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PROCESS OF DETENTION IN UKRAINIAN CRIMINAL PROCEDURE

Дарія Лазарева, Наталія Резцова. ПРОЦЕСУАЛЬНА СУТНІСТЬ ЗАТРИМАННЯ У КРИМІНАЛЬНОМУ ПРОЦЕСІ УКРАЇНИ. Досліджено сутнісні характеристики затримання уповноваженою службовою особою як кримінального процесуального інституту. Сформульоване авторське визначення поняття затримання уповноваженою службовою особою.

Зазначено, що одним із недоліків досліджень окресленої вище проблематики є намагання окремих науковців жорстко «прив'язати» сутність затримання уповноваженою службовою особою до приписів кримінального процесуального закону. Водночас головні сутнісні риси будь-якого правового явища не можуть визначатися виключно на основі приписів законодавчих норм, радше навпаки – виходячи із сутності правового явища повинно формуватись його нормативне вираження. Відтак, законодавча регламентація затримання уповноваженою службовою особою не може розглядатися як безапеляційна основа для визначення його сутності. Первинним в цьому аспекті є пізнаване на рівні теоретичного мислення змістовне наповнення вказаного інституту, яке виражає головне, основне, визначальне в його предметі. Лише на підставі цього можна вести мову про те, наскільки адекватно процесуальні норми відображають дійсну сутність затримання уповноваженою службовою особою.

Авторами запропоновано розглядати застосування цього заходу забезпечення кримінального провадження як форму належного і невідкладного реагування уповноваженими службовими особами на факт виявлення злочину та отримання первинної інформації, яка дає можливість обґрунтовано підозрювати певну особу у його вчиненні. Неприпустимість зволікань із затриманням в умовах безпосереднього виявлення уповноваженими службовими особами підстав для цього об'єктивно позбавляє можливості для попереднього звернення до слідчого судді із відповідним клопотанням. Саме тому при законодавчому визначенні процесуальних підстав затримання уповноваженою службовою особою без ухвали слідчого судді їх необхідно формулювати таким чином, щоб у конкретній життєвій ситуації вони могли бути встановлені лише на основі очевидних фактів, які повинні сприйматися суб'єктами затримання особисто в момент вчинення (замаху на вчинення) злочину або безпосередньо після цього.

***Ключові слова**: затримання за підозрою у вчиненні злочину, уповноважена службова особа, заходи забезпечення кримінального провадження, процесуальний примус.*

Relevance of the study. Scholars and practitioners are most certain that the procedure for detaining a person on suspicion of committing a criminal offense should be a part of criminal procedural regulations. As of today, the norms of the active Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) determine the grounds, conditions and procedure for detention by an authorized official, the rights of the detainee and the responsibilities of the subjects of procedural activities for the purpose of ensuring them. Recognizing the procedural nature of the above-mentioned type of detention implies solving the scientific problem of defining it as an institution of criminal procedure. Notwithstanding, it should be noted

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that solving the specified issue is complicated due to certain factors such as: the polysemy of the term «detention» in legislation, procedural science and law enforcement practice; the ambiguity of legislative regulations which indicate the procedural nature of detention on suspicion of committing a criminal offense; the differences in scholars' opinions on the given matter. Under these circumstances, comprehensive analysis of the essential characteristics of the detention process by an authorized official is required.

Recent publications review. Certain aspects of the stated issues were studied by Alenin Yu.P., Honcharenko V.H., Hroshevyi Yu.M., Dubynskyi A.Ya., Kaplina O.V., Kovalenko Ye.V., Lukianchykov Ye.D., Mykhailenko O.R., Nor V.T., Pysmennyi D.P., Pohoretskyi M.A., Udalova L.D., Shylo O.H., Shumylo M.Ye. Research papers of the above-mentioned scholars have defined theoretical grounds and key basic premises for correct understanding of the procedural nature of detention by an authorized official.

Herewith, there are several research papers aimed at defining the nature of the notion under examination by Bilousov O.I., Veretennikov I.A., Hryhoriev V.M., Huliaiev A.P., Makarenko Ye.I., Malyarova V.O., Melnykov V.Yu., Olshevskyi A.V., Popkov N.V., Retiunskykh I.O., Smokov S.M., Tertyshnyk V.M., Chernova A.K. Nevertheless, despite processualists' considerable attention to this issue, to date, it does not have a conclusive and established solution. Moreover, many of the previously developed theoretical provisions require reconsideration with regard to the requirements of the CPC of Ukraine of the year 2012.

This research paper **is aimed at** studying the essential characteristics of the detention process by an authorized official as an institution of criminal procedure which will serve as a basis for defining the above-mentioned type of detention.

