# WRIT PROCEEDINGS IN CRIMINAL CASES IN THE CONTEXT OF COMPARATIVE JURISPRUDENCE

**Lyazzat Nurlumbayeva, L.N. Gumilyov Eurasian National University**
**Arstan Akhpanov, L.N. Gumilyov Eurasian National University**
**Bakitkul Sembekova, L.N. Gumilyov Eurasian National University**
**Elnara Ashimova, L.N. Gumilyov Eurasian National University**
**Nurgul Mergembaeva, L.N. Gumilyov Eurasian National University**

## ABSTRACT

*Kazakh authors in the article carried out the comparative-legal analysis of the institution of writ proceedings in the criminal procedure. This institution started to operate in Kazakhstan in 2018. It was introduced into the Code of Criminal Procedure of the Republic of Kazakhstan by the Law "On amendments and additions to certain legislative acts of the Republic of Kazakhstan on the issues of modernization of procedural foundations of law enforcement activities" of December 1, 2017. The need to introduce such institution is due to the need to simplify the procedural form, speed up the time frame and procedural economy in cases of criminal misdemeanors and minor offences. At the same time, the norms in a short period of time, regulating the procedure for consideration of criminal cases in the form of order, have been transformed in domestic legislation with regard to the grounds and consequences of the application of the institution. It should be noted that in law enforcement practice, the institution of writ proceedings is not fully used by law enforcement and judicial authorities. Kazakhstan's Institution is based on positive foreign experience of Germany, Estonia and some other countries. Despite the fact that the above-mentioned institution is very successful abroad, there are a number of shortcomings in Kazakhstan, which indicates that the potential has not yet been revealed and the made changes are premature. In this regard, the authors analyzed the experience of Germany, Switzerland, France, Estonia, Latvia and Kazakhstan, which resulted in conclusions about the reception and adaptation of certain provisions. The research showed that there are required introduction of amendments and additions to domestic legislation which is allowed: to eliminate the possibility of illegal and unlawful restriction of the appropriate rights and expansion of certain obligations of the subject of offense, including by introducing the norm on the possibility of considering the criminal case in the ordinary manner after the decision in the form of order; to consider, according to the Germany's experience, the possibility of a more flexible system of payment of the fine as the main form of punishment.*

**Keywords**: Code of Criminal Procedure, Republic of Kazakhstan, Illegal and Unlawful Restriction, Germany, Switzerland, France, Estonia, Latvia.

## INTRODUCTION



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One of the important conditions for the progressive economic development and investment attractiveness of the country is the ensuring from the State side of the accessible, within a reasonable time frame, independent and fair judicature. In this regard, new-sovereign legal systems seek to simplify and streamline the national legislation in accordance with world trends in the regulation of legal relations, ensuring rational consideration of legal conflicts, transparency, efficiency and quickness. In this context, we are in solidarity with the opinion of (Stoyko, 2006), on the relevance and necessity to create at the national level and united mechanisms of legal regulation of homogeneous social relations in the international sphere. Global integration is allowed to coordinate own policy with legal policy of other countries. At the same time, many countries, including Kazakhstan, raise questions regarding the implementation and reception of foreign institutions, innovations (Mukasheva et al., 2018; Sabirov et al., 2019).

This tendency is inherent in all spheres of life of the state, including criminal procedure. The desire to simplify the procedure of criminal proceedings is reflected in the general trend of many states in which the accused admits guilt and the crime itself does not pose a great public danger (Torkunov, 2008). Shamardin & Bursakova (2005) noted that:

> *"The idea of simplifying and accelerating criminal proceedings within the framework of the differentiation of the procedural form characteristic of competitive judicature is becoming increasingly common not only in the countries of the Anglo-Saxon legal family, but also in European states. The need in the accelerated and simplified forms of criminal proceedings is recognized at the international level in a number of recommendations of UN bodies and the Council of Europe*".

