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Validity Criteria of Pretrial Detention: An Analysis of Judicial Errors

The purpose of this study is to provide a comprehensive analysis of the legal and practical criteria for the validity of pretrial detention and to identify typical judicial errors in the application of this measure. The methods include a systematic analysis of criminal procedure legislation, a comparative method, and a statistical analysis of judicial practice. Particular attention is paid to the regulatory resolutions of the Supreme Court of Kazakhstan and to the legal positions of the ECHR in assessing the validity of suspicion and the risks of obstructing justice. The findings demonstrate a persistent trend toward the excessive use of the most stringent coercive measure. The author reveals that the key issues include a formalized approach, manifested in the rubber-stamping of prosecution arguments, and the arbitrariness of assessments, where the severity of the charge becomes the sole and decisive factor for arrest. The article provides a classification of typical errors, ranging from the absence of specific factual data in case materials to the disregard of alternatives such as house arrest or bail. The conclusions emphasize the need for a transition from formalized to substantive judicial control when considering motions. The validity of detention must be supported by actual, not presumed, evidence of an intent to abscond or to destroy evidence. The recommendations may improve the procedural mechanism by minimizing cases of unjustified restrictions on personal liberty and overcoming inquisitorial bias in judicial practice.

Keywords: Pre-trial detention, measures of restraint, judicial errors, criminal procedure, validity of arrest, judicial formalism, excessive coercion.

Introduction

Urgency of this subject is caused by a practice of selecting and using the measures of procedural compulsion. Thus, however an arrest warrant was transferred to a sole competence of courts by Constitution, the law enforcement still keeps narratives of tendentious approach of pretrial detention being the dominant measure. Such a practice demonstrates that law enforcers have not reached a proper understanding and applying the presumption of innocence. This situation creates a misbalance between legal reasons and human rights and overloads the law enforcement agencies.

For this reason, the study attempts to identify the factors facilitating such a law enforcement practice. Following objectives have been accomplished to achieve the goal: key issues preventing an efficient application of alternative pre-trial restraints have been identified and structured; facts of redundancy, formalism and subjectivism in judicial line of argument have been analyzed; structural reasons for pretrial detention prevailing in the restraint system have been identified; criteria of relevance of legal judgments on applying such a restraint have been defined.

Collisions between theory, methodology and practice are represented with many consistent conflicts existing in the issues under study. First, there is a theoretical and practical collision between proclaimed exclusiveness of pretrial detention and actual presumption of expediency. The theory of criminal litigation is based on a principle of minimum sufficiency of human rights restriction, while the practice demonstrates a trend toward regulation of preventive rationale. Second, there is a methodological conflict between formal procedural compliance and a substantive risk assessment as prescribed by the law. Judicial line of argument often contains vague statements (“may go in hiding”, “may impede the investigation”) without evidentiary information. Third, there is an institutional conflict between the normative model of adversarial proceedings and the factual dominance of the prosecution at the stage of imposing measures of restraint. This results in a procedural imbalance and weakens the judicial oversight of the prosecution’s claims. Finally, there is a contradiction between human rights narrative of legal judgments and their actual rationale, which creates an illusion of compliance with standard, yet without its substantial application.

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Gaps in other studies are poor parameterization of validity criteria for pretrial detention despite a significant amount of research papers. Contemporary studies predominantly focus on either statutory analysis of an institution, or assessment of compliance with international standards, while the comprehensive analysis of judicial errors as a system-wide phenomenon has been developed piecewise. Insufficient research: impact of institutional drivers; dependence of judicial reasoning on prosecutional mindset; procedural mechanics of shifting from an exceptional to a default measure. Besides, current academic schools do not have a common approach to defining sufficiency criteria for evidence proving the presence of judicial risks. This creates uncertainty in law enforcement and expands the field for judgment calls.

The author assumes that an issue of dominance of pretrial detention stems from both deficiencies in law enforcement and a set of institutional and methodological factors. Among other factors, insufficient resources for alternative measures of restraint (bail, house arrest), lack of developed mechanisms of procedural controls, as well as rigidity of prosecutive mindset establish a consistent model of choosing the most stringent measure.

Thus, the study is aimed at shifting the analysis focus from declaratory part to criteria of validity and sufficiency of evidence. The author's approach includes an assessment of judgments using the principles of necessity, adequacy and tailoring, which helps identify systemic errors and suggest the ways to address them.

Methods and materials

Methodological framework of this study is represented with a set of general scientific and special legal methods of cognition that ensure a comprehensive analysis of pretrial detention institution using the validity criteria.

Dialectical method is utilized as a base method; it helped to review the pretrial detention in the balance between public interests and individual liberty; this method also helped to identify contradiction between the legal framework of an "exceptional measure" and persistent practices of its routine application.

A systematic approach was utilized to analyze a position of pretrial detention within a general structure of measures of procedural compulsion, and to identify correlations between canons of law, judicial line of argument and institutional law enforcement factors.

Among special legal methods, following were used: legalistic analysis to study the essence of norms regulating the grounds and procedure for selecting a measure of restraint; interpretation of legal norms (literal, overall, purposive) to identify regulatory connotation of "exceptional nature"; legal comparative method to compare nationwide approaches with international standards for assessing a necessity of custodial restraint; and legal modelling method to define the author's criteria for pretrial detention validity.

In addition, a critical discourse analysis of judicial line of argument was used to identify typical logical constructs, boilerplate language and indicators of pro forma approach in judicial acts.