Discussion. One of the downsides of studying the indicated issues is the attempts of many scholars to «tie» the essence of a detention by an authorized official tightly to regulations of the criminal procedural law. Nevertheless, we are convinced that the main essential features of any legal phenomenon cannot be defined solely based on the regulations of the legislative norms, rather on the contrary – a regulatory notion should be formed based on the essence of the legal phenomenon. Thereby, legal regulation of a detention by an authorized official cannot be considered as an dogmatic basis for determining its essence. The primary part of this aspect is the content of the mentioned institution which is studied through theoretical thinking and expresses the main, fundamental and defining parts of the subject. Based on this alone, we may speak about how adequately the procedural regulations reflect the actual essence of the detention by an authorized official.

The foundation for correctly defining the nature of the detention process by an authorized official as an institution of criminal procedure is the meaning of a more basic, generic term «detention». The common meaning of the word «detain» means keeping, restraining a person at a certain place for some period of time; forcefully stopping a person for a certain purpose [part 1 art. 359]. Should the given lexical meaning be extrapolated to the legal sphere, detention in its most common form may be defined as legally significant actions of subjects who are legally granted a appropriate authority, resulting in legitimate custodial restraint and personal integrity of a person for public benefit.

The restrictive nature of detention inevitably leads to state coercion during its application. The indicated characteristic has naturally formed an understanding of detention as a measure of procedural coercion. In accordance with the established viewpoint in legal science, criminal procedural coercion comprises a set of actions of psychological, physical, organizational or material influence associated with the restriction of subjective civil rights' restriction of participants in criminal proceedings, which are implemented through the application of statutory coercive measures by authorized officials, which consist of inducing the execution of procedural duties, termination of illegal activities, prosecution [part 2, art.149].

Nevertheless, as was aptly noted by Kornukov V.M., criminal procedural coercion represents a broad and multifaceted phenomenon. In some instances, it is the consequence of a violation of or non-compliance with the criminal procedure and serves as an accountability, in others, it serves as means of law enforcement and restoration of order, in the third instance, it is used as a prevention of certain actions [part 3, art. 8-9]. Due to specificity, criminal proceedings are primarily characterized by coercion, which has a special place and is pivotal to achieving the objectives of criminal proceedings. Implementation of many institutions of criminal procedure is associated, to a greater or lesser extent, with applying coercion for the purpose of eliminating the existing or potential obstacles. In this regard, the phrasing «means of procedural coercion» implies a wide range of procedural actions and decisions. Correspondingly, re-

garding detention solely as means of procedural coercion does not convey its procedural nature entirely, as in this case, the applied substantive characteristic has an overly broad sense.

In accordance with art. 131 of the CPC of Ukraine, detention of a person is one of the means of ensuring criminal proceedings. It should be noted that the category «means of ensuring criminal proceedings» is novel for Ukrainian domestic criminal procedural science and therefore, it is underdeveloped. Research papers express the opinion that the above-mentioned concept is identical to the measures of procedural coercion [part 4, art.163; p.5, art. 68; p.6, arts.102-103]. While not denying the evident fact that the application of measures to ensure criminal proceedings is directly associated with coercion, we nonetheless consider that it would not be entirely correct to use the indicated concepts interchangeably. In our opinion, the phrasing «measures to ensure criminal proceedings» used by the legislator is narrower compared to the more general concept of «measures of procedural coercion» and it more accurately reflects the purpose of the institutions covered by Section II of the CPC of Ukraine.

According to the Dictionary of Ukrainian Language (DUL-11), to ensure means «to create reliable conditions for implementing something; to guarantee something» [part 1, art. 18]. The legally defined purpose measures to ensure criminal proceedings is achieving the effectiveness of the latter. Thereby, it can be argued that means to ensure criminal proceedings through physical, psychological, material or organizational influence on the behavior of its participants are aimed at creating suitable conditions under which such proceedings are effective at achieving their objectives.

Despite the unified legal nature of the measures in question, each of them, by virtue of its specificity, facilitate achieving the objectives of criminal proceedings differently. The above-mentioned fully applies to the detention of a person. Each type of detention provided for by the active criminal procedure legislation, being associated with short-term custodial restraint of a person (which is a collective generic feature), differs in the area of implementation, grounds, purpose, executives and category of persons to whom it can be applied. On the basis thereof, detention by an authorized official should be regarded as a separate type of measures to ensure criminal proceedings, which has a special place in the structure of the purposefulness of criminal proceedings.

