PROCEDURAL DETENTION AS ONE OF THE GROUNDS FOR RECOGNIZING A PERSON TO BE SUSPECTED

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Summary

The authors analyzed the norms relating to the detention procedures, established by the new Criminal Procedure Code of Ukraine. It is concluded that the person may be detained on suspicion of committing an offense without a resolution of the investigating judge only on the grounds listed in Article 207 of Criminal Procedure Code of Ukraine. It is also summed up that it is possible to form the mechanisms to protect the rights and interests of the person taking into account the specificity of such legal provision. It is proposed the model, which determines the precise sequence of actions, which should not cause the varying interpretations of norms by the law enforcement officials, which in turn will promote the uniformity in the enforcement of criminal proceedings.

Key words: criminal proceedings, suspected, criminal procedure detention, investigation judge.

Аннотация

В статье авторами проанализированы нормы, касающиеся процедуры задержания, закреплённые в новом Уголовном процессуальном кодексе Украины, а также сделан вывод о том, что лицо может быть задержано по подозрению в совершении какого-либо правонарушения без определения следственного судьи лишь при наличии оснований, перечисленных в ст. 207 Уголовного процессуального кодекса Украины. Также подытожено, что представляется возможным сформировать механизмы защиты прав и интересов человека, принимая во внимание специфику юридического положения задержанного. Авторами предложена процедурная модель, которая определяет точную последовательность процессуальных действий, которые не должны приводить к разной интерпретации правоохранительными органами, что в свою очередь будет способствовать однообразному толкованию норм в правоприменительной практике уголовного судопроизводства.

Ключевые слова: уголовное производство, подозреваемый, задержание, следственный судья.

The statement of the problem. The realization of the rights of any party of the criminal proceedings in accordance with its procedural status is possible only after the acquiring of such status. The suspect is not the exception to this rule. Proper identification of the onset of the party in criminal proceedings is a key aspect of the principle of legality in the mechanism to ensure human rights and freedoms. According to art. 42 of the Criminal Procedure Code of Ukraine Code of Ukraine (hereinafter – CPC of Ukraine) a person is recognized to be a suspect in two cases: 1) suspect shall be the person who has been notified of suspicion as prescribed in art. 276 to 279 of this Code; 2) the person who has been apprehended on suspicion of having committed a criminal offence.

The art. 276 of the CPC of Ukraine stated the cases of notification of suspicion: 1) apprehension of an individual at the scene of criminal offence or immediately after the commission of criminal offence; 2) enforcement of a measure of restraint against an individual as prescribed in the present Code; 3) availability of sufficient evidence to suspect a person of having committed a criminal offence.

As a rule, a person acquires the procedural status of the suspect from the receipt of the notification of suspicion in accordance with the law. Except of these cases, the person is suspected since he/she is detained at the scene of a criminal offense or immediately after committing or after the application of the preventive measures. Thus, the application of these measures of ensuring the criminal proceedings does not negate the need to inform the person, to whom they are applied, about the suspicions. It seems that this legal structure is reasonable and logical.

However, on closer inspection of the specific detention procedures, notification of suspicion, prescribed in the CPC of Ukraine, it is obvious some shortcomings of the legal mechanism to protect the rights of the suspect, which in fact violate the certain principles of criminal proceedings. Therefore, there is a need to stop at the procedural detention as one of the grounds for recognition a person as a suspect, which is **the purpose and intend of this article.**

The main material. The new CPC of Ukraine differentiates clearly two types of detention: 1) detention under the decision of the investigating judge or court for permission to detain (art. 187–191 of CPC of Ukraine); 2) detention without decision of the investigating judge or court (art. 207–213 of CPC of Ukraine).

Comparing criminal procedural institutes of detention without a court order in a new CPC and CPC of Ukraine of 1961, it is easy to note that the legislator did a lot of debts from the criminal procedure law of 1961. This applies to the grounds and detention order.

Of course, it should be noted the elimination of many gaps in the regulation of detention on suspicion of having committed a criminal offense. Thus, at first at level of the criminal procedure law it was promulgated the legitimate opportunity to arrest a person suspected of having committed a criminal offense even by those who are not an officer authorized for the detention procedure (art. 207 of CPC of Ukraine). The new CPC also established the legal definition of the moment of detention (art. 209 of CPC of Ukraine).

