

## Reform Forum's Note

# JUDICIAL CONTROL OVER CRIMINALLY REMEDIAL MEASURES OF RESTRICTION IN KAZAKHSTAN: ANALYSIS AND EVALUATION OF A DRAFT LAW OF A NEW THREE-TIER MODEL

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**Summary:** 1. Introduction. – 2. The Background and Methodology of the Study on Judicial Control over Pre-trial Proceedings in Criminal Cases. – 3. Preventive Measures in Criminal Procedure and Its Indicators in the Republic of Kazakhstan. – 4. Conclusions.

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**Abstract.** The article considers judicial and other guarantees in the selection, authorisation, and application of such criminally remedial measures of pre-trial restriction as detention (or arrest), home confinement, and bail. These limit the constitutional rights and freedoms of the suspect and are authorised by the investigating judge. The authors analyse the legislative regulation, legal statistics, and judicial authorisation of these preventive measures. They also demonstrate the ambiguous use of bail in the period before its transfer to judicial control. In order to increase its effectiveness and reduce the number of prisoners, it is proposed to separate property surety from bail and make it an independent measure of restraint, similar to the US experience regarding commercial surety, and change the current procedure for replacing detention with bail. The article deals with the issue of strengthening the control functions of the investigating judge when authorising home confinement as a preventive measure. In particular, the authors analyse the draft Law 'On amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on optimisation of criminal legislation with simultaneous correction of the Criminal Procedure and Penal Enforcement Codes' and offer their vision of further development of the norms of criminal procedure legislation of the Republic of Kazakhstan on judicial control.

The authors propose to narrow the limits established by law for the application of various legal restrictions infringing on the rights and legitimate interests of suspects and preserve them only to the extent necessary to solve the public tasks of criminal proceedings.

**Keywords:** investigative judge, judicial control, restrictive measures, the enforcement of human rights and freedoms

## 1 INTRODUCTION

Certain prerequisites for judicial control at the pre-trial stages of criminal proceedings originated in Kazakh customary law. These origins comply with trends in the development of modern criminal justice. In this regard, we need to highlight the fundamental research of Saveliy Lvovich Fuchs, who is a founder of the systematisation, generalisation, scientific understanding, and comparative legal analysis of the state and law of the Republic of Kazakhstan. In Chapter 5 of his book, 'Court and criminal proceedings in the 18<sup>th</sup> and first half of the 19<sup>th</sup> centuries' describing the main features of legal proceedings according to Kazakh customary law, Fuchs emphasised that it was not only courts that applied measures ensuring court appearance.<sup>1</sup> The measures of procedural coercion were also carried out by a special judicial envoy – a 'yesaul'. Sent to the accused with a demand for satisfaction or to bring the latter to the court, yesauls worked together with judges ('sultans, biys'). Kazakh customary law testified to extremely wide powers of yesauls in the execution of procedural coercion. A common preventive measure of that time was 'the bailment of the accused to their fellow villagers', an analogue of the modern measure of restraint in the form of personal security.

The Kazakh customary law described by Fuchs indicates that the reasonable foundations of the administration of justice played an important role throughout the formation and development of the national criminal proceedings. In the post-Soviet criminal proceedings, the Habeas Corpus Act was introduced in relation to the mechanism for choosing measures of procedural coercion at the stage of pre-trial investigation. There is a variety of judicial approaches to the implementation of this function of judicial control. It is assigned to judges

1 SL Fuchs, Ocherki istorii gosudarstva i prava kazakhov v XVIII i pervoi polovine XIX V [Essays on the history of the Kazakh state and law in the 18th and first half of the 19th centuries] (edited by SF Udartsev, TOO 'Yuridicheskaya kniga Respubliki Kazakhstan'/OOO 'Universitetskii izdatelskii konsortsium 'Yuridicheskaya kniga' 2008).

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of general jurisdiction, specialised judges, or specialised investigative courts. Legislative regulation and investigative and judicial practice reveal institutional and legal proceedings arising from them.

In recent years, one of the important elements of judicial and legal reforms in the Republic of Kazakhstan has been the introduction of investigating judges in the format of specialised courts. Judges of the courts of the first instance should exercise judicial control over the observance of the rights, freedoms, and legitimate interests of persons in criminal proceedings. Since 2015, the successful functioning of this institution in Kazakhstan and the accumulated experience have confirmed the relevance and progressiveness of this step for the development of the criminal procedure doctrine in the context of ensuring the rights and legitimate interests of an individual. Since 2020, systematic measures taken in the country have become insufficient. These are associated with a conceptual revision of the functions of prosecutorial supervision, departmental procedural control, and judicial control at the stage of pre-trial investigation. In our opinion, their legislative implementation will entail several issues, including those that can give formalism and procedural rituality to the decisions of the investigating judge when authorising such preventive measures as detention, home confinement, and bail.

The study scientifically substantiates a set of theoretical conclusions, legislative proposals, and practical recommendations aimed at strengthening judicial control by the investigating judge to ensure the legality, validity, and motivation of procedural decisions and actions of criminal prosecution authorities when selecting measures of restraint to protect the rights and legitimate interests of persons subject to procedural coercion.

To achieve the above-mentioned objective, we solved the following tasks:

- To analyse legal statistics and generalise the application of detention, home confinement, and bail since the introduction of the institution of investigating judges authorising these preventive measures in the Republic of Kazakhstan;
- To study the legal framework for the regulation of procedures for the selection, authorisation, and application of these preventive measures, as well as substantiate proposals for their further improvement;
- To determine issues of the national law enforcement of election, judicial authorisation, and application of the preventive measures in question, as well as summarise, analyse, and propose possible ways to resolve them;
- To make legislative proposals for the implementation of international standards and principles to strengthen the guarantees of the rights and freedoms of suspects and other persons whose interests are limited by the application of the most stringent preventive measures;
- To conduct a comparative legal analysis of the Kazakh and foreign procedural and legal mechanisms of arrest, home confinement, and bail as preventive measures;
- To consider the relationship between judicial control and prosecutorial supervision in the application of detention, home confinement, and bail in the context of the implementation of a three-tier model of criminal proceedings.

