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Problems of application of procedural measures coercion at simplified form of investigation

Abstract: The legislation on simplified form of the investigation contains contradictions and gaps that impede solution of the tasks of criminal proceedings.

So far it has not defined a procedure for the application of the measures of restraint during the protocol form of investigation; it has not resolved issues of the delivering and other measures of procedural coercion.

It is given proposals on changing and supplements of the articles 86, 147, 148, 165, 178 и 295 of CPC.

Keywords: protocol form; measures of procedural coercion; inquiry body; guarantee; deliver; investigative actions.

According to article 154.1 of the CPC, a preventive punishment can only be applied in respect of a suspect or accused person. In addition, if it does not need to choose a preventive punishment, in this case it is taken back a written undertaking with a suspect or accused person to appear on call of bodies that carrying out criminal proceedings (article 155.5 of the CPC). Absence in this list, along with a suspect and accused person, to which are applied preventive punishment, a member of simplified proceedings - a person committing a deed, gives grounds to make a conclusion that the bodies of inquiry do not use preventive measure in protocol form of investigation.

I would like to elaborate on article 155.5 of the CPC. When it does not need to choose a preventive punishment, then it is taken back a written undertaking with a suspect or accused person to appear on calls of an inquirer, investigator, and prosecutor in charge of the preliminary investigation procedure or a court and about informing in connection with changing of his residence place. If it is not chosen a

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measure of restraint in this case it remains unclear why a written undertaking should be taken back. We believe that considered article should be regulated in details.

For example, article 112 of the Russian CPC regulates in details an obligation on appear on call and this article is considered to be by the measures of procedural coercion.

According to this article, constituted part of the obligation is information about a change of a place of residence by a person who gave a written undertaking. The question is that should a person inform to the body of pre-trial investigation about his business trip, vacation or performance of the family duties? In the listed cases it is changed a place of stay but not a permanent residence. Nevertheless, an inquirer or investigator has to have information on exact place of stay of a person called. Consequently, the CPC should be supplemented with the norm that would charge a person to inform about forthcoming changes of a place of stay. In addition to this, article of 155.5 of the CPC provides a presence of suspected or accused person on calls of an inquirer, investigator or prosecutor. It remains unclear a position of the lawmaker who did not foresee an obligation about presence to a victim, witness and other participants of criminal process. In our view, considered measure of procedural coercion should be applied not only to a suspected and accused person but to other participants of the process. The absence of a requirement to the person called a provision about “presence in time” is an omission of the article 155.5 of the CPC. Since, just a presence in time is allowed to a body of pre-trial investigation to execute necessary investigative actions.

An issue about ignore of presence on insufficient excuse has not resolved. Therefore, it should make changes which provide possible consequences of the violation of presence obligation.

It is required legislative resolution of an issue about giving a decision by the official person on application of presence commitment. The law does not provide a making of decision. In our opinion, V.A. Mikhaylov has an interesting attitude on issue considered. He believes that making a motivated decision during resolution of

question on taking of commitment on presence will be additional guarantee of legality and substantiation its application (5, p. 47).

A recognizance not to leave is the most often measure of procedural coercion on criminal cases to which the bodies of inquiry apply. The recognizance not to leave is one of the types of measures of procedural coercion which is applied in criminal process as essential and legal restriction the rights to freedom. The recognizance not to leave limits the rights to freedom that provides in article of 28 of Constitution of Azerbaijan Republic.

Article 165 of the CPC says that a recognizance not to leave is a written obligation of a suspect or accused person to be in disposal of a body performing criminal process, not to leave for other place without permission of this body, not to hide from it, not to do criminal activity, not to disturb to inquiry, investigation and court proceedings, to come on calls of an inquirer, investigator, prosecutor or a court and inform them about change of his (her) place of residence.

It should note that article 102 of the CPC of Russian Federation of 2002 expands this measure of restraint with provision "proper behaviour".

In spite of that article 165 of the CPC of Azerbaijan Republic contains a prescript of proper behaviour of accused or suspected person in respect of which is applied the measure of restraint; a term "proper behaviour" is not used in it. In our opinion, current content of this measure of restraint not only forbids leaving of residence place by a suspected or accused person but it also demands his appropriate behaviour which includes commitment not to impede to an inquiry, not to do criminal activity, to come on calls of the body performing investigation or a court. A recognizance not to leave as measure of restraint demands execution of all obligations and not only its separate elements. Therefore, we consider it necessary to make supplement in the name of article 165 of the CPC and write considered measure of restraint like "a recognizance not to leave and proper behaviour". Such definition of this article of the CPC would allow whole revealing its essence and assignment.