The issues related to the delivery of the detained pre-trial investigation (art. 210 of CPC of Ukraine), the duties of the person responsible for being of the detained persons (art. 212 of CPC of Ukraine) became to be under the criminal procedural regulation. These legislative innovations removed many topical issues that were raised in the publications devoted to the detention of suspects [1].

Nevertheless, a number of procedural points prescribed in the CPC of Ukraine

concerning detention without a decision of the investigating judge causes concerns. Thus, the art. 207 of CPC of Ukraine refers to the right of 'everyone' to perform the detention without the decision of the investigating judge: 1) when someone commits or makes attempt to commit a criminal offence; 2) immediately after the commission of a criminal offence or during hot pursuit of the person who is suspected of having committed it.

Herewith, based on the grammatical interpretation of the mentioned above provisions, under the 'everyone' as the subject of detention it should be understood both any person and an authorized officer. The only difference is the order of detention, depending on which anyone who is not an authorized officer (officer, who legally have the right to carry out arrests) and detained a person as prescribed in art. 207 of CPC of Ukraine shall have the duty to immediately bring him to a competent official or immediately inform the competent official of the apprehension and whereabouts of the individual suspected of the commission of criminal offence (p. 3 art. 207 of CPC of Ukraine).

This provision is logical and 'requested' from the point of view of the practice. If a person caught in the attempt, at the time of or immediately after the commission of a criminal offense, then surely this person must be detained and delivered to a law enforcement agency, regardless of the nature and type of the offense. However, the subsequent actions and decisions of the authorized law enforcement officers, including investigators, regarding the detained person by virtue of the principles of justice, freedom and personal security are directly dependent on the nature of the criminal offense, the actual circumstances of its commission and the characteristics of the detained persons and other factual and legal factors.

Thus, in accordance with art. 208 of CPC of Ukraine a competent official has the right to apprehend without investigating judge's, court's ruling, an individual suspected of the commission of crime for which a punishment of imprisonment is stipulated, only in case: 1) this person was caught upon committing a criminal offence or making an attempt to commit it; 2) if immediately after the commission of crime, an eye-witness, including the victim, or totality of obvious signs on the body, cloth or the scene indicates that this individual has just committed the crime. The criminal procedure law also defines the order and terms of detention, which generally meets the requirements of Article 29 of the Constitution of Ukraine.

However, it arises the question of the procedural order and terms of detention on suspicion of having committed a criminal offense, which is punishable by imprisonment. The arguing that in such cases there is no talk about detention as an institution of the criminal procedural law would mean that we leave many cases the actual limitation of the constitutional principle of liberty and security of person outside the strict procedural regulation, which is unacceptable both from a theoretical and practical points of view.

In addition, it should be noted that the temporary restriction of liberty and personal integrity of a suspected person without a court decision by virtue of a number of principles of criminal proceedings should be not the rule, but the exception to the rule. In accordance with p. 2 of art. 29 of the Constitution of Ukraine custody as a temporary preventive measure is allowed only in case of urgent necessity to prevent a crime or stop it. For example, a person is detained at the scene of the crime and is taken to the criminal investigation body. Investigator as soon as possible, having considered the circumstances of the crime and, in fact, of the detention or the circumstances that characterize the arrest, comes to the conclusion about the need of isolation of the detainee or about the detention before the investigating judge resolves the issue of preventive measure; or the investigator would come to the conclusion that there is no risk that gives the sufficient grounds for initiating a preventive measure. Certainly, in such cases there is no need to use detention as a temporary precaution and the detainee shall be released as soon as possible immediately after all necessary proceedings with his participation.

From this it follows that the Criminal Procedure Code of Ukraine did not resolve the issues related to the registration procedure and terms of restrictions of the right to liberty and security of the person suspected of a criminal offense, with no legal or factual basis for the use of detention as a temporary preventive measure.

In our opinion, these gaps in the new criminal procedural law are caused by the neglect by the legislature of a number of the proposals contained in the jurisprudence concerning the reform of the detention.