## 2 THE BACKGROUND AND METHODOLOGY OF THE STUDY ON JUDICIAL CONTROL OVER PRE-TRIAL PROCEEDINGS IN CRIMINAL CASES

The fundamental scientific works on judicial control over pre-trial proceedings in criminal cases are as follows: I.Ya. Foinitsky's 'The course of criminal justice' (1910)<sup>2</sup> and S.L. Fuchs' doctoral dissertation 'Essays on the history of the Kazakh state and law in the 18<sup>th</sup> and first half of the 19<sup>th</sup> centuries' (1948).<sup>3</sup>

In the Republic of Kazakhstan, issues of judicial control were touched upon in the works of V.V. Khan,<sup>4</sup> S.A. Adilov,<sup>5</sup> K.T. Baltabaev,<sup>6</sup> E.I. Idirov,<sup>7</sup> B.H. Toleubekova,<sup>8</sup> etc.

At the level of PhD dissertations in the Republic of Kazakhstan, A.A. Amirgaliev conducted research on the topic 'Functions of judicial control over pre-trial criminal proceedings in the Republic of Kazakhstan'<sup>9</sup> and M.S. Abakasov on the topic 'Judicial control in criminal proceedings: international legal and national aspect'.<sup>10</sup>

It should be noted that the above-mentioned works did not affect the human rights aspect of judicial control over pre-trial proceedings – the problems of the institution of judicial control were considered by scientists from a different perspective.

The scientific novelty of the article is due to the very choice of a human rights perspective. For the first time in Kazakh legal science, the problems of ensuring the constitutional rights and freedoms of the individual by the investigating judge when applying measures of criminal procedural coercion against participants in criminal proceedings are revealed and disclosed.

To substantiate the theory of judicial control, the post-Soviet countries allow the opposition of institutional logic and human rights, which causes unjustified ideas about the high efficiency of the judicial mechanism, including when choosing measures of procedural coercion.<sup>11</sup> Even in countries with well-established criminal procedure systems, such as Germany, a special judicial control judge (*Ermittlungsrichter*) can be compared to a 'ticket inspector, letting the audience through or not, without knowing the content of the play being performed'.<sup>12</sup>

2 IYa Fojnickij, *Kurs ugolovnogo sudoproizvodstva*. [Course of criminal proceedings], Tom II. Izd. 3-e. - S-Pb.: Senatskaya tipografia, 1910.

3 Fuchs (n 3).

4 VV Han, 'Powers of the investigating judge in the new model of the criminal process of Kazakhstan: essence and classification' (2014) 4 (41) *Kazakhstan Respublikasy IIM Almaty akademiyasyның ғылыми енбектері* 99-102.

5 SA Adilov, 'The legal status of the investigating judge in the criminal proceedings of the Republic of Kazakhstan' (Diss. ...kand. yurid. nauk: 12.00.09. M., 2018).

6 KT Baltabaev, 'House arrest in criminal proceedings of the Republic of Kazakhstan' (Diss. ...kand. yurid. nauk. - Karaganda, 2001).

7 EI Idirov, 'Legal status of an investigative judge in the Republic of Kazakhstan' (2016) 9 *Yuridicheskie issledovaniya* 53-57.

8 BH Toleubekova, 'On the correlation of the procedural and legal status and powers of the investigating judge: problems and prospects for improvement (according to the legislation of the Republic of Kazakhstan)' (2017) *Vestnik Kazahskogo nacionałnego pedagogicheskogo universiteta* <<https://articlekz.com/article/18697>> date accessed 16 Aug 2022.

9 AA Amirgaliev, 'Topical issues of the correlation of judicial control, prosecutorial supervision and departmental procedural control at pre-trial stages in criminal proceedings of the Republic of Kazakhstan' <[http://www.rusnauka.com/10\\_DN\\_2013/Pravo/11\\_131533.doc.htm](http://www.rusnauka.com/10_DN_2013/Pravo/11_131533.doc.htm)> date accessed 16 Aug 2022.

10 MS Abakasov, 'Judicial control in criminal proceedings: international legal and national aspect]. Diss. na soiskanie stepeni doktora filosofii' (PhD, Nur-Sultan, 2018).

11 LV Golovko, 'The post-Soviet theory of judicial control in pre-trial criminal proceedings: an attempt of conceptual reconsideration' (2013) 9 *Gosudarstvo i pravo* 17-32.

12 LV Golovko, 'The Institute of Investigative Judges: Americanization by manipulation' <<https://www.iuaj.net/node/1746>> date accessed 16 Aug 2022.

Kazakh law enforcement can change this paradigm of formal judicial control. In 2022, there will be a phased introduction of a different model that implies a 'specific' symbiosis of the functions of judicial control, prosecutorial supervision, departmental procedural control, and investigative activities.<sup>13</sup> The model is to coordinate the bodies of inquiry with the prosecutor in all cases of restrictions on constitutional rights and individual freedoms (the total pre-trial control of almost 50 procedural decisions and actions in criminal cases). The subsequent stages are as follows: the abolition of the procedural figure of the investigator; the adoption and procedural execution of key decisions in a criminal case by the prosecutor (on recognising a suspect and qualifying their act (similar to bringing charges); selecting preventive measures that do not require the sanction of the investigating judge (terminating the criminal case, drawing up an indictment, etc.); the initiation of a petition for the application of appropriate preventive measures by the prosecutor in relation to the investigating judge.<sup>14</sup>

The methodological basis of this study was the dialectical method of scientific cognition as the main method of objective and comprehensive analysis. Consequently, the research object and subject were considered not in isolation from each other but in conjunction with other legal and social phenomena within general patterns of development judicial control and measures of criminal procedural suppression. Special methods were selected based on the dialectical method of cognition.