On its internal content a recognizance not to leave is based on psychological influence on suspected or accused person as by the fact his obligation so possibility of application more strict measure of restraint in case of its violation.

V.M. Kornukov believes that execution of a recognizance not to leave as measure of restraint is displayed in psychological influence on the mentality of suspected or accused person which in turn is based on moral and ethical characteristics of his personality and do not allow him violating taken commitment (2, p. 54). A.V. Smirnov and K.M. Kalinovsky believe that as any measure of restraint the recognizance not to leave follows all their purposes including restraint of criminal activity (7, p. 255).

Based on the literal interpretation of the norm regulating an order of application of the recognizance not to leave as a measure of restraint, a suspected or accused person has no right to leave his permanent or temporary residence.

Studying of practice showed that the bodies of inquiry performing investigation meet difficulties connected with definition and instruction in the procedural document the place which a suspected has not leave without appropriate permission. In our view when choose considered measure of restraint besides of permanent or temporary residence the inquirers should take into account in mandatory order place of registration of suspected person.

The great practical importance has a right resolution an issue on concept of absence of suspected as a basis for considering violation of accepted by him obligation.

So, on opinion of Yu. Livshits, it should avoid of the two extremes when elucidating the concept of absence. If to let accused person absent within a town or region for long time and change residence then recognizance not to leave will lose its assignment as measure of restraint. If to forbid to suspected or accused person to leave his home then it will be look like house arrest (3, p. 43).

V. Mikhaylov indicates that one should take a written undertaking from accused person not to leave his place of registered residence but the place of his actual permanent or contemporary residence. At the same time it is senseless to use a recognizance not to leave to the homeless and individuals without a certain residence (4, p. 63).

One can not ignore the fact that currently there are such categories of citizens in the Republic who have few apartments and they are living only in one of mentioned.

Accordingly, in our view, at time of taking of recognizance not to leave it should accentuate on the place of residence or place of stay but not on availability legal documents of possession that or those home. Besides, a suspected or accused person should be notified on possibility of acceptance to him more strict measure procedural coercion when accepted a measure of restraint - recognizance not to leave.

On the bases of above mentioned, we believe that a lawmaker keeps in mind a recognizance not to leave for a long time.

In accordance with article 165.1 of the CPC suspected person has no right to leave for other place without permission of a body of inquiry. Consequently, on the bases of literal interpretation of this norm, a suspected person receiving permission from the body of investigation to leave, automatically obtain the right on absence in a place which indicated in recognizance not to leave. However, speaking about possibility such permission, a lawmaker does not determine an order and form of its receiving.

We believe that appeal of a suspected or his defender to the body of investigation for permission to leave can be complete by making the following decisions: a) taking into consideration a personality of suspected, relying on the internal belief and being sure that suspected will not evade from the investigating body, an inquirer may cancel of measure of restraint; b) to satisfy a request of suspected or his defender; c) to reject the request of suspected or his defender.

For efficiency application of this preventive measure one should correctly use it on practice. One of the terms to improve efficiency is informing of a district police officer about recognizance not to leave in order to any time an inquirer addressing to the district police officer could control proper behaviour of a person (11, p. 157).

One of the discussable measures of procedural coercion is personal guarantee (art. 166 of CPC) and guarantee of organization (art. 167 of CPC). According to article 166 of CPC personal guarantee as measure of restraint is written commitment of individual persons who are vouching for appropriate behaviour of a suspected or accused including ensuring by him public order, presence on calls of a body carrying out criminal process, and performance of other procedural duties. Personal guarantor can be only credible adult citizens of Azerbaijan Republic who in advance transferred

in deposit of a court in the state bank a fine in sum of five hundreds minimal wages which will be exacted from them in case of nonperformance of accepted obligations. It should note that if guarantor accepts commitment then suspected or accused person has also to take an obligation to the guarantor about his proper behaviour. The number of personal guarantors is established by the body carrying out criminal process, within 2-5 persons. According to article 167 of the CPC, the guarantee of organization as measure of restraint concludes in a written commitment of a credible legal entity registered in compliance with legislation of Azerbaijan Republic, in that the organization is vouching for the appropriate behaviour of a suspected or accused including ensuring by him public order, presence on calls of a body carrying out criminal process, and performance of other procedural duties. This guarantee is based on its own authority and in advance transferring in deposit of a court in the state bank a sum of one thousand minimal wages which will be exacted from organization in case of nonperformance of accepted obligations.