In terms of practice, detention (in the sense of temporary preventive measure) is almost always preceded by the activities in pursuit, physical capture of a person, overcoming the opposition with the possible use of physical coercion, special equipment or even firearms, bringing a detainee to the premises of preliminary investigation [2, p. 255]. Almost complete system of actions included in detention on suspicion of committing a crime was proposed by V.M. Grigoriev. In his view the specified activities include: establishment of the grounds for bringing a person to the office; capturing person; confiscation of weapons, items and documents revealing the identity of a crime; escorting the detained person; the identifying the facts of the socially dangerous act and its legal qualification; grounds for detention on suspicion of committing a crime; determining the motives of detention; decision on detention; informing the prosecutor about detention; acceptance and placement of a detainee into the temporary holding facility; personal search of the detainee; application of the preventive measures; detainee's release [3, p. 20].

In her dissertation V.A. Malyarova concluded that these steps are an integral part of the criminal procedure detention and should be conducted in the possible short term [4, p. 125].

We completely support the idea that the physical capture of the person at the crime scene or immediately after committing a criminal offense and bringing this person to the office of a law enforcement agency should be the parts of the criminal procedural activities. The provisions of paragraph 2 of Chapter 18 of CPC of Ukraine create a legal basis for such a conclusion. At the same time, it would unlikely be true to consider these actions as part of the application procedure for temporary preventive measure because, as it has been shown above, the freedom and personal integrity of a person caught in the commission or attempted commission of a criminal offense or directly after its commission is not always limited due to the absence of formal legal (criminal offense or the commission of a crime, which is not punishable by imprisonment) or factual basis (risks that provide a sufficient basis for holding a suspect in custody).

In view of the above said, the attention should be drawn to the proposals formulated in the works of V.M. Tertyshnyk, E.I. Makarenko, A.K. Chernova. The

essence of these proposals is as follows. The existing procedural form of detention should be differentiated into two independent institutions: detention at the crime scene as an investigative action; and detention as a temporary preventive measure. As an investigative action, detention is aimed at the forced ensuring of the participation of the perpetrator in the criminal process and obtaining of evidence relevant to the case. The reasons for doing such the act were defined in p. 1 of art. 106 of the CPC of Ukraine of 1961. Detention at the crime scene as an investigative action includes a set of measures aimed at the physical capture of the suspect or the crime prevention, finding and fixing traces and other evidence, bringing the detainee to the police. The conduction of these measures may involve the members of the public, persons with specialized knowledge (specialists). To identify and fix the evidence-based information it can be used photography, sound-, video-recording, science and technology. As a result of the detention it is drawn a protocol stating the actions of the suspect, circumstances that served as grounds for detention, established the evidence relevant to the case, the circumstances of their finding and fixing. Thus, detention as a means of proving process and a protocol of detention are considered as an independent source of evidence in this case [5, p. 424–426; 6, p. 26; 7, p. 99–103; 8, p. 10–11; 9, p. 165–166].

Unlike the detention within the meaning of investigation action, a short-term detention of a suspected person, by placing it to the temporary holding facility, aims to prevent the attempts to hide from the pre-trial investigation, destroy, conceal or distort any of the things or documents that are essential to establish the circumstances of the criminal offense of illegally influence the other participants of criminal proceedings or impede the criminal proceedings otherwise. That is, in such cases it is talking about a temporary preventive measure – short-term detention before the resolving the issue by investigating judge.

The implementation of the mentioned standards in the new criminal proceedings should ensure the functioning of the next model. A person may be detained on suspicion of having committed a criminal offense without ruling of the investigating judge by anyone only upon the grounds specified in art. 207 of CPC of Ukraine. If detention is made by an unauthorized person, such person shall immediately bring the detainee to an authorized officer or immediately inform the officer about the detention and the location of the detainee. About each fact of detention on suspicion of having committed a criminal offense an authorized person in place of detention or immediately after the delivery of a detainee to the police office, the officer should draw the protocol and perform other actions provided by the art. 208 of CPC of Ukraine. The list of information that should be drawn in this protocol is provided by p. 5 art. 208 of CPC of Ukraine. However, considering the mentioned above arguments, we believe that the protocol of detention also should include the circumstances surrounding the detention, the detainee's actions immediately before and during detention, evidence established during detention and relevant to the case, the circumstances of their finding and fixing. If the detention is recorded by video, it should be made the appropriate notes in the protocol of detention. After the protocol detention is drawn, the authorized person as soon as possible delivers the detainee to the nearest unit of the pretrial investigation as it is prescribed by the art. 210 of CPC of Ukraine. The above mentioned activities are covered by a single investigator action – detention.

