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The problems of ensuring right of detainee in pretrial criminal procedure

Abstract: It is considered the problems of ensuring rights of detention occurring on availability of collision between situations of law of criminal procedure are being investigated.
Some proposals are given about changing of legislation.

Keywords: detention, the rights of detention, judgment, measure of compulsion, collision, deprivation of liberty, lawfulness.

Criminal procedure of detention represents pre-trial deprivation of liberty for a short period of time with all given current notion to these signs. As fairly S.I. Yarov notes that the acuteness of the given measure of criminal procedure compulsion is determined that it is as a rule is applied by the organs of inquest (first of all of course police) and investigators, firstly without preliminary juridical and prosecutor control and then o the basis of investigations which never supposed to be complete proof of guilty of a person in committing o crime (10 p.p 11-12).

Some problems of detention let "Code of principles on defenses of all persons, submitted to detention of confinement in any kind of form" approved with the resolution of the General Assembly of YNO dated October 9, 1988? However a lot of problems are still demanded their settlement (6? P P 205-212). According to the article 7.0.39 of CPC detention as a measure of procedural compulsion are applied in the case and order contemplated in CPC, holding in a person in the places of temporary hold with a short time limit of his liberty (9.p.10)

Detention as a measure of procedural compulsion in pretrial criminal affairs is realized for the purpose of elucidation of accompliceship to crime, permission of a problem on submitting accusation, applying or changing measures of restriction. The motives of applying of given measure of criminal procedure of compulsion are accepted to be based on the objective circumstances of the affair, serving to causes for

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detention, subjective inducement of conformed official and not to let the suspected man to act in the crime as followings: a) evasion from inquiry, investigation or court; b) hampered conducting of criminal matter; c) continued his criminal activities.

In the theory of criminal trial it is adopted to detain suspected person (1;p;p 96-97). According to the criminal procedure legislation of the Republic of Azerbaijan, such conditions in pretrial criminal matters are springing up a suspicion on committing crime by a person and the availability of appropriated decision of the organs of criminal proceedings.

The moment of arresting is considered from the time of official announcement by the authorized person, that he is arrested on a concrete cause. Beginning from this moment there began to be formulated legal relation between physical person and the employee of law-enforcement agency and its deepest meaning is that the free person loses his liberty and any attempt for escaping is estimated as a measure of restriction even right up to use of weapon. The accused person has to obey to existing rules of detention, but recalibration or oppose is also suppressed by force according to the observance of rights of criminal-legal institutes on defense on absolute necessity and legitimacy of damage caused while executing of detention (5.p;p.114-127).

In practice the determination of the moment of detention is sometimes facing with certain difficulties. The official announcement to a person on his detention can't be done or done later, but in fact he will be deprived from his liberty with all the existing signs being so characteristic of it. Besides that, as it known there is some bound between depriving of liberty in detention and about compulsory investigating actions and bringing to courts.

According to the article 171.1 CPC in pretrial criminal affairs there can be used detention as a result of any suspicion in committing crime, arresting of a person for accusing and detention accused person for breaking conditions of measures of restriction.(9.p. 159).

Detention in pretrial criminal affairs can be applied before criminal affairs simultaneously with criminal and during the process of investigation of criminal affairs.

Other cases on detention and restraining of liberty in pretrial criminal affairs are illegal. Examples about illegal detention and restraining of liberty are: keeping people in official premises or other locations, detention without recording or registration; detention in administrative order; groundless on far-fetched causes and the other.

European court issued an order that the phrase "in order, put up" by law in the article 5(1) of European Convention is related to the domestic legislation and that

domestic legislation “must be appropriated the principles containing in European convention” (8 p.p.51-52)

The committee of human rights gave explanation that the term “arbitrary” in the article (9)1 of the International Pact on Civil and Political rights (IPCPR) belongs not only to “illegal” detention, but must be used rather broadly including the elements of irrelevance, injustice and unpredictedness of course (7.p.62).

