

CONCEPTS, SIGNS AND CLASSIFICATION OF MEASURES TO ENSURE CRIMINAL PROCEEDINGS

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Annotation. The paper analyzes modern scientific approaches to the definition of the concept, features of measures to ensure criminal proceedings and their classification. The relationship between this concept and the concept of procedural coercion is highlighted. It is emphasized that the signs of measures to ensure criminal proceedings should be divided into general and specific. General (generic) are those that are common to all types of procedural actions, i.e. inherent in other types of procedural actions. Specific or specific - those that are inherent exclusively to the means of ensuring criminal proceedings and allow to feed them from the range of procedural actions of other types. **Methodology.** During the research, a spectrum of both general scientific and special methods of cognition was applied, in particular, methods of dialectical and formal logic: analysis, synthesis, deduction, induction, comparative, and systemic-structural methods. **Results.** Emphasis is placed on the existing high degree of scientific development of the concept of measures to ensure criminal proceedings, which can become the foundation for further research of this institute of criminal proceedings, in particular, and in the direction of the peculiarities of their application in criminal proceedings regarding certain types of criminal offenses.

Key words: criminal proceedings, means of ensuring criminal proceedings, procedural coercion, concepts, signs, classification.

1. Introduction.

With the entry into force of the Criminal Procedure Code of Ukraine (here in after - CPC) on November 19, 2012, a number of new institutions of criminal justice were introduced into the criminal process. Among other things, one of these innovations was the introduction of the institution of measures to ensure criminal proceedings: their concept, list, and application procedure. Separately, it should be mentioned that a number of completely new procedural measures were introduced, compared to the provisions of the Criminal Procedure Code of 1960, which are aimed at ensuring the effectiveness of criminal proceedings, namely: the imposition of a monetary penalty, a temporary restriction on the use of a special right, temporary access to things and documents, temporary confiscation of property, and a new preventive measure - house arrest - was introduced. In the professional literature, it is correctly noted that the introduction of new measures to ensure criminal proceedings into investigative and judicial practice is an attempt by the legislator to systematize measures of criminal procedural coercion that can be applied in criminal proceedings, to determine additional guarantees of a person against illegal interference in his life by state authorities and officials. All this prompted scientists to study the essence of the new category. Over time, many works appeared in this direction. The purpose of this article is their analysis and unification.

2. Research methodology.

During the research, a spectrum of both general scientific and special methods of cognition was applied, in particular, methods of dialectical and formal logic: analysis, synthesis, deduction, induction, comparative, as well as system-structural methods.

3. Results.

One of the first domestic scientists to scientifically analyze the concept of measures to ensure criminal proceedings and their correlation with the concept of procedural coercion in the light of the Criminal Procedure Code of Ukraine of 2012, H.K. Kozhevnikov. The scientist came to the conclusion that the concept of measures to ensure criminal proceedings is identical to the concept of procedural coercion. We would like to remind you that the measures of procedural coercion in the literature are the coercive measures provided for by the criminal procedural law, which are applied by authorized officials and state bodies to the suspect, the accused, the victim, the witness, as well as to other persons who take part in criminal proceedings. in order to prevent real and possible obstacles that arise and do not allow the implementation of the tasks of criminal justice [1, p. 135].

It is noted that, based on the given definition of tasks of criminal procedural coercion measures, listed in Art. 131 of the Criminal Procedure Code of Ukraine measures to ensure criminal proceedings perform the main criminal procedural function - ensuring the proper behavior of the subjects of criminal proceedings.

Along with this, the scientist proposed a number of provisions to improve the current legislation. Yes, it is proposed to include in the list specified in Art. 131 of the Criminal Procedure Code of Ukraine, such a measure of ensuring criminal proceedings as placement of a minor who has reached the age of eleven in a receiver-distributor for children for a period of up to thirty days. Along with this, in the scientist's opinion, it is controversial to include such types of procedural actions as subpoenas to investigators, prosecutors and subpoenas in the measures to ensure criminal proceedings - given that this action, unlike the others specified in Art. 131 of the Criminal Code of Ukraine does not contain an element of coercion. A subpoena cannot be a measure of coercion, because in essence it involves voluntary execution by a participant in criminal proceedings. Coercion in this case occurs only in the event of non-appearance of a person without valid reasons upon summons in the form of the application of a pretext to such a person [2, p. 69].

