendencia de las transformaciones institucionales

### Resumen

La prevención del delito es una de las políticas básicas en el área de control social. Aunque la experiencia total en diferentes áreas administrativas de gestión social de delitos está proporcionando, y varios teóricos en el campo proporcionan teorías. En la República de Kazajstán, sin embargo, la falta de una política integral en este ámbito se siente hoy día más que nunca. En este artículo se ha intentado examinar las debilidades y ambigüedades de esta investigación de prevención del delito utilizando el método de estudio documental y de la biblioteca.

**Palabras clave:** el proceso penal, la investigación previa al juicio, la práctica policial, la investigación privada, los métodos especiales de procedimiento.

### 1. INTRODUCTION

The application of the updated criminal procedural legislation of the Republic of Kazakhstan testifies both to the positive solutions of many topical issues of investigative and judicial practice, as well as to the non-systematic, fragmentary approach to a number of theoretical and applied problems of the criminal proceedings. It is obviously necessary to pay attention to some key questions, connected with improvement of the simplified proceedings, transition to the new level of understanding of the role and problems of the pre-trial investigation, its construction on the basis of successfully approved foreign experience. In addition, it is important to clarify the place of institute of private detective activity,

including in the criminal proceedings, where the introduction is blocked by the government of the country for a long time.

As investigative practice shows *the institutes of the accelerated inquiry and preliminary investigation* (art. 190 of the Criminal Procedure Code of the Republic of Kazakhstan (CPC RK)), protocol proceedings on criminal offenses (art. 55 of CPC RK) have not given the expected effect (Tu, 2014). The periods of pre-trial investigation in comparison with the old cpc increased by 1,5 times, where the workload for the investigators and interrogators is increased at 3-5 times. The majority of cases on criminal offenses are closed, as the proceedings on them are complicated. Every fifth criminal case comes back by the prosecutor for additional investigation. (The criminal legislation without tricks / speech of the minister of internal affairs rk at the parliamentary hearings on November 18, 2016). The analysis of norms on article 190 and chapter 55 of the CPC RK, which were carried out by us, gives the grounds for a conclusion that novels are not simplified, so they complicate the procedural form (order) of pre-trial investigation in comparison with earlier operating institute of the accelerated pre-trial proceedings (Hendley, et al., 1997). The difference between the usual and accelerated inquiry and the investigation is had only in investigation terms, at the same time at the interrogator (investigator) is remained the same volume of work and the number of procedural documents. In this regard, it is offered the concept of pre-trial investigation on criminal cases in the simplified procedure and proceedings as the writ.

The concept is based on the comprehensive analysis of the legislation, including foreign, law-enforcement practice and data of the

state legal statistics. It provides the introduction to the existing the cpc of the essentially new edition of chapter 55 “features of the pre-trial investigation in simplified procedure” with inclusion in it of the separate norms for the article 190 “the accelerated pre-trial investigation” and also addition to the cpc with new chapter 55-1 “proceedings as the writ”. At the same time, it is offered in the cpc to keep such forms of investigation as the inquest and investigation with statement for the correction of art. 190 of the cpc (Tu, 2014). We can say, that for the first time the scientifically and practical reasonable criteria of crime evidence are introduced, which are based on the obvious bases of criminal procedure detention (experience of France, Germany and other European states).

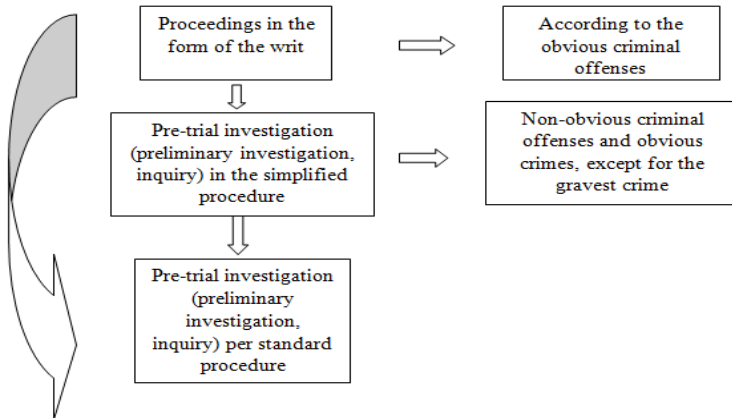


Figure 1. Scheme of the pre-trial investigation

The basis of differentiation of investigation forms are signs of criminal offense according to which it is recognized as obvious (Bruton, et al., 2003):

- The person was caught at the moment of committing a crime;
- The person is detained by the victim, eyewitnesses and other persons directly after his commission of crime;
- The person was caught near the place of crime commission with an encroachment subject, and/or the crime instrument;
- The victims and eyewitnesses directly point to this person;
- The crime and person, who committed it, are imprinted with technical means of fixing;
- The obvious vestiges of a crime, indicating the commission of obvious crime by him, are found on the suspect or his clothes, at him or in his dwelling.