In the course of the research, we used the following special methods: system-structural, formal-legal, and logical analysis; the expert assessment of relevant national laws and their application; the interpretation of legal norms; comparative-legal research; the constructive-critical analysis of conceptual approaches to the issues under study; the legal modelling of risks and costs related to the election of a prosecutor (the person conducting an investigation) and authorisation by the investigating judge of such preventive measures as detention, home confinement, and bail.

We were guided by the Constitution, laws and other regulatory legal acts, criminal procedure laws, resolutions of the Supreme Court, by-laws of the General Prosecutor's Office, and international legal acts generally recognised and ratified by the Republic of Kazakhstan, as well as strategic documents that determine the development of criminal justice (annual addresses of the President, concepts of legal policy, etc.).

To protect the rights and legitimate interests of an individual, it is crucial to implement Clause 3 of Art. 9 of the International Covenant on Civil and Political Rights of 1966 in the Kazakh criminal procedure legislation on the mandatory delivery of each detained suspect to the investigating judge. The implementation of this norm in investigative and judicial practice will effectively track every instance of illegal, unreasonable detention and groundless criminal prosecution and determine and stop the use of torture and other unlawful methods of pre-trial investigation against detained suspects in order to obtain confessions from them.

It is no less important to introduce a property guarantee into the system of preventive measures, separating it from bail and following the US experience regarding commercial surety.

<sup>13</sup> 'The project concept to the Law of the Republic of Kazakhstan. On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court' <[https://online.zakon.kz/Document/?doc\\_id=32781342#pos=5;120](https://online.zakon.kz/Document/?doc_id=32781342#pos=5;120)> date accessed 16 Aug 2022.

<sup>14</sup> The draft Law of the Republic of Kazakhstan (2021), 'On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court' <<http://advokatura.kz/wp-content/uploads/Proekt-zakona13042021181653-1.docx>> date accessed 16 Aug 2022.

We also studied the draft Concept and draft Law of the Republic of Kazakhstan developed by the Prosecutor General's Office 'On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the implementation of a three-tier model with the separation of powers and responsibilities among law enforcement agencies, the prosecutor's office, and the court'.<sup>15</sup>

### 3 PREVENTIVE MEASURES IN CRIMINAL PROCEDURE AND ITS INDICATORS IN THE REPUBLIC OF KAZAKHSTAN

The absolute indicators of preventive measures sanctioned in the Republic of Kazakhstan by investigating judges over the past six years (since the introduction of this party into criminal proceedings) and their scope in the structure of all seven preventive measures are presented in Table 1 below.

Table 1

Preventive measures	2015	2016	2017	2018	2019	2020	2021
Bail	16,217 (44%)	13,902 (53%)	4,731 (20%)	1,430 (7%)	1,284 (5%)	1,013 (4%)	760 (3.5%)
Home confinement	249 (0.6%)	261 (1%)	367 (1.2%)	655 (3%)	974 (4%)	1,543 (6%)	1,202 (5.5%)
Detention	10,132 (28%)	11,072 (42%)	15,689 (70%)	9,957 (46%)	10,619 (42%)	12,069 (50%)	11,587 (53%)
Preventive measures in total	36,390	26,346	22,498	21,528	25,074	24,188	21,724

In the table above, preventive measures are ranked according to the degree of repressiveness and restrictions on the constitutional rights and freedoms of an individual. The least restrictive is *bail*. This preventive measure encourages lawful behaviour and minimises interferences with the proceedings. Bail is a psychological and coercive measure rather than a repressive one. If compared with other preventive measures, the suspect's law-obedience does not depend on the nature and degree of restriction of constitutional rights to personal integrity and personal freedom. Despite the advantages of bail, there is a rapid decline in its performance in law enforcement in conformity with the above-mentioned statistics (11 times over six years). Bail was mostly used as a preventive measure in 2015 and 2016. The record is explained by the active promotion of this preventive measure by the prosecutor's office at that time. The Order of the Prosecutor General of the Republic of Kazakhstan 7/15 on the widespread use of bail as an alternative to arrest served as the basis for an artificial increase in statistical indicators during this period.<sup>16</sup>

Contrary to good intentions, the institutional resource of the supreme supervisory body has created favourable conditions for restricting the constitutional rights and freedoms of an individual. In pursuit of formal indicators, the Order made the investigating authorities and prosecutors superficially evaluate facts and evidence as grounds for the application of

15 One of our authors, Professor A Akhpanov, prepared an expert opinion on this bill for the Ministry of Justice of the Republic of Kazakhstan. It substantiates constructive-critical approaches, systematises possible risks and costs for law enforcement, and makes proposals for many non-controversial provisions, the legislator's adoption of which can significantly weaken judicial control over such preventive measures as detention, home confinement, and bail.

16 'The speech of the deputy of the Prosecutor General of the Republic of Kazakhstan on a briefing in the Service of central communications. Astana' <<https://www.youtube.com/watch?v=Msl0kXqGQ8Q>> date accessed 16 Aug 2022.

bail. The amount of bail was reduced below the lower limit, and it replaced another measure of restraint by the nature of legal restrictions, i.e., a written undertaking not to leave and recognisance to behave. A formal bail did not achieve its purpose. In the period from 2017 to 2020, there has been a sharp decline in the use of bail (Table 1). Such indicators are due to the fact that the legislator transferred its authorisation from prosecutors to investigating judges in 2017. The judicial procedure for sanctioning bail, along with a prior decision with the prosecutor, strengthened the guarantees of the suspect's rights. However, this approach did not solve old problems but gave rise to new ones.

