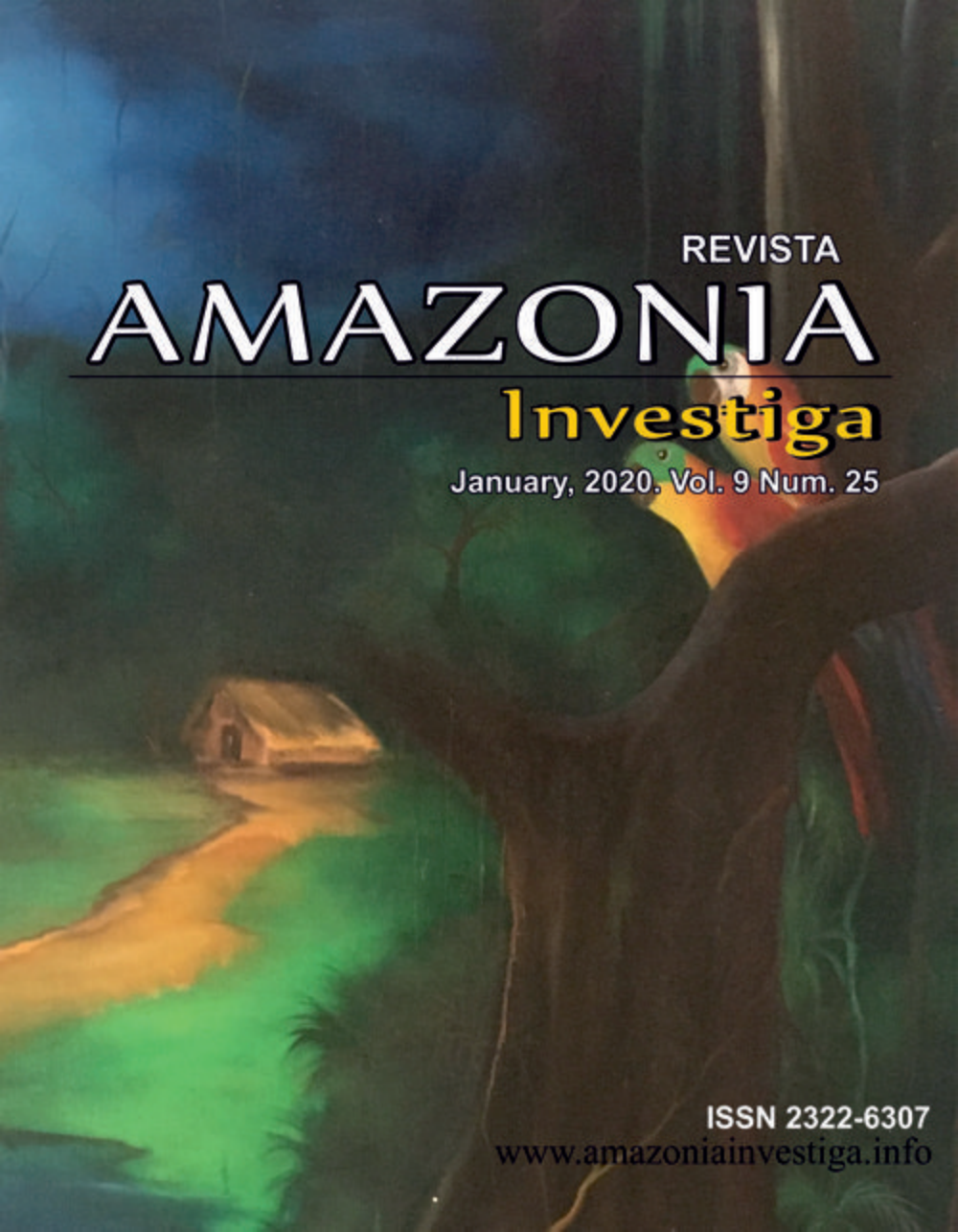


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Ensuring the Rights of the Person When Notifying of Suspicion or Detention on Suspicion of Committing a Criminal Offense

Забезпечення прав особи під час повідомлення про підозру або затримання за підозрою у вчиненні кримінального правопорушення

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Abstract

The article deals with topical theoretical and applied issues of ensuring the rights of a person when reporting suspicion or detention on suspicion of committing a criminal offense. The norms of the national legislation, the practice of the activity of the pre-trial proceeding bodies, the prosecutor's office and the legal positions of native courts and the European Court of Human Rights in the aspect of the investigated issue are analyzed. A strict adherence to the order to notify the person of the suspicion is emphasized, which is a guarantee of both the ensuring of the rights of the person suspected of committing a crime and the recognition of evidence as appropriate and admissible in the future. Attention is drawn to the positive changes in the content of the basis for ensuring the right to defense. A correct understanding by practitioners of the legislative provisions regarding reporting suspicion (chapter 22 of the Code of Criminal Procedure of Ukraine) and detention of a person on suspicion of committing a crime (Articles 207-213 of the Code of Criminal Procedure of Ukraine) will contribute to the unconditional fulfillment of the tasks of criminal proceedings. *The purpose of the article*

