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Procedural coercion in production of inquiry: the problem of choice and applying

Abstract: CPC does not contain the concept of measures of criminal procedural coercion, leading to varying interpretations. The content of some norms of the CCP creates a conflict. One person cannot have a status of suspects and accused, and in connection with this, article 147.1.2 of the CPC is to be excluded.

The content of a number of the norms of the CPC create collisions. It is unable that one person possesses by status of suspected and accused and in connection with this article 147.1.2 of the CPC should be excluded.

Practice of detention of persons as suspected testifies about gross violations of legality, the rights of individual.

It is given proposals on changing of legislation.

Keywords: procedural coercion; inquiry; detention; suspected; accused; victim; delivery; preventive measures.

With adoption of new CPC of Azerbaijan Republic, its content in part of measures of the criminal procedural coercion is more full and progressive, however, from our point of view, not all theoretical and practical issues of the mechanism of their application during production of inquiry have received its complete resolution.

The law regulates procedural order of application of the measures of procedural coercion: they are applying on motivated decision of the appropriate official persons or a court, and the strictest of these can be applied only on a court decision.

Unfortunately, the Criminal Procedural Code does not contain a concept of the measures of criminal procedural coercion. In the explanatory dictionary of juridical terms under the measures of criminal procedural coercion are understood the

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powerful and administrative means of the state influence that are applied in accordance with the criminal procedure law, exceptionally in sphere of criminal court proceedings. These measures are applied by authorized state bodies and official persons under availability of the grounds and in established by law order in respect of suspected, accused and other participants of criminal process for successful pre-trial investigation (1, p. 183).

It is existed various definitions in the scientific literature on the measures of procedural coercion. The most optimal is presented a definition of the measures as regimented by the criminal procedure law the optional, powerful, enforced actions of the institutions that carry out criminal process, applied to the physical persons against their will and desires to implement the tasks of criminal court procedure. They are expressed in deprivation or limitation of personal freedom, temporarily deprivation of a position, limitation of the right of property, threat of property losses and other restriction of rights (6, p. 10).

On content and assignment the measures of procedural coercion can be divided at: 1) the measures providing detention of an individual on suspicion in crime committing; 2) the measures of restraint providing proper behavior of a person subjected to criminal prosecution and accusation; 3) the measures procedural coercion providing an order of criminal court procedure and proper execution of a sentence.

Detention of a person suspected in commission of crime is one of the widely applicable measures of criminal procedural coercion.

According to article 7.0.39 of the CPC, the detention is upkeep of a person in the places of temporarily isolation with short dated restriction of his freedom in the cases and order stipulate in the CPC. Detention is concerned personal freedom and inviolability of person which are guaranteed not only by the Constitution and also generally recognized norms and principles of international law. Consequently, application of detention requires a strict observance of legality which is supposed clear understanding of legal nature, grounds and order of detention.

In criminal process, detention can be applied only to the following persons: an individual suspected in committing of crime; person to which should be brought an accusation or accused who broken the terms of chosen in respect to him measures of restraint; imprisoned person in order to solve an issue on his enforced departure to a place of execution of sentence or other final court decision, or a change of assigned punishment to another one, and also about repeal of conditional conviction or conditional early release from punishment (article 147.1 of the CPC).

It is presented that the combination of words "to a person to whom should be brought an accusation" creates a collision between the concepts "suspected" (article 90 of the CPC) and "accused" (article 91 of the CPC). According to article 91.1 of the CPC of an accused is recognized a physical person in respect of which by investigator, prosecutor or court is taken a decision about calling as accused. According to article 90.1.1 of the CPC suspected is a person in respect of which taken a decision about his detention for bringing him accusation.

It is obtained that an individual which received a status of accused, after accepting in respect of him a decision about his detention transforms in suspected. Under this it should not forget that status of suspect and accused is not analogical. Therefore, we believe that article 147.1.2 should be excluded from the CPC.

According to the article 148.1 and 148.2 of the CPC, in case of direct appearance of suspicion of a person in commission of crime, an inquirer, and other employee of inquiry body, investigator or prosecutor can apply his detention in the following cases: if an individual caught during committing of action stipulated by the criminal law or immediately after that; if a victim or other eyewitnesses of accident directly point at this person as committed action, provided by the criminal law; if on the body of an individual, on his face, clothes or other used things, at place of his residence, on transport means established obvious traces indicating on commission of the action, provided by the criminal law.

On issue of correlation of the concepts "detention", "actual detention" and delivering, and also about legal nature of these actions in the theory of criminal process has been going a long-standing discussion. This discussion was caused with

those that detention in that kind, in which it was formulated in criminal procedure legislation, had not answer on issue, what a procedural status of actions directed on detention of suspected in committing of crime and delivering him to the competent bodies for resolution of issue about procedural order of detention.

In searches of answer on this issue are offered such definitions as "detention of persons suspected in commission of crimes" (5, p. 2). It substantiated existing of "an act of detention" (7, p. 289) and "system of activity… on detention" (2, p. 21), one of the stages of which considered delivering that included such actions as a capture, seizure of weapons and incriminating items, convoying. Other authors suggested differing detention as a measure of criminal procedural coercion and detention (actions) with purpose of delivering criminal to the competent bodies (4, p. 9). The third ones divided "physical" detention and detention as procedure (3, p. 13).