If there is at least one of the specified signs of evidence of offense, the investigator/interrogator at his own discretion makes the decision on investigation:

- 1) Obvious criminal offenses as proceedings in the form of the writ;

2) Non-obvious criminal offenses and also obvious crimes, except for the gravest crime in the course of a simplified pre-trial investigation.

At the same time the consent of the suspect and victim is not required, there is enough the discretion of the person, conducting pre-trial investigation. Also, it is remained the right to transfer to the inquiry regime or preliminary investigation for the person, conducting the pre-trial investigation.

## **2. RESULTS**

An article considers the key questions, connected with improvement of the simplified proceedings, transition to the new level of understanding of the role and problems of the pre-trial investigation, its construction on the basis of successfully approved foreign experience (Kashima, et al., 2009). It is important to clarify the place of institute of private detective activity in the criminal proceedings, where the introduction is blocked by the government of the country. The need of thorough and complex study of the legislation and law-enforcement practice in the sphere of penal justice of the countries of continental law system for the purpose of creation of the model on domestic pre-trial investigation and judicial proceedings, meeting the high standard of the constitutional state, prescribed by the constitution of the republic in the developing of a new direction of investigation of criminal offenses will

allow to pay closer attention to the legislative procedures and practice for investigation of criminal offenses.

## **2. 1. Pre-trial investigation in the simplified procedure**

Pre-trial investigation in the simplified procedure can be applied by the interrogators and investigators on obvious crimes of small, average and grievous gravity of offence and also non-obvious criminal offenses in the presence of the following conditions:

- If the person who committed the criminal offense is precisely identified;
- The person agrees with the suspicion put forward against him;
- It does not challenge the proofs exposing it;
- According to the nature and size of the claimed civil claim.

By analogy with the accelerated pre-trial investigation (which is offered to abolish) the concept is kept the cases when pre-trial investigation in the simplified procedure is inadmissible. Pre-trial investigation in the simplified procedure, according to the concept, is as follows. Till seven days after registration of the statement and message about criminal offense in the single register of pre-trial investigations by the interrogator (investigator) there have to be made only those urgent investigative actions which are directed to exposure of the suspect, where delay with them can lead to loss of proofs and actual data. During pre-trial



investigation in the simplified procedure the investigation of the circumstances of case is limited by volume of proofs, sufficient for establishment of the fact on the criminal offense or crime and the person who was made it (Sultanov, 2016). At the same time it is offered to establish the ban on proceedings of the investigative actions, demanding a long time: made according to the sanction, confidential, directed to check and specification of evidences. Criminal procedure detention is applicable in accordance with general practice, but with restriction in this case of the term of pre-trial investigation in the simplified procedure. During these proceedings, it is allowed an application of measures of restraint: recognizance not to leave or personal guarantee, and also other measures of procedural coercion: the obligation about court appearance and seizure of property. On obvious grievous crimes the person, conducting the pre-trial investigation, has the right to apply a measure of restraint detention, according to the article 139 CPC RK, for a period - up to 10 days. Upon completion of this type of special proceedings by the investigator or interrogator there is formed the final procedural document - the protocol on pre-trial investigation in the simplified procedure, containing the description of act, its qualification, the list of proofs, personal details about the person who committed criminal offense. This protocol summarizes a number of the procedural acts which were done at usual investigation for criminal case. Its content does not need the pronouncement of separate procedural acts: resolutions on qualification of act of the suspect, protocol of acquaintance of the parties with case materials, indictment, and the prosecutor's decision on bringing the accused to trial. Pre-trial investigation in the simplified procedure will be applied by law-enforcement bodies generally. Criminal cases by this type of proceedings have to be considered by the first instance court in the

reduced order according to the rules of article 382 CPC RK “judicial proceedings in the simplified procedure” (HENDLEY, et al., 1997).