100 judicial acts on choosing and extending pretrial detention as a measure of restraint rendered by examining courts, as well as appeals from such judgments over last five years were the empirical background of the study.

Case materials were selected by following criteria: availability of rationale that contains an assessment of judicial risks; possibility of comparing prosecution with defense; availability of an analysis of alternative measures of restraint or absence thereof.

Analysis of judicial acts has highlighted repeated lines of argument, as well as typical errors in justification of pretrial detention.

In addition, statistical data over last three years were used to describe frequency of various measures of restraint, as well as data demonstrating the workload of judicial authorities and a practice of challenging decisions on pretrial detention.

Results

The analysis of judicial practice helped to phrase a key author's observation:

Pretrial detention in judicial practice is often used on the basis of presumption of expediency rather than a model of proven necessity.

In other words, at a number of times a court is guided by an abstract probability of its occurrence correlated mainly with severity of charges rather than by an assessment of certain judicial risks.

Following have been determined during the study:

- in majority of judgments, flight risk is justified by severity of charges without an analysis of individual's characteristics;

- court's reasoning relies on formulaic structures without concrete evidentiary substantiation;
- alternative measures of restraint are either assessed in a declarative manner or not analyzed at all;
- court's line of argument often matches with prosecution's case by logic and structure.

Thus, system-wide signs have been identified, such as formalization of judicial assessment; replacement of risk analysis with severity of charges; lack of evidentiary adequacy standard.

The results directly match with the objective raised, i.e. to identify the factors contributing to a steady dominance of pretrial detention.

Novelty of the results is following: for the first time, a systematic typology of judicial errors of choosing a measure of restraint has been suggested; operationalized validity criteria for pretrial detention were defined; existence of a presumption of expediency model as a hidden phenomenon of judicial practice was justified; an institutional correlation between the lack of resources for alternative measures and the dominance of pretrial detention was recognized.

Novelty has applicable rather than declarative nature, since the suggested model might be used in judicial practice when drafting procedural findings, improving the judges' qualifications, and research papers.

The stated objective, i.e. determining the factors of prevailing pretrial detention and definition of validity criteria has been achieved.

The objective has been met as follows:

- key issues of applying the measure have been put together;
- signs of formalism and judgment call have been detected;
- an author's concept of validity assessment has been developed;
- a tool for judicial errors minimization has been suggested.

The study resulted in a developed proprietary model for assessing the validity of pretrial detention based on five interrelated criteria: evidentiary specification of risk: the risk must be supported by factual data rather than probabilistic assumptions; verifiability of argumentation: each assertion of the court must be verifiable through the case materials; proportionality: the court must strike a balance between the restriction of liberty and the protected public interest; individualization: the assessment must take into account the personality of the accused, social connections, and behavior; impossibility of applying a milder punishment: the court must provide evidence to justify why alternatives do not achieve procedural goals.

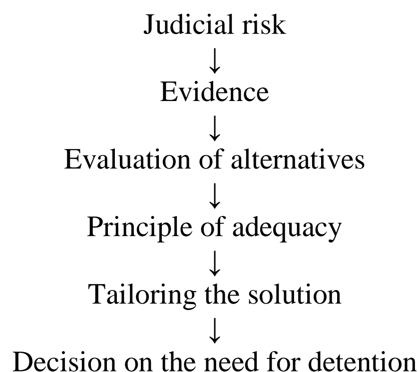

Figure 1. Logical model of validity assessment for pretrial detention

Discussion

An analysis of case law allows us to identify three interrelated problems in the application of measures of procedural compulsion in the Republic of Kazakhstan: *redundancy* (excessive frequent use of the most stringent measures), *formalism* (superficial approach in selecting a measure, insufficient motivation of decisions) and elements *of judgment call* (incomplete compliance with the criteria of necessity, or unjustified differences in approaches). Let's dive deeper into each of these problems.

Redundancy is the application of procedural coercive measures more frequently or in more severe ways than is objectively necessary to ensure the goals of the criminal process. Speaking of Kazakhstani criminal proceedings, the issue is mainly about the excessive use of pretrial detention as a preventive measure. According to statistical data analysis, detention has become an almost routine measure of restraint for a large share of suspects, even when the law permits milder alternatives.

Thus, according to 2023 statistics, examining courts granted 10,345 motions for pretrial detention as a measure of restraint, while the number of motions granted for house arrest was 343, and motions for bail were 77. In 2024, there were 10,611 cases of pretrial detention, 584 cases of house arrest, and 32 cases of bail. Notably, in terms of the severity of crimes, the use of pretrial detention under the extremely grievous category accounts for only 19 % of the total number of granted motions.

The criminal procedure legislation of the Republic of Kazakhstan poses detention as an exceptional preventive measure. For example, the commission of a crime of medium gravity with stated maximum penalty of up to five years of imprisonment allows a preventive measure to be a pretrial detention only in exceptional cases and if there are specific circumstances that prevent an individual from being summoned to the investigative bodies and the court, or that create real risks of a suspect obstructing the establishment of the objective truth in the case.

Thus, it is presumed that if a person is suspected of committing a crime of little or medium gravity, a prosecuting agency and the court must choose another measure of restraint: a travel restriction and recognizance to behave, a personal surety, bail, etc., if there are no extraordinary circumstances (repeat offense, tendency to abscond, obstruction of the investigation, etc.).