Procedural savings in cases where decisions can be taken as soon as possible are the priority direction. Moreover, guided by the principle of rationality and its uniqueness, each state has its own approach to this issue. This tendency was analyzed by the authors of this article on the example of the institution of writ proceedings in Kazakhstan criminal procedure. This institution was created as the result of the modernization of the criminal and criminal-procedural legislation of our country in 2014, as a result of which the generic concept of "*criminal offence*" was formed and its type-the criminal offences as criminally punishable acts, less heavy (minor) in the degree of social danger than non-grave crimes. The introduction of criminal offences was resulted in the registration of more criminal offences and, as the result, the additional burden on law enforcement and judicial authorities. In this regard, the legislator was taken measures to differentiate the procedural form in order to maximize the saving of temporary, human and material resources. The Institution of writ proceedings in Kazakhstan was introduced on the basis of the study of the tested foreign experience, first of all, Germany and Estonia. The Institution has been applied since January 2018 in the territory of our Republic, as the result of even a small experience, the comparative legal analysis with other countries of the first results of its application is possible. The analysis of foreign institutions similar to the writ proceedings is allowed to identify a number of general and special features of the writ proceedings as one of the types of special proceedings in criminal cases.

Common features include:



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1. Acceleration of criminal proceedings;
2. Simplification of procedural form;
3. Reduction of procedures;
4. Summary of procedural acts.

The special is:

1. Use of the institution regarding only the certain category of criminal cases, as a rule, about minor criminal offences;
2. Strict determinacy by law of the least severe sanctions that are applicable in such proceedings;
3. Not challenging by the suspect, accused, defendant of the indicted to them suspicion, charge, consent to the amount of caused damage or confession of guilt;
4. The trial is not the equivalent of ordinary proceedings, as well as the possibility of considering the criminal case in the general manner;
5. The court proceeding in absentia (investigation by the court of the written materials of the criminal case, without the minutes of the court session, without the participation of the defendant, the parties in court, etc.).

It is the prerequisite for the criminal-procedural writ proceeding at the court proceeding in absentia. Proponents on the theory of unity of procedural form support the view that the application of the simplified and accelerated forms of criminal proceedings significantly limits the constitutional rights and procedural guarantees of the person to the fair trial, the impartial, full, adversarial, fair and transparent trial, the presumption of innocence, and the right to the defence.

In this context, it should be accepted that the classical continental approach (France, Germany, Russia, and Kazakhstan) is based on the mandatory consideration of guilty pleas in line with evidentiary law (Golovko, 2017). This moment is very important as collecting evidentiary base takes considerable time, thereby there is a risk of infringement of the rights of persons, concerning whom the criminal legal proceedings are conducted (Akimzhanov et al., 2018). Meanwhile, the differentiation towards the simplification of criminal proceedings is characteristic of Kazakhstan's criminal-procedural policy. In Kazakhstan, the criminal-procedural writ proceedings are applied to criminal offences and crimes of minor gravity. There are a number of conditions under which it can be applied to: the established fact of the offence and the person who committed it through the collected evidence; the subject does not challenge the available evidence of his guilt and agrees with the characterization of the act, including the amount (sum) of the caused damage (harm); one of the main penalties is a fine; the consent of all participants on the issue of the consideration of the case by order of writ proceedings without investigation of the evidences, without calling them and without their participation in the judicial examination of the criminal case. One of the important procedural stages is the legal assessment of the committed act and the procedural situation, the adoption of the procedural decision about application of this type of the special proceeding. The procedure for making the decision about application of writ proceedings for each category of offences (criminal offences, crimes of minor gravity) is different and it is determined in accordance with Article 629-3 of the Criminal Procedure Code of the Republic of Kazakhstan (CPC of RK). The decision on application of the



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writ proceedings in the cases about criminal offences, issued by the person, conducting the pre-trial proceedings, is to be handed over to the head of the body of inquiry, and then the criminal case is sent directly to the court, bypassing the stage of bringing the accused to trial by the prosecutor. The decision about application of writ proceedings in criminal cases involving crimes of minor gravity, issued by the investigator (person conducting the initial inquiry), shall be sent by the head of the investigation department (head of the body conducting the initial inquiry) to the prosecutor. As it was noted above, the application of writ proceedings according to postulates of the presumption of innocence is connected not with recognition by the person of the fault, and entirely depends on his consent with the declared suspicion to him (interpretation by authors of this work of paragraph 2, part 2, Article 629-1 of CPC of RK). However, the procedure for making a decision on the application of the institution of accelerated proceedings in foreign countries is varied. But Kazakh legislation does not regulate the content and procedural significance of the document confirming the consent not only of the subject of the offence, but also of other persons, which de jure and de facto guarantees the protection of the constitutional right to the full, impartial court proceedings. The materials, published by the representatives of the judicial organs, show that the problem of explaining the nature and meaning and reasons for the application of the institution of writ proceedings in Kazakhstan is also present (Nurzhan, 2018).