It is necessary to note that according to the article 207.4 CPC before undertaking any criminal work it is forbidden to apply of the International Pact on civil and political rights (ipcpr) belongs not only to “illegal detention, but must be used rather broadly including the elements of irrelevance, injustice and unpredictedness of course (7.p.62)

It is necessary to note that according to the article 207.4 CPC before undertaking any criminal work it is forbidden to apply measure of procedural compulsion and in case of detention it causes collision.

4 a) Besides that, there exists a collision between the notions of “suspected person” an “accused” (p.91; CPC) in case of detention of a person for an accusation (3.p.49)

According to the article 91 CPC, any physical person firstly accused by the decision of the investigator court or public prosecutor is always accepted as an accused person f course. According to the article 90, CPC a physical person is considered to be as suspected person if there is a decision on his detention for being accused.

So, a person is directly getting a status of accused person when issuing an order on his detention is altered for the suspected person, whose status never corresponds to the reality.

Detention, as a result of any suspicion when committing a crime is one of the applied forms in pretrial criminal affair of an urgent measure of procedure, like detention as necessary and legal depriving the right of liberty.

Suspicion in criminal procedure is based on the doubts of the participant of criminal procedure about actions, intentions, events or appearances psychological procedures of a perception, memory, thinking and the others.

Spontaneity of implication is a result of personal perception, thinking and other psychological procedures. (1; p. 61)

According to the article 5 of European Convention, one of the situations grounding detention is the necessity of an assignment of transferring a person to the competent organs of a state for the reasoned suspicion in commission of a crime. (6; p. 237) European court resolved that suspicion, justifying a detention is reasoned when there are “facts or information, being capable to convict an independent observer that every person could commit a crime. So, any reasonable suspicion in committing crime it

is an assumption on committing criminal act by a person noted in criminal law, basing on an objective and convincing information, a perception and comprehending of which may be directly or indirectly of course.

5 a) As was noted by I.M. Abdulin, at present we are talking about two stages of obligations-perception and comprehension of information on committing of crime by somebody and the second from stages among the cases is conditional one. On the first stage, the official who is competent to realize detention perceives and comprehends such an information either directly (if a person was there when the crime was committed or he came there after committing a crime; if in the dwelling or somewhere else was discovered any obvious imprints or an instrumental of a crime and others) or indirectly (from damaged person or other eye-witness of the accident and the others)

On the second stage it is supposed either to assign this information from an official (investigator, public prosecutor, inquiry man or some other collaborators of any inquiry organ) to other person or in case of agreement of the last one with submission, suspicion may be accepted as a reasonable one.

As a rule, the second stage of communication, perception and evaluation of information is conditional, however a person assuming to commit detention must mentally oppose himself as an independent observer, a lawyer, an investigator or the judge known for their captiousness or meticulousness. (1. p.p. 170-172)

A reasonable suspicion, basing on direct or an indirect perception and comprehension of information may occur in case of arresting of a person in committing crime or finding any weapon or other things of the International Pakt on civil and political rights (IPCPR) belongs not onlyto “illeqal” detention, but must be used rather broadly including the elements of irrelevance, unjustice and unpredictedness of course (7.p.62).

It is necessary to note that according to the article 207.4 CPC before undertaking any criminal work it is forbidden to apply measure of procedural compulsion and in case of detection it causes collision crime, (blood, sperm injury or the others) concrete assertions of sufferers or other eye-witnessed people of an incident, etc.

Suspicion is considered to be reasonable in the presence of non-homogeneous of suspicion of committing crime may be applied by an investigator or other officials of investigating, by an investigator or public prosecutor, so such kind of suspicion may happen directly to above mentioned participants of criminal procedure including the way of indirect perception and comprehension of an information.

Distribution of the given kind of detention into two kinds (directly or the presence of other data) is conditional, as far as in both cases it is necessary the presence of any direct suspicion of the participants of the criminal procedure (an inquiry person, other

officials of inquest, an investigator, public prosecutor) who are competent to realize the act of detention.