However, as evidenced in practice, the "exceptional nature" of such a measure often remains on paper and has no real representation in practice. An analysis of the decisions of investigative judges on authorizing pretrial detention as a measure of restraint indicates that sanctions are issued in cases of crimes of medium gravity based on the severity of the crime committed, which actually contradicts the objective requirements of criminal procedure law. For this reason, criticism raised by the attorney community regarding the templated reasoning to authorize pretrial detention is entirely reasonable.

However, this practice contradicts international standards. The European Court of Human Rights has repeatedly stated that the severity of the potential punishment alone is not sufficient grounds for detention. In this case, specific facts of risk are required: flight, pressure on witnesses, etc. Although Kazakhstan is not a party to the ECHR Convention, nevertheless it has to adhere to this principle due to its worldwide recognition as a standard for the reasonableness of the arrest.

According to many scholars, the excessive use of arrest is largely due to the limited range of alternatives actually used. Thus, in his research D.R. Iseyev notes that the more measures of restraint are provided by law, the more opportunities the investigative bodies and the court have to choose a measure proportionate to a specific situation, without resorting to detention in all cases [1]. Kazakhstan's criminal procedure law contains a fairly broad list of alternative measures of restraint: house arrest, bail, supervision by military command, etc. However, legislative norms alone are not enough: it is important for these alternatives to actually function in practice. Unfortunately, experience has demonstrated that new measures remain unclaimed if left without adequate resources and organizational support. In their studies of house arrest issues, L.I. Lavdarenko, L.P. Plesneva and V.A. Votkin quite fairly draw attention to the fact that the lack of technical means of control has long been an obstacle to efficient utilization of such a measure of restraint [2]. In the same way, an institution of bail requires courts to be able to individually calculate its amount and verify the financial status of the suspect—this is a new and complicated challenge for the justice system. As a result, both house arrest and bail are used extremely rarely, while a "uniform approach" of detention still prevails. Thus, redundancy is to a certain extent caused by the insufficient utilization of non-custodial measures, even when they are expressly provided for by law.

Another criterion of redundancy is the duration of coercive measures. In most cases, suspects are held in custody for the maximum permitted period despite the criminal procedure law requires those investigations to be carried out within a reasonable time and to extend this preventive measure only if necessary. In practice, however, investigations often drag on, which results in suspects being held in custody for months, and sometimes even years, before the case goes to trial. Even though, such decisions are not always justified especially when a criminal case is dismissed or the defendant is acquitted. It is worth noting that even termination of a criminal case due to reasons other than exoneration, for example due to reconciliation is also a sign of redundancy and imbalance in the infringement of individual rights.

Thus, despite the declared principle of personal inviolability, the practical experience of Kazakhstan demonstrates an excessive reliance on the pretrial detention as a measure of restraint. This trend represents very large share of suspects arrested and the rare use of alternative measures, as well as the often maximum duration of the said measure of restraint. This situation contradicts to the spirit of the International Covenant on Civil and Political Rights, which requires that "the detention of persons awaiting trial shall not be the general rule" [3]. Excessive use of the most stringent measure of restraint both violates the rights of suspects

and overburdens the criminal justice system (courts, prosecutor's office, pre-trial detention facilities). We see solution to this problem in increasing the validity of the motions of pretrial investigation bodies and a bolder appeal to alternatives by prosecutors and courts.

Formalism in this context is a practice whereby participants in criminal proceedings approach the coercive measures inattentively and individually and limit themselves to minimal formal requirements. Formalism can manifest itself both at the stage of document drafting (investigator's motion, prosecutors' consent) and when issuing court decisions.

Often, a motion for choosing a measure of restraint is drawn up by templates using general phrases without specifics on the case. For example, almost all motions for choosing a measure of restraint such as pretrial detention include standard phrases, such as "may abscond", "may continue criminal activity", "may obstruct the investigation". Such risks are declared even in cases where a suspect cooperates with the investigation, has strong social ties, and has no previous convictions. An analysis of judicial practice demonstrates that investigators rarely cite specific facts: for example, attempts to abscond, threats to a witness, the preparation of a false passport, and other circumstances that would realistically substantiate the existence of risks.

In this regard, the Supreme Court of the Republic of Kazakhstan makes it clear that the materials attached to the petition for sanctioning a preventive measure in the form of detention shall contain information indicating suspicion of committing a crime by this particular person and the existence of grounds for applying this measure of restraint to them confirmed by specific facts [4]. Therefore, submission of abstract information about the severity of crimes is not sufficient ground for applying a measure of restraint in the form of detention. However, the practice demonstrates that investigators limit themselves to listing the articles and sanctions, and the prosecutor supporting the motion does not require additional evidence. This is a manifestation of formalism: when participants automatically reproduce the prescribed wording of the Criminal Procedure Code without filling them with real content.

The most criticized aspect in this regard is the brevity and boilerplate nature of the investigating judges' ruling authorizing pretrial detention. In the first years after the institution of the investigating judge was introduced, many such decisions consisted of several provisions: a judge referred to the gravity of the crime and the prosecutor's indication of the grounds followed with authorization of pretrial detention. The rights of a suspect to remain free, such as availability of a permanent place of residence, employment, health status, and dependent children were often not discussed. For this reason, the Supreme Court of the Republic of Kazakhstan has repeatedly emphasized that the conclusion that the suspect (accused) might obstruct the proceedings or abscond from the investigation and trial, or might continue criminal activity must be supported by sufficient evidence and duly motivated both in the petition of a person responsible for the pretrial investigation and in the ruling of the investigating judge on authorizing pretrial detention [4]. In other words, the judge's ruling must indicate the verification of each ground for the motion and the reasons for which this particular measure of restraint was chosen.