As we see, criminal procedural law is allowed an application of the measure of restraint to a suspected person. In addition, in our opinion, application such measure of coercion to the suspected person as a personal guarantee and the guarantee of an organization is not reasonable. The first, the indicated measures are based, in the mostly cases, on mutual trust of the parties (in our matter, an inquirer, guarantor, and person who is brought to responsibility), but to the time of appearance in criminal case of a suspected person these trustful relations cannot be formed since an inquirer does not have sufficient information that characterizes as a personality of suspected so his criminal action; the second, application of the measures in form of a personal guarantee and the guarantee of an organization requires a certain preparatory work at that time an availability of a suspected person as a participant of criminal process has usually temporary, short-term character.

In considered articles are reminded unclear also the concept of a guarantor as a person or organization that are trustworthy. However, a lawmaker does not make clear the criterions to determine the level of trustworthy. Non adjustment of this norm excludes its unambiguous interpretation as from theoretical point of view so practical one. It can be supposed that criteria “trust” will be determined by a person who

carrying out pre-trial investigation, which will be based on inner conviction. In this case, it is difficult to say what easer is: to determine criteria of trust to the physical person or organization.

According to the articles of 166.1 and 167.1 of the CPC the guarantors must guarantee “appropriate behaviour” of a suspected or accused person. We believe that usage of the term “appropriate behaviour” is wrong. Since, it is not clear, how behaviour can correspond to something. In our view, it should be used term "proper behaviour” instead of “appropriate behaviour”. It would correspond to the point of the considered articles.

We think that legislative fixation of the guarantee of an organization as measure of procedural coercion is not sufficient measure of restraint. Substantiating our opinion, the first of all, we believe necessary to note that capacity to provide the aims of guarantee is the main requirement to a guarantor. However, in case of application of the guarantee of an organization as measure of restraint, it will not make sure that all employees know their colleague (suspected, accused) well and enable to exert a moral influence as for example, can it make relatives, friends or neighbours in case of application of personal guarantee.

Public guarantee received a critical assessment of the Soviet scientists also. Thus, M.S. Strogovich expressed opinion that at the guarantee of an organization the responsibility of a guarantor is lost between its members or appropriate department and as result it is actually no any responsibility comes (8, p. 153-154).

In spite of that a lawmaker obliges to a guarantor to transfer a certain funds to the deposit of a court in the state bank as a guarantee of performance of its obligation. However, in actually nonperformance of the obligations is only come to the loss of money of a guarantor.

We think that one more argument against the public guarantee is that at the bodies of pre-trial investigation for the guarantee of an organization is addressed an administration of the organization. But in this case these managing employees can address at the bodies of pre-trial investigation as personal guarantors. Since, it can be supposed that if the part of employees are not agreed to guarantee for the proper behaviour of their colleague (suspected) then the appeal does not have a sense.

It should also note that according to the results of questionnaire among the employees who carry out pre-trial investigation, prosecutors and judges are shown that the guarantee of an organization as a measure of restraint was not applied by them at all.

On the basis of above said, we believe that the article 176 of the CPC should be excluded from the law: the first, it is not actually applied due to difficulty of the procedure; the second, as measure of criminal procedural restraint has not justified itself.

The concept "other measures" of the procedural coercion was added at the criminal process more than forty years ago. Traditionally, to these measures were related the most parts of the forced measures that were provided by the criminal procedural legislation, except of the measures of restraint. A number of scientists include at the list of other measures of the procedural coercion such investigative actions as inspection, collection, search, testifying and other (1, p. 67; 10, p. 27). Our lawmaker also went to this way; he included forced production of the investigative actions (art. 177 of CPC) at the Chapter 28 of the CPC (Application of other measures of the procedural coercion in the criminal process).

However, from our point of view, this provision of the law is wrong.

Production of the investigative actions is directed on receiving of the evidence, whereas application of other measures of the procedural coercion does not pursue such goal. They are applied for provision established by the law of an order of the criminal proceedings and proper execution of a sentence. They have various basis, terms and order of application and production.