A law-maker is usually dividing the condition of detention occurring in consequence of any suspicion in committing crime into two groups:

a) In case of direct suspicion(articles 148.3.1; 148.2.2;148.2.3)
b) In case of availability of other reasons(articles 148.3.1;148.3.2;148.3.3)

The conditions of detention during any direct suspicion are the followings:

- A person is directly arrested while committing a crime or after committing it;
- The sufferers or other eye-witnesses of the incident directly prove the person as committing crime;
- In body, clothes or any other items used just by a person, with his participation in his in this living quarters or in his own transport means if exact imprint of the crime is discovered (9/p.160).

The phrase of "a person, arrested when committing crime" in some cases shown in CC involves not only the action about executing of crime, but also its preparation (example: getting of fire-arm for killing a person undermining to a store working out a plan for robbery aims and the others).

A person can be caught in the place just after committing a crime when aggregation of temporary or territorial signs on finding a person directly relating to incident and the place of a crime gives a cause for suspicion relating him (For example: in case of leaving of a strangers flat, some steps from corpse and the others).

By law there shown no time on the expiry of which the information on damaged person or the other eye-witnesses of the incident is considered to be doubtful, however during its estimation it is necessary to consider peculiarity of human memory. Break of time between committing crime and detention may also happen in case of discovering the trace of a crime either in place of his habitation or in any transport mean belonging to him, if the appropriate investigative operation (search, inspection and the others) are not just held as an urgent and primary one(2;p.p 20-26).

The conditions, shown in the article 148.3 CPC by itself without any other information, giving cause to suspect a person in committing crime can't be enough for his arrest. An attempt of a person to hide from the place of incident is assumed as an active international action on his location out of the territory where he has to continue his activity connected with a situation of a crime or performing of some duties or conditions.

For the correct estimation of a person's action it, is necessary to consider that in some cases escaping from the place of an incident is specified with fear, unwillingness met in the material of criminal case.

Digression from the contact with the organs, implementing of a criminal procedure, has to be confirmed with proper documents (record of proceedings, subpoenas, notifications, telephone messages and the others witnessing on cognizance of a person about his call).

The presence of registration at a definite address doesn't mean it as a permanent address for him or having no registration doesn't mean him (her) having no any permanent place of residence. Without establishing of a person's personality can be caused a detention for him only either in case of his deliberately hiding or with different ways prevents identifying his personality which is necessary for further investigation or all the chances for it are over.

In case of one of the basis specified in the articles 148.1 and 148.2, CLP law-maker envisages the possibility of detaining a person in the course of 24 hours up to a criminal proceeding. It means that the given statutory of CLC as far as when applying the procedural figure of a suspected person appears before the criminal case and in case of absence of other materials connected with criminal prosecuting, that eliminates the presence of criminal proceeding, its participants, the sides and the others.

So, the absence of the aggregate of holding carried out actions and the adopted of procedural decisions on criminal prosecuting, stipulates the absence of criminal trial as it is just accepted to be its definition specified by the article 7.0.3 CLP.

The absence of criminal trial is eliminating the number of its participants and the sides, but the absence of criminal case eliminates the absence of enough evidence, collected with the way of holding procedural actions in the process of preliminary investigation and the judicial at trial. The absence of arguments collected in established by law, the order eliminates proving and so on and so forth and as well as the defense from any kind of suspicion, the possibility of implementation of rights of a suspected person as well as the rights of introducing any proof. There is no status of a suspected person-there must not be a suspected person. (3.p.p.66-68).

The article 148 CLC does not contain any regulation provided giving any judgment on detention, however according to the article 90.7.3 CLC, the suspected person has a rights to get a copy of a resolution on detention. In connection with it every detention has to be registered by the resolution substantiating the accepted decision, which can be carried out before the detention (if the person's data is known) or immediately afterward.

In connection with it the period of detention includes, the period of arrest and to serve out a sentence is to be fixed from the moment of depriving liberty, but not from the moment of drawing the record.

