

**Chairman of the Constitutional Council
of the Republic of Kazakhstan
I. Rogov**

Dear Igor Ivanovich

We thank you for involving PRI CA in the process of expert analysis on calculation of constitutional periods of detention provided by paragraph 2 of Article 16 of the Constitution of the Republic of Kazakhstan.

The issue of calculating the period of detention has a key meaning for the implementation of the right to liberty and security. It has been repeatedly discussed by experts of international law and international agencies monitoring human rights.

It is important to take into account that *detention* (*zaderzhanie*) means *arrest* in its English interpretation. And Russian versions of international documents specify the term *detention* as *arrest*. Thereby, while quoting articles on arrest, we mean detention as a measure of procedural compulsion and administrative detention.

Paragraph 2 of Article 9 of the International Covenant on Civil and Political Rights states that: ‘Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’. According to this principle calculation of the detention term starts from the moment of pronouncement on the act of arrest to the detained person.

According to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority. At the same time, it means ‘apprehending’, literally interpreted as "to seize, capture, detain physically." The point when detention begins with the announcement of the arrest

is confirmed by principle 12 of the mentioned document. According to that document there is a differentiation of three time points: time of the arrest, time of the arrest and the taking of the arrested person to a place of custody, and time of his first appearance before a judicial or other authority. This differentiation of time intervals also confirms the need for calculating periods of physical detention, after which the person could not control his freedom on his own. This logic is confirmed the principle 13: 'any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights'.

According to Paragraph 3 of Article 9 of the International Covenant on Civil and Political Rights, anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power. "Urgent order" is an important guarantee for the rights of detainees, and any extension of the beginning of the calculation of "urgent order" (in the form of proposals of beginning of detention term from the registration of the detainee (the protocol), or the moment of bringing the person in the place of detention of the detainee) and it creates a danger of implementation and using of guarantees (not only a guarantee of judicial review). In this regard, the time of calculation of detention should be considered at the earliest time for the long term for safeguards for detainees. It will appropriate implementation of paragraph 1 of Article 31 of the Vienna Convention on the Law of Treaties of 1969, 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

International monitoring agencies on human rights also provide a large case-base on the subject. In all cases, in consideration of this issue, the UN Committee on Human Rights underlined the importance of "urgent order" and made decisions in favour of shorter terms and more equitable methods of calculation time limits. Thus, in *Rostislav Borisenko v. Hungary* (report number 852/1999), the Committee concluded that detention for three days until the moment when the author was taken to a representative of the judiciary is too long and does not fit the definition of "urgent order". In the case of *Campbell v. Jamaica*, submission of charges after 7 days of arrest has been evaluated as a violation of paragraph 2 of Article 9 of the International Covenant on Civil and Political Rights (report number 248/1987).

In the case of *Murray v. United Kingdom* (report number 14310/88) the European Court of Human Rights found no violation of the rights to liberty and security only because the issue was discussed in detail at the national level. Thus, the United Kingdom House of Lords recognised that a person should be detained since it feels limiting of freedom. The House of Lords found that a person is arrested from the moment he is subject to restraint and that the first applicant was therefore under arrest from the moment that Corporal D. identified her on entering the house. The formal words of arrest were communicated to the applicant at 7.30 a.m. British practice of law has gone even further than the announcement of the arrest, based on the principle of restrictions of rights. This concept was widely supported by the European Court of Human Rights in a variety of solutions, when the arrest was understood not as a formal arrest, as well as any action that effectively restricts the freedom of individuals. For example, when a law enforcement officer makes it clear that a person cannot leave a place of detention or other place, or shall follow him. Moreover, as explained by the Court in *De Wilde, Ooms and Versyp* (1971), it does not matter if a person came voluntarily or person does not realise that he is deprived of his liberty. The main fact is limited freedom of movement of persons.

In the case of *Anguelova v. Bulgaria* (report number 38361/97), the Court clearly stated that the authorities' attempt to calculate the moment of detention only after identification of the person, is a violation of rights to liberty and security. Similarly, in *Zakharkin v. Ukraine* (report number 172 704) administrative detention was evaluated as a violation of human rights, because Court found it necessary to calculate periods of detention since the beginning of administrative detention.

Based on the above, and assuming that the detention is the kind of restrictions on the right to liberty, personal security and freedom of movement, we think that the moment of the beginning of the calculation of periods of detention should be considered as the time reference to a person the fact of his / her arrest, which led to the loss of will in management of his / her freedom.

Taking the opportunity let me express my respect and forward to further cooperation.

**Regional director
of Penal Reform International
in Central Asia**

Saule Mektepbayeva