## RESEARCH METHODOLOGY

The study and analysis of the relevant prescriptions of foreign legislation on the issues of the writ criminal-procedural proceedings, the use of the method of comparative jurisprudence, the theoretical and applied research of domestic problems of this institution provide the basis for the presentation of the following comparative provisions.

### Grounds and Cases of Application of Writ Proceedings in Foreign Countries

Proceedings for misdemeanors and offences in France are divided into two types:

1. Classical (ordinary) proceedings conducted under the traditional rules of court proceedings;
2. Special proceedings in the form of absentia or simplified proceedings. In the latter case, the court proceeding is absent in whole or in part (Nurzhan, 2018).

Minor offences without imprisonment are considered in the framework of two types of simplified proceedings: the criminal order and the fine system of the certain amount. The criminal order applies in cases of all offenses with the exception of: offences of the $5^{th}$ class (dangerous category of offences) committed by minors; offences provided by labour law; cases in which the victim initiates the criminal proceedings by directly bringing the accused before a court (Khupergenov, 2014). In Germany, there are considered criminal cases, subjected to the jurisdiction of the schöffe court, when committing misdemeanors at the written request of the Prosecutor's office, where the legal consequences of such act may be established without trial in the form of the written order about punishment. The order about punishment refers to special



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types of proceedings. The Public Prosecutor's office requests this if, according to the results of the inquiry, it does not see the need for the trial. The application must indicate certain legal consequences. Having considered the experience of the United States, it can be concluded that there is no institution of writ proceedings there, taking into account the procedure for conducting court proceedings and the Anglo-American legal system in general. Together with it, there are other elements of accelerated proceedings that should be considered. Prior to the beginning of judicial investigation, the court reads out the indictment (or information) for the accused and asks him on the merits of the charge whether he pleads guilty, not guilty or refuses to challenge the charge. The response of the accused plays an essential role for further proceedings (Khupergenov, 2014). Inside the complex of proceedings, which are considered in summary order, there are 90% of cases in which the accused is immediately sentenced on the basis of the confession of guilt (Bernam, 2006). The acceptance of the plea of guilt is carried out in the order of simplified proceedings. The accused, together with a lawyer in the courtroom, answers the judge's questions. Moreover, the task of court is dual: to determine voluntariness of the accepted statement; to establish the facts on the basis of which it is possible to conclude sufficiently that he is guilty. The order of the prosecutor on punishment is applied at the pre-trial stage in the Criminal Procedure Code (CPC) of Latvia. It seems that this institution is closest to the nature of the criminal-procedural writ proceedings of the Republic of Kazakhstan. According to the Article 420 of the CPC of Latvia, this pre-trial process is applied for the criminal offence or the lesser crime; the prosecutor, taking into account the nature of the committed criminal act and the caused harm, characterizing the person of the given and other circumstances of the case, is convinced that he is not required to be punished, which is connected with deprivation of liberty, but it cannot be left without punishment, and therefore the prosecutor may terminate the criminal proceedings with drawing up the sentence of punishment (Criminal-Procedural Law of Latvia, 2005). In Estonia, there is applied the proceedings in order of writ, which is regulated by Chapter 3 of the CPC. It applies to second-degree crimes. According to the Criminal Code 3) the second-degree offence is the punishable intentional or negligent act, for which the Code provides for deprivation of liberty for a term not exceeding eight years as the maximum penalty (Criminal code of Estonia, 2002). The considering case in the form of writ is carried out in cases where the prosecutor considers it possible to impose the monetary penalty as the main penalty, as well as the circumstances of the subject matter of the evidence are clear. In such cases, the prosecutor requests the court to hear the case in the form of the writ. The Institution cannot be applied to the minor or, if there is a possibility of taking measures to treat the person against drug addiction (Criminal-Procedural Code of Estonia, 2005). In Kazakhstan, the writ proceedings is applied to criminal offences and minor offences; the person does not challenge the available proofs of the guilt in commission of criminal offense, agrees with qualification of his actions (inaction), the size (sum) of the caused damage (harm); the sanction of the criminal offence by one of the basic penalties provides for the fine, including the mandatory additional penalty of deprivation of the right to hold the certain position or engage in certain activities, if the sanction establishes the exact period of deprivation of that right; the parties agreed to consider the case in the form of order. The application of the institution is not possible if: the person became ill after committing a criminal offense with a mental disorder; the subject of the offence is the minor or the person



