ЮРИДИЧНИЙ НАУКОВИЙ ЕЛЕКТРОННИЙ ЖУРНАЛ

ЕЛЕКТРОННЕ НАУКОВЕ
ФАХОВЕ ВИДАННЯ

www.lsej.org.ua

1'2018

Запорізький національний університет
Міністерства освіти і науки України

Електронне наукове фахове видання «Юридичний науковий електронний журнал»

№ 1, 2018

Електронний журнал включений до переліку електронних фахових видань України на підставі Наказу МОН України від 21 листопада 2013 року № 1609, а також до міжнародної наукометричної бази Index Copernicus International (Республіка Польща)

Запорізький національний університет
Запоріжжя 2018

SECTION 8
CRIMINAL PROCESS AND FORENSIC SCIENCE; FORENSIC EXAMINATION; OPERATIVELY-SEARCH ACTIVITY

SECTION 9
INTERNATIONAL LAW

SECTION 9
PHILOSOPHY OF LAW

UDK 343.98

THE RIGHT OF THE SUSPECT TO SHOW THE INDICATION AS A PROTECTIVE GUARANTEE TO PROTECT ITS RIGHTS AND LEGITIMATE INTERESTS AFTER DETENTION

ПРАВО ПІДОЗРЮВАНОГО ДАВАТИ ПОКАЗАННЯ ЯК ПРОЦЕСУАЛЬНА ГАРАНТІЯ ЗАХИСТУ ЙОГО ПРАВ ТА ЗАКОННИХ ІНТЕРЕСІВ ПІД ЧАС ЗАТРИМАННЯ

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The article is devoted to highlighting one of the topical issues of the criminal procedural law of Ukraine regarding the observance of human rights and freedoms, in particular, the right to silence while detaining a person. The right not to answer the question and the mechanism for its implementation is a very important element of protection in criminal proceedings. It is the organs of pre-trial investigation and the prosecutor as a party to the prosecution and the court are called upon to ensure the realization of this right by the suspect, the accused, who has this right guaranteed by law. However, according to our study, investigative bodies of the pre-trial investigation in their criminal investigation activities are more focused on the fact that the suspect did not take advantage of his right to remain silent. Procedurally, a person who does not testify against himself is in no way in a worse position than the one who answers the question. At the same time, investigative and judicial practice has produced a radically different position. The refusal to provide an explanation is assessed by the authorities of the pre-trial investigation as a way of avoiding a person to punish an offense. The revealed tendencies of realization of the right of the detained person do not answer the questions. According to the results of the study, proposals were submitted to the current criminal procedural code of Ukraine.

Key words: human dignity, detention, guarantees, suspect, rights, freedoms, guarantees of silence, private life, realization of rights.

У статті на підставі теорії пізнання проаналізовано деякі положення дотримання прав і свобод людини, зокрема право на мовчання під час затримання особи, оскільки право не відповідати на запитання та механізм його реалізації є досить важливим елементом захисту у кримінальному провадженні. Виявлені тенденції реалізації права затриманої особи не відповідати на запитання. За результатами дослідження надані пропозиції до чинного Кримінального процесуального кодексу України.

Ключові слова: людська гідність, затримання, гарантії, підозрюваний, права, свободи, гарантії, мовчання, приватне життя, реалізація прав.

В статье на основании теории познания проанализированы некоторые положения соблюдения прав и свобод человека, в частности право на молчание при задержании лица, поскольку право не отвечать на вопросы и механизм его реализации является весьма важным элементом защиты в уголовном производстве. Выявлены тенденции реализации права задержанного не отвечать на вопросы. По результатам исследования предоставлены предложения к действующему Уголовному процессуальному кодексу Украины.

Ключевые слова: человеческое достоинство, задержание, гарантии, подозреваемый, права, свободы, гарантии молчания, частная жизнь, реализация прав.

Criminal justice in Ukraine serves as a task of the successful fight against crime, but along with this system contains guarantees of rights and legal interests of its members. Concern about compliance with the procedural guarantees set out in the Constitution of Ukraine regarding the privacy and other rights and freedoms largely on bodies of pre-trial investigation and the Prosecutor as the prosecution side, and on the Court. These organs during the investigation of criminal offences and the trial of criminal cases are designed to ensure the realization of the rights of the suspect, accused and other persons to whom these rights are guaranteed by law. An important procedural safeguard against the rights and interests of a person and a citizen is the right to silence. In particular, in accordance with part one of the provisions of Article 63 of the Constitution of Ukraine, a person is not responsible for refusing to testify or explain his or her family members or close relatives circle determined by law.

