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Erroneous Detention as a Type of Fundamental Mistake in Criminal Procedure

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The article considers one of the types of fundamental mistake – erroneous detention of the suspect or the accused. The article proposes the legal mechanism of avoidance of such mistakes in the criminal procedure.

Keywords: fundamental mistake, detention, matter of law, matter of fact, evidence.

Point

By analogy with the concept of fundamental violations of criminal procedure, it is possible to define the notion of fundamental mistake in the criminal procedure.

In our opinion, fundamental mistake is presented in the following cases:

1. Officials conducting a pre-trial investigation and court examination of the criminal case do not identify the use of illegal and unallowed violence (first of all, torture and physical violence) by law-enforcement officers (first of all, operative officers of 'enforcement agencies') against suspects and the accused to obtain confession testimony from them;

2. Officials conducting a pre-trial investigation and court examination of the criminal case do not identify the use of provocation to commitment the crimes by law-enforcement officers (first of all, operative officers of 'enforcement agencies') against suspects;

3. Officials conducting a pre-trial investigation and court examination make errors in gathering, examining and assessing evidence of the criminal case, with the result that the suspect or the accused are illegally detained, illegally kept in custody, illegally sentenced to real imprisonment;

4. Officials conducting a pre-trial investigation and court examination of the criminal case incorrectly apply substantive law, first of all, there is incorrect qualification of committed act ('legal classification with the surplus', 'excessive qualification') with the result that the suspect or the accused are illegally detained, illegally kept in custody, illegally sentenced to real imprisonment.

Example

During solving the issues concerning the detention of the suspect or the accused and the prolongation of the detention, it is important for a court (Sviridov, 2001; Boikov, 2002; Barabash,

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2009),[1] prosecutor, head of the investigative body or inquiry unit to avoid mistakes, detect and correct in time erroneous intentions of an enquirer or an investigator that are aroused as a result of various reasons (an accusatory tendency in criminal investigation, an urge to avert any negative consequences coming from unpredictable behavior of a suspect or the accused, etc.) and entail decisions about the detention of a person under investigation or prolongation of his detention.

Therefore there is the need to impose additional procedural guarantees concerning court decisions that are related to a detention of a suspect or the accused and prolongation of his denention.

Our researches indicate that due to various reasons it is harder for a judge to acquit a person or to award a sentence that is not connected to imprisonment against the defendant who is kept in custody.

At the same time, it is harder for a judge to make an individual decision to impose against a suspect or the accused a less severe measure of restraint than detention, because if the accused escapes from prosecution and trial, commits new crimes, influences other persons who are involved in a criminal case, a judge will connect these negative consequences of the "human" decision with own mistakes and errors.

In our opinion, the current model of arrest during solving the issue of detention or prolongation of detention should take into account the need for a court to examine not only the matter of law (formal basis for making the mentioned decisions), but also the matter of fact that is the presence of a minimum set of evidence of alleged suspicion or accusation.

Scientists in criminal procedure argue that there a priori must be substantial and legal grounds for detention. 'In order to avoid a mistake, a judge should be sure that the guilt of a person brought by investigation authorities is proven at least for one episode, there are necessary evidence in criminal case, and investigation authorities will not lose the evidence.' (Judicial control in criminal procedure. 2009. P. 390).

The need to verify the availability of evidence that confirms the occurrence of the certain type of crime and implication of a suspect or the accused in the crime is emphasized by Yu.K. Yakimovich, N.V. Bulanova, A.B. Soloviov, M.E. Tokareva, M.V. Parfenova and other scientists in criminal procedure. Of course all of them understand that during the consideration of issues about detention, its prolongation and question of personal guilty in alleged act it is necessary to take into account difference in requirements of proof of circumstances in the criminal case in its different stages (Bulanova, 2005; Solovyov et al., 2006; Yakimovich, 2006; Solovyov, Tokareva, 2008).

The reasons of importance of the matter of fact for the judicial decision: as a basis for the repressive decision, a judge willy-nilly refers to the legal qualification of the act that is alleged to a suspect or the accused and gives particular attention to its gravity or high gravity. However, such situations as the 'excess of legal qualification of the act' or 'legal qualification with the surplus' are known to the theory and practice of criminal procedure (Nazarov, 2003. P. 112).[2]

There are two reasons why investigators and enquirers use the "excessive legal qualification":

– to avoid a 'bad indication' of their work, i.e. not to receive back a criminal case from a judge in accordance with article 237 of the Russian Code of Criminal Procedure. Indeed, if an investigator or an enquirer provides the 'legal qualification with the surplus', then the court, without returning a criminal case to a prosecutor, will be able to make a shift from a 'severe'

legal qualification to the 'softer' legal qualification, but never vice-versa;

– with the knowledge of established judicial practice, to obtain a court sanction for detention and its prolongation without any doubt. Indeed, in the most number of cases the conditions of isolation make the accused resigned, controllable and convenient, eliminate unwanted risks for the career development of investigator or enquirer (in case the accused escapes, commits a new crime, starts to impede the investigation, etc.), and forges an alliance between the accused and operative officers.