Therefore, the judge may not simply state that the suspect "may abscond", since they is obliged to assess whether the suspect really has the preconditions for this. For example, no permanent place of residence, previous attempts to abscond criminal prosecution authorities, etc. The wordings such as "due to the gravity of the crime, they may attempt to abscond" without providing specific reasons shall be considered as not meeting the requirement for validity.

Unfortunately, the main drawback of decisions by investigative judges to authorize pretrial detention is still insufficient motivation. The attorney community keeps criticizing the decisions of investigative judges for their boilerplate language, which is represented by copying the arguments of the criminal prosecution body contained in the motion and making conclusions without analyzing alternative solutions. Indeed, an analysis of the rulings of investigative judges authorizing pretrial detention reveals that the lack of a reasoned answer to the question: "Why can't bail or house arrest be applied?" has become somewhat of a pattern. Beyond doubt, such formal approaches condensed into the boilerplate thesis "the goals will not be reached by any other measure" have provoked and will be provoking criticism both in the pages of legal literature and from practitioners.

At the same time, such formal approaches of investigative judges when authorizing the measures of restraint undermine the very meaning of judicial review at the pre-trial stages of criminal proceedings and turn the judge into a "certifying officer" for criminal prosecution authorities [5]. The tendency of investigative judges to prematurely support the initiatives of criminal prosecution bodies by authorizing their decisions and actions ultimately makes the institution of judicial review illusory.

Thus, one of the decisions of an investigative judge of Astana specialized interdistrict examining court that we examined states that "the court considers the arguments of the body conducting the pretrial investigation and the prosecutor that the female suspect is involved in the criminal offense she is charged with to be justified at the stage of choosing a measure of restraint". Based on the fact that the alleged offence carries a sentence of more than five years' imprisonment, the investigating judge suggested in his decision that the suspect might abscond from the investigation and the court due to the severity of the potential punishment. This hypothetical assumption, contrary to the requirements of the criminal procedure law and the position of the Supreme Court of the Republic of Kazakhstan, formed the basis for the thesis: "the court does not set bail for her when authorizing pretrial detention as a measure of restraint", and the court does not see the possibility of "choosing house arrest or travel restriction and recognizance to behave, or other more lenient preventive measures".

In addition, the investigating judge noted in his decision that: "the defense's arguments that the suspect has no previous convictions, has a permanent residence, and children, are not a mandatory and unconditional grounds for refusing to grant the motion; there is a father of the children who is also obligated to upbring them". We believe that such a formal approach to deciding a person's fate clearly based on the position of the criminal prosecution agency is fundamentally wrong.

At the same time, it is worth noting that investigative judges have become more careful in justifying their decisions influenced by requirements of the Supreme Court of the Republic of Kazakhstan and the growing professionalism of lawyers seeking to vacate unreasoned authorizations. Courts of appeal have also begun to take a more principled approach to reasoning and to annul those rulings of investigative judges that fail to display the arguments of the defense or verify the validity of the suspicion. This practice encourages investigative judges to describe in their decisions the specific factual data that supports the suspicion and the risks of obstructing the investigation. However, eliminating formalism is still a long way off—both raising legal awareness of judges and, possibly, amendments to criminal procedure law are required, such as the mandatory drafting of a detailed ruling on authorizing a pretrial detention similar to a sentence. This is required to strengthen the judge's accountability for the quality of the decision made.

It should be understood that the decision to authorize pretrial detention without proper justification entails both suffering of a particular individual and a negative attitude of society towards the justice system. It results in grounds for accusing the court of arbitrary application of the norms of criminal procedure law. Along with that, formalism is associated with redundancy due to the lack of real grounds for applying stricter preventive measures. Assessing each case individually allows us to avoid the routine application of pretrial detention and replace it with milder measures. Therefore, elimination of formalism is a necessary condition for a reasonable reduction of more stringent measures of restraint to be applied.

Subjectivism in this context is the utilization of procedural coercion measures in violation of the principles of legality and justice while restrictions on the rights and liberties of a person and citizen are permitted without sufficient grounds or disproportionate to the circumstances. Arbitrariness is precisely what the guarantees of judicial authorization and prosecutorial oversight combat. However, individual manifestations of arbitrariness can be highlighted in the current practice of Kazakhstan.

First, this refers to the problem of *diversity of practice* depending on the region or specific judges. In this case, we do not mean uniformity in judicial practice, which basically contradicts to the principle of justice and other legal principles, but the lack of a uniform understanding of the norms of criminal procedure law. Thus, the case study shows that some regions demonstrate the percentage of refusals to authorize pretrial detention being significantly lower than average, while other regions have a higher percentage. This indicates a different interpretation of the legal criteria for the application of this measure of restraint. For example, one investigative judge sees an argument "gravity of the crime" to be sufficient to authorize pretrial detention, while it is not true for another judge that requires factual data to confirm specific risks. The lack of broad access to the decisions of investigative judges obscures a full and accurate picture, but the attorney community has repeatedly criticized the element of "judicial discretion", which, unfortunately, has increasingly come to border on subjectivity.