This important provision of the Basic Law of the State is detailed in the Criminal Procedure Code of Ukraine. In accordance with part 2 of Article 18 of this Code, each person has the right not to speak about suspicion or accusation against her, at any time to refuse to answer the questions, and also to be promptly notified of these rights. In addition, Part 1 of the said procedural norm establishes a direct prohibition on compelling a person to provide explanations, indications that may serve as grounds for suspicion, or prosecution of a criminal offense [1].

One of the three cases in which a person may be identified as a suspect is, in accordance with Article 42 paragraph 1 of the Criminal Procedure Code, his detention on suspicion of committing a criminal offense. An authorized official who has committed such detention must promptly explain to the suspect a number of his procedural rights provided for in Article 208, paragraph 4, of the Criminal Procedure Code of Ukraine, including the right to give explanations, testimonies or not to speak about suspicion against him. The right not to speak about suspicion, accusation or at any time to refuse to answer the question set forth in paragraph 4 of paragraph 3 of Article 42 of the Criminal Procedure Code of Ukraine as a general rule and detailed in part 4 of Article 224 of this Code.

In accordance with Part 5 of Article 208 of the Criminal Procedure Code of Ukraine, a detention of a person suspected of committing a crime is drawn up in a protocol in which, among other information, a complete list of procedural rights and obligations of the detainee is indicated. The detention report shall be signed by the person who made it and the detainee. A copy of the protocol immediately under the painting is handed to the detainee, and also sent to the prosecutor.

The right of a detained person to fail to answer the questions posed to her by an investigator may be communicated both verbally and in writing. It is rather difficult to check the application of the oral form of clarification of this right. As to the clarification of this right, which is fixed in writing – the handing over of a monument on the rights – the presence of a signature under the corresponding text in the detention protocol does not in any way indicate that the person in fact was not only explained his rights, but also properly The mechanism for their implementation was announced. In view of the above, the absence of written confirmation by the suspect in paragraph 4, 5 of Article 208 of the Criminal Procedure Code of Ukraine

of a full understanding of his rights aimed at the observance and guarantee of his legitimate interests is a significant gap that requires urgent resolution. The right not to answer the questions, among a number of other procedural rights of the suspect, is also reported to him during the handing of a written notice of suspicion (paragraph 7 of part 1 of Article 277 of the Criminal Procedure Code of Ukraine). Thus, on the one hand, the suspect's right to speak about suspicion against him is not procedurally regulated in a number of articles of the current Criminal Procedure Code of Ukraine and its implementation in criminal proceedings should not raise any questions. On the other hand, the study we conducted revealed significant problems associated with reporting a detained person about her right not to answer the question.

In particular, informing a detained person about his procedural rights should be carried out at various stages of pre-trial investigation, starting from the moment of his detention. It is precisely at this moment that the party is accused of interference with the private life of a person, since the fact of his detention as an element of personal secrecy, which she would like to conceal, becomes the property of society. In addition, during a detention, a personal search, which can result in the removal of photographs, mobile phone, tablets, business cards, other things related to the privacy of a person.

During interrogation, only one third of the detainees are informed about their right not to answer the questions. In particular, our survey showed that in only 18% of cases the suspect was fully aware of this right, and only in 7% of cases the investigator explained in detail to him this right.

In our opinion, the main reason for this phenomenon is that investigators are not interested in implementing the detained person's right not to answer the question, which was fully confirmed by their questioning. Probate investigators consider that in some cases restrictions on the use of the right provided for by Article 63 of the Constitution of Ukraine should be established. In this case, a person may say something interesting or important during the testimony. When in contact, the interrogation answers the question, and the investigator will be able to obtain the necessary information. In addition, investigators believe that the testimony of a suspect is a source of evidence used in evidence, along with other sources identified in paragraph 2 of Article 84 of the Criminal Procedure Code of Ukraine.

