Universal Decimal
Classification 342.9 : 343.1

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COMPARATIVELY-LEGAL ANALYSIS OF ADMINISTRATIVE AND CRIMINAL-PROCEDURAL DETENTION[1]

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Here is noted that the wording of detention of a suspect, which is contained in the Code of Criminal Procedure of the RF, cannot satisfy either theorists or practitioners, because it does not disclose all the signs that characterize this legal category, what leads to different interpretations of this notion and itself the procedure of detention of a suspect.

The author substantiates that some of the elements of the procedure for administrative and criminal-procedural detention are not fully regulated by the current legislation, as well as that the level of scientific-methodological development of the organizational and tactical grounds for detention is low, which in turn serves as a major source of conflicts between an official and a detainee.

Keywords: detention, administrative detention, criminal-procedural detention, restriction of the right to freedom, terms of detention.

[1]Published on materials of VII All-Russian scientific-practical conference with international participation «Theory and practice of administrative law and process» (Rostov-on-Don — Krasnodar — Nebug — 2012)

Article 22 of the Constitution of the Russian Federation [1] states that everyone shall have the right to freedom and personal immunity, but in this article are also provided measures to limit the human and citizen rights to freedom, i.e., there is specially stipulated that arrest, detention and remanding in custody shall be allowed only by court decision. Without a court's decision a person may not be detained for a term more than 48 hours.

The police must carry out its activities in strict accordance with the law, and any restriction of the rights, freedoms and legitimate interests of citizens, as well as the rights and lawful interests of public associations, organizations and officials is permissible only on the grounds and in the manner prescribed by Federal Laws.

Thus, the application by the police of public enforcement measures to fulfill the duties and to exercise the rights of the police is also permissible only in cases provided for by Federal Laws.

Outlined constitutional provisions are reproduced in the relevant procedural norms – in administrative and criminal-procedural legislation. So, on the basis of the constitutional provision on inviolability of person, article 10 of the Criminal Procedural Code of the RF (hereinafter CPC RF) [3] contains the following provisions:

- No one may be arrested on suspicion of committing a crime or detained without legal grounds under CPC RF. Before a court's decision a person may not be detained for longer than 48 hours;
- court, prosecutor, investigator, body of inquiry and interrogator must immediately release any person illegally detained, or imprisoned, or unlawfully placed in a medical or psychiatric hospital, or held in custody for a period exceeding that provided for by CPC RF;
- a person who has been imprisoned, as well as a person who is detained on suspicion of committing a crime, should be held in conditions that do not endanger their lives and health.

Article 27.5 of the Code on Administrative Offences of the Russian Federation (hereinafter CAO RF) [2], in respect of the terms of administrative detention, provides for the following:

- the term of an administrative detention shall not exceed three hours, except for the cases provided for by parts 2 and 3 of article 27.5 CAO RF.
- any person who is on trial in connection with a case concerning an administrative offence, which encroaches upon the established regime of the State Borders of the Russian Federation and the procedure for staying on the territory of the Russian Federation, or concerning an administrative offence committed in the

inland sea waters, in the territorial sea, on the continental shelf and in the exclusive economic zone of the Russian Federation, or concerning violations of customs rules, may be subjected to an administrative detention for a term not longer than 48 hours, when it is necessary for it identification or for clarification of the circumstances of the administrative offence.

- any person, who is on trial in connection with an administrative offence entailing an administrative arrest as one of the measures of administrative penalty, may be subjected to an administrative detention for a term not longer than 48 hours.

Thus, we are considering one of the main measures of state coercion – detention. At that, it should be borne in mind that the notion of "detention" covers not only the detention of a suspect, which is a measure of criminal procedural coercion, but also administrative detention, which is a measure to ensure the proceedings on a case of administrative offense.

As defined in paragraph 11 of article 5 CPC RF, detention of a suspect is a measure of procedural coercion applied by the body of inquiry, interrogator, investigator for a period not exceeding 48 hours from the moment of actual detention of a person suspected of committing a crime. Part 1 article 27.3 CAO RF stipulates that administrative detention is a short-term restraint on the freedom of a natural person, which may be enforced in exceptional instances where it is necessary for securing correct and timely consideration of a case concerning an administrative offence and for exercising a decision on a case concerning an administrative offence.

However, at the level of scientific research, the issue of legal, procedural and organizationally-tactical support of administrative detention in comparison with the institute of criminally-procedural detention, as well as in the context of a comparative legal analysis of the relevant rights' restricting institutes provided for by the norms of international law, has been studied not enough. Moreover, the contained in CPC RF wording of the detention of a suspect cannot satisfy either theorists or practitioners because it does not disclose all of the signs, which characterize this legal category, what leads to different interpretations of the notion and the very procedure of the detention of a suspect.

Common signs of detention as a measure of state coercion are provided for by a number of branches of the legislation and have constitutional and legal base, pointing to its generally-legal nature.