With the exception of the cases, participation in interrogations or other investigatory actions, as well as the person brought up compulsorily, is considered to be detained compulsorily by physical or psychological influence is to be deprived of real opportunity moving in an unlimited space by his own will or detained by officials being authorized realizing detention much more for indentifying his personality, which as a rule lasts for some minutes.

As regards the detention of bringing of an accusation, according to the article 150.1 CLC is accepted to be incomplete and contradictory, that of an illegal interpretation may seriously hamper its application of course.

So, according to the first word combination (a sentence) of the article 150.1 CLC, an investigator or public prosecutor has a right to detain a person for bringing an accusation if he lives in another place, or the place where he lives is unknown for that time. Unlike the article 148.3.2 CLC, the notion of "living in another place" in this case has some other meanings and must legibly be noted in law.

As the decision or detention of a person for bringing him an accusation outside the territory of the Republic of Azerbaijan has not got any juridical force and is not executed as it is not provided by international agreements (the majority of international agreements provide detention by the request received via post, telegraph and the others).

So living outside the territory of the country, according to the article 150.1 CLC, it should be understood the other administrative and territorial unit of the Republic of Azerbaijan, being too far from the place of committing crime.

As is known detention, is depriving of a person's liberty because of his living place is too far contradicts the right for liberty and the principles of justice of legal criminal proceedings. It also contradicts the right for liberty and the principles of justice and presumption of innocence for detention of a person, which the organ of criminal prosecuting cannot set up the place of his residence.

Detaining of a person for bringing him accusation in both cases can be approved reasonable if a person hides (avoids) from the organ of criminal prosecution and it is confirmed with a complex of appropriate documents, (copies of served notifications, telephone messages, reports of the employee of inquiry on an impossibility of executing of bringing him to court, explanations of the members of family, relatives, neighbours and the others).

In pretrial proceeding great attention must be paid to the problems of ensuring the rights of a detainee. Under the term of ensuring is understood as creating of necessary condition for the usage of detainees being suspected or accused on their rights providing in CLC.

The rights of suspected and accused person were enumerated in the article 90 and 91 of CLC, however in the article 153 of CLC is spoken about only on assuring rights of a person detained accordingly in the articles 147-152 of CLC.

Ensuring the rights is a duty of all officials of organs, realizing criminal proceeding, but law especially pays attention to the duties of officials of the place of temporary detention as directly realizing depriving of liberty in the form of detention. We think that the orientation in this must serve "The minimum standard rules on treating with arrested persons", adopted in 1955 by the first congress of UNO on warning of criminality and treating with law-breakers (6.p.p 213-228).

The article 153 of CLC provides ensuring of following rights of detainees:

Timely knowing the reasons of detention;

Never giving evidences about him and near relations;

- Using of defenders;
- Informing of their own detention;
- Using services of translator free of charge;
- Respecting of honour and dignity, protection of health;
- Appear in court in good time;
- For liberty (not to be detained more than certain period of time, setting up in the law;

Not to be subjected to a punishment (detention) twice for the same action.

In order to know the legality of his detention he must immediately be informed about the reason of his detention. This right of personality is provided in the article 67 of the Constitution of Azerbaijan Republic; article 9(2) of IPCPR (International Pact on Civil and Political Rights) in the principle of 10 codes of principles, article 5(2) of European Convention and other international documents (6 p 237).

Article 67 of the Constitution of Azerbaijan Republic notes: " Every person whether he is detained, arrested or accused in committing crime he must immediately be explained by the competent state organs on his rights and the reason about his detention, arrest and also for instituting him criminal proceedings against smb. (4.p.20).

Explanation of the reason of detention must be concrete and express exact legal and actual reason for detention.

In connection with it the Committee about the human rights announced that "it is not just enough informing the detainee, that he was arrested because of urgent measures of security without the essence of blaming against him (7 p.p 99 -100).

The Committee on human rights also decided that there was a violation in the article 9(2) of IPCPR in case when the detainee was informed that he was being searched in connection with the investigations about murder and during the period of

some days he was not informed about the reason of his detention, neither the circumstances of the crime, nor about the personality of a sacrifice (7.p.101).