Consequently, the investigative bodies of the pre-trial investigation in their criminal investigation activities are more focused on the fact that the suspect does not use his right to remain silent. Typical situations are the communication of the suspect to this right in a form that increases the chance of ignoring it – by providing a mechanical signature in the protocol or so that the suspect believes that this right applies only to certain stages of the criminal proceedings and acts only in court or so that the suspect considered it disadvantageous for him to use this right (exaggerating the importance of facilitating the pre-trial investigation, the prospect of a negative attitude towards him by the investigator, etc.).

The study convinces that the right not to answer the question and the mechanism for its implementation is a very important element of protection in criminal proceedings. Polls of lawyers reveal their ambiguous attitude to the practice of implementing this right. A number of lawyers interviewed indicate the benefits of this right and notes that it is widely used in practice.

Indicative are the opinions of other interrogated lawyers, who believe that answering the question is necessary, but it matters how to answer and what statements to provide. It all depends on the circumstances of the event and on the fact that in the commission of which the crime is suspected of a person. Of course, there are cases of convictions of these lawyers, when it is better for the client to say nothing at all, because, as practice shows, in about 50% of cases the person is found guilty only because she confesses her guilt. In addition, suspects are generally understood to have the right not to testify during interrogation, but they believe that in the court the prosecutor will use it as evidence of their guilt. However, they do not understand that if the protocol is not being conducted, they may also fail to answer the question.

Most of the lawyers interviewed draw attention to the obstacles faced by investigators in implementing detainee's right to silence. After all, investigators, although they are right and explain, but warn about the alleged negative consequences of the refusal to testify, in particular, the impediment to the investigation. Therefore, without a lawyer, detainees find it difficult to resolve the issue of refusing to testify.

Some of the lawyers interviewed draw attention to the stereotype of investigators, prosecutors and judges' perception of the detainee's refusal to testify as a covert evidence of his guilt. At the same time, the analysis of the answers of lawyers during the questionnaire proves that the right not to answer the question – a rather difficult instrument and for its use should take into account all the circumstances of the criminal proceedings. In the course of a person's detention, the exercise of this right is justified because it provides the opportunity to get time for orientation in an investigative situation, to consult an attorney, and consider the details of his position.

Procedurally, a person who does not testify against himself is in no way in a worse position than the one who answers the question. At the same time, investigative and judicial practice has produced a radically different position. The refusal to provide an explanation is assessed by the authorities of the pre-trial investigation as a way of avoiding a person to punish an offense. This is indicated by both interviewed lawyers and investigators, who are characterized by the position that the suspect thus has a chance to escape the punishment if the investigator does not have direct evidence; instead, the investigator has the ability to indicate in the indictment that a person is not aware of his guilt, does not repent.

Lawyers in their responses note the tendency of the court to disagree with assessing the refusal of the suspect to testify, and in a number of cases – to consider the position of the suspect as an aggravating circumstance, unlike cases where the person completely confesses his guilt, and repulses.

Thus, investigative practice reveals the following trends in the implementation of the right of the detained person not to answer the question:

– insufficiency of procedural guarantees of the realization of this right;

– concealing the true meaning of this right, distorting its provisions, exaggerating the negative consequences of its implementation for the detainee;

– unlawful pressure aimed at obtaining testimony from the detainee;

– the existence of prejudiced attitudes among lawyers and an assessment of the refusal to provide evidence as a way of avoiding the responsibility of a detained person for a criminal offense committed.

Depending on the investigative situation that occurs at different stages of the investigation, for any person detained, any form of behavior may be desirable: to provide or not to provide an explanation, to answer or not to answer a question posed to her, etc. It is important that a decision on whether or not to provide testimony is taken by a person in a conscious and balanced manner, understanding the very possibility of such a choice and the consequences of his behavior. The correct understanding of the detained person by the said procedural law is a guarantee of observance of the principle of legality during the interrogation and other procedural actions provided for by the Criminal Procedure Code of Ukraine. In fact, in the practice of investigating criminal offenses, because of the presence of a high risk of conflict during a person's detention and subsequent interrogation, often resort to various ways of obtaining information from a person bypassing her genuine will, forcing her to communicate in that or another way (by

holding oral interviews and obtaining explanations in which the right not to testify is declared as such, which can only be used for interrogation; the conviction of the detained person that the right has not been given The testimony acts only in court, exaggeration of possible negative consequences of refusal of testimony, etc.).