As a general rule, measures to ensure criminal proceedings are implemented based on the decision of the investigating judge, which is quite logical, taking into consideration how much interference is caused by personal rights and interests during the implementation of such measures. Therewith, detention by an authorized official is one of the cases where there are always exceptions to the rule. In order to understand the reasons for a legislator to allow albeit short-term, but still custodial restraint of a person without prior judicial control, it is imperative to take into account the the area of implementation of the type of detention in question.

Daily activities of of state law enforcement agencies are inseparably intertwined with various life situations caused by illegal actions of individuals. Nonetheless, it is not uncommon for law enforcement officials in their line of duty to encounter a person in the process of committing, attempting to commit or upon committing a criminal offense. Furthermore, it is possible to obtain data that will indicate the person involved in committing the criminal offense during the prompt response to the crime-related information. The source for such data would be the information received from the person affected, witnesses, clear evidence and traces at the crime scene, on the body or clothing of a certain individual.

A distinctive feature of the described situations is that the factual circumstances are evident, typically occur suddenly (conditionally) and are personally witnessed by law enforcement officials at the time of committing (attempting to commit) a criminal offense or immediately thereafter. Under the above-mentioned conditions, the functions assigned to the latter cause the urgent need to stop or prevent illegal activities, preventing the subject suspected of the crime from escaping. Implementing this task is possible only by means of psychological and/or physical influence on a person suspected of committing a criminal offense, which results in their custodial restraint, restriction of personal security, which is nothing but a detention on suspicion of committing a criminal offense in legal terms. In practice, depending on the specific situation, detention can be implemented both by verbal means (verbal order to stay put, stop certain actions, etc.) and by the use of physical force, special means or firearms.

On the premise of the above-mentioned, it is completely lawful to consider the application of the indicated measure to ensure criminal proceedings as a form of appropriate and urgent response by authorized officials to the detection of a crime and obtaining primary information that allows to reasonably suspect a certain individual of its commission. The ineligibil-

ity of delays in detention in the conditions of direct detection of the grounds for detention by authorized officials impartially deprives them of the opportunity for a preliminary appeal to the investigating judge with a corresponding petition. This is precisely why, when legally defining the procedural grounds for detention by an authorized official without the approval of the investigating judge, it must be phrased in such a way that in particular situations they can be established only on the basis of concrete evidence that should be perceived by the subjects of detention at the time of committing (attempting to commit) a criminal offense or immediately thereafter. Any indirect assumptions about the involvement of a certain person in the commission of a crime, which were formed within a certain time period after its commission, regardless of the degree of their reliability, cannot be considered as solid grounds for detention in the absence of the decision by the investigating judge.

The urgent nature of the detention by an authorized official determines another essential feature of this procedural measure, which is that it can be implemented before the start of the pre-trial investigation. The criminal procedure legislation requires an investigator or prosecutor to enter information into the Unified Register of Pre-trial Investigations (hereinafter referred to as URPI) and to initiate an investigation immediately, within 24 hours after filing a complaint, notification of a criminal offense or detection of the crime via any source that may indicate the commission of a criminal offense. Onward, the pre-trial investigation is considered to be open (P.1-2 art.214 of the CPC of Ukraine). Meanwhile, in practice, detention by an authorized official on suspicion of committing a crime quite often occurs simultaneously with receiving relevant information or shortly thereafter. The need to respond as promptly and urgently as possible to criminal acts against the background of a minimum time gap between their detection and obtaining factual data, which evidentiate the involvement of certain persons, may quite natural»entering the relevant information into the URPI.

The Criminal Procedure Code does not does not directly ban detention by an authorized official before entering information into the URPI. Thereby, it is appropriate to agree with the opinion that implementing an actual detention of a person suspected of committing a criminal offense and delivering them to the body of the pre-trial investigation without an appropriate decision of the investigating judge and before entering information into the URPI about opening of criminal proceedings is quite legitimate [part 7, art. 180]. However, to avoid misunderstandings on this issue in both procedural theory and law enforcement practice, it would be appropriate to provide for a corresponding opportunity in Part 3 of Article 214 of the CPC of Ukraine similarly with the crime scene examination.

One of the important aspects of comprehending the nature of the detention type in question is determining the range of subjects of its implementation. In this context, there is a necessity for interpreting the legislative phrasing»authorized official». It should be emphasized that an authorized official may act as a subject of detention both with the decision of the investigating judge, the court, and without it. This conclusion results directly from the content of Article 191 of the CPC of Ukraine, which is entitled «Actions of authorized officials after detention on the grounds of the decision of the investigating judge, the court on permission to detain», Part 6 of the above-mentioned article, as well as Part 3 of Article 207 of the CPC of Ukraine contain a fairly concise explanation: An authorized official is «a person who is legally entitled to carry out detention». In fact, the legislator confined themselves to this explanation, not resorting to establishing a complete and exhaustive list of categories of officials authorized to carry out detention, and in this regard, referring to other legislative acts regulating the procedure of law enforcement agencies in Ukraine. Based on this, it can be argued that the subject of detention is an official of the law enforcement agency of Ukraine, who is entitled by a certain law to detain persons suspected of committing criminal offenses.