In this regard, we propose a comprehensive approach to eliminate the real obstacles to the use of bail. One of them is the principle of self-regulation of legal relations, which is embodied in the voluntariness of bail with due regard to the procedural position of the suspect (attitude to suspicion), their financial situation, and the confidence of the investigating authorities and the investigating judge in a high degree of probability that this preventive measure will ensure the proper behaviour of such a person. In addition, when authorising bail, it is important to consider the personal qualities and financial and property capabilities of the suspect. The amount of bail in a particular criminal procedure should be regarded as the most effective means to achieve the goals set when regulating their behaviour.

Christine S. Scott-Hayward and Henry F. Fradella conducted fundamental research on bail and its forms in the United States. They studied the historical forms and unsuccessful attempts to reform the bail system, as well as the issues of racial and social inequality in the justice system.<sup>17</sup> The legislative experience of foreign countries in the system of interim measures of restraint highlights such a form as commercial surety. This measure of restraint in terms of its procedural and legal mechanism is generally similar to bail. However, the guarantor is a special agent who monitors the proper execution of all orders and restrictions by the suspect, including ensuring their presence in court, which is more effective than the other measures. Commercial surety is well developed in the United States and has solved the problem of overcrowded prison populations in densely populated areas.<sup>18</sup> The variety of bail forms has broadened the scope of this preventive measure; therefore, most suspects seek bail to avoid detention. We believe that this positive experience can be useful for the Republic of Kazakhstan since the draft Legal Policy Concept until 2030 raises the issue of introducing property guarantees into the system of preventive measures, separating it from bail.<sup>19</sup>

In the context of strengthening the control functions of the investigating judge, the procedure for changing detention to bail is of great importance. In our opinion, the current legislation establishes an illogical procedure for such a replacement. Clause 8 of Art. 145 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter – CrPC) provides that the obligation to execute a procedural decision on changing detention to bail with the release of a person rests with the head of the penitentiary institution, i.e., place of detention (a temporary detention centre or pre-trial detention centre). This decision is based on the verification of the fact that the pledger put bail to the deposit account, about which the investigator, prosecutor, and investigating judge are notified.

We propose a different procedure: documents confirming the payment of bail should be first provided to the investigator. After checking, the investigator sends them, together

17 CS Scott-Hayward, HF Fradella, *Punishing Poverty: How Bail and Pretrial Detention Fuel Inequalities in the Criminal Justice System* (University of California Press 2019).

18 TH Cohen, 'Commercial Surety Bail and the Problem of Missed Court Appearances and Pretrial Detention' <[https://www.researchgate.net/publication/228226049\\_Commercial\\_Surety\\_Bail\\_and\\_the\\_Problem\\_of\\_Missed\\_Court\\_Appearances\\_and\\_Pretrial\\_Detention](https://www.researchgate.net/publication/228226049_Commercial_Surety_Bail_and_the_Problem_of_Missed_Court_Appearances_and_Pretrial_Detention)> date accessed 16 Aug 2022.

19 'The concept (project) of the legal policy of the Republic of Kazakhstan till 2030' (one of the developers of Section 4.10 of this Concept in the sphere of criminal procedural activities is Professor A.N. Akhpanov) <<https://legalacts.egov.kz/npa/view?id=7553105>> date accessed 16 Aug 2022.

with a cover letter, to the investigating judge and notifies the prosecutor. Subsequently, the investigating judge decides whether to satisfy the petition for changing the measure of restraint or to refuse to satisfy it. Their decision is represented by the relevant resolution.

Otherwise, there can be the forgery or revocation of a document confirming the deposit of bail or changes in the investigative situation in a criminal case, which eliminates grounds for the application of bail. An inspection can only be carried out by the person conducting pre-trial proceedings in the given criminal case and by no means by the head of the place of detention.

The next preventive measure sanctioned by the investigating judge is **home confinement**. Compared to bail, there are no sharp fluctuations in its application in the statistical indicators presented in the table. The consistent and stable increase in the application of this preventive measure is due to the fact that the Republic of Kazakhstan has chosen a reasonable vector for the development of the legal system aimed at ensuring the priority of personal rights and freedoms, strengthening the competitiveness and equality of the parties to criminal proceedings, reducing the prison population and procedural economy, including through wider use of alternative measures of restraint. The application of home confinement as a preventive measure was influenced by the 2015 Project '10 Measures to Reduce the Prison Population'<sup>20</sup> as well as the measures taken by the General Prosecutor's Office of the Republic of Kazakhstan to introduce humanistic ideas into the activities of the criminal prosecution authorities. These are reflected in the Order of the Prosecutor General of the Republic of Kazakhstan of 9 April 2015 No. 1/15, aimed at significantly reducing the use of detention.<sup>21</sup> The amendments and additions made to the CrPC of the Republic of Kazakhstan in July 2018, which provide for the possibility of applying less severe preventive measures, also played a major role. If compared to detention (arrest), home confinement can be considered more humane, but it still significantly restricts the rights and freedoms of an individual. Therefore, it is important to strictly follow the procedures established by law for its selection, sanctioning, and application.

Considering international experience and the existing investigative and judicial practice, we propose to narrow the broad interpretation of Clause 2 of Art. 146 of the CrPC of the Republic of Kazakhstan, which provides for the application of 'one or more restrictions' to a person in respect of whom a measure of restraint in the form of home confinement is selected. It seems that the list of restrictions applied to the suspect should be defined in order to minimise the subjective selection of additional means to ensure this measure of restraint. The objective is not only uniform law enforcement but also reasonable limits of judicial control while limiting the rights of the suspect. We propose the exclusion of para. 7) of para. 2 of Art. 146 of the CrPC of the Republic of Kazakhstan in order to prevent an expansive interpretation of legal restrictions.