At the same time in a such situation, European Court explained that the article 5(2) of European Convention notes that every person deprived of liberty must be "informed in a simple and familiar to him language about the main legal and actual reasons of his arrest and give him a chance if he wants to appeal about the legality of his arrest"; however it does not demand full description of all blame during the moment of his arrest (8. P.p. 192-193).

Concerning the time of notification about detention, the Committee on human rights resolved that there was a break in the article 9 92 0 of IPCPR in case when the lawyer of legal organization retained the accused person without any information about the reason of his detention (7. P. 104).

"The term" immediately is being commented rather legibly in international documents however there are some exceptions stipulating with a number of delays, for example, for a search of translators and others.

So, in case when a detained person with narcotics was informed about his accusation through the translator for the next morning after his detainment, the Committee about human rights acknowledged that is such kind of circumstances a person must be informed about the reason of his temporary depriving of liberty (7;p.105).

In connection with this European Court decided that "the interval of some hours" between the time of detention and interrogation that gives an opportunity to the detained person to understand the reason of his arrest cannot be considered as a slipping out of a temporary frame, imposing the requirements of immediateness containing in the article 5(2) (8.p.p.160-161).

Timeliness about informing the person about the reasons of his detention met in law is assured the timeliness of recording of a fact about detention and registration of a protocol and also its acquaintance with the detainee. We think that if the organ of criminal prosecution and as well as the employees of the place of temporary detention is to be charged on giving an opportunity to the detainee with his own hand to make notes in the protocol on making acquaintances with it, explaining him about his rights and also the rights of having defenders and a translator, that will ensure timeliness and completeness of drawing the record and registration of a protocol and observance of the rights of a detainee.

European Court resolved that "the right of keeping silence during the interrogation in police station and ensuring guarantee against self-exposure is universally recognized in international norm underlined in the core of legal proceedings,

according to the article 6. Giving defense for a defendant against any kind of improper force from the side of authorities, these guarantees serve for escaping of court mistakes and ensuring the aim given in the article 6" (8. P.p. 271-272).

According to the articles 13 and 16 of the Convention, all the requests about the enforcement against the application of torture or confessing one's quality have to be immediately and impartially considered by the competent authorities including the judge of course (6; p.p. 119-130).

The rights for protection, including the rights of self-protection with the help of the legal representative or using the services of defender is secured in the article 61 of the Constitution of the Republic of Azerbaijan and some other international documents.

The main parts of the given rights are timeliness of notification; the right for protection within the help of a lawyer; the right for choice of defender, the right for having free juridical aid, the right for confidential meeting with a defender, the right for getting of an experienced, competent and effective defender, forbidding oppression and intimidation of a lawyer.

The assistance of a lawyer is one of the main meanings on ensuring protection of human rights. The right for protection with the help of a lawyer is spreader in all the stages of criminal proceeding, including all kinds of detention. This right is envisaged in the article 14(3) (d) of IPCPR with a principle 1 of the main principles of the participation of lawyers, in the article 6(3)(s) of European Convention, in the article 67(1)(d) of the status of MUSS and other documents.

The right for protection is ensured with the status about obligatory participation of defender in criminal proceeding and the procedure of refused from the service of a defender according to which such kind of decision of a suspected or accused person is obligatorily fixed in a protocol within the presence of a written request given willingly with the participation of an appointed lawyer as a defender, who also signs this protocol.

In a case, if a detainee refuses from the service of a defender, but does not want to write it in the form of a written request, the fact of refusal is fixed in a protocol and signed by a lawyer or employees of the place of temporary detention.

The right of choice of a defender means that the suspected or accused man according to personal discretion determines the lawyer, whom he trusts to protect his interests.

The Committee on human rights determined that the right for choice of defender was violated when a court restricted the right of a choice with only two appointed lawyers.

Besides that, the suspected or accused person has not got an unlimited right on choosing of a lawyer if expenses are paid by a state.