Second, we may raise the cases of *unjustified non-application of milder measures*, which can be considered a manifestation of arbitrariness from the standpoint of violating the principle of expediency. The requirements of international standards are aimed at choosing a measure that minimally restricts the rights and freedoms of a person and citizen and is sufficient to achieve the goals of criminal proceedings. Accordingly, unreasonable ignoring this obligation by a court or criminal prosecution body by applying more stringent preventive measures in practice than required by the prevailing circumstances represents nothing other than

arbitrariness. Thus, research demonstrates the presence of facts of occasional bail. The defense often motions for replacing pretrial detention with bail specifying a specific amount and guaranteeing their appearance, but investigative judges refuse without clear reasoning. Such decisions by investigative judges are naturally recognized by the appellate court as unreasoned and are overturned. The severity of the article of the Criminal Code itself does not preclude the possibility of bail, especially if a suspect receives favorable reports, has the relevant property and has committed the crime for the first time. In this case, the court's arbitrary preference for pretrial detention is unacceptable.

Third, *routine extension of pretrial detention*. Preliminary investigations are often delayed, and the period of pretrial detention is extended automatically despite the absence of investigative actions by the investigating authorities. The situation itself contradicts the principle of a reasonable period of pre-trial investigation. Therefore, the lack of activity in investigative actions may serve as grounds for the release from custody, since prolonged detention without compelling reasons and grounds, including by delaying proceedings, is one of the forms of torture. In practice, incidents often arise where a criminal prosecution agency attempts to extend a person's pretrial detention simply "for the sake of order", but the appellate court overturns such an extension, citing its unreasoned nature and a violation of the individual's right to a reasonable time and a speedy trial. Consequently, such a practice can be considered arbitrary deprivation of liberty, especially in cases where the investigation results in either a downgrade to a more lenient charge or the dismissal of the case altogether. Under such conditions, a person is effectively serving a "punishment" in advance, which contradicts the principle of the presumption of innocence.

The abovementioned issues established as a result of the court decisions analysis are also raised by other legal scholars [6, 7, 8].

International standards define *reasonableness and proportionality* of their application as criteria for the legality of procedural coercive measures. Principles and norms of the International Covenant on Civil and Political Rights require pretrial detention to be reasonable and necessary in each specific case, otherwise it must be recognized as arbitrary even if formal legality is followed. For this reason, the decision of investigative judges to authorize pretrial detention as a measure of restraint as a routine one, without a detailed analysis of specific factors that form the basis for the application of this measure of restraint is considered a significant violation of criminal procedure law. In 2014 and 2019, during the Universal Periodic Review, a number of countries recommended Kazakhstan to implement alternative measures of restraint other than pretrial detention and to ensure judicial review in full compliance with Part 3, Article 9 of the International Covenant on Civil and Political Rights [9, 10]. This means that unreasonable application of pretrial detention as a measure of restraint has been recognized at the international level and should be eliminated as soon as possible.

Fourth, arbitrary use of pretrial detention may include cases where this measure of restraint is chosen *for a purpose other than its intended purpose*—for example, when arrest or pretrial detention is used to pressure a suspect into confessing, including for less serious crimes than the original subsumption of the action. The application of a measure of restraint that does not serve the objectives of criminal proceedings but is used to exert pressure on a suspect or accused, constitutes not only a gross violation of the rule of law but also a form of torture.

Unfortunately, due to corporate ethics and resistance, such facts remain latent and difficult to prove. However, objective signs of such tactical techniques are revealed quite easily, which becomes the basis for public distrust of criminal prosecution agencies.

An analysis of criminal cases allows us to identify several behavioral patterns of criminal prosecution authorities in this respect. Thus, a suspect may remain at large as long as they fully cooperate with the investigation; however as soon as they begin to understand the real legal consequences in accordance with the subsumption of the action and begins to deny certain facts, an investigator immediately begins to initiate a motion to apply pretrial detention. The situation remains the most complicated in cases of economic crimes, where the application of pretrial detention as a measure of restraint is effectively prohibited. By their very nature, economic crimes always occur in interactions with various parties to legal relations. Therefore, a solution for the criminal prosecution agency is to attempt to classify these acts to be done by an organized crime group, which subsequently allows for the application of pretrial detention. The application of this measure of restraint is tactically determined by the fact that economic crimes are often committed through contractual relations, namely are of a civil legal nature. Accordingly, a suspect staying at liberty is fully capable of properly meeting the demands of creditors and fulfilling their civil obligations, which may serve as grounds for terminating the criminal case due to the absence of corpus delicti. For this reason, criminal pros-

ecution authorities may exhibit an unhealthy interest, which results in an accusatory bias, therefore may apply pretrial detention as a means of pressure. Another option may be the reverse procedure, namely plea bargaining, which results in the criminal prosecution agency changing their measure of restraint to the one not associated with deprivation [11, 12].

This practice is dangerous because it transforms the institution of procedural compulsion into a means of pressure and torture, which is unacceptable given the purpose and objectives of the national criminal process. This is the quintessence of arbitrariness—shifting away from legally established goals to illegal ones. This phenomenon must be eliminated in the fields of judicial control, prosecutorial supervision and the internal professional ethics of investigative bodies.

In general, the application of procedural compulsion measures in Kazakhstan is based on the law, however individual instances of arbitrariness still may take place. The criteria for the arbitrary application of procedural compulsion measures include incomplete consideration of individual circumstances, differences in practice due to the arbitrary application of norms, ignoring the application of alternative measures, and excessively long-term pretrial detention for purposes other than intended. All this undermines trust in the justice system and requires further reforms in this area of criminal procedure.