In spite of wide range of views, the theoreticians and experts agree with the opinion that some system of actions of coercive nature of foregoes criminal procedural detention which directed on deprivation of an individual suspected in commission of crime an opportunity to take cover and coercive delivering him to a department or to official which is authorized to make criminal procedural detention. These actions begin from the time of capture of such person and are completed by his delivering to department or officials who are authorized make a decision on application of criminal procedural detention or release.

Unfortunately, the practice of detention of the bodies of internal affairs shows that difference between actual detention and time of compiling of report of detention can be 3-4 days, i.e. a report of detention is compiled by an inquirer or investigator after delivering suspected person to them. Usually, before that time suspected is kept at "working office". In this case, a time of detention and calculating of duration of detention is considered to be a time of writing of detention report by an inquirer or investigator. It is presented wrong and contraries the CPC. It is quite often at the stage of pre-trial investigation in the files of criminal cases can see a warrant of suspected about that ostensibly after temporary detention by other employees of inquiry body (which actually does not writing), he was released home with "promise"

to return at time. Without doubt, in these cases suspected is not released home, and this time frame the bodies of pre-trial investigation use for collection of additional evidences in respect of suspected. Such violations of the rule of detention are gross violation of human rights.

The use of the term "victim" by a lawmaker in article 148.2.2 of the CPC is presented untrue. Since, one of the cases of application of detention by an inquirer is statements of eyewitnesses of accident which directly show at this person, who committed crime. In this case victim is an eyewitness of crime. We believe that in this case one cannot use a term "victim" together with term "eyewitness" in respect of a person who is not recognized such. Whereas on logic together with term "victim" a lawmaker could use instead of term "eyewitness" term "witness". A term "eyewitness" is conception of criminalistic than criminal procedural. In our view, in article 148.2.2 of the CPC the term "eyewitness" and "victim" would be reasonable to replace on term "person has watched an incident". This term would cover the term "victim" and "eyewitness". Exclusion the terms "eyewitness" and "victim" from article 148.2.2 of the CPC would completely solve this terminological muddle.

Under availability of other facts giving grounds to suspect a person in commission of crime, stipulated by criminal law, he/she can be detained by an inquirer, other employee of the body of inquiry, investigator or prosecutor at the following cases: while trying to escape from the place of incident or concealment from the body carrying out a criminal process; under absence permanent residence or living in another residence; if it is not established his personality (article 148.3 of the CPC).

In order to reply positive on this issue whether a person has a permanent residence it was always enough to check his residence registration. Only on this formal indication on practice it is attached importance of absence (availability) to the person a permanent residence. In spite of availability of residence registration, total combination of information, that is possessed an investigator, can confirm that a long time person does not live on this address and he constantly changes residence.

In practice, in process of detention the bodies of inquiry do not take into account such factor that quite law-abiding citizen due to change of residence connecting with transfer to other job, study etc. can be no residence registration in another town. The indicated factors should be taken into account during detention.

Under the presence of one of the grounds, provided by the articles 148.1 and 148.2 of the CPC, a lawmaker foresee an opportunity of detention of a person during 24 hours before institution of criminal case (article 148.4 of the CPC).

However, from our point of view, a lawmaker did not take account that procedural figure of suspected would be able to appear only after institution of the criminal prosecution, and accordingly the availability of materials connected with criminal prosecution, and opposite it excludes of the presence of criminal process and accordingly its participants.

Absence of combination of performed procedural actions and accepted procedural decisions is led an absence of criminal process since it is his concept, foreseen by the article 7.0.3 of the CPC. In turn, absence of criminal case excludes an absence of evidences which collected by way of performance of procedural actions (6, p. 36).

Proceeding from above stated, we believe untrue of the application of procedural detention before institution of criminal case when it does not wait delaying. Production of detention as application of suppression before institution of criminal case actually leads to liquidation of this important stage of the process and as result it destroys necessary obstacle protecting of the citizens from illegal interference of the bodies of power.

Therefore, we believe that it should change a content of the article 148.4 of the CPC and to exclude the norm about possibility of implementation of detention before institution of criminal case.

According to the article 154.1 of the CPC, the measure of procedural coercion is a measure of suppression which is chosen under production on criminal case in order to suppress illegal behavior of suspected or accused and providing of execution of sentence, and also in cases foreseen by the article 155.1 of the CPC. The measures of

suppression are the following: arrest; home arrest; pawning; signed statement; personal guarantee; guarantee of institution; handling over police control; handling over control of command; relinquish from position. According to the article 155.1 of CPC, the measures of suppression can be applied by an inquirer, investigator and prosecutor.

This provision is in collision with the articles 86.2.4, 86.4.10, 214 and 293-297 of the CPC. In the articles 86.2.4 and 86.4.10 of the CPC is pointed that under the necessity in accordance with requirements of the articles 154-156, 160, 165-172 of the CPC, an inquirer has to provide a choice of measures of suppression in respect of suspected, accepts decisions about selection, change, cancelation of the measure of suppression, performance of investigative or other measures of procedural coercion, with the exception of the decisions relating to the court competence. From the sense of considered articles follows that an inquirer possesses with powers to select the measures of suppression. However, in the general provisions of the order of inquiry production in the article 214 of the CPC and in the order of production of simplified pre-trial investigation in the articles 293-297 of the CPC these powers of an inquirer are not foreseen.

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