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who, due to physical or mental disabilities, cannot exercise his or her right to the defence himself or herself; the person has privileges and immunity from criminal prosecution; the confiscation of property, deprivation of special, military or honorary rank, class rank, diplomatic rank, qualification class and state awards, as well as the expulsion from the Republic may be imposed to the persons as the mandatory additional penalty.

It should be noted that attempts to introduce the institution of writ proceedings were made in Russia within the framework of the *"Draft of the chapter of the CPC of the Russian Federation on accelerated forms of criminal proceedings, which were prepared by the interdepartmental working group for discussion at parliamentary hearings on January 16, 2001"* (Lebedev & Mizulina, 2007). At the same time, as it was noted in the legal literature,

> *"The Russian legislator needs to know and take into account (this project) at reforming the court proceedings, but it is not necessary to borrow the legal structure at present. In addition, this institution does not comply with the Russian model of the principles of separation of powers, presumption of innocence and adversarial nature" (Trefilov, 2015).*

## RESULTS & DISCUSSION

Taking into account foreign experience, in Kazakhstan, the grounds for the application of criminal-procedural writ proceedings correspond to world practices. Moreover, cases of impossibility to apply the institution in Kazakhstan are exhaustively rational, which is quite consistent with the principles of protection and defense of human rights in criminal proceedings.

### Adjudication in Criminal Cases of Writ Proceedings

In Switzerland, there is the similar institution of Kazakhstan's writ proceedings – the order about punishment. Its features include the fact that it is issued by the Prosecutor's office in cases where the accused in the pre-trial proceedings admitted the circumstances indicating his guilt or otherwise clarified them sufficiently. Also, as the additional guarantee, it is provided that if within 10 days there are no objections from the accused, other interested persons, as well as higher bodies of Prosecutor's office, the order about punishment, in accordance with Part 1 of Article 354 of the CPC of Switzerland, becomes equivalent to the court sentence (Trefilov, 2015). In Germany, the decision on the application of the court order is taken by the judge at the request of the Prosecutor. The judge also has the right to accept or reject it if there are doubts about the guilt of the person being brought to criminal responsibility. In Estonia, the final decision is made directly by the judge. However, in drawing up the indictment, the prosecutor reveals the circumstances in which the crime was committed, the qualification of the act, determines the nature and extent of the caused harm, presents evidence, and makes a proposal on the type and measure of punishment. The analysis of the relevant Chapter of the CPC of Estonia showed that the sentence, handed down by the court, indicated the reasons for the imposed sentence. This fact shows, first of all, that the court, having read the case file, agrees with the fairness of the imposed punishment on the person, ensuring compliance with the fundamental principle of criminal procedure - justice. In the Republic of Kazakhstan, the final decision is



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made directly by the judge. In accordance with Article 629 of the CPC RK, the judge, up to three days from the moment of receiving the criminal case in court with the decision on the application of writ proceedings, considers it on the basis of the submitted materials individually, without a court hearing.

The types of punishments provided on categories of the criminal cases and considered in the form of order, the appeal procedure.

In Switzerland, the prosecutor has the right to impose one of the following punishments: the less severe fine (die Busse) provided for by the norms of the Criminal Code; the criminal fine (die Geldstrafe) not exceeding amount 180 daily rates; community service, but no more than 720 hours; deprivation of freedom (die Freiheitsstrafe) (Trefilov, 2015). The prosecutor, in the case of receipt of the application from participants of process about disagreement with the decision, collects additional proofs which are required for permission of objection and accepts one of four decisions: to leave the order about punishment in force; to terminate the proceedings; to issue the new order about punishment; to bring charges to the court of first instance. If the prosecutor insists on leaving the order punishment about unchanged, then he will submit the case for consideration to the court of first instance, in which it will be considered on the merits. After, the court has the right to leave the order about punishment in force or to declare it as invalid and send cases to the Prosecutor's office for preliminary investigation in the general manner (Lebedev & Mizulina, 2007).