During the COVID-19 pandemic, home confinement has been aggravated by the fact that a person is also infringed on the right to health care in addition to the restriction of freedom. Thus, it is logical to enshrine in the criminal procedure legislation grounds and conditions allowing or restricting walking in certain places, sports activities outside the home, etc. In this regard, we can provide the following wording of Clause 1 of Art. 146 of the CrPC of the Republic of Kazakhstan:

When authorizing a preventive measure in the form of home confinement, the investigating judge decides on the possibility of providing the suspect with time for

20 'The project concept. Ten measures to reduce the prison population. Astana' <<https://www.zakon.kz/4591574-vystuplenie-zamestitelja-generalnogo.html>> date accessed 16 Aug 2022.

21 Order of the Prosecutor General of the Republic of Kazakhstan 1/15 (9 April 2015) 'On a major decrease in using detention' <[https://online.zakon.kz/Document/?doc\\_id=39614359](https://online.zakon.kz/Document/?doc_id=39614359)> date accessed 16 Aug 2022.

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walking and doing sports within two hours a day, with the right to leave the place of serving home arrest in agreement with the pre-trial investigation body.

In addition to the right to health protection, home confinement also limits the right to work. The loss of a job (the main source of income) casts doubts on the advisability of complete isolation from society. For remote employees, strict isolation is not always justified. The issues related to the life support of suspects, with their ability to continue offline labour activity under home confinement, require legislative regulation.

When authorising such a measure of restraint as home confinement, it is important to consider the suspect's identity, their activities, official position, the presence of dependents, and job as the only source of income. Taking into account the above and other circumstances, the court should allow them to continue labour activity. The remote format of labour relations excludes contact with other people and does not require leaving their residence, which is the best option during the COVID-19 pandemic and meets the interests of all parties to legal relations.

In the United States, home confinement as a measure of restraint is divided into three types, depending on the severity of serving conditions. At the first level of severity, the suspect is required to be at home only at a certain time. At the second level of severity, this person stays at home permanently but might be allowed to visit their place of work or study. At the third level of severity, the suspect stays at home all the time and can leave it only by the court order and visit medical institutions.<sup>22</sup> Such a differentiated application of home confinement can be useful for investigative and judicial practice since certain similar elements are already contained in the CrPC of the Republic of Kazakhstan.

There are some issues related to the electronic monitoring of the suspect's behaviour during the execution of such a preventive measure as home confinement. The scientists from the Old Dominion University of Virginia (USA), Randy Gainey and Brian Payne, conducted an experiment using various methods in order to study the effectiveness of an electronic bracelet and its effect on the quality of life of suspects. The experiment results were assessed on three levels and classified according to various criteria. In particular, they evaluated the impact of an electronic bracelet on personal life, work, discipline, drug and alcohol consumption, the level of shame from wearing the bracelet, restrictive aspects of the sanction, etc. Most respondents regarded this experience as less oppressive than detention. Furthermore, the electronic monitoring program helped some of them cope with self-destructive lifestyles.<sup>23</sup>

An important factor in regulating the measure of restraint under consideration is the rights of third parties who, due to family and other relations, live with a person serving house arrest. A favourable condition for ensuring the rights and freedoms of an individual guaranteed by the Constitution of the Republic of Kazakhstan is the fact that the legislator is obliged to obtain the written consent of persons living with the suspect (family members, landlords).<sup>24</sup> However, such third parties suffer the inconvenience caused by checks carried

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22 JN Hurwitz, 'House Arrest: A Critical Analysis of an Intermediate-Level Penal Sanction' (1987) 135 (5) University of Pennsylvania Law Review 771.

23 RR Gainey, B Payne, 'Understanding the Experience of House Arrest with Electronic Monitoring: An Analysis of Quantitative and Qualitative Data' (2000) 44 (1) International Journal of Offender Therapy and Comparative Criminology 84-96.

24 'Rules for implementing such a preventive measure as house arrest (2014)', Joint Order of the Ministry of Internal Affairs of the Republic of Kazakhstan of 29 August 2014 No 564, the Prosecutor General of the Republic of Kazakhstan of 2 September 2014 No 86, the Chairman of the National Security Committee of the Republic of Kazakhstan of 4 September 2014 No 290, the Minister of Finance of the Republic of Kazakhstan of 11 September 2014 No 394 and the Chairman of the Agency of the Republic of Kazakhstan for Civil Service Affairs and Anti-Corruption of 12 September 2014 No 4. Registered by the Ministry of Justice of the Republic of Kazakhstan on 22 September 2014 No 9741 <<http://adilet.zan.kz/rus/docs/V14C0009741>> date accessed 16 Aug 2022.

out at any time of the day. In our opinion, a more effective solution to the problem would be the widespread use of electronic means of control (electronic bracelets). From the financial perspective, we recommend an additional condition to the CrPC of the Republic of Kazakhstan, according to which, when using electronic surveillance tools, the controlled person compensates the costs incurred in an amount of a fixed monthly calculation index. Compensation will reduce the cost of maintaining house arrest, save state budget funds, and encourage criminal prosecution authorities to apply this preventive measure more often. Such conditions of legal restriction will not violate the personal life of both the suspect and the persons living with them.

Many scholars concluded that the key factor influencing the final decision (the verdict of the court) is the preliminary conclusion, i.e., the very fact that a person is in custody. Moreover, its impact on an acquittal or termination of a criminal case is not so significant.<sup>25</sup> The increased degree of legal restrictions on an individual due to the use of a measure of restraint in the form of **detention (arrest)** entails the need to adjust the current mechanism for its authorisation.