Анотація

Статтю присвячено актуальним теоретичним і прикладним питанням забезпечення прав особи під час повідомлення про підозру або затримання за підозрою у вчиненні кримінального правопорушення. Проаналізовано норми національного законодавства, практику діяльності органів досудового розслідування, прокуратури, правові позиції вітчизняних судів та Європейського суду з прав людини в аспекті досліджуваного питання. Акцентовано увагу на необхідності неухильного дотримання порядку повідомлення особі про підозру, що є запорукою як забезпечення прав особи, яка підозрюється у вчинені злочину, так і визнання в подальшому доказів належними і допустимими. Звернуто увагу на позитивних змінах змісту засади забезпечення права на захист. Разом з тим, правильне розуміння практичними працівниками законодавчих положень, що стосуються повідомлення про підозру (глава 22 КПК України) та затримання особи за підозрою у вчиненні злочину (ст. 207-213 КПК України) лише сприятиме беззаперечному виконанню

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was to study the provisions of the Code of Criminal Procedure of Ukraine regarding the regulation of ensuring personal rights when reporting suspicion or detention on suspicion of a criminal offense, identifying legislative gaps and forming on these basis relevant proposals to address them. The authors used such special methods of research as: system-structural, comparative-legal and statistical.

Key words: Ensuring rights, suspect, detention, suspicion, defender.

завдань кримінального провадження. Метою статті стало дослідження положень Кримінального процесуального кодексу України в частині регламентації забезпечення прав особи під час повідомлення про підозру або затримання за підозрою у вчиненні кримінального правопорушення, виявлення законодавчих прогалин та формування на цій основі відповідних пропозицій з їх усунення. Методи дослідження. При написанні статті авторами використано такі спеціальні методи дослідження, як: системно-структурний, порівняльно-правовий та статистичний.

Ключові слова: забезпечення прав, підозрюваний, затримання, повідомлення про підозру, захисник.

Introduction

Human rights and freedoms and their guarantees determine the content and direction of the state's activities, and the establishment and maintenance of such values are its main responsibility. These provisions are important for criminal procedural activity, which is associated with interference in person's life and restriction of his rights and freedoms in cases and in the manner prescribed by national legislation. The most significant restrictions on rights, freedoms and legitimate interests are experienced by people suspected of committing a criminal offense. Despite the fact that a person is presumed innocent of committing a criminal offense until his guilt is proved legally and established by a guilty verdict of the court, during a pre-trial investigation it may be temporarily limited in constitutional rights and freedoms. Therefore, in connection with the radical changes that occurred after the adoption of the Criminal Procedure Code of Ukraine in 2012 (hereafter - the CPC of Ukraine), the issue of ensuring personal rights when reporting suspicion or detention on suspicion of a criminal offense is of particular relevance.

The purpose of the article is to study the provisions of the Code of Criminal Procedure of Ukraine regarding the regulation of ensuring personal rights when reporting suspicion or detention on suspicion of a criminal offense, identifying legislative gaps and forming on these basis relevant proposals to address them.

Research methods

According to the goal, the set of research methods of modern epistemology was used. Special methods of research used in writing the article were: system-structural and comparative-legal. In particular, these methods were used in the analysis and study of the provisions of the current Code of Criminal Procedure of Ukraine, which regulate the procedural procedure for notifying of suspicion and detention of a criminal who committed a crime.

Results and discussion

Nowadays, every democratic, law-bound state seeks to embody such a legal mechanism to ensure the rights, freedoms and legitimate interests of a person and which will exactly conform to the realities of modern life. In the scientific literature, the most common is the position that in ensuring human rights in the field of criminal process one should understand the activities of competent state bodies conducting criminal proceedings, consisting in the implementation of procedural actions aimed at creating favorable conditions for the realization of rights by each subject of criminal procedural activity, their protection, and in the case of a violation or possible violation, the adoption of measures to prevent this or effective restoration of violated rights, freedoms and legitimate interests (Verkhoglyad-Gerasimenko, 2011). Therefore, according to the quite fair T. G. Fomina's assertion, the mechanism for ensuring the rights of individuals in criminal proceedings has a dual nature. In particular, on the one hand, it is a dynamic system of interrelated social and legal conditions, means and measures, which in their unity contribute to ensuring rights; and on the other, it appears itself in the activities of state bodies, officials involved in criminal proceedings, and other participants, aimed at

ensuring the implementation, protection and protection of individual rights (Fomina, 2014). Such a mechanism for ensuring rights and freedoms extends to the suspect too.