Despite the fact that an authorized official may act as a subject of both types of detention, the official's role in the first and second cases will differ. In order to clarify this term, we should elaborate on the structure of the concept of «a subject of the procedural detention». Depending on the context, the mentioned subjects may be: a) a subject of procedural activity who initiates the detention; b) the subject of procedural activity, vested with the authority to make a decision regarding the application of detention c) the subject of procedural activity, who is the direct executor of the decision on detention.

In the case of detention on the ground of a decision of the investigating judge, the distribution of roles is as follows: the investigator, the prosecutor act as the initiators of the detention, apply to the investigating judge with a request for a detention permit, commission law enforcement agencies to carry it out or do it unassisted; the investigating judge decides on the

application of detention based on the results of consideration of the investigator's or prosecutor's petition; the authorized official acts as a direct executor of the decision to detain a suspected of committing a criminal offense on behalf of the investigator or prosecutor.

In turn, a prominent feature of detention on suspicion of committing a criminal offense on the grounds provided for in Part 1 of Article 208 of the CPC of Ukraine is that its only subject is an authorized official meaning that they independently (without the participation of the prosecutor, investigator or investigating judge) initiates the detention, makes the decision regarding its application and directly implements such a decision. Moreover, as it was aptly noted by Nykonenko, M.Ya., neither the investigator, nor the prosecutor in their procedural status may act as authorized officials who are legally entitled to implementing a detention of that kind. This conclusion is drawn from a grammatical interpretation of the provisions in Part 3 of Article 208 of the CPC of Ukraine, which states that an authorized official, investigator and prosecutor are listed separately as independent subjects, not connected by the authority to carry out a detention, as well as Article 210 of the CPC of Ukraine, whose content allows us to conclude that an authorized official who carries out the detention is absolutely unrelated to the pre-trial investigation body [part 8, art. 85-87].

To support the above-mentioned argumentation, we add that the claim such procedural figures as an investigator or prosecutor cannot act as subjects of detention on the grounds provided for in Part 1 of Article 208 of the CPC of Ukraine, conditioned by the very nature of this detention. As it has been noted above, the specificity of such a detention is that the grounds for its implementation are established as a result of personal perception of the relevant circumstances of the crime by an authorized official, which clearly reveal its commission by a certain person. In this case, the authorized official becomes a potential witness and may further be questioned in criminal proceedings about the crime on suspicion of committing which a certain person was detained. Consequently, implementing the detention without the decision of the investigating judge or prosecutor eliminates the possibility of their participation in the criminal proceedings in their procedural status.

Thus, a precondition for detention by an authorized official is the latter having a reason to suspect a certain person of committing a criminal offense, which is based on evident facts that were personally perceived by the authorized official at the time of committing (attempting to commit) a criminal offense or immediately thereafter. In the case of a prompt response to a crime, the authorized official of time independently assesses the situation in a short period to decide whether there are grounds for detention provided for by the criminal procedure law, makes an appropriate decision and physically seizes the suspect. In this case, the authorized official is not a subject of procedural activity, who is entitled to conduct a pre-trial investigation, and therefore there is an objective need to verify the initial suspicion by the subject that has the appropriate procedural status, namely investigator or prosecutor. In this respect, the requirement of Part 1 of Article 210 of the CPC of Ukraine to deliver the detainee to the nearest unit of the pre-trial investigation body appears to be quite logical.

The generalization of the above-listed features of detention by an authorized official enables us to distinguish its special purpose, comprising of the following elements: 1) immediate prevention of the commission of a crime or termination of a crime being committed; 2) preventing the escape of a person caught at the time of committing (attempting to commit) a criminal offense or immediately thereafter; 3) delivery of a person suspected of committing a crime to the nearest body, whose competence includes the verification of the said suspicion by conducting a pre-trial investigation.

The formulation of the purpose of detention by an authorized official enables us to distinguish it among other criminal procedural institutions, including precautionary measures. If detention is considered as a temporary precautionary measure, as required by Part 2 of Article 176 of the CPC of Ukraine, it is logical to assume that the purpose of its implementation should be equal to the purpose of precautionary measures, and the adjective «temporary» in this context will mean short duration, limited to the time required for a court to make a decision regarding a «permanent» preventive measure. However, the indicated consistent pattern does not appear in relation to the detention by an authorized official.