According to the article 14(3)(d) of IPCPR of the principle 6 of the main principles about the participation of lawyers, article 6(3)(c) of the? European Convention, a state has to grant necessary free juridical aid (to a lawyer), when it requires the interests of justice, or a person is not able to pay for this service.

According to the principle 8 of the main principles on participation of lawyers of the principle 18 of the principles and the rule 93 of a minimum right of a person deprived of liberty has to be given enough time and condition for meeting and confidential meeting with their lawyers personally, on the phone or in a written form. Such kind of meetings or telephone talks can be held within the visibility, but not the audibility of other people.

According to the principle 6 of the main principles of the participations of lawyer, if the interest of a person is realized by the appointed lawyer, authorities should see him getting experience and competence corresponding to the character of a crime. (6;p.115)

The Committee of human rights acknowledged that if the appointed lawyer works ineffectively, the authorities have to make him fulfill his duties in the proper way or dismiss him from new one. (7; p. 200)

According to the common commentaries of the Committee on human rights, lawyers "should have chances to give them necessary advice and represent their clients in accordance with fixed professional norms and their own judgements without any restriction, impact, pressure or an improper interference by somebody. (7; p. 201)

According to the principle 18 of the Main principles on participating of lawyers, the authorities should follow in order the lawyers do not identify with their clients or their works because of protecting them.

According to the principle 19 of the Code of Principles, the rule 92 of the minimum rules and the rule 92 of the European Rule of imprisonment content, the people being in preliminary imprisonment should be given necessary chances for a contact with their family members or relatives.

These rights are subjected to restriction and control if it is "necessary in the interests to bring to justice and for the maintenance of safety and order at the institution."

According to the principle 16 (1), the Code of principles, the rule 92 of minimum rule, rule 92 of European rule about imprisonment and article 10 (2), the Declaration about disappearance, every detainee has a right to inform about himself to his family or relatives personally or through the authorities. If a person is transferred to another place of detention, it should be immediately informed about it to the members of his family or the relatives.

According to the article 36 of Vienna Convention about consular relations, the rule 38, of common minimum rules, the rule 44 of European rule on imprisonment, the article 10 of the Declaration on human rights, being no citizens of the country i which they live, the foreign nationals temporarily deprived of liberty should be granted necessary conditions to contact with the representatives of their governments and their visit.

If they are refugees or they are under protection of any intergovernmental organizations, they have a right or contact with the representatives of any appropriate international organizations.

According to the principle 14, the Code of principles, every detainee, who does not have a proper juridical knowledge of language, has a right to get information in his rights or how to use them, on the reasons of his detention or arrest and on the accusation against him in an available to hi language. He also has a right receiving any written document with a statement about his detention with indication about the time of his arrest and transfer to the place of detention, date and time forwarding him to a judge and some other authorized people and also the facts who and when he was arrested by and when it happened. He as well has a right for having a translator for assisting him in all legal proceedings after his detention and it should be free of course.

Bibliography

1. Abdulin I.M: "Detention in criminal proceeding", Kazan, Umud, 2007- p.261;
2. Agayev S.A: "Detention of a person as a suspected person and his theoretical statute", Baku, Juridical sciences and education" №18;2005;p.p 20-26;
3. "The commentary to paradox of The CLC of the Republic of Azerbaijan" (Part 1). Under the editorship of Suleymanov B.I; Baku. Tafakkur;2004;p.120;
4. Constitution of the Republic of Azerbaijan; Baku, "Ganun", 2009; p.60;
5. Nasibov K.R: "Problems of ensuring the rights of a detainee and participation of barrister in it"; Baku, Juridical sciences and education; №1, 2004, p.p 114-121;
6. "The rights of a person and the juridical collection of international documents"; Warsaw, 2001; p.289;
7. "Direction on fair court"; Moscow, "Human rights", 2003, p.289;
8. "The collection of a decisions of European Court on Human Rights", M.Atribut; 2008; p.469;
9. "Criminal-Procedural Code of the Republic of Azerbaijan", Baku;2007,p.552;
10. Yarov S.I: "Detention as a measure of compulsion", Tver; Arbalet;2007;p.266.