Conclusions

The synthesis of the research results provides a comprehensive review of the flaws in the application of pretrial detention as a measure of restraint in the Republic of Kazakhstan.

As part of the judicial practice analysis and comparison with international standards and doctrine, the following have been established:

1. The excessive use of pretrial detention is expressed in the high frequency of authorizing this measure for the medium-gravity crimes, rare use of alternatives, and the routine extension of pretrial detention.

2. Formalism manifests itself in the template reasoning of motions and court decisions, the lack of evidentiary specification of risks, and the substitution of individual circumstances analysis with references to the severity of the charges.

3. Subjectivism (elements of arbitrariness) is expressed in regional heterogeneity of practice, divergent interpretations of risk criteria, ignoring alternative measures and, in some cases, the use of pretrial detention outside its intended procedural purpose.

4. A discrepancy has been established between the normative model of the “exceptional nature” of a preventive measure and the actual presumption of its appropriateness.

5. An institutional relationship was identified between the lack of resources for alternative measures and the dominance of pretrial detention.

Thus, the results confirm the systemic nature of the identified problems, rather than occasional occurrence.

In summary, the main results of the study are as follows:

- pretrial detention ceases to be a measure of last resort and becomes an administratively expedient instrument;
- judicial line of argument often complies with the formal legal requirements, but does not meet the standard of evidentiary sufficiency;
- alternative measures of restraint are applied less frequently due to institutional and organizational factors rather than their normative inconsistency;
- the main methodological problem is the substitution of the presumption of freedom with the presumption of procedural expediency.

Thus, we can state that the objective set in the article, namely, to identify the factors of prevailing pretrial detention and to determine the validity criteria, has been achieved.

The scientific value of the paper is as follows:

1. A systemic classification of law enforcement flaws (redundancy—formalism—subjectivism) as interrelated levels of violation has been suggested.

2. A conceptual model for assessing the justification for detention has been developed on the basis of the following criteria: evidentiary specification of risk; proportionality; tailoring; and the impossibility of applying a milder measure.

3. The concept of institutional inertia of the prosecutional mindset has been formulated as an explanatory framework for the identified phenomena.

4. The necessity of transition from a formal to a substantive standard of judicial review has been substantiated.

Thus, the study contributes to the improvement of the theory of procedural coercion measures and provides a more profound theoretical insight into the practical application of the presumption of innocence.

The practical significance of the results is demonstrated by their potential use in following ways: the preparation of reasoned judicial orders on authorizing measures of restraint; the formulation of prosecutorial stance on supporting or dismissing motions; the activities of the defense when appealing pretrial detention decisions; the development of methodological guidelines for criminal prosecution bodies; and the improvement of training courses on criminal procedure and judicial review.

The proposed validity criteria may serve as a tool for internal self-control of law enforcement officers to minimize the risk of arbitrary decisions.

Possible areas for application of the results are the following: rulemaking—to clarify the requirements for the reasoning of decisions on detention, as well as to develop procedures for the mandatory assessment of alternatives; judicial practice—as a guide for the unification of approaches to the assessment of procedural risks and smoothing regional diversity; human rights activities—to track compliance with international standards regarding pretrial detention; research activities—framework for empirical analysis of the influence of judicial reasoning on the trend of preventive measures applied; the education—to develop competencies focused on the application of the principles of adequacy and tailoring.

References

1 Исеев Д.Р. Система мер принуждения и порядок их применения в уголовном процессе России: автореф. дис. … канд. юрид. наук [Электронный ресурс] / Д.Р. Исеев. — Уфа, 2009. — Режим доступа: https://www.susu.ru/sites/default/files/dissertation/iseev_damir_ruslanovich.pdf (дата обращения 24.01.2026).

2 Лавдаренко Л.И. Меры пресечения: проблемы правового регулирования и правоприменительной практики / Л.И. Лавдаренко, Л.П. Плеснева, В.А. Воткин // Пролог: журнал о праве. — 2024. — № 3. — С. 92–100.

3 Международный пакт о гражданских и политических правах. Adopted by UN General Assembly Resolution 2200A (XXI). — 1966. — [Электронный ресурс]. — Режим доступа: https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml (дата обращения 24.01.2026).

4 Нормативное постановление Верховного Суда Республики Казахстан от 24 января 2020 года № 1 «О некоторых вопросах санкционирования мер пресечения». — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/P200000001S (дата обращения 02.01.2026).

5 Хан В.В. Объективизация обвинительного уклона суда: идеи современности / В.В. Хан // Сборник материалов международного круглого стола «Модернизация уголовного, уголовно-процессуального и уголовно-исполнительного законодательства в условиях цифровой трансформации общества». — 2022. — Косшы, С. 113–120.

6 Шарипова А.Б. Содержание под стражей как мера пресечения в уголовном производстве / А.Б. Шарипова // Journal of Actual Problems of Jurisprudence. — 2018. — 85(1). — С. 181–191.

7 Макогон А.А. Ошибки судей при рассмотрении ходатайств о заключении под стражу [Электронный ресурс] / А.А. Макогон // Уголовный процесс. — 2019. — 7. — Режим доступа: https://e.ugpr.ru/737472 (дата обращения 24.01.2026).

8 Нехороших М.Е. Проблемы определения сроков применения мер пресечения в уголовном процессе / М.Е. Нехороших // Юридическая наука и практика. — 2025. — Т. 21, № 2. — С. 88–95.