I.L. Petrukhin is also considered an opponent of classifying of the forced investigative actions to other measures of the procedural coercion. He emphases that "identifying of a number of the investigative actions on collection of the evidences with the measures of procedural coercion is wrong because the each of such action is realization of a combination of the norm, forming an institute of the criminal procedural right, whereas procedural coercion is an existence of sanction of the norm of law, or a preventive measure that is applied without blame, for the purpose of avoidance of the expected illegal actions of the participants of a process" (6, p. 51).

The similar opinion is kept also A.A. Chuvilev who believes that “the investigative actions do not lose it content and do not become by the measure of procedural coercion even if a person, carrying out a pre-trial investigation, forced to resort to coercion (to break locks of the warehouses during search, to undress a suspected person with the use of force etc.)” (11, p. 46, 47).

It can be assumed that it basing on above mentioned opinions the Russian lawmaker does not include a procedure of performance of the forced investigative actions at the Chapter 4 of the CPC of the RF (Measures of the procedural coercion). We think that articles 176-177 of the CPC should be excluded from the law, and an order of execution of the forced investigative actions to include at the articles on the order of implementation of the separate investigative actions.

One of the other measures of the procedural coercion is a deliver that is applied not only to the suspected and accused persons but also to other participants of criminal proceedings. The deliver is a restoration measure of the criminal procedural coercion consisting at forced deliver of the participants of a process, which will not come on respectable reason, to the bodies of investigation or a court for participation in procedural actions.

The deliver is laid in a forced deliver of a person at the body carrying out a criminal process, and also in forced providing his participation in production of the investigative or other procedural actions (art. 178 of the CPC).

According to article 85.4.6 of the CPC an investigator is authorized to entrust to an appropriate body of inquiry a performance of detention, forced delivering and other measures of the procedural coercion, an also to demand an assistance from the body in production of investigative or other procedural actions. In spite of that a lawmaker classifies a forced deliver to other measures of the procedural coercion and in compliance with the article 86.4.10 of the CPC authorizes an inquirer with the rights on choice, change and repeal of other measures of the procedural coercion. But on understandable reason unlike the powers of an investigator that are in the article 85.4.6 of the CPC, the law does not authorizes an inquirer with separate powers to entrust to a body of inquiry to carry out a forced delivering. An importance of application this measure of the procedural coercion is especially needed at time of

performance by the inquirer urgent investigative actions on criminal case. It is unclear the reasons on which a lawmaker did not authorized an inquirer with the powers of application of forced deliver.

In a number of cases it is become a problematic the forced deliver of participants of a process, which are evaded from the presence to a body of the pre-trial investigation. The sample of which can be objections living in home individuals against entering there of the employees of a body of inquiry to which are entrusted an execution of a deliver decree. It is obviously, that criminal and procedural law should have the means which would allow realistically and efficiently resolving a task of the forced delivering to an inquirer. In connection with this, it is presented necessary to supplement the article 178 of the CPC and to provide in it the right of an inquiry or pre-trial investigative body to submit appeal in a court about permission to enter at home for the forced delivering a suspected, victim and other participants which are evaded from the presence.

We believe it necessary also to make changes in the article 86.4 of the CPC and to authorize an inquirer with powers to entrust to an appropriate inquiry body performance of the forced deliver. This allows an inquirer on the first stage of investigation of criminal case with purpose of quick disclosure of crime to interrogate of the participants of a process which possess of importance information and hiding from the inquiry body or during production of other necessary investigative actions.

As we noted earlier, initiating criminal proceedings at the form of simplified pre-trial production, an inquirer cannot apply not only the measures of procedural restraint and coercion in respect of an individual committed deed that is provided by the criminal law, but even he cannot take a written undertaking about timely presence in the bodies of inquiry. Though, according to article 86.4.10 an inquirer is authorized to right of application the measures of procedural coercion, but an order of performance of simplified pre-trial production on obvious crimes that do not have a great public threat, it does not provide application of the measures of procedural coercion (art. 295 of the CPC). It is substantially negative moment of absence of an application procedure of the measures of procedural coercion is that a person who committed criminal deed can hide from an inquiry, to continue his criminal activity,

to interfere with a preliminary investigation, threatening and exerting a pressure on a victim or witness.