Since the CPC of Ukraine does not have a normative definition of the concept of measures to ensure criminal proceedings, the literature offers a doctrinal definition of this concept. For example, V.I. Farinnyk believes that they should be understood as: "State legal coercion measures provided for by the criminal procedural law, which are applied by authorized state bodies and persons, in accordance with the procedure established by law, to the suspect, the accused, the victim, a witness, and other persons who are involved in the field of criminal procedural activities, with the aim of preventing and stopping their unlawful actions, ensuring the discovery and consolidation of evidence, the achievement of the objectives of criminal justice and the effectiveness of proceedings" [1, p. 135]. There are other definitions of this concept. In particular, in the educational literature, this concept is formulated as measures of a coercive nature provided for by the criminal procedural law, which are applied by competent persons and bodies in the presence of grounds and in the order provided by law, with the aim of overcoming negative circumstances that prevent the resolution of the tasks of criminal justice, and ensuring the implementation decisions of pretrial investigation bodies and the court [3, p. 292].

O.M. Bondarenko, in turn, proposes to define this category as measures of a coercive nature, which consist in limiting the rights and legitimate interests of suspects, accused and other participants in criminal proceedings, applied by authorized persons on the basis and in the order provided by law in order to achieve effectiveness criminal proceedings [4, p. 3-4].

I.M. Chemeris claims that this concept should be understood as a set of actions or means for creating reliable conditions for carrying out criminal proceedings, which are used in order to achieve the ability of the investigator and prosecutor to actively act in criminal proceedings. Measures to ensure criminal proceedings not only create a mechanism for procedural activity, but also ensure the reliability of the functioning of this mechanism for the implementation of the tasks of criminal proceedings [5, p. 3-4].

The issue of correlation between the concepts of criminal procedural coercion and measures to ensure criminal proceedings remains debatable in the scientific literature. According to the results of the

analysis of this issue, conducted by N.R. Bobechko, the scientist came to the conclusion that there are three approaches to its solution. Representatives of the first direction equate these concepts. Other scientists talk about measures to ensure criminal proceedings as a group of measures of criminal procedural coercion, that is, their variety. Others make a distinction between these concepts [6, p. 28]. For example, V.V. Nazarov believes that these concepts are identical, as they make it possible to detect, collect and store evidence, to warn of possible illegal behavior or to exclude the possibility of a suspect or accused to evade investigation and court [7, p. 103]. O.M. Mykolenko emphasizes the need to distinguish between measures to ensure criminal proceedings and measures of criminal procedural coercion. The scientist claims that these concepts are related as general and particular categories. Among the measures to ensure criminal proceedings, there are also those that are not of a coercive nature and the application of which does not involve the imposition of certain restrictions on a person. Examples include a subpoena, a subpoena by an investigator or prosecutor, as well as temporary access to things and documents. On this basis, measures to ensure criminal proceedings should be divided into two types: coercive (measures of procedural coercion) and non-coercive [8, p. 83]. A similar position is expressed by N.R. Bobechko. The scientist claims that the concept of "measures to ensure criminal proceedings" is generic in relation to measures of criminal procedural coercion. Along with those reflected in Chapter II of the Criminal Code of Ukraine, according to the scientist, there are other measures to ensure criminal proceedings. The author's approach to the analysis of this issue, based on the nature of criminal procedural norms, is interesting. Considering the fact that the latter perform not only a protective, but also a regulatory function, measures to ensure criminal proceedings should be divided into two groups: measures of enforcement of criminal proceedings and measures of non-enforcement of criminal proceedings.