After bringing the detainee to the pre-trial investigation department investigator checks the person of detainee, considers the materials, conducts the necessary proceedings involving a detainee, and then takes one of the following decisions:

– about the detainee's release if the suspicion of a criminal offense is not confirmed;

– about the notification the detainee of suspicion and his release;

– about the notification the detainee of suspicion and applying a temporary detention before the court considers an application for election a preventive measure.

The last of these decisions can be taken only due to all of the following procedural conditions: 1) a person is detained on suspicion of committing a crime punishable by imprisonment; 2) there are reasonable grounds to believe that the suspect would hide from the pre-trial investigation or commit acts, which are provided by the art. 177 of CPC of Ukraine. Each of these solutions should be formalized by the relevant ruling, approved by the prosecutor. Term for such a decision must meet the deadline for delivery of a notice of suspicion. In accordance with p. 2 of art. 278 of CPC of Ukraine, written notification of suspicion should be given to a detainee within 24 hours of detention.

Conclusions. It seems that the given procedural form of detention without the ruling of investigating judge and the use of the temporary preventive measure will contribute to a full implementation of a number of principles of the criminal proceedings. Firstly, each step of the examining falls within the scope of the criminal procedural regulations, providing the legitimacy of these actions. Secondly, a clear differentiation of the detention as an investigative action and temporary preventive measure helps to avoid the arbitrary and excessive duration of restrictions of the right to liberty and security of the suspects, by transforming the 72-hour detention into the really exceptional measure to ensure the criminal proceedings. Thirdly, this approach provides the basis for a clear delineation of the legal status of a person detained on suspicion of having committed a criminal offense and brought to the trial investigation unit and the person (suspect), to whom it is applied a temporary preventive measure.

Summing, it should be said that it is possible to form the mechanisms to protect the rights and interests of the person taking into account the specificity of such legal provision. And fourth, the proposed model determines the precise sequence of 'linear' actions, which should not cause the varying interpretations by the law enforcement officials, which in turn will promote the uniformity in the enforcement in the proposed field of criminal proceedings.

List of reference links:

1. Гуткин И.М. Актуальные вопросы уголовно-процессуального задержания : [учебное пособие] / И.М. Гуткин. – М. : Изд-во Акад. МВД СССР, 1980. – 89 с. ; Григорьев В.Н. Задержание подозреваемого органами внутренних дел / В.Н. Григорьев. – Ташкент : Изд-во Ташк. ВШ МВД СССР, 1989. – 121 с. ; Малярова В.О. Тактико-криміналістичні та процесуальні основи пошуку та затримання злочинця : дис. … канд. юрид. наук : спец. 12.00.09 / В.О. Малярова. – Х., 2005. – 258 с. ; Бірюков В.П. Юридична природа затримання: постановка проблеми / В.П. Бірюков // Форум права. – 2010. – № 4. – С. 81–89. – [Electronic resource]. – Access mode : http://www.nbuv.gov.ua/e-

journals/FP/2010-4/10bvpzpp.pdf ; Ковальова Н.Ю. Проблеми застосування процесуального затримання обвинуваченого у кримінальному судочинстві України / Н.Ю. Ковальова // Форум права. – 2010. – № 1. – С. 159–163. – [Electronic resource]. – Access mode : http://www.nbuv.gov.ua/e-journals/FP/2010-1/10knjkcu.pdf ; Макаренко Є.І. Щодо систематизації дій по затриманню підозрюваного (обвинуваченого) у вчиненні злочину / Є.І. Макаренко // Науковий вісник Дніпропетровського державного університету внутрішніх справ. – 2010. – № 2. – С. 25–41 ; Назаров В.В. Затримання підозрюваного у вчиненні злочину: проблеми та реальність / В.В. Назаров // Наше право. Кримінальне право, кримінальний процес та криміналістика. – 2010. – № 4. – Ч. 2. – С. 89–93.

2. Гій Т.О. Процесуальні проблеми затримання підозрюваного під час розкриття злочину по гарячим слідам / Гій Т.О. // Центральноукраїнський правничий часопис Кіровоградського юридичного інституту ХНУВС. – 2011. – № 1. – С. 254–259.

3. Григорьев В.Н. Задержание подозреваемого органами внутренних дел / В.Н. Григорьев. – Ташкент : Изд-во Ташк. ВШ МВД СССР, 1989. – 121 с.