Evasion of persons committing criminal deed on the practice lead to that the inquirers motivating with an absence of the institute of the measures of procedural coercion in a protocol form of investigation, submit an appeal to a prosecutor about initiation of criminal case in connection with appearance of necessity in performance of investigative actions, which impossible to make in frame of simplified pre-trial procedure (art. 294.3 of the CPC). Institution of the criminal cases on the crimes that do not have a great public threat, artificially increase workload of the investigative bodies. It leads to that a procedure of a protocol form of investigation is become ineffective and this, in its turn, makes senseless of an existence of this kind of investigation.

Above stated confirm necessity of an establishment of the institute of accusation in a simplified form of the pre-trial production that would allow to the bodies of inquiry to apply the measure of procedural restraint in respect of the individuals against of which are initiated a simplified production.

We think that for the effective application of the measures of procedural coercion by the bodies of inquiry it is necessary to make the following changes and supplements in the CPC:

1. Article 86.4.10 of the CPC shall read as follows: an inquirer carries out the following rights in the cases and in order that is provide by the present Code: makes resolution on detention, election, change, cancellation of the measures of restraint, performance of other procedural coercion except decisions which are related to the court competence, *authorize to an appropriate body of inquiry a performance of forced delivering.*

2. On the reasons stated in a descriptive part of the paragraph, to exclude article 147.1.2 from the CPC.

3. In article 148.2.2 of the CPC the terms “a victim or other eyewitnesses” to change on the term “*the persons who observing an incident*”.

4. Article 165 of CPC to add with word combination “proper behaviour” and name it “*a recognizance not to leave and proper behaviour*”.

5. To supplement the CPC with article 165.3 as follows: "*Suspected, accused, his defender or representative has right to state motivated verbal or written appeal for obtaining a permission on absence in a place of permanent or contemporary residence, stipulated in a recognizance not to leave, with indication of a specific place and time of staying at the period of his absence. An inquirer or investigator makes a resolution on satisfaction or refusal this appeal and the judge issues a ruling in which are indicated the time of absence of a suspected or accused person and place his stay in that period or motives of refusal in satisfaction of the appeal*", and also with article 165.4 as follows: "*Under election of the measure of restraint in kind of a recognizance not to leave and proper behaviour an inquirer, investigator and judge should make clear to a suspected or accused individual: the rules of application a recognizance not to leave and proper behaviour to this person; restrictions which are applicable to him; the rules of proper behaviour*".

6. To exclude article 155.5 of the CPC and adopt in the Chapter 18 "*Obligation on presence*" of the CPC a separate article 178-1 "Obligation of presence" as follows:

Article 178-1.1 *For the provision of a presence to an inquirer, investigator, and prosecutor or in court, it could be taken a written obligation on presence from a witness, civil plaintiff, civil defendant, expert, specialist and interpreter who have the certain residence. The inquirer, investigator, prosecutor or court issues a decision about taking of the presence obligation that contains indication on the basis of application of this measure of procedural coercion.*

Article 178-1.2 *The presence obligation is a commitment of the persons indicated in the article 178-1.1 of the present Code to be timely on calls of the inquirer, investigator, prosecutor and a court, and in case of forthcoming change of a residence place or place of stay to inform them about that. Upon taking of obligation it should be explained to a person the consequences of his violation.*

Article 178-1.3 *In case of violation of the obligation it can be applied a measure of restraint to a suspected, accused person. Other participants violating an obligation can be subjected to forced deliver that provided in article 178 of the present Code.*

7. In article 166.1 of the CPC a term "appropriate" behaviour of suspected or accused to exchange on a term "proper" behaviour of suspected or accused.

8. To exclude article 176 (Forced measures applicable for production of the procedural actions) and 177 (Right to forced production of the investigative actions) of the CPC and their content to supplement to the articles in Chapters 19-35 of the CPC which regulate a production of separate investigative actions.

9. To include in procedure of the protocol form of investigation (art. 295 of CPC) the possibility of applying of the measures of procedural coercion and reads article 295.3 of CPC as follows: In case if indicated in article 295.2 of the present Code will be insufficient for performance of court proceedings than in purpose of collection of necessary evidences, during simplified pre-trial production on obvious crime that do not have a great public threat, the inquirer can carry out urgent investigative actions that stipulated in article 86.4.2 of the present Code *and if necessary to apply the measures of procedural coercion.*

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