In many countries, legal statistics on the use of pre-trial detention (arrest) as a measure of restraint show high rates, as evidenced by the study by Catherine Heard and Helen Fair from the Centre for Crime and Justice Research, University of London. They conducted their studies in ten countries and confirmed excessive arrest cases in the pre-trial stages of criminal proceedings.<sup>26</sup> The statistics we cited (Table 1) also demonstrate high rates of using arrest both in comparison with alternative preventive measures (bail, home confinement) and in the system of all preventive measures, which determines the scale of its repressiveness and negative consequences.

Positive trends in ensuring the rights and freedoms of an individual when applying a preventive measure (detention) are conditioned by the fact that over the years of independence, the Republic of Kazakhstan has ratified almost all key international legal acts in the field of human rights and implemented many of their norms into the national legislation. A number of such provisions laid the foundation of the state policy of democratisation and humanisation of criminal proceedings.

However, the dynamic development of social relations and the state of investigative practice require constant updating of the criminal procedure legislation to effectively protect the rights and freedoms of an individual when the investigating judge authorises detention (arrest). Even in the EU, the general standards and principles of regulation of pre-trial detention (arrest) are not properly fixed. According to the scientists from the Institute of Criminal Law and Criminology at the University of Leiden, Adriano Martufi and Christina Peristeridou, this situation causes many conflicts within the legislation of the EU countries, but this preventive measure is being sanctioned and applied. The authors critically assess the state of affairs and argue that the absence of a unified legal act entails significant restrictions on human rights.<sup>27</sup>

Detention should not be accompanied by actions that cause physical or mental suffering to suspects and those accused of committing crimes and held in special institutions. In order to exclude or minimise this impact, we propose to eliminate discrepancies between

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25 MR Williams, 'The Effect of Pretrial Detention on Imprisonment Decisions' (2003) 28 (2) Criminal Justice 299-316 <<https://www.researchgate.net/publication/249772159>> date accessed 16 Aug 2022.

26 C Heard, H Fair, 'Pre-trial detention and its over-use' <[https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial\\_detention\\_final.pdf](https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf)> date accessed 16 Aug 2022.

27 A Martufi, C Peristeridou, 'Pre-trial Detention and EU Law: Collecting Fragments of Harmonization within the Existing Legal Framework' <[https://www.researchgate.net/publication/347950255\\_Pre-trial\\_Detention\\_and\\_EU\\_Law\\_Collecting\\_Fragments\\_of\\_Harmonisation\\_Within\\_the\\_Existing\\_Legal\\_Framework](https://www.researchgate.net/publication/347950255_Pre-trial_Detention_and_EU_Law_Collecting_Fragments_of_Harmonisation_Within_the_Existing_Legal_Framework)> date accessed 16 Aug 2022.

Clause 3 of Art. 9 of the International Covenant on Civil and Political Rights and the CrPC of the Republic of Kazakhstan on the mandatory delivery of each detained suspect to the investigating judge. The implementation of this rule will effectively track every instance of illegal, unjustified detention and criminal prosecution and identify and stop the use of torture and other unlawful methods of pre-trial investigation against detained suspects.<sup>28</sup>

An important circumstance in the process of protecting the constitutional rights and freedoms of an individual when deciding whether to apply detention (arrest) as a preventive measure is the violation of the fixed deadline for the prosecutor to send materials confirming the legality, validity, and motivation of detention, as well as the need to extend it, to the investigating judge. The thing is that, in most cases, the investigating judge ignored violations of such deadlines when extending the terms of the arrest. Such facts were revealed by the monitoring group of the OSCE Office for Democratic Institutions and Human Rights (ODIHR) during the implementation of the project ‘The judicial authorization of arrest in the Republic of Kazakhstan’<sup>29</sup> In order to avoid unreasonable extension of the terms of arrest, which are often associated with the fact that the pre-trial authorities do not have time to collect evidence, it is necessary to officially record the time such applications were received and indicate them on the judicial authorisation materials.

The existing organisational and legal barriers, as well as departmental and institutional dependence on investigating judges, deprive them of the freedom to evaluate criminal cases based on their inner convictions. Thus, judges are not guaranteed true independence within the judicial system. The existing system makes the investigating judge follow the lead of the pre-trial investigation bodies and the prosecutor’s office. It is necessary to overcome the prevailing stereotypes of the criminal prosecution authorities that detention is a convenient tool for conducting investigative actions and operational activities.

When checking materials justifying the need for arrest, the investigating judge should follow a certain algorithm. This will allow comprehending not only a criminal case but also checking the legality, validity, and motivation of the person’s suspicion of committing such a criminal offence. The judge is obliged to check the substantive legal basis, i.e., the evidence of all the constituent elements of this criminal offence and other circumstances of proof, as well as the commission of the incriminated act by this particular suspect according to criminal case files. Then the investigating judge shall verify the validity of the evidence and facts of one or another criminal procedural basis for arrest, given in Clause 1 of Art. 136 of the CrPC of the Republic of Kazakhstan. In the end, it is necessary to investigate criminal procedural conditions for the application of detention (arrest), namely, the circumstances taken into account when authorising a measure of restraint (Clause 1 of Art. 138 of the CrPC of the Republic of Kazakhstan).

According to Art. 148 of the CrPC of the Republic of Kazakhstan, the investigating judge is authorised to consider a petition and make one of the following decisions: to authorise the arrest (including for up to ten days) or to deny this authorisation for arrest. In matters of deciding on the punishment, the example of the Code of Criminal Procedure of Ukraine is indicative. Art. 186 of the Code of Criminal Procedure of Ukraine provides that a petition for the application or change of a preventive measure is considered by an investigating judge, a court without delay, but no later than seventy-two hours from the moment of the actual detention of the suspect or the accused, or from the moment of receipt of the petition to the court, if the suspect or the accused is at large, or from the moment of presentation by the

28 The International Covenant on Civil and Political Rights (16 December 1966) <[https://online.zakon.kz/Document/?doc\\_id=1010760#pos=0;0](https://online.zakon.kz/Document/?doc_id=1010760#pos=0;0)> date accessed 16 Aug 2022.