A study of the provisions of the current CPC of Ukraine allows us to note that it provides three grounds for recognizing a person as a suspect in a criminal proceeding: 1) a person who has been notified of a suspicion in the manner provided for in Articles 276-279 of the CPC of Ukraine; 2) a person detained on suspicion of committing a criminal offense; 3) the person in respect of whom a notice of suspicion was drawn up, but it was not handed to him due to the failure to establish the person's location, however, measures were taken for delivery in the manner provided for in Art. 135 of the CPC of Ukraine (service of notices).

So, for any other reason, a person cannot acquire the procedural status of a suspect, which is important to ensure legal certainty in this matter. In this case, the person is in suspect status from the moment of notification of suspicion or detention on suspicion of committing a criminal offense and until the indictment is transferred to the court (the person acquires the status of the accused). The procedural documents on the basis of which the person acquires the procedural status of a suspect are: 1) a notice of suspicion, the requirements for the content of which are established in Art. 277 of the CPC of Ukraine; 2) a custody record of a person on suspicion of committing a crime which is drawn up in accordance with the requirements of Art. 208 of the CPC of Ukraine.

The mandatory cases of notification a person of suspicion are provided for by the legislator in Art. 278 of the CPC of Ukraine, namely: 1) detention of a person at the place of committing a criminal offense or immediately after its commission; 2) choosing one of the preventive measures to a person provided for by the CPC of Ukraine; 3) availability of sufficient evidence for suspicion of a person committing a criminal offense. In this regard, in our opinion, it is of great practical importance to establish the grounds, or, as it is defined by the legislator, cases for notifying a person of a suspicion, in the presence of which the suspicion can be considered legitimate and reasonable (CCU).

At the same time, there are some difficulties in understanding the concept of "cases" clearly. This is due to the fact that the current criminal procedural legislation of Ukraine does not specify what it is necessary to understand by this definition. In our opinion, cases (grounds) of notification to a person of suspicion should be understood as a set of such factual data (evidence), in the presence of which authorized individuals (investigator, prosecutor) will be able to draw up and deliver a written notice of suspicion. On this basis, it should be emphasized that reasonable suspicion is the objective factor that enables one to determine a person involved in committing a specific crime.

Regarding clarification of the meaning of the concept of "reasonable suspicion" the legal position of the European Court of Human Rights should be mentioned, according to which it is submitted that there is the existence of factual data or information that can convince the impartial observer that the person who is spoken about could commit a crime. However, the European Court stated that such facts should not be as convincing as the facts for the prosecution – the next stage of criminal proceedings (Case of Fox, Campbell and Hartley v. The United Kingdom).

According to the analysis of prosecutor's practice, one of the most common reasons of closing criminal proceedings against suspects by the prosecutors is the absence of a crime in the act of suspected individuals. For example, the prosecutor's office of the Vilnianskyi district of Zaporizhzhia region closed criminal proceedings against a person suspected of committing the crimes provided for in Part 1 of Art. 153, Part 2 of Art. 152, Part 1 of Art. 187 of the Criminal Code of Ukraine due to the absence of a crime in his actions. The reason for this was that during the pre-trial investigation, the investigator, during the interrogation of the victim, did not find out all the identifying signs by which she would be able to identify the person who had committed the crime, and therefore, when conducting the identification, she referred to the suspect as a person similar to the one who committed the crime against her. In addition, the traces of person's shoes who probably committed the crime, as well as the biological traces on the victim's clothing and body, were not examined for belonging to the suspect. At the same time, despite the apparent lack of evidence of the person's guilt, he was informed of the suspicion and a preventive measure in the form of detention was chosen in a month and a half later he was released from custody, since it was established that this crime was committed by a completely different person.

For the purposes of the foregoing, we draw attention to the fact that the identification of a

person was carried out with violation of the requirements of Art. 228 of the CPC of Ukraine, which is inadmissible evidence according to the Art. 86 of the CPC of Ukraine. Moreover, it was also emphasized by the panel of judges of the Third Trial Chamber of the Cassation Criminal Court of the Supreme Court in the judgment of 07.08.2019 (proceedings No. 51-2604km19). Therefore, when solving such issues, it is necessary to take into account not only compliance with the requirements of the law regarding the procedural order for collecting evidence, but also the importance of each evidence to establish the circumstances to be proved, and the consequences that occurred in case of violation of the established procedure for obtaining specific evidence.