In other words, every kind of detention as a measure of state coercion is characterized by certain generally-legal signs. So, detention is a procedural coercion measure, temporarily restricting human and civil right to freedom. Besides, the direct legal grounds for detention are provided for by the norm of a relevant branch

of law (mainly by the norms of administrative and criminal procedure law). Detention includes the enshrined in a relevant legislation procedural order of its implementation and registration (i.e., drawing up a protocol).

If we dwell on the similarities, we must note the norm prescribing that the detainee's relatives should be informed of the detention. If article 96 CPC RF envisages the obligation of officials, who have conducted detention, to inform someone of the close relatives of a suspect, moreover, limiting the obligation by 12 hour period that shall be counted from the moment of actual detention, then notification of the relatives of a person detained in administrative procedure is performed only at the request of the detained person. In this case, about the place of its location in the shortest possible time can be notified not only relatives, but also the administration of its place of work or study, as well as its defender.

About administrative detention of a minor in a mandatory manner notify its parents or other legal representatives. The same rule is provided for criminal procedural detention. Administrative and criminal procedural legislations provide for unified rules regarding notification about the detention of a soldier or a citizen called up to undergo a periodical military training, when in a mandatory manner notify military commandant's office or the military unit, in which the detainee does its military service (military training), of a member of a public monitoring commission, when notify the Secretary of the Public Chamber of the Russian Federation and the appropriate public monitoring commission. At that, if in the case of detention on suspicion of committing a crime, the legislation envisages a specific time frame for notification – 12 hours, in the case of administrative detention the law has formulated a provision stating, that the notice must be made immediately.

CPC RF also enshrines the norm that if a suspect is a citizen or national of another State, then within 12 hours period the Embassy or Consulate of that State shall be notified about its detention. CAO RF does not provide for such a norm.

As for the procedure of registration of detention, in the case of an administrative detention authorized body draws up a protocol of administrative detention, in which indicates the date and place of its drawing up, position, name and initials of the person, who draws up the protocol, details of the arrested person, time, place and motives of the detention.

Protocol on administrative detention shall be signed by the officer, who has drawn up the protocol, and by the detainee. If the detained person refuses to sign the protocol, an appropriate entry must be done in the protocol on administrative detention. A copy of the protocol of administrative detention is given to the person at its request.

In the case of criminal procedural detention, also must be drawn up a detention protocol, in which a note is made about the fact that the suspect has been explained the rights provided for by article 46 CPC RF.

Protocol must indicate the date and time of drawing up the protocol, date, time, place, reason and grounds for detention of a suspect, results of its personal search and other circumstances of its detention. Protocol on detention shall be signed by the officer, who has drawn up the protocol, and by the suspect.

Unfortunately, some elements of the procedure of administrative and criminal procedural detention are not fully settled by the applicable law, the scientific and methodological level of development of the organizational and tactical foundations of detention is not high, what is the main source of conflicts arising between an officer authorized to carry out criminal procedural detention and detained person in the application of this coercive measure to ensure proceedings on criminal cases and cases of administrative offences.

For example, if we talk about criminal procedural detention and proceed from the literal interpretation of the norm regulating this legal institute, then detention is a totality of its characteristic elements that set three consistently implemented phases, namely, actual detention, delivering and juridical detention, which consists in the drawing up of the protocol. Turning to the original source – paragraph 15 article 5 CPC RF, which provides characteristic of the actual detention, you may find that the actual detention procedure is not regulated by the legislator. This, in turn, extremely negatively affects the compliance with the procedural time limits for detaining suspects and the exercising of rights and freedoms set out not only under the Constitution of the Russian Federation, but also under the norms of international law. Within the meaning of paragraph 11 article 5 and part 3 article 128 CPC RF, the maximum period of detention of a suspect shall not exceed 48 hours, which is calculated from the moment of actual detention. Thus, in the period of criminal procedural detention include the time of actual detention, and itself the actual detention of a person is an initial stage of application of criminal procedural detention.

In the application of this norm of the CPC RF it is very difficult, and often impossible to determine the moment, from which begins to run the period established by the legislation – "no more than 48 hours from the moment of actual detention". There is no reference to the document that defines the moment of actual detention, i.e., the deprivation of freedom of movement, in the CPC RF, what greatly complicates the practical application of the norms on detention. Besides, article 92 CPC RF, which regulates the content of the protocol on criminal procedural detention,

does not contain a direct instruction to reflect the actual detention time, although part 2 article 92 CPC RF regulates the ability to specify other circumstances of detention of a person.

Thus, the protocol of detention of a suspect does not contain the term of actual detention, what in practice leads to confusion in the issue of calculating the period of detention. Returning to the literal interpretation of the norm, the period of no more than 48 hours shall be calculated from the moment of actual detention, and exactly this time should be indicated in the protocol of detention in the box "date and time of detention".