9 Совет по правам человека. Рабочая группа по универсальному периодическому обзору. Двадцатая сессия (27 октября — 7 ноября 2014 года). — [Электронный ресурс]. — Режим доступа: https://documents.un.org/doc/undoc/gen/g14/140/98/pdf/g1414098.pdf .

10 Совет по правам человека. Рабочая группа по универсальному периодическому обзору. Тридцать четвертая сессия (4–15 ноября 2019 года). — [Электронный ресурс]. — Режим доступа: https://docs.un.org/ru/A/HRC/WG.6/34/KAZ/2 (дата обращения 25.01.2026).

11 Нормативное постановление Конституционного Суда Республики Казахстан от 18 июля 2025 года № 74-НП «О рассмотрении на соответствие Конституции Республики Казахстан части шестой статьи 152 Уголовно-процессуального кодекса Республики Казахстан». — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/S2500000074 .

12 Нормативное постановление Конституционного Суда Республики Казахстан от 4 мая 2024 года № 43-НП «О рассмотрении на соответствие Конституции Республики Казахстан пункта 17) части девятой статьи 64 и пункта 5) части второй статьи 70 Уголовно-процессуального кодекса Республики Казахстан». — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/S2400000043.

А.А. Касимов

Күзетпен ұстаудың негізділік критерийлері: сот қателіктеріне талдау жасау

Зерттеудің мақсаты — күзетпен ұстау түріндегі бұлтартпау шарасын қолданудың негізділігін айқындайтын құқықтық және практикалық критерийлерді кешенді талдау, сондай-ақ осы шараны таңдау кезеңінде туындайтын типтік сот қателіктерін анықтау. Жұмыста қылмыстық-процестік заңнаманы жүйелі талдау әдістері, салыстырмалы-құқықтық әдіс, сонымен қатар сот практикасына статистикалық және дескриптивті талдау жасау әдістері қолданылды. Күдіктің негізділігін және сот төрелігіне кедергі келтіру қауіптерін бағалау тұрғысында Қазақстан Республикасы Жоғарғы Сотының нормативтік қаулыларын және Адам құқықтары жөніндегі Еуропалық соттың (АҚЕС) құқықтық ұстанымдарын зерттеуге ерекше назар аударылды. Зерттеу нәтижелері процестік мәжбүрлеудің ең қатаң шарасын шамадан тыс қолдану үрдісінің сақталып отырғанын көрсетеді. Автор соттағы формализм (тергеу тарапының уәждерін автоматты түрде көшіру) мен бағалаудың еріктілігі (айыптың ауырлығы қамауға алудың жалғыз және шешуші факторына айналуы) негізгі мәселелер екенін анықтады. Мақалада типтік қателіктер егжей-тегжейлі жіктелген: іс материалдарында нақты деректердің болмауынан бастап, баламалы шараларды (үйқамақ немесе кепіл) қолдану мүмкіндігін ескермеуге дейін. Қысқаша тұжырымдар өтініш хаттарды қарау кезінде формальды бақылаудан мазмұнды бақылауға көшу қажеттілігін негіздейді. Күзетпен ұстаудың негізділігі тұлғаның жасырыну немесе дәлелдемелерді жою ниетінің болжамды емес, нақты дәлелдерімен расталуы тиіс. Жеке бостандықты негізсіз шектеу жағдайларын азайтуға және сот қызметіндегі айыптау бағытын еңсеруге бағытталған процестік механизмді жетілдіру бойынша ұсыныстар берілген.

Кілт сөздер: күзетпен ұстау, бұлтартпау шаралары, сот қателіктері, қылмыстық процесс, қамауға алудың негізділігі, сот формализмі, процестік мәжбүрлеу.

А.А. Касимов

Критерии обоснованности заключения под стражу: анализ судебных ошибок

Целью данного исследования является комплексный анализ правовых и практических критериев, определяющих обоснованность применения заключения под стражу, а также выявление типичных судебных ошибок, возникающих на этапе избрания данной меры пресечения. В работе использованы методы системного анализа уголовно-процессуального законодательства, сравнительно-правовой метод, а также статистический и дескриптивный анализ судебной практики. Особое внимание уделено изучению нормативных постановлений Верховного Суда Республики Казахстан и правовых позиций ЕСПЧ в контексте оценки обоснованности подозрения и рисков воспрепятствования правосудию. Результаты исследования демонстрируют сохраняющуюся тенденцию к избыточности применения наиболее строгой меры принуждения. Автором выявлено, что ключевыми проблемами остаются судебный формализм, выражающийся в автоматическом копировании доводов следствия, и произвольность оценок, когда тяжесть обвинения становится единственным и решающим фактором для ареста. В статье детально классифицированы типичные ошибки: от отсутствия конкретных фактических данных в материалах дела до игнорирования возможности применения альтернативных мер (домашнего ареста или залога). Краткие выводы подчеркивают необходимость перехода от формального к содержательному контролю при рассмотрении ходатайств. Обоснованность заключения под стражу должна подтверждаться реальными, а не предполагаемыми доказательствами намерений лица скрыться или уничтожить улики. Предложены рекомендации по совершенствованию процессуального механизма, направленные на минимизацию случаев неоправданного ограничения личной свободы и преодоление обвинительного уклона в деятельности судов.

Ключевые слова: заключение под стражу, меры пресечения, судебные ошибки, уголовный процесс, обоснованность ареста, судебный формализм, избыточное принуждение.