Along with this, the author divides the non-coercive measures of ensuring criminal proceedings into: measures of information provision (notices, subpoenas); ensuring the impartiality of subjects of criminal proceedings (recusal, self-recusal, removal of a juror); organizational and technical support (exhumation of a corpse, search); ensuring the safety of subjects of criminal proceedings (confidentiality of personal information, closed court proceedings, listening to telephone and other conversations); non-compulsory obtaining and verification of evidentiary information (interrogation, presentation for identification, requisitioning of things, documents, conclusions of audits and inspection reports, obtaining explanations) [6, p. 34].

On this issue, O.V. Firman proposes to divide coercive measures of criminal proceedings into: prevention measures (detention of a person, precautionary measures, temporary restriction on the use of a special right, removal from office, placement of a person in a receiver-distributor for children); termination measures (pretext, imposition of monetary penalty, removal from the courtroom for repeated violation of the order of the courtroom); security measures (summons by investigators, prosecutors and court summons, temporary access to things and documents, temporary seizure of property, seizure of property, obtaining samples for examination, search, examination, appointment of inpatient psychiatric examination).

The scientist considers measures to ensure criminal proceedings as a group of measures of criminal procedural coercion, which are applied on the basis, under the conditions and in the order determined by the criminal procedural law, by state bodies and officials conducting criminal proceedings, and in some cases by other persons, in relation to the suspect, the accused, the witness and the victim or other persons to ensure their proper performance of their procedural duties, prevention of possible or elimination of existing obstacles during criminal proceedings, obtaining evidence, as well as the execution of court decisions in terms of the civil legal consequences of the decision of the case [9, p. 231–234].

Speaking about the definition of measures to ensure criminal proceedings, it is necessary to indicate their characteristics. A number of scientific positions have also been expressed in the literature on this matter. Yes, L.M. Loboyko and O.A. Among them are Banchuk: 1) have a state-authority character; 2) they are applied at any stage of criminal proceedings; 3) related to restrictions on the rights and freedoms of participants in criminal proceedings; 4) have a personal nature; 5) are used when the method of persuasion regarding the need to comply with criminal procedural norms is ineffective [10, p. 130].

There are other positions on this matter. In particular, O.M. Mykolenko claims that the following are the main features of measures to ensure criminal proceedings: 1) they are implemented within the framework of criminal procedural legal relations; 2) have a specific purpose – to ensure the effectiveness of criminal proceedings, and not to punish a person or protect the rights of participants in criminal proceedings; 3) the subjects of their application are authorized state bodies and their officials conducting criminal proceedings (with the exception of lawful detention of a person) [8, p. 81–84].

V.V. Nazarov makes a distinction between measures to ensure criminal proceedings and other measures of state coercion, on the basis of the following specific features inherent in them: 1) they are a component of the criminal procedural form; 2) the grounds, limits and procedure for their application are clearly defined by law; 3) they are aimed at achieving a specific goal – ensuring the proper order of criminal proceedings, its effectiveness; 4) have a pronounced coercive nature (even if a person does not object to the restriction of his rights and freedoms, they are still coercive in nature, since the possibility of applying coercion in the event of their non-fulfilment is provided for by law); 5) are of an exclusive nature, that is, they are used only in those cases when it is impossible to fulfill the task of criminal proceedings in another way; 6) are applied by specific entities, which are exclusively competent state bodies and their officials who conduct criminal proceedings [7, p. 102–106]. It should be noted that such features as legislative regulation and a pronounced coercive nature cannot be classified as specific features of measures to ensure criminal proceedings, because they are inherent in other measures of state coercion, not only criminal procedural.

I.M. Chemeris refers to the circle of such signs: 1) such measures temporarily restrict the constitutional rights and freedoms of the persons to whom they are applied; 2) their justification – there must be sufficient reasons and grounds for their application; 3) coercive character; 4) efficiency – their application should be quick and timely; 5) they are applied by specific subjects, which are competent state bodies and their officials who conduct criminal proceedings; 6) such measures are applied to persons involved in criminal procedural activities [5, p. 4]. However, some of the signs mentioned by the scientist rather indicate the principles of applying measures to ensure criminal proceedings, rather than reveal their properties. For example, something like: efficiency or reasonableness.