4. Малярова В.О. Тактико-криміналістичні та процесуальні основи пошуку та затримання злочинця : дис… канд. юрид. наук : спец. 12.00.09 / В.О. Малярова. – Х., 2005. – 258 с.

5. Тертишник В.М. Кримінально-процесуальне право України : [підручник] / В.М. Тертишник. – 5-те вид., доп. і переробл. – К. : А.С.К., 2007. – С. 424–426.

6. Тертишник В.М. Гарантії прав і свобод людини та забезпечення встановлення істини в кримінальному процесі України : автореф. дис. … докт. юрид. наук / В.М. Тертишник. – Дніпропетровськ, 2009. – 31 с.

7. Тертишник В.М. Проблеми процесуальної форми затримання особи у кримінальному процесі / В.М. Тертишник // Підприємництво, господарство і право. – 2003. – № 8. – С. 99–103.

8. Чернова А.К. Затримання особи, підозрюваної в скоєнні злочину : автореф. дис. … канд. юрид. наук / А.К. Чернова. – О., 2009. – 19 с.

9. Макаренко Є.І. Затримання особи, якою вчинено злочин: запобіжний захід чи слідча дія? / Є.І. Макаренко // Право і суспільство. – 2010. – № 5. – С. 161–167.

СУДЕБНОЕ РЕШЕНИЕ В ГРАЖДАНСКОМ ПРОЦЕССЕ УКРАИНЫ КАК РОДОВОЕ И ВИДОВОЕ ПОНЯТИЕ

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Summary

This paper examines the problem of the correlation of the judgment in its generic and specific understanding. Concepts of "judgment", "the act of judgment" and "an act of justice" are directly analyzed. On the grounds of the analysis of civil procedural law norms and modern special literature the author suggests the ways of improvement of the Economic Procedural Code of Ukraine, which allow avoiding confusion in the judicial law enforcement.

Key words: civil procedure, types of judgments, legal judgment, judgment, court act, administered justice.

Аннотация

В статье исследуется проблема соотношения судебного решения как родового и видового понятия. Анализируется содержание категорий «судебное решение», «акт суда» и «акт правосудия». На основе анализа норм гражданского процессуального законодательства и современной доктрины сформулированы предложения о внесении дополнений и изменений в Гражданский процессуальный кодекс Украины, направленных на усовершенствование судебной правоприменительной практики.

Ключевые слова: гражданский процесс, виды судебных решений, судебное решение, решение суда, акт суда, акт правосудия.

Постановка проблемы. В Украине продолжается процесс проведения судебной реформы. В ее рамках совершенствуется процедура рассмотрения и разрешения гражданских дел в контексте приведение ее в соответствие с европейскими стандартами, что позволит обеспечить реальную возможность в судебном порядке защитить нарушенные, непризнанные или оспоренные права и интересы физических лиц, права и интересы юридических лиц, интересы государства. Результатом осуществления правосудия по гражданским делам является вынесение, в соответствии с нормами материального и процессуального права, акта правосудия – судебного решения.

Актуальность темы исследования. Судебное решение в законодательстве, правоприменительной практике и доктрине рассматривается в трех значениях. Во-первых, судебное решение рассматривается как результат выполнения судом возложенных на него задач. Суд, будучи органом государственной власти, осуществляет рассмотрение и разрешение гражданских дел. Как орган государственной власти, осуществляющий функцию правосудия, он наделяется соответствующими властными полномочиями. В процессе реализации последних принимаются акты, имеющие специальную форму выражения – процессуальных документов или актов правосудия. Во-вторых, судебное решение рассматривается как межотраслевой институт. В-третьих, судебное решение рассматривается как непосредственный результат рассмотрения и разрешения судом спорных гражданских правоотношений. В национальном законодательстве отсутствует нормативное определение категории «решение суда».

Состояние исследования. К наиболее фундаментальным проблемам гражданского процесса относится проблема судебного решения. Отдельные ее аспекты были предметом изучения зарубежных и отечественных ученых М.Г. Авдюкова, С.Н. Абрасова, О.Т. Боннер, Е.В. Васьковского, Т.М. Губаря, М.А. Гурвича, П.П. Заворотько, Н.Б. Зейдера, В.В. Коморова, Д.И. Полумордвинова, А.Ю. Угринева, Н.О. Чениной, Д.М. Чечота, С.М. Шака-