## **2. 2. “Proceedings in the form of writ” (chapter 55-1 of CPC RK)**

This type of special proceedings can be applied at the discretion of the person, conducting investigation on obvious criminal offenses, which punishment for commission does not provide arrest. Proof limits in pre-trial preparation in the form of the writ are limited to the proofs, establishing evidence of criminal offense and commission it by suspect. Along with interrogation of the suspect by the investigator, interrogator it is formed the protocol on explanation to him the rights to be present at court session, and in case of his absence - the right to bring objections on a sentence, the resolution in the form of the writ. The appropriate behavior of the suspect is provided with the same measures, as at pre-trial investigation in the simplified procedure, except for detention. Within two days from the date of registration in the single register of pre-trial investigations of the statement or message, the person conducting pre-trial investigation makes the protocol on obvious criminal offense and directs the case to the prosecutor. The court, according to the prosecutor petition, can consider the merits of the case in the form of writ on the basis of the criminal case file with - or without participation of the parties, but with obligatory prosecutor’s participation as the state accuser. After obtaining the copy of the sentence, the resolution on dismissal of the case in the form of the writ, the convict, justified and their defenders, the victim and his representative has the right to bring the objections within seven days.

The act in the form of the writ is recognized as invalid in the presence of objections, this case is subject to new consideration in other structure of the court according to the rules of article 382 CPC RK. At their absence, the sentence, resolution on dismissal of the case in the form of the writ comes into legal force and can be appealed, protested in accordance with general practice, the expected effect. Implementation of the concept in the draft law will allow: to provide procedural economy; to considerably reduce time between the moment of the commission of act and the resolution of the case on the merits, to reduce the costs of pre-trial and judicial proceedings for crimes of the small, average and grievous gravity of offence, committed in the conditions of evidence, and also for non-obvious and obvious criminal offenses; to simplify a subject and limits of proof with its transferring to the main judicial proceedings; to concentrate efforts of criminal prosecution authorities on investigation of the non-obvious and the gravest crimes; to raise a role of court in the criminal legal proceedings; to bring the criminal procedure in line with international standards and the best world practices of the simplified investigation and also to allocate the elements of mandatory proceedings on criminal cases (Germany experience). The current state of domestic criminal proceedings inevitably put question about its historical model and a vector of further development. It is appropriate to emphasize that the Kazakhstan criminal legal proceedings as national branch of the continental law system is a successor of the soviet, Russian, German and French criminal procedure doctrines.

### **2.3. Further improvement of the organization for the pre-trial investigation**

According to the Republic of Kazakhstan Criminal Procedure Law, distributed on February 26, 2013, due process of criminal law has three stages: (a) a preliminary investigation in the prosecutor's office (under the state attorney), which may end in issuing an indictment; (b) proceedings previously the court of first instance primary court, which issues a governing in either sentencing or discharge; and (c) proceedings before the court of appeal.

Including at the present time the investigation and inquiry, has to consist in transition only to one form of preliminary investigation - in inquiry (police inquiry). In general the investigator and interrogator perform the single function, have the identical procedural status and equal volume of competences. The procedural figure of the interrogator differs from the investigator in separate secondary signs: the subject sub-investigation of criminal cases, investigation periods, coordination of all procedural decisions, by the last one, with the chief of body of inquiry and formal procedural independence of the interrogator. His "independence" is inherited owing to "the institutional deformations" (Golovko, 2011) by interrogators of the soviet prosecutor's office in the beginning, and since april 6, 1963 – interrogators of law-enforcement bodies from the court interrogator, who was really independent and which legal status was regulated by the charter of criminal legal proceedings of the Russian empire of 1864.

Certainly, the return to archaic institute of the interrogator is irrational. Then abolition of such participant of criminal proceedings as interrogator is logical, like, for example, it took place in Germany in 1974 (Nik-zainal, et al., 2012). His status has to be transformed into the investigator. Thus, the process of proof needs to be distributed according

to the functions and competence of the bodies authorized on that, according to the theory of criminal procedure functions. The realization of the principles of a presumption of innocence, competitiveness and participant equality in pre-trial proceedings demands conceptual reconsideration of canons of the Kazakh successors of the soviet proof theory. On the basis of stated it is expediently to refuse from the concept of criminal prosecution (charge) at a stage of pre-trial investigation, in favor of the concept, according to which the stage of pre-trial investigation should not state official validity of act, its commission by the person and his guilt. The actual data collected by the investigator (interrogator) should not be recognized by them as case proofs. Judicial practice shows that the court is not only limited with to the collected evidence, but also it is not inclined to reconsider their status. The court coherence with “preliminary” validity of the facts of case is confirmed convincingly by the public statement of the Kazakh judge that the miserable amount of verdicts of not guilty is caused by the fact that “all illegal charges have been already checked for stages of pre-trial investigation and they took the appropriate assessment”. (Lawyers announce about decrease in legality standards at investigation and judicial proceedings /, 2016). According to the letter of the law, the interrogator must follow the requirements of the article 24 CPC RK about a comprehensive, complete and objective investigation of the case facts, collecting both accusatory and exculpatory evidences. But, the rules are not always followed as the norm on the ban of performance of different criminal procedure functions by the same participant of process is applied theoretically and practically. In this regard, the interrogator is focused objectively on search of accusatory evidences, giving to the defense the *carte blanche* on identification of the justificatory or to the detection of