The realization of the right to provide or not to testify in an investigative practice is rather complicated and depends on the compliance of all actors involved in the detention of a person (operational officers, investigators, prosecutors as procedural executives, investigators, lawyers, persons responsible for detainees, etc.) guarantees, a significant part of which lies in the mechanism of their application, namely, in specifying the moment, method, form of notification of the right to keep silence, clarifying the consequences of this right [2]. The legal regulation of interviewing and the rights of a suspect while not answering the questions of an investigator is sufficiently detailed and consistent. Its main provisions are enshrined in the Constitution of Ukraine, the Criminal Procedure Code of Ukraine, and other normative acts. In accordance with the provisions of the law, the investigator is not obliged to immediately question the detained person or person who has been notified of the suspicion. Existing problems are mainly related to implementation mechanisms and guarantees of the rights of suspects. The questioning of the detainee matters in the context of the detention itself as procedural action and cannot be evaluated on its own.

In the context of securing the rights of the suspect, the greatest danger lies in the unofficial communication with him of operational workers, oriented not so much on the procedural documentation of testimony as a future source of evidence, but on obtaining the maximum amount of information about a crime that is known to the suspect. A more skilled and dangerous form of conducting of informal interrogations is communication under the pretext of carrying out secret investigative (search) actions.

One of the main guarantees of observance of the procedural form of interrogation and realization of the right of the suspect to fail to answer the questions is the participation of the lawyer. It provides the opportunity to receive complete and objective information about the rights and consequences of their implementation, to counteract attempts to influence the behavior of the suspect, to choose the best position during the pre-trial investigation and trial. At the same time, studying the practice of investigating criminal offenses gives grounds for conclusions about investigators' attempts not to provide the defense party with the full exercise of their functions (a solicitor's call only for drawing up a detention protocol or for giving a notice of suspicion).

In order to avoid such negative phenomena and to ensure the implementation of the complex of procedural rights of the suspect, in particular, there is nothing to speak about suspicion against him; access of the lawyer to the detainee should be as prompt as possible. Legislation provides sufficient guarantees for the exercise of the right to use the lawyer's assistance. The stage of pre-trial investigation as a whole and detention as a temporary precautionary measure are not based on clear and detailed normative regulation regarding the notification of a lawyer to conduct procedural actions. The norms of communication have controversial content, which consists in the fact that the legal regulation of a lawyer's call concerns a suspect, victim, witness, and does not provide for the direct extension of this rule to a lawyer. In addition, Article 47 (2) of the Criminal Procedure Code of Ukraine establishes the duty of a lawyer to appear for participation in conducting procedural actions with the defendant. It should also be taken into account that it is objectively necessary for an invitee and actual arrival of a lawyer to have some time during which a person remains alone with the officials who detained him. Therefore, the issue of the lawyer's report on detention and the need to appear in order to participate in the conduct of procedural actions should receive detailed legislative regulation. Our research confirms that the lack of specifics of the duty of the prosecution party to clarify the law by way, form, content and timing of their explanation, as well as the lack of a clear form of notification of the suspect's right to remain silent, constitute a material violation of human rights and fundamental freedoms, which entails the consequences of the recognition of evidence as inadmissible under Article 87, paragraph 2, clause 3 of the Criminal Procedure Code of Ukraine. The presence of a signature in the detention protocol or in the protocol of the interrogation of the suspect regarding the clarification of the right not to answer the question and not to give explanations does not yet ensure the fixation of the fact of explaining the true meaning of this right and understanding of the suspect.

In view of the above, it would be advisable to establish a procedural code for self-written spelling of the suspect in all procedural documents related to the clarification of his rights, their awareness of the content of the relevant law and procedural mechanisms for its implementation. At present, such additions are relevant in part 5 of Article 208 of the Criminal Procedure Code of Ukraine and in part 3 of Article 224 of the Criminal Procedure Code of Ukraine. Taking into account the expressed proposals will make it impossible to use physical violence to detainees, to receive testimony from them through deception or psychological pressure and other illegal means, which can often be resisted by silence.

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