In Estonia, it is established the right of the accused to appeal of the sentence. In this case, the judge draws up the decision about returning criminal case to the Prosecutor's office, which is the basis for drafting of the new indictment and the continuation of proceedings in the general manner. In Germany, according to Paragraph 407 of the CPC, only the following types of punishment may be imposed separately or in summary:

1. Monetary fine, conditional non-imposition of punishment, prohibition to drive a vehicle, its seizure, confiscation, destruction, disuse, declaration of conviction and administrative fine on the legal entity or association of persons;
2. Deprivation of the driver's license in which the ban is no more than two years;
3. Refusal of punishment.

If the accused has the defence counsel, then it can be established the punishment in the form of deprivation of liberty on the term up to one year if its execution is suspended with the probationary period. It is also interesting the German procedure for appealing the court decision that is entered into force. For example, the fourth book of the CPC of FRG contains grounds for the resumption of proceedings, completed by the imposition of sentence that was entered into force. These norms also apply to the court order. According to Paragraph 359 of CPC, the resumption of proceedings (in favor of the convicted person) is possible in the following cases:

1. Falseness of the proof;
2. Deliberate falseness of witness testimony and conclusion/explanation of the expert;
3. If the judge or schöffe participated in the sentencing, who were found guilty of violating his official duties, except in the case where the convicted person himself did not give the reason for the violation;



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4. If the decision of the civil court on which the conviction was based is overturned by another decision that was entered into legal force;
5. If new facts or evidence are presented which, by themselves or in conjunction with the obtained evidence previously, can justify the defendant's acquittal or, with the application of the less severe criminal law, the lesser punishment or the substantially different decision on the measure of correction and security;
6. If the European Court of Human Rights was found the violation of the European Convention on Human Rights and Fundamental Freedoms or its protocols and the sentence is based on that violation.

According to Paragraph 373a of the CPC of FRG, it is provided the possibility of resumption (not in favor of the convicted person) of the proceedings, completed by the adoption of the court order on punishment that was entered into force. It takes place in cases where new facts or evidence are presented that, by them or in combination with previous evidence, are applicable for conviction in connection with the offence (Criminal-Procedural Code of Germany, 2005). According to the court order, it is also possible to postpone or interrupt the execution of punishment under the Paragraph 360 (2) of the CPC of FRG. Such practice about the postponement and interruption of punishment on payment of the fine is very interesting and relevant for the Republic of Kazakhstan. The investigative practice of our country shows that one of the reasons for the minimum application of writ proceedings in criminal cases is the lack of readiness of the suspect to pay the fine due to the material situation (Abdikanov, 2019). In our opinion, it seems that the application in Kazakhstan of such postponement or payment by installments of fine requires:

1. Examination of the defendant's characteristics;
2. Fixing the right of the accused to submit the application about postponement of the execution of the sentence in the form of the fine or the possibility of paying the fine in parts for the certain period, for example, the schedule of repayment may be the reasonable period from the position of the accused and the court. If, during the provided payment period, there are systematic facts of delay or non-payment of part of the amount, appropriate measures may be applied for evasion of punishment.

The resumption of proceedings for the purpose of determining another amount of punishment on the basis of the same criminal law is inadmissible on the basis of Paragraph 363. (1) of the CPC of Germany. It seems that the analogous provision should be fixed in the case of the introduction in the CPC of RK of the grounds for the resumption of the criminal case in the form of order. Otherwise, it is possible the probability of the abuse by the norms establishing the grounds for the resumption of the case in order to reduce the amount of the fine or to determine another procedure for its payment. In France, the prosecutor submits the case file with his claim to the police court if it is necessary to apply simplified proceedings. The judge decides to issue the criminal order. The prosecutor has the right to appeal the decision in the form of opposition within 10 days in case of disagreement with the amount of punishment. In such case, the criminal order is annulled and the case is considered in the usual manner with the challenge of the parties. If the prosecutor agrees with the amount of punishment, he shall inform the convicted person about the court decision, and the latter shall have the right to appeal the decision within 30 days (Khupergenov, 2014).



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The second type of proceedings as the fine is close in content to administrative proceedings.

