**LIBERTY AND SECURITY OF PERSON RIGHTS:**

**INTERNATIONAL SIGHT AND AS UNDERSTOOD IN KAZAKHSTAN**

*M.A.Sarsembayev*

*Ex-Member of the UN Committee on Human Rights,*

*Doctor of Law, Professor (Kazakhstan)*

Learned discussion of the problems of liberty and security of person rights, organized by Harvard University Professor J.Neuman within the UN Human Rights Committee with promotion of its Secretariat and with the participation of the significant nongovernmental organizations, became a noticeable event. Taking part in the work of this seminar the author of these lines seeing into the provisions of Article 9 of International Covenant on civil and political rights of 16 December 1966, during the process I was looking back, how my country (Republic of Kazakhstan) responded to International Covenant, including Article 9, how we as citizens of this country, as the lawyers, as the officials responded to it.

The Republic of Kazakhstan, becoming the party to the International Covenant on Civil and Political Rights, has an obligation to implement the rules of the international legal instrument in its domestic law. This was reflected in the Constitution of the Republic of Kazakhstan as of August 30, 1995 as the fundamental law of the country. Almost all the civil, political and other rights are placed in section 2 (Articles 10-39) of the Constitution, whose ideas were taken from the provisions of the Covenant, including the provisions of article 9 on liberty and security of person rights.

Comparing the articles of the Covenant and the Constitution of Kazakhstan, we can ascertain their similarity. This can be illustrated by a comparison of the provisions of Article 9 of the Covenant and the relevant provisions of the Constitution of Kazakhstan. Paragraph 1 of Article 9 of the International Covenant on Civil and Political Rights provides: "Everyone has the right to liberty and security of person". Paragraph 1 of Article 16 of the Basic Law of Kazakhstan reads: "Everyone has the right to personal liberty". Next paragraph 1 of article 9 of the Covenant continues: "No one shall be subjected to arbitrary arrest or detention. No one should be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". These provisions correspond to rules of paragraph 2 of Article 16 of the Constitution of the Republic of Kazakhstan: "The arrest and detention shall be allowed only in the events provided by the law and only with the sanction of the court to provide to the arrested a right for appeal. Without the sanction of the court a person can be detained for a period of not more than seventy-two hours". The total content of 5 paragraphs of article 9 of the Covenant corresponds, in particular, to a certain extent to the provisions of paragraph 3 of Article 16 of the Constitution of Kazakhstan which states: "Every person detained, arrested and accused of a crime has a right to counsel (a lawyer) from the time of detention, arrest or indictment".

But the Constitution, as we know, the general law on the basis of and for the development of ordinary laws, codes, ordinances and regulations. So let us pay attention to the specific regulations of the Republic of Kazakhstan, which are relevant to the issues of liberty and security of person rights of a Kazakh citizen, to ensure his rights, if he had been arrested or detained. Thus, personal liberty is guaranteed in Kazakhstan by article 14 of the Criminal Procedure Code of the Republic of Kazakhstan of 13 December 1997, which is entitled "Security of the person", the total content of which is disclosed in the following lines: "No one may be arrested on suspicion of committing a crime, arrested or otherwise deprived of liberty except for the reasons and in the order prescribed by this Code. The arrest and detention shall be allowed only in the events prescribed by this Code, and only with the sanction of the court with the provision for the arrested the right to appeal".

Until relatively recently, the arrest warrant in my country was being given by the prosecutor not by the court. We, including this writer, had to work hard to prove that the sanction of the court for the arrest - a more democratic process than the sanction of the prosecutor. And now, both in the Constitution and the Criminal Procedure Law, we see lines that arrest warrant provided to the court. In addition, we see in the Code the implemented constitutional provision, which is set out as follows: "Without the sanction of a court a person can be detained for a period of not more than seventy-two hours".

I liked the reports of the invited representatives of nongovernmental organizations and institutions on the questions of liberty and security of person rights, including the report of International Commission of jurists. In particular he formulated several principles and mentioned the principle on liability in the sphere of detention. In this regard I would like for developing of his speech to say some words on the questions of liability in the sphere of detention and arrest. I believe that here the liability of judges (inspectors) who take decisions on detention or arrest is meant. I remember how the questions of detention and arrest were solved in Kazakhstan. At that time I had talks with the prosecutors and inspectors, then with the judges to whom this right afterwards was rendered.