Unfortunately, in the practice of investigators and interrogators the cases of indication in protocols of detention the date and time of detention of a person coinciding with the date and time of drawing up the protocol of detention are not uncommon, what, of course, should not be. In this case, there is not taken into account the fact that the person has been actually arrested before its delivering, and then has been moved to the premises of the body of inquiry.

In part 1 article 92 CPC the legislator mentions the term of "delivering", pointing out that protocol on detention should be drawn up for a period of not more than three hours "after a suspect is delivered into the body of inquiry or to an investigator". Criminal procedural law attaches considerable importance to the time of drawing up a protocol on detention, because this document sets the time of occurrence of the procedural status of a suspect (under article 46 CPC RF).

And once again we are faced with the fact that the procedure of delivering suspect is not resolved legislatively. If many authors define the term of "delivering" as non-procedural activity of the bodies of inquiry regarding the forced displacement of a detainee from the place of its capture to the place of preliminary investigation, then the interpretation of the phrase "after delivering into the body of inquiry or to an investigator" is controversial.

From what moment shall be calculated the period of "no more than three hours" established by the CPC RF for drawing up a protocol? Some believe that the period shall run from the date when a detained person actually stepped over the threshold of the body of inquiry, while others believe that the period should be calculated from the moment when the detained person actually enters the office of an investigator or interrogator.

The actual detention, which always precedes criminal procedural detention, and which consists in the suppression of a crime and delivering of a person who has committed a crime to the police, which is carried out by an official vested with the right of criminal procedural detention, must be recognized as an initial stage

of the criminal procedural detention and not independent kind of detention of a person suspected of committing a crime. After all, to draw up a protocol on the detention of a person suspected of committing a crime, you must first make actions, in respect of which, in fact, draw up a protocol on criminal procedural detention.

Thus, the protected by criminal law interests of justice are infringed in carrying out of a deliberately unlawful either criminal procedural or administrative detention. Constitutional rights of an individual during deliberately unlawful administrative detention are violated to the same extent as during deliberately unlawful detention on suspicion of a crime.

It also seems that exactly the fragmentary and not always meeting current needs of strengthening public order lighting of the institute of criminal procedural and administrative detention in the scientific literature gives rise to many issues that arise in law enforcement practice, which are related to the determination of legal grounds, procedural order, general provisions and organizationally-tactical requirements to the tactics of implementation of this administrative coercion measure.

Established in CAO RF and CPC RF grounds for detention contain not only common, but also distinctive features that make up the content of a specific legal nature, the order and range of subjects of its application, and their sectorial differentiation is due to the designated use of a particular type of procedural detention.

Distinctive features of the legal grounds of administrative-legal detention is the fact that the grounds of administrative detention are provided for by codified administrative legislation at the federal level – CAO RF, represent a measure of administrative procedural coercion and are of exceptional nature, and administrative-legal detention itself can be carried out only in connection with the commission of an administrative offense, while the order and procedure for the application of detention as a measure of criminal procedural coercion are governed by chapter 12 CPC RF.

The purpose of criminal procedural detention – to suppress the criminal activity of a suspect, to prevent suspect's hiding from investigation and trial, to prevent the falsification of evidence, to suppress its influencing on witnesses and its others attempts to prevent reliable clarification of a criminal case, and administrative detention is implemented only to ensure the proper and timely review of an administrative case, enforcement of the judgment on a case concerning an administrative offense;

Within the meaning of article 91 CPC RF, detention takes place only after the institution of a criminal case on the basis of decision of an inquiry body, investigator

and interrogator. Detention at the crime scene, in the absence of an issued by an investigator, interrogator decision to institute criminal proceedings, is not provided for by the current criminal procedural law. Detention as a measure of procedural coercion may be applied only to persons suspected of a crime, for which the Criminal Law Code of the RF provides for a penalty of imprisonment. Detention, as well as any procedural action may be carried out only if there are reasons and grounds specified by law. Exercising of detention is permissible only if there is one of the following reasons: a) when a person is caught committing a crime or immediately after its commission; b) when victims or witnesses point to a person as one who has committed a crime; c) when at this person or its clothing, with it or in its home police officers find clear evidence of a crime; d) if there are other data giving reason to suspect a person of a crime if: it has tried to escape, or has no permanent place of residence, or the person is not identified, or to the court has been directed a petition regarding imposing against such a person a preventive measure in the form of taking into custody.

Supervision over the validity and legality of the implementation of detention is exercised by an appropriate prosecutor. Article 92 CPC RF obliges the officials, who had detained a person suspected of a crime, to report this to the prosecutor in writing in a period not exceeding 12 hours from the moment of detention.

Comparative legal analysis of the legal grounds for detention in various branches of the Russian legislation allows us to come to the conclusion that the generally-legal understanding of detention means establishing in the law of the possibility of jurisdictional actions of coercive nature to ensure, as a rule, administrative or criminal procedural proceedings.

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