mitigating evidences. It is known that the existing CPC RK. In comparison with the previous code expanded considerably the competences and possibilities of the lawyer on implementation of protection function of the suspect, accused, defendant and function of the representation of interests for the victim in pre-trial proceedings. At the same time, the introduced innovations essentially did not change the place and a role of the lawyer as the main form of participation in the process of proof for subjects of the defense is still the statement of petitions, and recognition (or non-recognition) of the object or information provided by the lawyer as the source of evidence remains the exclusive prerogative of the body pre-trial investigation, prosecutor and court. There is remain the old, already “preserved”, scheme of legal relationship of the lawyer and criminal prosecution authorities and court, pretentiousness of equality of the parties in criminal proceedings.

The existing actual procedural inequality of the lawyer and interrogator (investigator) in the course of proof at a stage of pre-trial investigation, in our opinion, does not allow to realize fully the principle of competitiveness by consideration of criminal case on the merits in court, turning it into a declarative requirement. Besides, it is still observed in modern investigative practice obvious superiority of the prosecuting party over the defense. The actual data collected by the person conducting investigation, or submitted to him by the suspect, his defender, get the status of proofs only after giving them a procedural form of the relevant source exceptionally by the interrogator (investigator). The investigator has the sole right to form the prosecution evidence system, to estimate and “to filter” the actual data, submitted by the prosecuting party which contradict or weaken the version of accusation. Thus, for today the

interrogator is not interested in a research and collecting the proofs, justifying the subject of a crime, he has no corresponding legal status for assessment of proofs. It should be noted that at a stage of pre-trial investigation the accusatory bias is inevitable owing to performance possessing authority of the criminal prosecution authorities of the direct function, and for a stage of judicial proceedings the body, conducting criminal proceedings, collects and presents evidence, formed taking into account the requirement of admissibility which is a subject of the judicial analysis. In Russia it is discussed the question about “de-formalization” of investigation according to the European standards of proof and rules of criminal prosecution. It is offered “gradually ... to reduce the requirements for the formal side of evidence and raise the requirements for their actual quality by courts” (relevancy, credibility and reliability of actual data about guilt of the person). It is remarkable that according to the Germany cpc the evidences, given in prosecutor’s office and police, have not the evidentiary, and focusing meaning ... At pre-trial proceedings there isn’t carried out the criminal procedure proof which is exclusive competence of court (Maslov, 1999).

### **3. CONCLUSION**

Application of the supplies of the Concept of Legal Policy will allow pushing into practice the main ideas and principles of the pre-trial proceedings in the context of new phase in development of rule of law in Kazakhstan. Criminal policy is the greatest important section of the legal policy of the government. Improvements and improvements in criminal policy are presented through a complex, coherent correction of criminal,

criminal procedural and criminal executive legislation, as well as law enforcement practice. It is necessary in the Kazakhstan criminal proceedings to assign for police inquiry the clarification of circumstances on commission of criminal offense and collecting of the confirming actual data (detection, fixing and withdrawal), having excluded the right for their recognition as proofs by the persons conducting pre-trial investigation. At such model the prosecutor's office, according to the article 83 of the constitution rk, will inspect of legality of operational search activity, pre-trial proceedings and respect for the rights and freedoms of citizens at a stage of preliminary investigation, to be as the prosecuting party in court. Besides, prosecutor's office keeps the right, according to the procedure and within the limits prescribed by law, to carry out criminal prosecution. In our opinion, a comprehensive and objective investigation of the actual data collected by the criminal prosecution authorities and subjects which are carrying out protection against it, and also assessment of data (from the point of view of relevancy, admissibility, reliability, and in total sufficiency for the solution of criminal case) have to be assigned to judicial authorities and to be considered directly in court. At such approach in pre-trial proceedings it will be reached the procedural equality of the criminal prosecution authorities and persons performing protection function, that, undoubtedly, will positively affect realization of the principle of competitiveness and providing of equal possibilities of asserting of the procedural interests in court.