Therefore, it is necessary to prescribe in legislation that when a judge is making a decision about detention or its prolongation the court should examine either all copies of case file materials presented to court, or the criminal case file itself. Furthermore, while the court is examining evidence that are available in the case, the court should verify the legality and validity of the suspicion or accusation with respect to both legal qualification of a committed act and its evidentiary basis.

Such actions of the court during the discussion of the questions related to the authorization of an arrest of a suspect or the accused or the prolongation of the term of their detention are even more appropriate in the light of article 125 of the Russian Code of Criminal Procedure that empowers the court to take decisions on the complaints of interested parties about the legality and validity of an accusation made against the person.

Unfortunately, as O.I. Andreeva figuratively said, imperfection of criminal procedure legislation allows 'in some cases to exercise authority without any control,' and unwillingness of government body officials to accept a concept of recognition of human rights and freedoms as the supreme value 'leads to the perception of the need to secure human rights and freedoms as an obstacle in crime suppression activity' (Andreeva, 2004. P. 66).

Resume

In our opinion, in order to improve the current pattern of detention of a suspect or the accused and to avoid mistakes of fundamental character made by investigators, prosecutors and judges, the following legislative amendments should be endorsed:

1) While adopting legislative bases for using a restrictive measure in the form of detention against a suspect or the accused and for prolongation of the term of their detention, legislators should emphasize that it is mandatory to submit evidence to a court, but not unsubstantiated assumptions that a suspect or the accused, being at large, has intentions to escape from prosecution and trial, commit new crimes, start to impede investigation by destroying material evidence, putting influence on victims and witnesses, etc.

The evidence of these intentions could be the data from special records of 'enforcement' agencies concerning previous convictions of the person, his escapes from custody, etc.; statements of witnesses (cellmates and others) about intentions of a person under investigation to escape from prosecution and trial, commit new crimes, put influence on witnesses, etc.; properly documented results of operational search activities that are presented to investigators and court as evidence of the criminal intentions of a suspect or the accused along with other evidence; etc.

It is reasonable to agree with the opinion of Z.D. Enikeev, A.B. Soloviov, M.E. Tokareva that the grounds for the use of restrictive measures determined by the criminal procedure law have 'evidential and predicting' character that gives an opportunity to come to the superficial conclusion

about the further behavior of a suspect or the accused, but in any case there are still evidence (Evikeev, 1982. P. 8; Solovyov, Tokareva, 2006. P. 237).

The need to prove the availability of the grounds for the use of restrictive measures in a criminal case follows from article 7, paragraph 4 of the Russian Code of Criminal Procedure that stipulates that any judicial decision and order of a judge, prosecutor, investigator or enquirer, including an act authorizing a restrictive measure, should be legal, well-grounded and reasonable. It means that it should be based on the evidence gathered in a criminal case (Lupinskaya, 2006; Solovyov, Tokareva, 2008).

2) It should be adopted in legislation that the person who has committed a crime for the first time should be subjected to the house arrest, release on bail, and other less severe restrictive measures.

Detention can be applied to such an individual only in case of his violation of the conditions of above-mentioned restrictive measures and his commitment of certain grave and high grave crimes against a person or involving the use of violence against a person, if there would be the evidence that this individual has intentions to escape from prosecution and trial, commit acts that could impede ascertainment of the truth in a criminal case and commit new crimes.

The adoption of this procedure that is formal to some extent, would contribute to the development of more progressive and human practice of the use of house arrest and release on bail.

[1] International legal standards of justice administration and norms of national legislation, first of all, the Constitution of the Russian Federation, make us take into account that judicial control of pre-trial stages of criminal proceedings has become a reality nowadays. But the scientists opinion about the controversial nature of judicial control (A.K. Sviridov), confusion of procedural functions of investigation and criminal trial (A.D. Boikov), and that the establishment of the united investigative committee 'would put all governmental bodies in their proper places: court without intervention in the activity of the organs conducting pre-trial investigation, would be absolutely free in the administration of justice; prosecutor without the function of procedural management would be an objective supervision body, and consequently, there would be no need to discuss a proposal to introduce a new procedural agent – an investigating judge…, because in fact all suggested authority are the overseeing authority of the prosecutor,' (A.S. Barabash) are worth considering. Moreover, experience of the soviet criminal procedure when aprosecutor, not a judge, approved an arrest, a search etc., carried out comprehensive supervision of the pre-trial investigation of criminal cases, was not negative in every aspect.

[2] According to the data of our analysis that was carried out in the 1990s, 'legal qualification with the surplus' in the structure of investigation errors connected with the violations of substantive law made up 70,9 %. At the present time, according to the results of our continuous researches of that problem, the situation has not become better.

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Ошибочное заключение под стражу как разновидность фундаментальной ошибки в уголовном судопроизводстве

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В статье рассматривается одна из разновидностей фундаментальной ошибки – ошибка при заключении под стражу подозреваемого, обвиняемого; предлагается правовой механизм недопущения данных ошибок в уголовном судопроизводстве.

Ключевые слова: фундаментальная ошибка, заключение под стражу, вопрос права, вопрос факта, доказательства.