References

1 Iseyev, D.R. (2009). Sistema mer prinuzhdeniia i poriadok ikh primeneniia v ugolovnom protsesse Rossii [System of coercive measures and the procedure for their application in the criminal process of Russia]. *Extended abstract of candidate's thesis*. Ufa. Retrieved from https://www.susu.ru/sites/default/files/dissertation/iseev_damir_ruslanovich.pdf (accessed 24.01.2026) [in Russian].

2 Lavdarenko, L.I., Plesneva, L.P., & Votkin, V.A. (2024). Mery presecheniia: problemy pravovogo regulirovaniia i pravoprimenitelnoi praktiki [Preventive measures: problems of legal regulation and law enforcement practice]. *Prolog: zhurnal o prave — Prologue: Law Journal,* 3, 92–100 [in Russian].

3 (1966). Mezhdunarodnyi pakt o grazhdanskikh i politicheskikh pravakh [International Covenant on Civil and Political Rights]. Adopted by UN General Assembly Resolution 2200A (XXI). Retrieved from https://www.un.org/ru/documents/decl_conv/conventions/pactpol.shtml (accessed 24.01.2026) [in Russian].

4 Normativnoe postanovlenie Verkhovnogo Suda Respubliki Kazakhstan ot 24 yanvaria 2020 goda № 1 «O nekotorykh voprosakh sanktsionirovaniia mer presecheniia» [Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated January 24, 2020 No. 1 "On certain issues of authorization of preventive measures"]. *adilet.zan.kz.* Retrieved from https://adilet.zan.kz/rus/docs/P200000001S (accessed 02.01.2026) [in Russian].

5 Khan, V.V. (2022). Obektivizatsiia obvinitelnogo uklona suda: idei sovremennosti [Objectification of the accusatory bias of the court: modern ideas]. *Sbornik materialov Mezhdunarodnogo kruglogo stola «Modernizatsiia ugolovnogo, ugolovno-protsessualnogo i ugolovno-ispolnitelnogo zakonodatelstva v usloviiakh tsifrovoi transformatsii obshchestva» — Proceedings of the International round table "Modernization of Criminal, Criminal Procedure, and Penal Enforcement Legislation in the Context of the Digital Transformation of Society"* (pp. 113–120). Kosshy [in Russian].

6 Sharipova, A.B. (2018). Soderzhanie pod strazhei kak mera presecheniia v ugolovnom proizvodstve [Detention as a preventive measure in criminal proceedings]. *Journal of Actual Problems of Jurisprudence, 85*(1), 181–191 [in Russian].

7 Makogon, A.A. (2019). Oshibki sudei pri rassmotrenii khodataistv o zakliuchenii pod strazhu [Judicial errors in considering motions for detention]. *Ugolovnyi protsess — Criminal Procedure,* 7. Retrieved from https://e.ugpr.ru/737472 (accessed 24.01.2026) [in Russian].

8 Nekhoroshikh, M.E. (2025). Problemy opredeleniia srokov primeneniia mer presecheniia v ugolovnom protsesse [Problems of determining the duration of preventive measures in criminal proceedings]. *Yuridicheskaia nauka i praktika — Legal Science and Practice, 21*(2), 88–95 [in Russian].

9 Sovet po pravam cheloveka. Rabochaia gruppa po universalnomu periodicheskomu obzoru. Dvadtsataia sessiia (27 oktiabria — 7 noiabria 2014 goda) [Human Rights Council. Working Group on the Universal Periodic Review. Twentieth session (October 27 — November 7, 2014)]. *documents.un.org*. Retrieved from https://documents.un.org/doc/undoc/gen/g14/140/98/pdf/g1414098.pdf [in Russian].

10 Sovet po pravam cheloveka. Rabochaia gruppa po universalnomu periodicheskomu obzoru. Tridtsat chetvertaia sessiia (4–15 noiabria 2019 goda) [Human Rights Council. Working Group on the Universal Periodic Review. Thirty-fourth session (November 4–15, 2019)]. *docs.un.org.* Retrieved from https://docs.un.org/ru/A/HRC/WG.6/34/KAZ/2 (accessed 25.01.2026) [in Russian].

11 Normativnoe postanovlenie Konstitutsionnogo Suda Respubliki Kazakhstan ot 18 iiulia 2025 goda № 74-NP «O rassmotrenii na sootvetstvie Konstitutsii Respubliki Kazakhstan chasti shestoi stati 152 Ugolovno-protsessualnogo kodeksa Respubliki Kazakhstan» [Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan dated July 18, 2025 No. 74-NP "On review of compliance with the Constitution of Part 6 of Article 152 of the Criminal Procedure Code of the Republic of Kazakhstan"]. *adilet.zan.kz.* Retrieved from https://adilet.zan.kz/rus/docs/S2500000074 [in Russian].

12 Normativnoe postanovlenie Konstitutsionnogo Suda Respubliki Kazakhstan ot 4 maia 2024 goda № 43-NP «O rassmotrenii na sootvetstvie Konstitutsii Respubliki Kazakhstan punkta 17) chasti deviatoi stati 64 i punkta 5) chasti vtoroi stati 70 Ugolovno-protsessualnogo kodeksa Respubliki Kazakhstan» [Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan dated May 4, 2024 No. 43-NP "On review of compliance with the Constitution of paragraph 17 of part 9 of Article 64 and paragraph 5 of part 2 of Article 70 of the Criminal Procedure Code of the Republic of Kazakhstan"]. *adilet.zan.kz.* Retrieved from https://adilet.zan.kz/rus/docs/S2400000043 [in Russian].

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