In practice, there are also cases of violation of the requirements of the CPC of Ukraine concerning notifying a person of suspicion without sufficient evidence of his guilt. For example, the prosecutor's office of the Kirov district of Dnipropetrovs'k region closed criminal proceedings for a person suspected of committing a crime provided for in Part 1 of Art. 115 of the Criminal Code of Ukraine, in connection with the failure to establish evidence to prove his guilt. The person was notified of the suspicion only on the basis of his confession of guilt, which he later changed, and it was not possible to obtain other evidence of his guilt. Then, this is clear evidence of not a violation of the requirement to have sufficient evidence, but of course, only the evidence given by a person against himself and which formed the basis of the notifying of suspicion cannot be considered sufficient evidence.

In the other criminal proceedings, on the contrary, despite the person's objection to involvement in the crime provided for in Part 2 of Art. 263 of the Criminal Code of Ukraine, his evidence were not examined and he was notified of the suspicion without any proofs. In particular, the investigator did not examine the hunting rifle in order to detect fingerprints of a suspected person and himself in order to detect the remains of gunpowder on his clothing and body. In addition, as it was noted in the report of the inspection of the scene of action, the packet with the hunting rifle was in the person's hands, so, the actual removal of the packet was conducting by personal inspection of a person that is not provided by the CPC of Ukraine, and therefore the removed hunting rifle should be considered inadmissible evidence. This was the reason for the prosecutor to close the criminal proceedings.

Summarizing the above, it should be noted that by the time the person is served with a written notice of suspicion the investigator, the prosecutor should establish the following: 1) whether there was an act about which the pre-trial investigation in criminal proceedings was conducted; 2) whether it was committed by the person in respect of whom the issue of notification of suspicion is being decided; 3) whether the act committed by the person, who is being notified of suspicion, contains a criminal offense provided for the Criminal Code of Ukraine; 4) whether there are no circumstances that exclude the grounds for further pre-trial investigation in criminal proceedings (its closure); 5) whether the person was detained at the scene of the criminal offense or immediately after its commission; 6) whether one of the preventive measures provided for by the CPC of Ukraine was chosen; 7) whether the evidence is sufficient to notify a person of suspicion.

With regard to the second case of notifying of suspicion namely arresting a person at the scene of the crime or immediately after committing it, it should be noted that it belongs to those legal phenomena, which existence is constantly accompanied by certain problems, and sometimes attempts to solve them, do not bringing full clarity, often gave rise to new ones. On this issue, in the last decade, the theory of criminal process and practice has been dominated by the opinion that the detention of a person (allegedly at the request of Part 3 of Article 29 of the Constitution of Ukraine) is a temporary preventive measure consisting in short-term isolation of a detained person by placing him in a special institutions, including detention centers. The legal institute of detention of a person was reflected in the current CPC of Ukraine. At the same time, it should be noted that the system of measures, which application is connected with the restriction of the rights and freedoms of a person, neither in the CPC of the Ukrainian SSR of 1922, 1927, nor in the CPC of Ukraine of 1960 included detention. On the contrary, for half a century the detention of a person was considered as an urgent initial investigative action aimed at physical capturing, obtaining and verifying evidence of a person's involvement in a crime.

According to the current CPC of Ukraine, the peculiarities of detention of a person as a temporary preventive measure is determined by the presence of two main factors: first, the duration of the action, which may not exceed 72 hours; second, the actual moment of detention of a person who, unlike other measures of ensuring

of criminal proceedings, does not require prior authorization - the investigating judge's decision. In view of this, in the scientific writings the lawyers try to trace and identify the appropriate stages of detention of the person without the decision of the investigating judge or the court (Yanovich, 2014). In our opinion, this is quite logical since the process of detention of a person suspected of committing a crime is dynamic: physical capture and restriction of the person to the right of free movement → delivery to a pre-trial investigation agency → notification of a free legal aid center about such detention → drawing up a detention report → delivery within 24 hours from the detention of the written notice of suspicion → delivery of the suspect within 60 hours from the moment of detention to the investigating judge for deciding the issue of choosing a preventive measure.

It should be noted that, compared to the CPC of 1960, according to which the precise moment of detention was not determined at all and the person was considered to have been detained since the moment of drawing up the detention report, the current CPC of Ukraine is more settled. Before the current CPC of Ukraine came into force it took several hours from the moment of actual detention to the moment of drawing up a report, and such individuals were restricted in free movement beyond the statutory time, which significantly violated the rights and freedoms of man and citizen. Today, the legislator obliged the authorized officer to deliver the detainee to the nearest department of the pre-trial investigation body, which immediately records the date, exact time (hour and minutes) of the delivery of the detainee and other information provided by law. At the same time, however, one has to state that in practice the problem remains with regard to a clear fixation of the moment of restriction of a person to the right of free movement (actual detention). Undoubtedly, the absence of a legal procedure on this issue affects the correct calculation of the procedural time limits of notifying a detainee of suspicion.