Criticizing some of the mentioned features, V.I. Farinnyk proposes to single out the following: 1) security nature - they are aimed at creating proper conditions for conducting criminal proceedings. In contrast to investigative (research) actions, which are characterized by a cognitive orientation;

2) the state-authority nature of relations that arise, develop and terminate during their application; 3) cross-cutting nature - they can be applied at any stage of criminal proceedings, in contrast to investigative (search) and other procedural actions; 4) individually determined character – they are applied personally, that is, relative to a specific person; 5) rights-restrictive nature, which provides for the possibility of coercion due to a person's failure to fulfill his procedural obligations, or coercion is assumed to be a necessary component of a certain measure; 6) an exhaustive list of them is fixed in the Criminal Procedure Code of Ukraine [11, p. 44-45]. It should be noted that in the named classification, as in the previous ones, some of the signs cannot be considered specific, on the grounds that they reflect the essence of other types of procedural actions – for example, the same investigative (search) actions. We are talking about the state-authority character, the individually-determined character, the legislative fixation of an exhaustive list of them. In this regard, the signs of measures to ensure criminal proceedings should be divided into general and specific. General are those that are generic and inherent in other types of procedural actions. Specific, respectively, – species, that is, those that are inherent exclusively to the means of ensuring criminal proceedings and allow to feed them from the range of procedural actions.

There is also a completely correct view of measures to ensure criminal proceedings as a legal institution, which is a set of criminal procedural norms that regulate social relations associated with the application of the specified procedural measures aimed at achieving the effectiveness of criminal proceedings. The legal norms of the specified institute make up its own subsystem, which includes: 1) norms-principles establishing the general principles of applying measures to ensure criminal proceedings; 2) norms that form the order of application of measures to ensure criminal proceedings of certain types and 3) norms that determine the order of implementation of

measures to ensure criminal proceedings within the framework of special procedures of criminal proceedings [11, p. 50-51].

Their other classification, formulated in the literature, has an important cognitive value:

1) for the purpose of application:

- measures to ensure proper behavior of the suspect, accused in criminal proceedings and their fulfillment of procedural duties (precautionary measures);
- measures that ensure the receipt and collection of evidence (subpoena to investigators, prosecutors, subpoena, temporary access to things and documents, etc.);
- measures aimed at ensuring legal order during the proceedings (pretext, imposition of fine, removal from office);
- measures to ensure a civil lawsuit and possible confiscation of property (temporary seizure of property, seizure of property, etc.);

2) by the term of validity:

- measures that last for a clearly defined period of time (precautionary measures, removal from office, seizure of property, etc.);
- measures, the validity period of which is not determined (reason, etc.);

3) on the grounds of application:

- measures applied in connection with non-fulfillment (or possible non-recognition) of procedural obligations (imposition of fine, pretext, precautionary measures, etc.);
- measures that are applied regardless of the procedural offense (temporary access to things and documents; temporary seizure of property);

4) according to the regime of restriction of human rights and freedoms:

- measures related to the temporary isolation of a person (detention, house arrest, detention of a person);
- measures that are not related to the temporary isolation of a person (imposition of a monetary fine, temporary restriction on the use of a special right, personal commitment, personal guarantee, pledge, etc.) [12, p. 334].

There are also known other approaches to the classification of measures to ensure criminal proceedings, proposed by L.D. Kovalenko.

1. According to the regime of restriction of rights and freedoms:

- 1) isolation - aimed at isolating the suspect, the accused from society and consist in limiting the personal freedom of such persons (detention, detention, house arrest);
- 2) non-isolation (psychological and coercive preventive measures) - these means consist in the application of mental influence on the suspect, the accused, which is outwardly expressed in the establishment of certain duties on such persons, the purpose of which is to ensure their proper behavior (personal obligation, personal surety, pledge).