29 Analytical report 2011. The judicial authorization of arrest in the Republic of Kazakhstan, Warsaw <[https://online.zakon.kz//Document/?doc\\_id=30983793#pos=5;-108](https://online.zakon.kz//Document/?doc_id=30983793#pos=5;-108)> date accessed 16 Aug 2022.

suspect or the accused, or his/her defender to the court of the relevant petition.<sup>30</sup> The CrPC of the Republic of Kazakhstan contains a similar but more repressive provision: when there are no sufficient grounds for sanctioning detention for two months, the investigating judge may authorise it for up to 10 days (Clause 2 of Part 7 of Art. 148 of the CrPC of the Republic of Kazakhstan).

One of the progressive steps taken by the Republic of Kazakhstan to eliminate stereotypes and ensure the constitutional rights and freedoms of an individual in case of conflict with law is a gradual transition to a three-tier model of criminal proceedings, following the example of the OECD countries with a clear division of powers of the police, the prosecutor's office and the court.<sup>31</sup> The General Prosecutor's Office of the Republic of Kazakhstan has developed a draft Concept and a draft Law of the Republic of Kazakhstan 'On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office, and the court'. Its main idea is large-scale coordination of all the key procedural decisions affecting the rights and freedoms of a citizen with the prosecutor, as well as the adoption of intermediate and final decisions on a criminal case at all pre-trial investigation stages instead of the investigator and interrogating officer, including on preventive measures. It is predicted that the phased implementation of the three-tier model of criminal proceedings will solve the issues connected with the current separation of powers among the police, the prosecutor's office, and the court. In particular, when discussing the Concept of this model, it was proposed to exclude the direct appeal of the investigator to the investigating judge with a request to authorise a measure of restraint since the decision on selecting or applying a certain measure of restraint should be made by the prosecutor.<sup>32</sup> To fully implement this three-tier model, it is necessary to solve conceptual problems. If ignored, favourable conditions will be created for an even greater restriction of the rights and freedoms of an individual under the pretext of ensuring the rule of law.

From the viewpoint of ensuring the speed of investigation, there are doubts that it will be difficult to coordinate with the prosecutor numerous procedural acts of the investigation affecting the constitutional rights of citizens following from the Concept and the draft Law. There are obvious risks and time costs incurred by the investigator and the interrogating officer in order to coordinate the main procedural decisions and actions with the prosecutor:

- There is a significant decrease in the ability to perform the main task of collecting evidence through investigative and other procedural actions.
- Even if every settlement in the Republic of Kazakhstan has a full-fledged Internet connection, the duration of electronic approval will be affected by subjective factors influencing the prosecutor's decision.
- There is a preliminary approval of the draft decision in Word with the prosecutor (before it is added to the electronic database of prosecution authorities), which includes: internal coordination in the instances of the prosecutor's office; time for prosecutors to study the submitted materials or the criminal case a substantiate their decision; the right to demand and study additional materials; time to receive an oral or written explanation from the investigator and the interrogating officer, as a result

30 Criminal Procedural Code of Ukraine, updated <<https://zakon.rada.gov.ua/laws/show/4651-17#Text>> date accessed 16 Aug 2022.

31 'Kazakhstan in a new reality: time to act]. Nur-Sultan' <[https://www.akorda.kz/ru/addresses/addresses\\_of\\_president/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-1-sentyabrya-2020-g](https://www.akorda.kz/ru/addresses/addresses_of_president/poslanie-glavy-gosudarstva-kasym-zhomarta-tokaeva-narodu-kazahstana-1-sentyabrya-2020-g)> date accessed 16 Aug 2022.

32 'The proceedings of the International scientific conference (2 April 2021). A three-tier model of criminal justice as a guarantee ensuring the rights and freedoms of citizens. Almaty' <<https://www.facebook.com/almatyadaldyqalany/posts/862890300956960>> date accessed 16 Aug 2022.

of which the investigative and procedural action is delayed, the parties to the process are repeatedly brought to the police, and investigators or interrogators are forced to execute the decision until agreed with the prosecutor.

- There is a heavy load on the prosecutor supervising the investigating authorities since about 300,000 criminal cases are processed annually. According to the Consolidated Report in Form 1-E of the Committee on Legal Statistics and Special Records under the General Prosecutor's Office of the Republic of Kazakhstan, 324,869 cases were under investigation in 2020, including 205,765 cases resolved (drafting an indictment and sending the case to court, terminating the case on non-exonerative grounds) and 119,104 criminal cases terminated on exonerative grounds.<sup>33</sup>
- About 50 actions and decisions will be coordinated for each of the criminal cases under investigation by the investigating authorities.<sup>34</sup>
- The number of prosecutors supervising the legality of the investigation is 1,482 employees (as of May 2021).

#### Sample calculations:

300,000 criminal cases \* 50 decisions and actions on average in one criminal case (according to the current CrPC of the Republic of Kazakhstan + after the adoption of the draft law) = 15,000,000 approvals from the prosecutor and decisions made by the prosecutor himself;

300,000 criminal cases / 1,482 prosecutors = 202(202,4) cases per year or 17(16,8) cases per month per prosecutor;

202 cases \* 50 decisions and actions = 10,100 decisions and actions in all cases per year;

10,100 decisions and actions per year / 246 working days = 41 decisions and actions per day or five decisions per hour, or 12 minutes per decision.