Ensuring the right to defense in criminal proceedings is seen as a basis in accordance with public authorities and officials are obliged not only to explain to the person, who is notified of suspicion, his rights and duties, but also to take measures to make oral or written submissions to a suspected person regarding suspicion, collect and present evidence, take part in criminal proceedings, use defender's legal aid etc. Thus, we cannot support those scholars who believe that the right to defense is a part of the right to legal aid. This is confirmed by the fact that at least the following rights are guaranteed by Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms : a) to be immediately and fully informed in understandable terms of the nature and cause of the charge b) to have time and facilities necessary for preparing their defense; c) to protect himself personally or use defender's legal aid chosen at his own discretion, or - in connection with the lack of sufficient funds to pay for the defender's legal aid, to receive such assistance free of charge when required by the interests of justice etc (CPHRF).

According to the requirements of Art. 59 of the Constitution of Ukraine everyone has the right to legal aid and everyone is free to choose the defender of their rights (CU). The implementation of this constitutional provision compels the investigator, the prosecutor, the investigating judge, the court to refrain from providing recommendations concerning the involvement of a specific defender. Such a duty is one of the guarantees of the right to legal aid to be provided by a competent and impartial person who has no personal interest in the investigation of criminal proceedings but acts in the sole interests of the suspect.

The freedom of choice of defender embodies both in the possibility to participate in criminal proceedings of any person who meets the statutory requirements, as well as the possibility of refusing the participation of a defender or replacing him with another one at any stage of criminal proceedings. This should be done only under certain conditions, namely: the voluntary consent of refusal to be represented by defender should come exclusively from the suspect. At the same time, the refusal to be represented by defender is not final, then, in case changing his decision regarding the participation of the defender, the suspect has the right to invite him at any time, regardless of the stage of the criminal proceedings. When the participation of the defender in the criminal proceedings is compulsory (Article 52 of the CPC), it shall not be refused. In this case, the suspect is explained his right to replace the defender. If the suspect refuses to be represented by defender and does not involve another one, the defender must be involved by the investigator, prosecutor, investigating judge or court in the manner provided by Art. 49 of the CPC, for the purpose of protection.

Thus, the issue of ensuring the rights of a participant in criminal proceedings, which are disclosed in the provisions of Art. 20 of the CPC

are of great importance for every person, since criminal proceedings are connected with the interference in person's life and the restriction of the rights and freedoms established by law. Moreover, the right to defense, being one of the fundamental person's rights in criminal proceedings, cannot be unlimited. Otherwise, it should be regarded that a violation of the right to defense is a material breach which leads to the annulment of judicial decisions.

Conclusions

Comparing the provisions of the CPC of 1960 and 2012, we can say that they differ significantly from each other. The current CPC of Ukraine restricts the number of people who can be defenders, because such a concept as "unprofessional protection", who were close relatives and other experts in the field of law in criminal proceedings were excluded. This is due to the fact that in the circumstances of strengthening the competitive nature of criminal justice, the activities of professional participants of criminal proceedings, on whose effective action the ensuring the right of suspect to defense depends on, are of particular importance.

An important step in improving the activity of defender in the process of proving is the rules of paragraph 7, 8. Art. 20 of the Legal Profession and Legal Practice Act of Ukraine [9], which significantly broaden the lawyer's right to gather information about facts that can be used as evidence, use technical means, record procedural actions where he is involved, as well as the course of court meeting in the manner provided for by law etc. However, as S. Y. Ablamskiy stressed, despite the fact that the defender is empowered to collect evidence in criminal proceedings (paragraph 8 of Part 2 of Article 42, Article 93 of the CPC of Ukraine), the corresponding legislative mechanism for the realization of this right is not provided. In this regard, the researcher stated that the current CPC of Ukraine does not provide a clear regulation of criminal procedural relations in all provisions that arise during the collection and presentation of evidence (Ablamskiy, 2016).

In addition, in the provisions of Art. 20 of the CPC of Ukraine, which enshrines one of the constitutional principles of criminal proceedings - "Ensuring the right to defense", in comparison with Art. 21 of the CPC of Ukraine of 1960 - "Ensuring the Suspect, the Accused, the Defendant with the Right to Defense", the essence of this basis revealed more successfully.

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