Certainly if the judges resort to detention or arrest from the negative reasons for instance, revenge, if they do not redeem the arrested persons whose innocence was proved in the stage of investigation, they should be brought to responsibility. But what shall we do if the false testimonies of perjurers were put to the base of detention or arrest? May be in this case the responsibility is to be shared between the perjurers and the judge who could not professionally go into the matter. If the responsibility of a judge was heightened in regard with their decisions of detention and arrest, it may lead to the matter that the judges will avoid to detain or arrest, and this strikes to the social interests: not arrested dangerous criminals may be free from prosecution.

Is it expedient to bring the judge to responsibility if the person who was arrested by him has proved himself as innocent and in regard with this he (the judge) releases him? If we in this case try to bring the judge to responsibility, to strengthen his responsibility, the judge and the inspector will have to keep the accusatory deviation or grade in the process of investigation. And this will lead to violation of human rights. To my view, there different proportions of responsibility for judges should be applied and it would be desirable all these aspects of liability to fix in the legislation of a state. Before this it is necessary to discuss these matters carefully, to weigh all arguments and counterarguments.

Paragraph 2 of Article 9 of the International Covenant on Civil and Political Rights, speaks on the need of immediate reports concerning the reasons for arrest: "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". Pursuant to this provision of the Covenant in paragraph 3 of Article 14 of the Criminal Procedure Code of the Republic of Kazakhstan, is said: "Every detainee immediately notified of the grounds for detention, and the legal description of the offense of which he is suspected or accused". "Everyone who is deprived of his liberty by arrest or detention - in paragraph 4 of Article 9 of the International Covenant is referred to, - shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". Around about the same reads Article 14 paragraph 4 of the Criminal Procedure Code of the Republic of Kazakhstan: "The Court, the police should immediately release the illegally detained, or arrested, or illegally placed in a medical organization or held in custody beyond the period provided for by law or judgment" .

Paragraph 3 of Article 9 of the International Covenant provides that the detention for persons awaiting trial shall not be the general rule. Kazakh legislation, based on this provision requires that the law enforcement agencies should often resort to security measures not related to the arrest. It is stated in Article 140 of the Criminal Procedure Code of the Republic: "1. Preventive measures are: 1) obligation for non-departure and of good behavior, 2) a personal guarantee, 3) the consignation of military servant under the supervision of the military unit, 4) the return of a juvenile under supervision, 5) a pledge, 6) house arrest”. “2. If necessary, the person to which is applied a preventive measure, except for the consignation of military servant under the supervision of the military unit and the arrest can be applied electronic surveillance".

The idea of ​​paragraph 5 of Article 9 of the International Covenant "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation" is supported by Article 14 of the Criminal Procedure Code of Kazakhstan: "The harm caused to an individual as a result of unlawful confinement, detention in conditions dangerous to life-threatening and health, ill-treatment shall be reimbursed as provided in this Code" and by Article 41 of the same Code, which states that individuals who have been illegally detained or arrested, "entitled to full compensation for property damage, the elimination of moral injury and recovery in labor, pension, housing and other rights”.

We consider it appropriate the provision of paragraph 3 of Article 9 of the International Covenant: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". In general, this provision to some extent is implemented in the criminal and criminal procedural legislation of the Republic of Kazakhstan, but it would be advisable to bring the provisions of the Covenant in the Kazakhstan legislation directly.

Concluding I would like to share some considerations wafted by discourses of the colleagues of the Committee, representatives of the nongovernmental organizations. Of course, every article is strengthening at the expense of the other articles close by contents of the same document. In this sense Article 9 of the International Covenant at any case is strengthening at the expense of Articles 6, 7, 10 и 17 of the same Covenant. But Article 9 itself is full of thoughts therefore it is not necessary to decry its significance. Moreover, we should underline that this article is one of the key articles of the Covenant, directed for provision of liberty and security of person rights.

The representative of International Federation of Action by Christians for the Abolition of Torture named some facts on the absence of the official standards on the limited length of preventive detention in some African countries, named the facts of lasting custody within preventive detention. Regretfully, that is present in some European countries, therefore the intent attention, research and solution are needed for this problem. In solving this issue it is expedient to insist on application of provisions of paragraph 1 of Article 9 of International Covenant: «No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law».

The representative of the organization «Human Rights Watch» gave his attention to the term of Article 9 «promptly». Really, how this term should be understood: from the moment of study of the case, during an hour, during a day, during 2-3 days? It is advisable to add to this term the phrase «with indication of designation of the concrete, fixed time in the legislation of a state».

The whole seminar was interesting and useful.