- Additional time to perform other functions related to the prosecutor's activities, as well as those that go beyond the scope of this area of supervision.

As a predictable result, the frontal coordination of most procedural decisions and actions with the prosecutor will significantly slow down the pre-trial investigation in criminal cases, practically paralysing it and redirecting human resources to overcome artificial barriers instead of performing the main function, i.e., a complete, comprehensive and objective study of the case circumstances. Thus, judicial control over pre-trial investigation will weaken due in part to the formal and ritual procedure for authorising criminally remedial measures of restraint. The investigating judge will rely on the prosecutor's filter, superficially assessing the evidence presented in support of their decision.

In addition, the procedure proposed by the Concept and the draft Law for the independent choice by the prosecutor (without accepting a criminal case for his own proceedings) of a restrictive measure and a personal petition to the investigating judge for its authorisation (detention, home confinement, and bail) might entail obvious risks and costs.

33 Analytical information (2020) presented in Form 1-E on legal statistics and special reports of the General Prosecutor's Office of the Republic of Kazakhstan <<https://www.gov.kz/memlekет/entities/pravstat/documents/details/54973?lang=ru>> date accessed 16 Aug 2022.

34 The comparative table of amendments to the draft Law of the Republic of Kazakhstan (2021). On amending and revising some legislative acts of the Republic of Kazakhstan on the introduction of a three-tier model with the separation of powers and areas of responsibility among law enforcement agencies, prosecutor's office and court <<http://advokatura.kz/wp-content/uploads/ST-na-19.02.21-g.13042021181707-1.docx>> date accessed 16 Aug 2022.

This innovation may entail the following risks and costs that are destructive to the pre-trial investigation system:

- The violation of the consistency and logic of pre-trial investigation, when such amendments to the CrPC of the Republic of Kazakhstan infringe the fundamental principles of criminal proceedings, mix the basic functions and general conditions of production at this stage;
- The dissolution of traditional, well-established, and justified delimitations of such criminal procedural functions as investigation, departmental procedural control, prosecutorial supervision, and judicial control;
- The selective acquisition by the prosecutor of the functions of an investigator, interrogator, head of the investigative department and head of the body of inquiry;
- The violation of the rules of collection, verification and evaluation of evidence under the CrPC of the Republic of Kazakhstan by the person in charge of a criminal case, guaranteeing the observance of public interests (disclosure of the crime, exposing the guilty, proving suspicion and accusation), and protection and restoration of rights and legitimate private interests, the loss of motivation for evidentiary activities, lowering the level of personal responsibility for the investigation on the part of both persons involved and the prosecutor;
- The possibility of cognitive dissonance in the person responsible for the course and results of the criminal case being processed during a preliminary assessment of the evidence, including the evidence collected during investigative actions conducted by the prosecutor to justify the chosen measure of restraint;
- The exclusion of any personal responsibility of the prosecutor who made a procedural decision on a preventive measure without considering a criminal case for its legality and validity;
- The creation of conditions for corruption manifestations at the stage of pre-trial investigation in cases where the inner conviction of the prosecutor and the person conducting the investigation may not coincide in matters of choosing one or another measure of restraint.

As a result, there is a direct contradiction to Clause 3 of Part 1 of Art. 180 of the CrPC of the Republic of Kazakhstan. To obtain the right to conduct an investigation, the prosecutor shall issue a decision on accepting a criminal case into their proceedings.

The initiation of criminal proceedings is as follows: the definition of a specific official endowed by law with exclusive competence to conduct a pre-trial investigation in a specific criminal case to perform procedural, including investigative actions, in order to make procedural decisions; the personal responsibility of the person conducting criminal proceedings for compliance with procedural deadlines, ensuring the rights and legitimate interests of parties to criminal proceedings, etc.; the systematic verification of investigative versions of the prosecution and defence; the planning and organisation of pre-trial investigation; the development of tactics for specific investigative actions; adherence by the person conducting criminal proceedings to the rules, principles and logic of collecting, verifying and evaluating evidences; assessment by the person conducting a criminal case of the evidence collected on the basis of their inner conviction in conformity with Art. 25 of the CrPC of the Republic of Kazakhstan.

Thus, the selection of a preventive measure by the prosecutor without initiating criminal proceedings means the illegitimacy of their procedural decisions and actions. According to Clause 2 of Art. 9 of the CrPC of the Republic of Kazakhstan, they shall be recognised as illegal and cancelled.

The Concept substitutes and confuses different notions. With its implementation, the prosecutor becomes a person who does not supervise the law but stands above the law. After all, such an arbitrary interference in the activities of an investigator or interrogator would entail criminal liability for any other person.

## 4 CONCLUSIONS

International standards and principles of the Habeas Corpus Act are mainly implemented by the national legislation of the Republic of Kazakhstan in the institution of criminal procedural coercion and measures of restraint. The procedure for selecting, authorising, and applying such criminally remedial measures of restraint as detention (or arrest), home confinement, and bail can be improved both from the standpoint of the public tasks of criminal justice and the private interests of parties to criminal proceedings.

The introduction of a three-tier model of criminal proceedings regarding preventive measures applied with the authorisation of the investigating judge can reduce the effectiveness of judicial control over the pre-trial investigation. The investigating judge can also introduce a formal and ritual procedure for sanctioning measures of criminal procedure restraint. The investigating judge will rely on the prosecutor's preliminary filter, superficially assessing the materials and evidence presented in support of this decision.

A well-balanced, selective, and systematic approach is required to transform the functions of investigation, departmental procedural control, prosecutorial supervision, and judicial control at the stage of pre-trial investigation so that permanent reforms do not affect the legal system, fundamental principles, and standards, do not violate the existing litigation practice, do not reject established legal traditions, and abandon the established procedural culture.

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