2. Depending on the form of pre-trial investigation:

- 1) those used during the pre-trial investigation (all measures to ensure criminal proceedings provided for by the Criminal Procedure Code of Ukraine);
- 2) those applied during inquiry (precautionary measures such as house arrest, bail or detention are prohibited).

3. Depending on the circle of persons against whom preventive measures may be applied:

1) general - those that can be applied to all categories of suspects, accused (personal commitment, bail, house arrest, etc.);

2) special - which can be applied to certain categories of persons: minors (handing them over to the supervision of parents, guardians or custodians, the administration of an educational children's institution), persons with limited criminal liability (placed in a psychiatric institution in conditions that exclude dangerous behavior of persons with limited criminal liability) [13, p. 170].

A well-known classification proposed by L.M. Loboyko, when measures to ensure criminal proceedings are divided depending on the severity of the consequences for the persons to whom they are applied:

1) preventive measures; 2) other measures to ensure the criminal process [14, p. 161].

S.M. Smokov classified the measures to ensure criminal proceedings based on the restriction of the constitutional rights of citizens into the following types: 1) measures that limit the public and private life of citizens (to them the author precisely assigned a challenge to an investigator, a prosecutor, a court summons, as well as a pretext, a temporary restriction on the use of special by law, removal from office, temporary access to things and documents; 2) measures that limit the property rights of citizens (imposition of fines, temporary seizure of property, seizure of property); 3) measures that limit the freedom of movement of citizens (personal commitment, house arrest, personal guarantee, bail); 4) measures that limit the personal freedom of citizens (detention and detention) [15, p. 629 - 630].

A.E. Rudenko also presents the author's classification of measures to ensure criminal proceedings, which he divides into two main groups: preventive measures and other measures to ensure criminal proceedings. Within the framework of the second group, the scientist singles out a subgroup of measures that limit the property rights of participants in the criminal process: temporary seizure of property and seizure of property [16, p. 22].

The problem of functional assignment of measures to ensure criminal proceedings in a criminal process is also developed in the literature. According V.I. Farinnyk, the application of measures of criminal proceedings in the criminal process pursues two goals - protective and preventive. The security goal is to create conditions for the suspect, the accused to fulfill the procedural duties assigned to him, for example: to arrive at the summons of the investigator, prosecutor, investigating judge, court, to notify in advance of the impossibility of arrival; fulfillment of the duties assigned to these persons by the decision on the application of preventive measures; to comply with the legal orders and requirements of the investigator, prosecutor, investigating judge, court. The preventive goal, according to the scientist, is to prevent attempts to hide from pre-trial investigation bodies and/or the court; destruction, concealment or distortion of any things or documents that are essential for establishing the circumstances of a criminal offence; illegal influence on victims, witnesses, other suspects, accused, experts, specialists in criminal proceedings; committing other criminal offenses [17, p. 149].

4. Conclusion.

Summarizing what has been said, it should be emphasized the existing high degree of scientific development of the concept of measures to ensure criminal proceedings, which can become a foundation for further research of this institute of criminal proceedings, in particular, and in the direction of the peculiarities of their application in criminal proceedings regarding certain types of criminal offenses. The application of measures to ensure criminal proceedings constitutes a separate criminal-procedural institute, the norms of which regulate the specified activity. The measures themselves should be understood as procedural actions, which can be both coercive and non-coercive in nature and are aimed at ensuring the effectiveness of criminal proceedings by ensuring the active participation of the subjects of the criminal process, preventing and stopping their evasion of the obligations provided for by the criminal procedural law, creation of obstacles to the administration of justice, etc.

Signs of measures to ensure criminal proceedings should be divided into general and specific. General (generic) are those that are common to all types of procedural actions, i.e. inherent in other types of procedural actions. Specific or specific - those that are inherent exclusively to the means of ensuring criminal proceedings and allow to feed them from the range of procedural actions of other types.

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