The purpose of precautionary measures, which is evident from the content of Part 1 of Article 177 of the CPC of Ukraine, is to ensure that the suspect, accused carries out the procedural obligations as well as to prevent their attempts at improper procedural conduct, whose typical forms are given in this procedural regulation. While having certain formal similarities with precautionary measures, particularly custodial restraint; the restriction of the rights and

freedoms of a person suspected of committing a criminal offense, inherent to the detention by an authorized official, has a completely different purpose than that referred to in the said Part 1 of Article 177 of CPC of Ukraine. The main objective of this type of detention is to seize a person in the process of committing, immediately upon committing a criminal offense, eliminate their every opportunity to escape and hand them over to the pre-trial investigation authorities, that are responsible for conducting criminal proceedings on this fact. Stating that the detention by an authorized official is aimed at ensuring proper procedural behavior of the suspect would not be entirely correct, as at the time of making the decision to implement it, it is objectively impossible to identify and assess the risks that would give the reason to believe that such behavior would really be of an improper nature. In other words, at the moment of the detention being implemented, the authorized official cannot and should not try to make any assumptions about the further procedural behavior of the detainee: proper or improper. The decision regarding the specified issue is made after the detention within the limits of the further pre-judicial investigation. Nevertheless, the said detention does not necessarily have to trigger the initiation of a precautionary measure by default, as: firstly, in the course of the investigation, the initial suspicion may not be confirmed, and secondly, there may not always be grounds for such a decision due to the absence of risks of improper behavior on the part of the suspect.

Taking into account the above-mentioned, a temporary detention can only be considered detention on the basis of a decision made by the investigating judge, as the mechanism of its implementation involves assessing the risks of improper procedural conduct of the suspect before applying for «permanent» preventive measure in the form of custodial restraint. As for the detention by an authorized official, from our viewpoint, this procedural institution is a separate type of a set of measures that are aimed at ensuring criminal proceedings, whose purpose does not allow it to be characterized as a temporary measure of restraint.

Thus, the generalization of the above-mentioned features of detention by an authorized official enables us to make a **conclusion** regarding the nature of this institution of criminal procedure, in the form of the following definition: «Detention by an authorized official is a measure to ensure criminal proceedings, which is applied without the approval of the investigating judge by a law enforcement officer vested by a special law with appropriate powers against a person reasonably suspected of committing a criminal offense based on evident facts and circumstances perceived by an official of the law enforcement agency at the time of committing (attempting to commit) a criminal offense or immediately thereafter; and is expressed in the implementation of procedural action associated with the restriction of freedom and personal integrity of such a person in order to prevent or stop their illegal actions, prevent them from escaping and deliver them to the nearest body, whose competence includes the verification of the said suspicion by conducting a pre-trial investigation».

The proposed definition of the procedural nature of detention by an authorized official is the foundation for further scientific analysis of the grounds and procedure for its application.

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Abstract

This research paper presents the analysis of essential characteristics of the detention process by an authorized official as an institution of criminal procedure. The author's definition of the concept of detention by an authorized official has been formulated.

The authors have proposed to consider the use of this measure to ensure criminal proceedings as a form of proper and immediate response by authorized officials to the discovery of a crime and obtaining primary information that allows to reasonably suspect a person in its commission.

***Keywords**: detention on suspicion of committing a crime, an authorized official, measures to ensure criminal proceedings, procedural coercion.*

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MODERN STATE AND SIGNS OF ILLEGAL ACTIVITY IN THE FIELD OF TRANSPLANTATION

Оксана Мислива. СУЧАСНИЙ СТАН ТА ОЗНАКИ НЕЗАКОННОЇ ДІЯЛЬНОСТІ У СФЕРІ ТРАНСПЛАНТАЦІЇ. Визначено основні специфічні ознаки незаконної діяльності у сфері трансплантації. Надано характеристику протиправної діяльності у галузі трансплантації, зокрема, з урахуванням сучасного стану та нових форм протиправних дій у цій сфері, її суб'єктам та їх рольовому розподілу. Наведено кримінологічні особливості протиправної діяльності в галузі трансплантації, які обгрунтовано на емпіричному матеріалі. Особлива увага приділяється сучасним методам вчинення розслідуваної злочинної діяльності – вербуванню із застосуванням телекомунікаційних та інформаційних технологій.

Бурхливий розвиток технології трансплантації на початку XX століття призвів до появи нового типу соціально небезпечної протиправної діяльності, яка набула значного поширення через

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