Along with it, legal opportunities of the lawyer in criminal proceedings can be strengthened. It is expedient to strengthen guarantees of obligatory participation of the lawyer in proceedings of investigative and procedural actions concerning the third parties which are conducted



according to his petition or the request of the person whose interests he represents. In addition of point 13) the second part of the article 70 CPC RK, the lawyer has to be beforehand notified about time and the place of proceedings of such actions. Derogation from this rule has to attract recognition invalid results of the specified actions. In this case it is applied the rule of point e) the third part of article 14 of the international covenant on civil and political rights, saying that “everyone has the right at consideration of any criminal charge brought to him ... for citation and interrogation of his witnesses on the same conditions which exist for the witnesses, acted against him” (International covenant on civil and political rights (Adopted by the resolution 2200 a (xxi) of the United Nations general assembly from December 16, 1966). Meanwhile in the point 22 article 7 CPC RK, the concept and the moment of the beginning of implementation of criminal prosecution (charge) are associated with the beginning of pre-trial investigation and collecting of accusatory proofs at this stage. Whereas in a stage of pre-trial investigation there is no figure of the defendant and charge isn't brought.

Wherein, according to the rules of committee of legal statistics and special recording of the prosecutor general's office the person is considered brought to trial if criminal case is dismissed against him in pre-trial proceedings on non-rehabilitating bases. At the same time from a position of presumption of innocence the official beginning of criminal prosecution (charge) concerning the particular person has to be considered the moment of the bringing of the defendant to court by the prosecutor and the direction of case to court with the indictment. In this regard it is possible to resort to analogy with § 151 Germany cpc which has differentiated the investigation and next initiation of criminal prosecution

before court (the public charge, brought by the prosecutor). In Kazakhstan there is a social demand on the provided services of **private investigation** from citizens and legal entities (the commercial enterprises, banks, lawyers, etc.). It is remarkable that signs of private detective activity were traced in common law of Kazakhs. In particular, the laws of “zhety zhargy”, except settlement of dispute, applications of punishment to the person who committed a crime, were established requirements for collecting data and detection of the stolen cattle, property, etc. Thereby we establish the fact that there were people whose profession was investigation of the stolen property for special remuneration, at the same time they assigned to themselves powers of “the national pathfinder” or an analog of private investigation.

Adoption of the relevant law will remove from “the shadow” this type of service to the legitimate sector that will allow law enforcement and other public authorities to control legality of private investigation. Besides, formation of the services market of private investigation does not require the big financial funds from the state budget and it will open new jobs and will provide tax revenues. It is obvious that private investigation will promote to the state law-enforcement activity and develop the competitive environment. Proceeding from performance by the private detective of support function in criminal proceedings and its bit part, disinterest in the case solution, we suggest including it in group of the other persons who are involved in criminal proceedings and promoting collecting of proofs. Provision of services to participants of criminal proceedings will allow to for the private detective to use the procedural methods on collecting, researching and submission of proofs. In particular, we offer the following: poll of citizens and officials (from their

consent); obtaining information from citizens and officials from their consent; the examination of objects according to the written consent of their owners; external survey of the buildings, constructions, rooms, territories, vehicles and other objects for obtaining necessary information; measures for fixing of traces of an offense event. It is also important to provide the special procedural methods, used by the private detective during the provision of services to participants of criminal proceedings. It means use of technical means (video and an audio recording, photographing and others) without violation of the rights and freedoms of citizens, conducting an observation with use technical means (except for special, used in operational search activity). Besides, the detective must have the right to detain the person, obviously involved in crime for prevention and suppression of illegal acts. The foregoing demonstrates about the need of thorough and complex study of the legislation and law-enforcement practice in the sphere of penal justice of the countries of continental law system for the purpose of creation of the model on domestic pre-trial investigation and judicial proceedings, meeting the high standard of the constitutional state, prescribed by the constitution of the republic. Wherein, we incline to the opinion that it is expedient to pay closer attention to the legislative procedures and practice for investigation of criminal offenses, existing in Germany.

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Revista de Ciencias Humanas y Sociales

Año 34, N° 85, 2018

Esta revista fue editada en formato digital por el personal de la Oficina de Publicaciones Científicas de la Facultad Experimental de Ciencias, Universidad del Zulia.

Maracaibo - Venezuela

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