In Kazakhstan, the sanction of the criminal offence by one of the types of basic punishment provides for the fine, including the mandatory additional punishment of deprivation of the right to hold the certain position or engage in certain activities, if the sanction establishes the exact period of deprivation of this right. Moreover, previously, there was provided only the fine. This change was made by the Law of the Republic of Kazakhstan of December 29, 2019. The modern theory of criminal law should continue a research of the criminal procedural legislation and law enforcement practice first of all, in order to establish, and then and to resolve the available problems in the field of criminal law, morals, rationality and justice (Akimzhanov et al., 2018). According to the Kazakhstan's law, the convicted person has the right to submit the application (within seven days from the date of receipt of the copy of the conviction) for disagreement with the sentence to the court, sentencing in the form of writ proceedings, except for the amount of the fine. If the request for opposition to the sentence is received from the convicted person within the prescribed time limit, the judge quashes the sentence, sentenced by him in the form of writ proceedings, and returns the case to the pre-trial body, which makes the decision. The decision about cancelling the sentence in the form of writ proceedings is not subjected to appeal or review at the request of the Prosecutor.

### Procedural Terms of the Writ Proceedings

In Switzerland and Germany, the Institution of writ proceedings is primarily aimed at respecting the principles of reasonable time frames. If the accused agrees with the order about punishment, the consideration of the case in the court is not begun (Trefilov, 2015). The CPC of Estonia provides for the following procedural time limits (at the same time, there is no fixed regulation regarding the general terms of consideration):

1. From the moment the indictment is submitted to the court within fifteen days, the accused and his defence counsel have the right to present their position on the resolution of the criminal case and to forward them to the judge (it seems to us that at this stage, it is possible to take into account this information, transmitted by the accused, and return the case to the prosecutor on the results);
2. After the decision is rendered, it is delivered to the accused, the defence counsel and the prosecutor's office within three days;
3. The accused and the defense counsel within fifteen days from the date of receipt of the sentence have the right to apply for consideration of the criminal case by the court in the general manner.

## CONCLUSION

In order to realize the right of the suspect to apply the criminal-procedural writ proceedings, it is advisable to introduce the obligation of the body conducting the criminal proceedings, to clarify it in the presence of the defence counsel (with his participation in the case), including the legal consequences of this type of special proceedings.

The conducted analysis of foreign legislative experience showed that in some countries, the sanctions for certain types of offences are not only fines, but also other types of punishments.



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This fact is primarily due to the fact that accelerated forms are applied in various categories of criminal cases. But this experience is common in the countries where there is effective and independent judicial control and supervision of the rule of law and corruption is minimized.

The expansion of corpus delicti of criminal offences in the form of writ proceedings (the crimes of medium gravity and serious crimes) does not seem appropriate at this stage. Moreover, the introduction of criminal offences into the CPC of RK was created instability of writ proceedings, as they constitute most of the offences to be considered in this procedure. At the same time, the exclusion of criminal offences from the CPC of RK will cast doubt on the need and relevance of the institution of writ proceedings in general.

The issues of reception of foreign institutions of writ proceedings into the national legislation of Kazakhstan are required close study. The lack of systemic scientific and applied research based on the methodology for assessing the risks of borrowing provisions of foreign experience for domestic criminal and criminal-procedural legislation contributes to the insufficient and shallow development of accepted innovations.

It is recommended to consider the possibility to introduce into domestic legislation of the norms regulating the consideration of the criminal case in the usual manner after the entry into force of the decision made in the form of order. However, the suggestion is the subject of the separate scientific research that goes beyond the scope of this article.

It is much more rational to study the issue of reception of the German legislative regulation of cases of postponement or payment by installments of the fine imposed by the court instead of introducing the additional punishment along with a fine in the criminal-procedural writ proceedings of the Republic of Kazakhstan.

In conclusion, it should be emphasized that when deciding on the legal reception of certain norms of foreign including criminal and criminal-procedural legislation, it is necessary to take into account the existence of three constituent factors under which it is acceptable:

1. The real need for law enforcement activities, including due to existing contradictions, collisions, gaps in the current legal regulation;
2. The political initiative as the will of top government leaders in carrying out systemic, complex, step-by-step and pilot modernization of the legal model. Implementation at the national level of rational regulation of legal relations in the sphere of criminal and criminal-procedural legislation;
3. Carrying out of the risk assessment of decision-making, use of forecasting methods and legal modeling.

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